

**LEGAL OPINION ON (THE *NEPTUNE SPEAR*
OPERATION THAT LED TO) THE DEATH OF BIN
LADEN**



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Dedico este trabalho de conclusão do mestrado à memória do falecido compatriota Jean Charles de Menezes, morto em 22 de julho de 2005, na Estação “Stockwell” em Londres, confundido com um terrorista, mais uma vítima inocente da violência arbitrária estatal.

I dedicate this master's thesis to the memory of the deceased fellow countryman Jean Charles de Menezes, killed on July 22, 2005, at Stockwell Station in London, mistaken for a terrorist, another innocent victim of state arbitrary violence.

Only the dead will know the end of the war –

Plato

Even in this day and age war is sometimes justified, but “this truth” must coexist with another – that no matter how justified, war promises human tragedy. The soldier's courage and sacrifice is full of glory ... But war itself is never glorious, and we must never trumpet it as such. So part of our challenge is reconciling these two seemingly irreconcilable truths – that war is sometimes necessary, and war at some level is an expression of human folly- **US President Barack Hussein Obama** (Nobel Peace Prize speech in Oslo, 2009)

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1. INTRODUCTION

“*Geronimo, E.K.I.A-(enemy killed in action)*”, these words marked the end of Osama Bin Laden. A non-identified member of the top-elite/secretive team of the “*United States Naval Special Warfare Development Group*” (also: DEVGRU/Navy-SEALs/team SIX), in the village of Abbottabad in Pakistan, had gunned down the headman of Al-Qaida for good and the precious information was instantly conveyed back to the White House Situation Room, where President Obama was gathered with senior officials.

Contrary to what was originally thought, “Geronimo” was not the nickname for the terrorist leader; in fact, this word, in military parlance, commonly refers to “G”, the seventh letter and seventh *stage* of the military operation carried out on 2nd, May, 2011, which involved the killing or capture of the main target. The secret alias of Bin Laden was “Crankshaft” and the whole mission was baptized rather “*Neptune Spear Operation*”¹.

The outcome of the operation did not startle the world. The likelihood of a Bin Laden *detainee* was instinctively low. As for a simple tactical challenge: what to do with Bin Laden alive? However, the perspective of a dead Bin Laden does not damp the symbolism, theories of conspiracy, call for jihad and revenge either, not even does it vanquish completely the infamous group he belonged to. The fact that he was deprived of his life, nevertheless, raises some questions over necessity, proportionality, thus, the lawfulness of this specific, though not unusual, tactic of current counterterrorism, if assessed through the lens of international law as it stands.

Piecing together art.3-UDHR, art.6(1)-ICCPR and art.4(1)-ACHR, it becomes evident that the right to life inherently appertains everyone, without exception, and it shall be respected and protected by law, imposing that no one be deprived arbitrarily of this paramount attribute. The key legal element lies precisely on how to interpret the meaning of **arbitrary**, inasmuch as the non-arbitrary deprivation is, in principle, admissible. Additionally, it shall become clear throughout this legal opinion that the

¹News0(*see*:6.1).

right to life, anyway, is far from being absolute. It is not anytime that the domestic criminal law-enforcement paradigm is operational.

The ICJ has asserted in the *Nuclear Weapons Advisory Opinion* that "(t)he test of what is an arbitrary deprivation of life...falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict(...)" (§25). It is not to say that peacetime provisions are completely superseded by "warlike" commandments: both frameworks complement each other (CCPR/General Comment.31,(§11)) and during hostilities there is still room for humanitarian considerations. The regulatory regime of interstate resort to force also has an impact on the human right to life, particularly considering the onset threat of non-states actors.

As a premise, in despite of the US traditional position that the expressions "within its territory" and "subject to its jurisdiction" of art.2(1)-ICCPR should be interpreted cumulatively to limit the scope of application of the international obligation to respect and ensure the rights set forth without discrimination, human rights apply extraterritorially in cases where State agents exert sufficient control, illegal or not, such as through the use of firearms, over individuals. The fact that they act abroad does not mend a serious violation.

The present opinion is built upon 10 intuitive topics relating to three relevant branches of international law with impact on the right to life.

2. LAW-ENFORCEMENT

2.1. Kill to arrest

“*Osama Bin Laden was killed in a **firefight***”², through these words, President Obama implied, possibly, that the death of the terrorist leader came about as a result of the latter resistance to an attempt of arrest made by the Navy-SEALS, as they broke into Bin Laden’s lair. Nevertheless, in the rush to provide details of the successful raid in Abbottabad, the critical information of whether Bin Laden shot back was actually wrong: he was **unarmed**³.

Press Secretary Carney backed from the first data provided, confirming, though, that a gunfight erupted, indeed, inside the compound, but Bin Laden was not directly in its midst⁴. According to sources from the media, the SEALs were only once shot at, by the trusted courier, Abu Ahmed al-Kuwaiti, who fired from behind the door of the guesthouse and was immediately killed⁵. The elite troop identified him through the wall with help of night-goggles⁶, before the special commando made further foray into the main house. How could then Al-Qaeda’s headman have resisted, so as to justifying his killing?

The truth is the tactical group had no idea what Bin Laden’s minions had in store for them inside the housing-complex. In regards to the hideout of the most wanted man on Earth, all caution was, in principle, called for. Abrar Ahmed, the courier’s brother, also a resident, based in some sources appeared holding an AK-47 gun on the paved patio of the front entrance⁷, even if he had not had time to use it. He was mortally wounded, alongside his wife caught in the crossfire standing beside him⁸. Explosive devices or weapons of any kind could have been concealed in the rooms the SEALs had to clear before going up the three-storey main building⁹.

As the special commando made their way up, other people plunged at them, such as Bin Laden’s youngest son, 19-year-old Khalil, slain at the staircase¹⁰, just as they

² News1.

³ News2.

⁴ News2.

⁵ News3.

⁶ News4.

⁷ News4.

⁸ News2.

⁹ News5.

¹⁰ News4.

came across scores of children and women, who were collected and restrained with plastic “flexi-cuffs”, for their own sake¹¹. It would have astonished all personnel involved in the operation if Bin Laden had just let himself fall readily into the hands of his sworn enemy. For a man whose ideology of life consisted in praising martyrdom, some resistance was to be reckoned with. Indeed, Bin Laden possessed two weapons at arm’s reach, an AK-47 and a *Makarov* hand-gun¹², though they were only discovered as the SEALs ransacked his room for valuable information¹³.

Likewise, it would have been an arguable ground for killing him in case he had attempted to escape. Something that intrigued most investigators, nonetheless, was the total absence of underground tunnels, bunkers, fake walls/doors¹⁴ in the place Bin Laden holed up for at least 5 years. For a man such wary about his security – the place had no phone or internet connection¹⁵ - it seems odd to choose a place to be so easily corralled!

The *UN/Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, even if not a binding instrument, represent the consecration of desirable international standards to be implemented by nations across the globe¹⁶. The following excerpts shed some light in which situations the death of an individual is **not** considered **arbitrary**:

*5. Whenever the lawful use of force and firearms is **unavoidable**, law enforcement officials shall:*

*(a) Exercise **restraint** in such use and act in **proportion to the seriousness of the offence** and the legitimate objective to be achieved; [...]*

*9. 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**. (emphasis added).*

The paragraphs above offer some clues to fathom the **necessity** and **proportionality** criteria. Starting with the latter, solely in a few scenarios, two presented before – *attempt of arrest/prevention of escape* – and two that will be

¹¹ News3.

¹² News6.

¹³ News6.

¹⁴ News7.

¹⁵ News8.

¹⁶ Melzer, Targeted Killing...p.200.

discussed in the next topic – *self-defence/prevention of a serious offence* –, the use of firearms (including: lethal force), is commensurate and justifiable, i.e. **proportional** to the objectives sought: the avoidance of a particular imminent and actual threat to life.

Granted that the implementation of the non-conventional (customary) right to life probably considers acceptable to kill in order to overcome the resistance of Bin Laden to the lawful¹⁷ attempt of arrest based in the commission of violent felonies and even crimes against humanity – and considering that the risk of the supreme Al-Qaeda chief evading capture was minimal - was is really still necessary to bring an end to his life? The necessity prong imposes that the unwanted result arises from the **unavoidability** to save, otherwise, other lives, and the **insufficiency** of using less extreme measures, according to §9 of the *UN/Basic Principles*.

The principal mark of a human rights informed paradigm is that it makes no distinction based on statuses of persons, thereby not classifying individuals nor warranting wanton discrimination¹⁸. If a person is deprived of her right to life in a concrete situation, it arises from blameworthiness/culpability, i.e., an exclusive conduct-based approach¹⁹. In that manner, as the exhaustion of lesser life-endangering measures of crime-repression failed, lethal force may be utilized²⁰. However, I consider arrest to be rather a *means* (non-lethal force) to enforce the law, **not** the *end* in itself. It is certainly preferable to detain someone instead of killing. Arrest caters the general societal interests, by preventing the materialization of an actual danger²¹. At the same time, this measure also serves the interest of the legal order by bringing someone to trial, uncovering the truth and imposing a penalty in retribution²². Clearly, it is nonsensical to kill in order to arrest, simply because the police **cannot** arrest *a corpse*, only take custody of it. Death, the opposite fallout of arresting someone, represents the total frustration of the legal process in the criminal sense²³. As O’Connell marked, the “*fleeing felon doctrine*” that authorized killing to effect the arrest even of a person not presenting any danger at all was harshly criticized in *Tennessee v. Garner*, which ended up rebutting Tennessee’s then legal statute²⁴.

¹⁷ Eventual encroachment of sovereignty: *see*(3.3);There was an arrest warrant at a district court in NY.(News9).

¹⁸ UCIHL,Expert Meeting...,pp.17,35.

¹⁹ Statman,“Targeted...”,pp.181,191;*also*:Kretzmer,Targeted...,pp.181,190

²⁰ Kretzmer,id.,pp.178-179.

²¹ Kremnizer,Use of Lethal...,p.80

²² Id.

²³ Id.,pp.81,83

²⁴ O’Connell,Kill or Capture,pp.327.

Practically, the price of a non-dangerous someone's escape is lower to the legal order and general societal values than liquidating him. As Osama Bin Laden did not fit the standard of "non-dangerous person", the allowance to his death befits better when considering the **threat/danger** he transpired at the moment, *not in order to exclusively arrest him*. Not to mention that his killing annihilated most part of information that could have otherwise been obtained through a legal process.

Moreover, pursuant to the standards summarized in the *UN/Basic Principles*, governments and control agencies should equip law-enforcement officials with a broad range of different types of weapons and ammunition that render it possible to exhaust non-lethal incapacitating measures before resorting to the inevitable tragic outcome (§2). Beyond that, officers must receive **proper training** concerning appropriateness and efficiency of alternative non-lethal measures (§19), whereas their agencies and commanders ought to foster issues of "police ethics" and "human rights" (§20)²⁵. It is unwise to jump to the foregone conclusion that the elite troop of the SEALs, the maverick "team-SIX" was not trained/equipped in effecting an arrest, even a toilsome and risky one as that of Osama Bin Laden.

Thus, regard should be had to the overarching values in which the conventional and customary right to life is assumed to rely. For instance, the complete wording of §9-*UN/Basic Principles* sets forth that is justifiable to use firearms *to arrest a person presenting "such a danger" (highlighted)*, which refers to imminent violence and threat to life. Therefore, it is obvious that the justification to kill someone in confront with law-enforcement agencies does not derive from resistance *per se* – arrest alone, as a matter of policy, cannot be a sufficient reason - but rather from the **cumulative** danger the affected person exhibits.

2.2 Kill to prevent threat/crime

Imminent²⁶, actual and grievous threat to life/limb²⁷ mainly directed at innocent bystanders constitutes a **proportional** ground to authorize the incapacitation of the

²⁵ These precautionary measures are further explained by Melzer (Targeted...,p.198); See:(AI), "Guns and Policing",pp.18-21.

²⁶ Kremnitzer argues that as for *de lex lata* of most countries a future threat will suffice as well, though I recognize the risk of it being too far-fetching or even arbitrary, due to a pure guessing exercise of dubious foresight (id,pp.73,75,79)

dangerous aggressor, which in most circumstances to be effective requires overwhelming force with death as an inevitable/instant consequence²⁸ in order to utterly quench the impending peril.

Handbook cases, such as that of “*ticking bomb*” scenario, in which an explosive ordnance is about to be detonated by a suicide-bomber, or of the hostage-taker menacing helpless ones with death if his demands remain unheeded, illustrate well the extreme situation calling for a *final rescue shot*²⁹. This is also the most usual interpretation of §9-UN/Basic Principles. Indeed, the resort to force in accordance with art.2(2)(a)ECHR- “*in defense of any person from unlawful violence*”- does not contradict the right to life. Despite not applicable to the countries involved in this legal opinion – US and Pakistan – it is still an important source of comparative interpretation displaying the current state of customary law. Besides, as Melzer put it, the prohibition of “*intentional killing*” conveyed by art.2(1)ECHR is **synonymous** to the “*arbitrary killing*” of the remaining international instruments³⁰, namely: art.6(ICCPR), art.4(ACHR),art.4(AfCHPR).

The **right to life** contains, at the bare minimum, a negative to duty imposable to all (*erga omnes* obligation), especially law-enforcement officials, to simply abstain from taking it. For the sake of effective observance, public agents must protect lives (positive duty) that are being flagrantly menaced. In consonance to those principles, it is not question of whether an aggressor forfeits his right to life while engaged in the unlawful behavior, merely, at that point, involving serious violence against life/limb, the duty of respect and protection of his right is suspended³¹, meaning that it becomes legal to repel the ongoing violence, even by means that renders death very likely. Or, in other words, through his guilt the attacker loses “*moral parity*” with his victim(s)³². Due to the conscious and deliberate choice that he has made to resort to unlawful violence against others, the demise of the offender is preferable to, or less regrettable than, that of innocent bystanders³³.

²⁷ Some authors contend about whether threat to limb or other forms of violence upon the physical integrity, such as battery or rape, allow the use of lethal counter-action to stifle it (Wicks,Right to Life,pp.128-129) and Melzer(id,p.11).

²⁸ Melzer,id.,pp.24-25.

²⁹ Id.,pp.10-11,18-20.

³⁰ Id.,pp.118-120.

³¹ Wicks,id.,pp.130-132.

³² Id.,p.132.

³³ Id.

Moreover, the use of the sentence “(...)to prevent the perpetration of a particularly serious crime involving grave threat to life(...)”[§9,UN/Basic Principles] should more **properly** be understood as coupling and further explaining the “defence of self or others” exception to the arbitrary taking of a human life rather than creating a discrete ground. It comes to mind intuitively that (self)defence against an urging and serious threat, translated into death and maiming, prevents the commission of an offense universally criminalized (murder, physical assault and battery) and, conversely, the prevention of a particularly serious crime is executed in form of (self)defence against an imminent threat of death or injury.

All things considered, two practical questions remain unsettled: - Exactly which kind of danger or threat did Bin Laden pose? – Bearing in mind that it is proportional to apply deadly force upon a person displaying such danger or threat, was it, in this particular case, really necessary to proceed in doing so?

Much of the same explanation to how the supreme headman of Al-Qaeda resisted the arrest could be repeated at this point. At the heated epilogue of the 10 years-long manhunt everything could go wrong. The Special Forces, composed by the Navy-SEALs/DEVGRU, on the ground, and the DELTA-Forces, waiting, on board of the heavy-lift *Chinooks*, from some distance³⁴, did not have entirely foresight of the operation. The first attempt to descend stealthily from the *Black Hawks* copters onto the roof of the three-storey building almost presaged a disaster: one of the aircrafts had to crash-land in the patio³⁵, probably affording whoever was protecting the terrorist leader inside the compound, plenty of time to prepare a stronghold. Instead of confronting Bin Laden in flesh and blood right away, the team had to level down three walls³⁶ and, additionally, climb their way up the lair, floor by floor, of one of the most dangerous men recent history has witnessed.

Withal, Bin Laden made use of a common tactic among terrorists of commingling with innocent civilians/relatives; hence, putting them deliberately in harm’s way. At the same time, through this unfortunate gathering of innocent women and children, the task of the commando became even harder to accomplish without miscalculations. As seen above, although he did not timely procure, he had access to

³⁴ News4.

³⁵ News4.

³⁶ News10.

two weapons in his bedroom, including a heavy machine-gun³⁷. While the SEALs were climbing up the stairs, it is presumed that Bin Laden, judging by the bearded man that appeared at the cross-hairs of night-goggles, peeped out for a moment when he was shot at, then to duck back into the room³⁸. This could have given sufficient time to ambush the troops or put on a bomb-vest.

Melzer propounded a *tripartite* assessment of necessity as encompassing *qualitative*, *quantitative* and *temporal* aspects³⁹. The former represents what is considered to be the main criteria of defining necessity itself: the quality of force capable of incapacitating the target by inflicting fatal wounds as strictly unavoidable in order to protect life⁴⁰. The middle criteria should not be mistaken with proportionality: once the lethal force is proportional and qualitatively necessary, no more force, in quantity, than absolutely necessary is to be applied⁴¹. Finally, it does not pass muster if the person does not yet or no longer present a justifiable danger or threat⁴². Bearing in mind that not solely a real threat, but a reasonable *putative* threat as well, as long as held in good faith⁴³, especially in strained scenarios, can give rise to the necessity to kill. After all, as they entered the final room of the compound, the SEALs had to make split-second decisions of whether to apprehend Bin Laden, while ensuring the safety of everyone involved therein, or to aim at vital organs and pull the trigger. Everybody knew that the likelihood of the latter alternative was higher, regard had to all the pressing circumstances.

Some voices might reason that well trained troops such as the Special Forces in charge should have been ready to accept a higher risk level, including the possibility of violent death on duty, to accomplish maximal strategic/tactical success. Through a moral lens, there is absolutely no logic at all in yielding part of the upper hand of breaking into the complex, by surprise, to Bin Laden and his faithful followers. Law-enforcement officials are not required to favour violent aggressors in detriment of their own lives. There is no such duty. It might have jeopardized the whole mission of capturing, alternatively, killing Bin Laden. Conversely, even in the operational law applied to the conduct of full-blown hostilities, which embraces more havoc as matter

³⁷ News6.

³⁸ News11.

³⁹ Melzer, Targeted..., pp.101/116.

⁴⁰ Id.

⁴¹ Id.

⁴² Id.

⁴³ As decided in ECtHR-“McCann vs. UK” that the ground-troops believed the terrorists in the car presented a real danger, despite not being armed (§200).

of fact, there is not a duty of risk acceptance in order to increase protection for the (unlawful)combatant one is engaging. Yet, it only refers to assume more risk to own troops if so decreases “collateral-damage” to innocent civilians⁴⁴. The agents have all right to self-defence⁴⁵, on the same footing as the defence of others, against the danger Bin Laden posed. Apart from a sum of individual “rights” of self-defence of every single member of the Special Forces, arising from domestic criminal law, the Unity, as an administrative collective endowed as the State’s *manu militari*, also had a right of self-defence, a tactical-level right, derived from the most comprehensible and strategic right of national self-defence⁴⁶.

Instead of acknowledging that the mission was more prone to killing, given the extremely risky circumstances and all stakes involved, by pointing out that the sole purpose of the operation was to kill Bin Laden, no matter what, raises indeed concerns over the legality⁴⁷. Officially, at least, the SEALs were prepared to arrest him in case the balance of the operation favored it⁴⁸. To sum up, missions the only purpose of which is to kill, to wit, proper *targeted killings*, are incompatible with “human rights”-based law-enforcement. If such a violent path is to be chosen, minimally, all the details about the target and the actual danger he poses have to be thoroughly analyzed, so as to avoid lamentable outcomes of innocents being mistakenly killed based in “shoot-to-kill” policies⁴⁹. In regards to Bin Laden, however, everything appeared to have been double-checked.

2.3 Extra-judicial execution?

On the night of 1st May-2011(US-time zone), President Obama, through a televised speech from the White House’s East Room, addressed the United States and the world with a clear message:“***Justice has been done***”⁵⁰, as in clear conviction of the righteousness of slaying the terrorist leader. These words were carefully chosen to reach the decade-long demand for some form of forceful response from “*those families who*

⁴⁴ Paradoxes of Counterinsurgency Operations...(US Army/Marine...)

⁴⁵ See:Kremnitzer,id,pp.72,73;also:Melzer,id,p.101

⁴⁶ Gill/Fleck,Handbook,pp.420-422.

⁴⁷ News12/13.

⁴⁸ News14.

⁴⁹ Alston,Report...,p.11.

⁵⁰ News1.

have lost loved ones to al-Qaeda's terror"⁵¹, and, apparently, from everyone that directly or indirectly had been affected by the tragic events which smeared that September cloud-free morning sky in Manhattan.

Understandable as they are, the cries of joy of the cheering crowd that eagerly encircled the White House gardens in the waiting of a public confirmation, the celebration of a death, even of someone as Bin Laden that showed little mercy upon his victims, provoked some disquiet in other places around the globe⁵². The fact is, besides former Cuban president Fidel Castro⁵³ and the Hamas-run administration of Gaza Strip⁵⁴, the feeling of general relief was almost universal and no country publicly criticized/condemned the operation that led to the death of Bin Laden, including European countries⁵⁵ that previously displayed some mistrust/hesitance of backing up particular US military adventures, such as the invasion of Iraq under false pretenses.

Amnesty International-(AI), the reputable human rights nongovernmental organization seemed to have spared some of the fierce critiques uttered in the past. To wit, AI classified the targeted killing of the Al-Qaeda high operative in the Arabian Peninsula, *Al-Harithi*⁵⁶, in 2002, by a "hellfire"-missile launched from an unmanned "Predator"-drone, the first case wide acknowledged by the US counter-terrorist campaign⁵⁷, as an extra-judicial execution⁵⁸. Swedish Foreign Minister Anna Lindh portrayed it as a "summary execution"⁵⁹ and so did the *UN/Special Rapporteur for Extrajudicial, Summary and Arbitrary Executions*⁶⁰. At this time, senior Director of AI adopted a milder tone only asking for further information from US and Pakistani authorities in order to clarify whether Bin Laden really resisted arrest, though unarmed, and whether stronger efforts were made to capture him⁶¹.

UN/General Secretary, Ban Ki-Moon, welcomed the death of Bin Laden as a "*watershed moment*" in the fight against global terrorism⁶². On the other hand, Kenneth Roth, executive director of Human Rights Watch-(HRW) responded the statement the

⁵¹ Id.

⁵² News15.

⁵³ News16.

⁵⁴ News17.

⁵⁵ News15.

⁵⁶ The mastermind of the *USS Cole* bombardment.

⁵⁷ Downes, 'Targeted Killings'...pp.277-278;also:Byman,Do Targeted Killings Work?...p.106.

⁵⁸ News18.

⁵⁹ News19.

⁶⁰ Alston,Report...p.16.

⁶¹ News20.

⁶² News21.

UN/General Secretary, that the international community “*needs more facts*” and, in the way the operation was executed wanting credible “*mortal threat*” posed by Bin Laden, the latter was denied **due process**⁶³. Additionally, two other Special Rapporteurs fell short of lambasting the Bin Laden killing, though both underscored the need for a due attempt to capture rather than kill, as well as that usually terrorists should be dealt with as criminals “*through legal processes of arrest, trial and judicially decided punishment*”⁶⁴. Besides, it is important to put all the answers on the table for public scrutiny, since the use of deadly force sets the pattern upon which the right to life will be interpreted and applied henceforth⁶⁵.

All the same, Obama’s choice of words must not be used as a precedent to consider “terrorists” as outlaws that can be slain anytime, anywhere, stripped off of the protections flowing from the conventional and customary right to life. The life of alleged criminals and terrorists has the same ethical value as that of anybody else⁶⁶. Within the law-enforcement the mortal force constitutes an unexpected (and, must say, undesired) outcome of an operation that, forcefully, aims for other “loftier” goals, such as capture and neutralization⁶⁷. The death of an individual under such circumstances neither stems from punitive (past-driven) nor deterrent (future-driven) purposes, it rather derives from the **urgent** need to deploy strictly necessary defensive force, as the veritable meaning of “*ultima ratio*”(last resort) option denotes. Violation of the straightforward constraints on the use of deadly force is tantamount to the application of an immediate death penalty by agents that act outside the spectrum of judicial review.

Using Wittes’ play on words: prior to asserting any “*due process*”, one must ask which process is *actually due* in a given case⁶⁸. Unlike the right to life, most of due process rights are subject to derogation clauses in times of public emergency (art.4,ICCPR)⁶⁹⁷⁰, albeit with very limited material and temporal scopes of restriction⁷¹, and of course not discriminatory with regards only to certain people. Putting it patently,

⁶³ News22.

⁶⁴ News23.

⁶⁵ News23.

⁶⁶ Wicks, The right to life....pp.128-129.

⁶⁷ Melzer, Targeted....p.239.

⁶⁸ Wittes, What Process is Due?(OpinioJurisBlog).

⁶⁹ ECHR [art. 15(2)] admits derogation due to lawful acts of war, never declared in practice, probably because the application of humanitarian law is automatic (UCIHL,Expert Meeting..., p.13).

⁷⁰ International humanitarian law offers actually higher protection “due process rights” than human rights law. After capture, no derogation will be allowed to prisoners-of-war(art.4,GCIII); those with clear status, “unlawful combatants” will receive at a minimum the combined application of common art.3/art.75. API.

⁷¹ Duffy, The “war on terror”....pp.292-297;also:Doswald-Beck, Human Rights in Times of....pp.79-105.

performance of derogation, law-enforcement officials enjoy freer hand to arrest people with, concomitantly, fewer options to challenge the power of “incommunicado”-detention. However, the right to life, as highlighted by CCPR/General Comment.6(§1) and *UN/Basic Principles*(§8), does **not** warrant the same limitations, even in times threatening the security of the nation, which would have justified curtailment of other rights.

Inasmuch as the ontological preponderance of the right to life renders all rights dependent on the existence and fruition of life, an extrajudicial execution, i.e., the use of arbitrary mortal force in contravention of the narrowly defined permissible possibilities, *ipso facto*, violates all the rights that person was entitled to, including “due process rights”. Nevertheless, the correlative converse does not hold true: a violation of due process rights does not entail necessarily an arbitrary deprivation of life, unless the person also gets killed as consequence. Therefore, a duty to investigate the (suspicious) deaths of people in the hands of public agents accrues as an international obligation of the State, for the sake of transparency and democracy. Rusinova propounds that this duty transpires from art.6(1)-ICCPR(“*protection of the law*”) and CCPR/General Comment.31(§§15,18)⁷²; I could also add General Comment.6(§4). Furthermore, as States must ensure respect for human rights (art.2,ICCPR), a thorough and impartial investigation of deaths dispenses the climate of impunity and permits that State agencies learn from past mistakes⁷³. The duty to scrutinize publicly the legality of the killing by State forces was also pronounced by the ECtHR⁷⁴. Accordingly, the US government should maintain the maximum extent of openness in ascertaining the multiple questions arising out of human rights NGOs and other voices of civil society.

Finally, Professor Mary O’Connell, well-known vehement critic of the US-led drone campaign in Pakistan, expressed “relief” for the death of Bin Laden⁷⁵. Besides, she congratulated the Obama administration for having “come to senses” in adopting the peacetime law-enforcement paradigm in the *Neptune Spear*, while rejecting wholesale the “*war on terror*” paradigm⁷⁶. With all due respect to the eminent international law pundit, the sole application of human rights law, as discussed, offers only shaky grounds for the justification of Bin Laden’s killing. This is precisely why

⁷² Rusinova IN:Tomuschat,The Right to Life,pp.67-68.

⁷³ Doswald-Beck, The right to life...p. 887.

⁷⁴ ECtHR, “*Isayeva, Yusupova and Bazayeva v. Russia*”,§§ 209-213.

⁷⁵ News24.

⁷⁶ News24.

many laypeople dismiss right away the operation as another example of American imperialism and total disregard to international law, without even glancing upon the more adequate *ad bellum* and *in bello* paradigms.

3. “JUS AD BELLUM”

3.1. Occurrence of an armed attack

Historically, until the early 20th-Century there was nearly no compunction to go to war⁷⁷, though there were some incipient rules on *how* to wage war⁷⁸, once the tensions had already burst in open conflict. As Clausewitz’ *famously* proclaimed “*war is the continuation of politics by other means*”. Violent, bellicose means, one must say. Shattered peace time negotiations were the usher of the war trumpets, when the stronger side could compel, in a form of unbridled self-help, its will upon the inferior opponent. At least, previously, in the middle ages there existed some Christian-inspired institutes, such as Truce/Peace-of-God, intended to sparing some vulnerable people and sacred land from violence and limiting destruction among knights during holy days⁷⁹. The chivalry that constrained recourse to war was later replaced by the 17th-century Grotian “*just-war*” theory imposing that there existed a just-cause to seek (legitimate defence, compensation/reparation of wrongdoings, punishment of offenders through reprisals), a competent authority to permit the warlike path and a (subjective) right intention aimed at the prevalence of good over evil⁸⁰. In other words, the aggressor party, bearing the moral guilt, would have to endure greater loss of life and property, which conversely would condone the greater permissibility to wreak havoc by the counterpart waging a just-war.

In the dawn of last century, the nationalist mentality embedded in whim/pride led to the WWI. It followed attempts to limit resort to inter-State military force: a) the 1919/League of Nations’ Covenant which made the right to go to war contingent on

⁷⁷ Martin, *Going Medieval*, pp.5-6.

⁷⁸ First Geneva Convention(1864) and the Hague Conventions(1899 /1907).

⁷⁹ *Encyclopedia Online Britannica*(<http://www.britannica.com/>)

⁸⁰ Raines, “Osama, Augustine...”, pp.224-226.

ineffective arbitration or judicial settlement, creating insurmountable gaps⁸¹;b) 1928/Kellogg-Briand Pact which is generally considered to have outlawed war as an instrument of national policy, due to the loophole, it permitted war as an instrument of international policy between non-signatories⁸². The rest is (painful) history: neither of these tentative instruments impeded the WWII. Just for the record, there were no rules proscribing reprisals against the civilian population, something which led to escalations, insofar as all parties considered themselves to be pursuing a just-cause reminiscent of the Grotian theory, with the moral hanging on their side.

The UN/Charter is believed to have closed the gap by peremptorily⁸³ interdicting war altogether. Thenceforth no right to go to war (*jus ad bellum*) properly exists. Rather a *jus contra-bellum* that spares the international community from the “scourge of war” (Charter’s preamble) was born. The bedrock thereto was laid down at Article 2(4) which mandates that

“[...]all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”.

Considering that a *jus ad bellum* became proscribed, another feature that followed was the total severance of *ad bellum* and *in bello* issues in legal literature about a decade after the WWII⁸⁴. Irrespective of whichever State provided the final thrust to the outbreak of a conflict, the *in bello* constraints should be borne equally by everyone, mainly because of humanitarian concerns and to the fact that legality of recourse of force would never be definitely settled between warring parties⁸⁵. Any other fallout setting aside equality would not afford the culpable nation any incentive to comply with *in bello* norms at all⁸⁶.

However, some exceptions still warrant the use of force in other nations following the approval by the Security-Council using the powers of the Charter’s Chapter VII or in case of self-defence:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member

⁸¹ Dinstein, “War, Aggression and Self-Defence”, pp.75-77.

⁸² Id. pp.78-80.

⁸³ As for the discussion whether it conforms “*jus cogens*”, see: Dinstein, id. pp.93ff

⁸⁴ ICRC/IHL and other legal regimes...

⁸⁵ Kolb/Hyde, Introduction to LOAC, pp.23-25.

⁸⁶ Fleck, Handbook of IHL, pp.10-11.

of the United Nations, until the Security-Council has taken measures necessary to maintain international peace and security(...)"(art.51)

The Charter speaks of an **inherent** right of self-defence, understood to be a declaration of pre-Charter customary international law⁸⁷ that continued to exist alongside the new contours of the use of force post-San Francisco. Self-defence against unlawful armed attack crystallizes the first of the traditional "just-causes" for "just-war". Therefore, while legitimate retortions and reparatory countermeasures were jettisoned from the unilateral/multilateral initiative lacking the backing of the Security-Council, there can only be self-defence as a responsive form of military self-help if an armed attack occurs⁸⁸.

Despite being one fundamental concept in international law, what an **armed attack** really is remains largely unsettled⁸⁹. Wariness is called for in interpreting different, albeit similar, terms present in the Charter. Pursuant to art.31(1) of the 1969 "Vienna Convention", perusal shall conform in good faith with the "ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". Perhaps it is easier to define it for what it is **not**. **Armed attack** is not tantamount to **armed conflict**. An armed attack, alternatively, can trigger an armed conflict, be a part of ongoing hostilities or constitute a measure short of war. As O'Connell stated: "*Wars, however, do not begin with an attack. They begin with a counter-attack*"⁹⁰. Interestingly, because of the independence of *ad bellum/in bello*, this first counter-attack is governed by a different set of criteria (**immediacy, necessity and proportionality**) than actual *acts-of-war* strikes that would follow the moment self-defence has been exacted whilst violence continues under a different legal rubric. Besides, Jinks asserted that the different fields of application result from two different concerns: the self-defence requires a higher standard because it tends to be over-applied maximizing the risk of open wars, exactly what the Charter avowed to avoid, whereas the problem with humanitarian rules is precisely their under-application⁹¹.

Moreover, the notion of armed attack is not completely absorbed by *threat to or breach of peace*, the subject-matters of the Security-Council. While it is clear that most armed attacks violate the spirit of the Charter and perforce constitute a tort eroding

⁸⁷ Gill/Fleck, Handbook of International Law of Military Operations,p.189.

⁸⁸ Dinstein,id.,p.159.

⁸⁹ Duffy,id.,p.151.

⁹⁰ O'Connell, When War...,p.4.

⁹¹ Jinks, The Applicability...,p.8.

international peace, minor attacks cannot purport such comprehensive threats; just as unfriendly/hostile acts not involving the employment of military force, otherwise illegal under international law, could amount to a threat of peace without being armed attacks⁹². The same could be said about *aggression*, which consists in a particularly serious form of international criminality impinging personal liability to the senior officials/military leaders that directly waged *wars-of-aggression (crime against peace)*⁹³. In this case, conspiracy to wage aggression is also criminalized even though unlawful (armed) attacks do not ensue⁹⁴. Taking into account that the equally authentic French text of the art.51 uses the term “*aggression armée*” instead of armed attack, one can deduce that the latter is a subtype of aggression, an armed one⁹⁵.

Anyhow, as Gray pointed out the paradigmatic case of armed attack corresponds to “*an invasion by the regular armed forces of one state into the territory of another(...)*”⁹⁶. In the same token, Cassese defined it as “*a massive armed aggression against the territorial integrity and political independence of a State that imperils its life and government*”⁹⁷. The latter concept utilizes the same terminology of art.2(4) of the Charter, which is correct since armed attack is something States should *refrain* from. Nevertheless, it is clear that both experts raised the threshold high above to uncontested cases of armed attack that nowadays seem more like a relic from the past. If taken too literally self-defence could be rendered nigh-obsolete. In the *Nicaragua* judgment, while assessing the attribution of actions of non-state actors to the official government, the ICJ stated that:

“*the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces*”(§195).

The decision specified a lower threshold below which transboundary violence would constitute a *frontier incident* instead of armed attack because *its scale and effects* do not compromise security. Dinstein harshly criticized as the attempt to exclude “small-scale” armed attacks from the purview of self-defence⁹⁸. Unless they are

⁹² Gill/Fleck,id,p.191.

⁹³ Dinstein,id.,p.114.

⁹⁴ Cassese, ICL,p.161.

⁹⁵ Gray, International Law...p.118;*also*,Gill/Fleck,id.p.190.

⁹⁶ Gray,id.,p.128.

⁹⁷ Cassese, International Law,p.354.

⁹⁸ Dinstein,id,pp.175-176.

obviously “trifling”, some form of response cannot be theoretically excluded⁹⁹. Schmitt concurred that excluding acts of “transitory/sporadic” nature, it is wishful that the *gravity* threshold be markedly low¹⁰⁰.

Some critiques that historical cases pre-Charter cannot dictate the interpretation of the customary right to self-defence¹⁰¹ notwithstanding, the *Caroline* incident is widely considered to be the seminal case of the modern idea of restricted *jus ad bellum*. It is especially important for two controversial topics: because the pivotal involvement of non-state actors (NSAs) in the absence attribution/imputation of their armed attacks to organs controlled by the foreign sanctuary State and, secondly, for the considerable leeway granted to the specific use of force in order to *anticipate* imminent attacks. In 1837, Upper-Canada, a rebellion was underway against the British crown, while sympathetic American nationals offered aid in form of supplies and even enlistment¹⁰². The Vessel *Caroline* was usually seen carrying supplies from US territory to the naval base in Navy Island¹⁰³. Fearing that the unwarranted behavior could escalate into direct attacks, a British commander mounted a preventive action, at night, before the *Caroline* could enter Canadian territorial waters resulting in at least one violent death onboard, the vessel capsized, set ablaze only, then, to be consumed by the Niagara Falls¹⁰⁴. The US-government denounced what it deemed to be an extraordinary outrage upon its sovereignty. In the sequence of a fierce exchange of letters by US-Secretary of State, Daniel Webster, and the British envoys, the former wrote the famous words urging the UK to “‘*show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation*”¹⁰⁵. A claim to the permissibility of anticipatory self-defence was fleshed out in strict terms that accommodate legitimate responses to threats of armed attacks that are imminent, manifest, in progress or at least highly probable under the prevailing circumstances¹⁰⁶.

Taking Webster’s formula cautiously, Sofaer advised that it does not apply as a general rule-of-thumb for all pre-emptive¹⁰⁷ actions, rather only in situations in which

⁹⁹ Id.

¹⁰⁰ Schmitt, Counter-Terrorism...,pp.17-18.

¹⁰¹ Martin,id.p.16.

¹⁰² Sofaer, On the Necessity...pp.214-215.

¹⁰³ Id.

¹⁰⁴ Id.

¹⁰⁵ Dinstein,id.,p.219.

¹⁰⁶ Gill IN:Schmitt/Pejic, International Law...p.115.

¹⁰⁷ Inconsistency in vocabulary prompted Lubell to highlight that pre-emptive measure is more adequate to threats even more remote in time than anticipatory(Lubell, Extraterritorial...p.55).

the territorial country was not directly responsible for the threats and is both able and willing to act accordingly¹⁰⁸.

When it comes to newer threats, a terrorist attack would hardly reach success lest total secrecy of its location/timing, therefore making them very difficult to defend against¹⁰⁹. Equally, as private actors, it would be counterintuitive to adopt the same negotiations tactics as with official authorities that tend to act rationally and strike agreements at the latest hour averting the utter collapse of bilateral relations¹¹⁰. Besides, regarding the danger of acquisition of weapons of mass destruction, far exceeding conventional armed attacks, by so unpredictable individuals¹¹¹, the risk to wait the first blow, usually against “soft targets” indiscriminately¹¹², is legally and factually unbearable.

In the immediate aftermath of 9/11, former US-Secretary of Defense, Donald Rumsfeld stated that “(...) [*d*]efending against terrorism(...) may well require that we take the war to the enemy. The best, and in some case, the only defense, is a good offense”¹¹³. His words represented the prelude of the move by the Bush administration to reserve a right to pre-empt emerging threats long before they are able to operate, especially when rogue States and enemies seek the world’s most destructive technologies¹¹⁴. The claim for a pre-emptive self-defence responsive to only contingent or incipient threats, to a mere possibility among others of future attack, or to capabilities not yet operative¹¹⁵ has no basis in customary law whatsoever. The Bush-doctrine, dismissed by the 2004 UN High Level Panel on Threats, stretched too far the permissibility of contemporary *jus ad bellum*, in a dangerous move that does deprive of credibility the anticipatory self-defence under the Webster’s formula.

Additional theories are still attempting to shed more clarity to the customary right of self-defence. One of them, known as the “accumulation of events”, purports to authorize armed defensive measure against a series of pin-prick assaults emanating from the same source which singularly could not be considered as full armed attacks, but set together would conform to the gravity and nuisance scale as if they were part of one

¹⁰⁸ Sofaer, id., 220.

¹⁰⁹ Schmitt, Targeted Killings... IN: Arnold/Quénivet: IHL and HRL... p.536.

¹¹⁰ Id.

¹¹¹ Id.

¹¹² Lubell, id., p.61.

¹¹³ Rumsfeld, 21st Century...(Speech)

¹¹⁴ 2002 US National Security Strategy.

¹¹⁵ Reisman/Armstrong IN: Schmitt/Pejic: International Law... pp.80-81.

single phased armed attack¹¹⁶. For instance, Operation Enduring Freedom-(OEF) in Afghanistan drew its legitimacy from the *past* 9/11 attacks considered cumulatively, though probably the Pentagon and World Trade Center *consummated* attacks considered separately would have reached the threshold nonetheless.

The last doctrine of relevance here is the “continuing” self-defence which relies on stretching the temporal requirements, not *backward* to a remote point before an actual armed attack occurs (as the pre-emptive one), but rather *forward*, after one has taken place and until the common genetic source of threat is drained. Traditionally the immediacy requirement from the Webster’s formula would mandate that there was proximity between the attack and the response thereto, without undue time-lag¹¹⁷. Gill dismisses immediacy as an independent criterion based on the unreasonableness of the forfeiture of the States’ rights to integrity simply because an instant military response is impossible¹¹⁸. In fact, it is hard to picture a really immediate self-defence, in the absence of the investigative determination of responsible actors, the mobilization of military force and a comprehensive plan of action, all of which require the lapse of some time. OEF only started on 7 October 2001, almost one month after the attacks to which it was intended to respond.

Furthermore, Schmitt propounds the simplification of the immediacy criterion after the first strike, which already demonstrated **ability** and **intent** to pursue similar attacks in the future¹¹⁹. This fits perfectly terrorist organizations - the sole purpose of which is to spread violence - that launched a campaign of attacks. The victim State knows that the likelihood of future attacks being attempted is very high, though exactly when/where remains to be determined¹²⁰. If, cumulatively, an armed attack occurred, present the lingering ability and intent to mount similar ones, the immediacy criterion will be absorbed by the necessity to react to a *continuing threat*. Analysis of the treasure trove of data found at the Bin Laden’s compound uncovered several plans to mark the 10th anniversary of 9/11, namely, killing president Obama and sabotaging passenger trains¹²¹. Al Qaeda demonstrated intent and ability in a campaign of attacks since the 1998 bombing of the US-embassies in Kenya/Tanzania and the 2000 strike on the USS-

¹¹⁶ **Pro**: Ago, Eighth Addendum...,pp.69-70;Distein,id.,pp.203-204/**Contra**:Lubell,id.,pp.53-54.

¹¹⁷ Schmitt, Targeted...,p.535.

¹¹⁸ Gill IN:Schmitt/Pejic...,p.153.

¹¹⁹ Schmitt, Targeted..pp.537-538.

¹²⁰ Id.

¹²¹ News25.

Cole vessel in Yemen¹²². A pattern of aggression followed in a public campaign against the heretic enemies. Thus, the *Neptune Spear*, a logical outspread of OEF in Afghanistan, not to mention an important concluding chapter thereof, could be framed as a lawful exercise of self-defence for past attacks and to continuing threats arising alike from the same source.

3.2 Response to NSAs (Direct Participants in Armed Attacks)

Hongju Koh, US-Department of State's legal adviser, before the Bin Laden's raid, referred in a speech the "*in conflict occurring in Afghanistan and elsewhere, we continue to fight the perpetrators of 9/11: a non-state actor, al-Qaeda (as well as the Taliban forces that harbored al-Qaeda)*"¹²³. The last part of the statement is not well precise, since the Taliban became involved as a consequence of the attacks in Afghanistan and neighboring areas, when they sidelined Al-Qaeda and resisted the operation to disrupt the terrorist camps, not that they, then a not worldwide recognized Afghan government, could constructively be considered responsible for 9/11¹²⁴. The Taliban for sure incurred in some form of State responsibility, yet the terrorist strikes were not attributed to them¹²⁵; non-state actors (NSAs) did it. It is clear that the Obama cabinet considers that actions against Al-Qaeda fall within necessary measures of self-defence. So, considering Bin Laden as the headman of this private group, it is just natural that the necessity to defend the nation from further attacks would subsist until he was captured or killed. After all, the world could not be safer with Bin Laden at large.

Even publicists skeptical to the permissibility of taking action against NSAs seem to agree that such groups are capable of mounting devastating attacks¹²⁶. If they are capable of attacking with comparable or stronger force than conventional inter-State military maneuvers, then why stand idle and do nothing? Certainly a legal paralysis is not the desired outcome when sacred values for the international community are at stake. In the wake of 9/11 the NATO for the first time in history invoked the reciprocal

¹²² Murphy, *The International Legality of US Cross-Border Operations...*,p.28.

¹²³ Koh, ASIL speech(*emphasis added*).

¹²⁴ Schmitt, *Counter-Terrorism*..pp.40ff.

¹²⁵ Id.

¹²⁶ Martin,id.,pp.15,22.

principle, regarding the as if committed against all members of the Military Alliance¹²⁷; the OAS followed suit¹²⁸. The Security-Council in Resolutions n.1368/1373 acknowledged the incidence of the right of self-defence in response to the atrocities perpetrated Al-Qaeda. Not that it needed to do so, inasmuch self-defence vests **automatically** in the occurrence or imminence of an armed attack, there subsists solely a duty to report back to the council. In fact, the Security-Council's presidency published a statement, one day after the raid, welcoming that he will not be able perpetrate acts of terrorism again¹²⁹.

Nothing in the Charter would imply that defensive response is **only** admissible if the attacks can be somehow connected or imputed to a sovereign territory¹³⁰. It is even inaccurate to imply the ICJ opposes this view: a) in "*Nicaragua*" attribution through the criteria of *effective control*(§103,195) was the issue at hand, either Salvadorian rebels attacks being attributed to Nicaragua or "Contras" attacks to the USA; b) in the "*Wall Opinion*", the need to avert armed attacks in the form of self-defence action was overruled because the threats arose from the same [occupied] territory, not an alien ground(§163); finally in the "*DRC/Uganda*" as the incursions within Ugandan borders by NSAs could not be attributed to the DRC, the Court fell short of analyzing, and admitted that explicitly, whether under contemporary international law a right of self-defence against large-scale attacks by irregular forces exists(§147).

Furthermore, the concept of *jus ad bellum* has been traditionally conceived to regulate permissible **justifications** for the deployment of military force *against* or *in* foreign territory, not precisely how this force was used, this has been referred preferably to human rights or international humanitarian law(IHL)¹³¹. Yet, as Schmitt asserted [*i*]/*f it is permissible to use force in self-defense against terrorist groups, then it is obviously permitted to target individual terrorists.*"¹³² It is inevitable, then, that *ad bellum* issues are not kept separately of how defensive force is going to be individualized, despite further implications with other international law frameworks. Paust talks about, without precisely defining it, an interesting concept of *direct participant in armed attacks*

¹²⁷ News41(Statement North Atlantic Council).

¹²⁸ OAS/Terrorist Threat to the Americas.

¹²⁹ S/PRST/2011/9

¹³⁰Paust, Self-Defence Targeting..p.4;*also*,Dinstein,id.,pp.213,216;*also*,Gill/Fleck,id,pp.192-193;*also*,Lubell,id.,p.35;*also*,Franck, Recourse to Force..pp.53-55.

¹³¹ Lubell,id.,p.9.

¹³² Schmitt, Targeted..p.534.

(DPAA)¹³³ warranting the targeting of individuals directly involved and personally responsible for the launching of unlawful attacks against other nations. He takes the DPAA notion for granted probably because he considers it to be the logical implication of engaging single NSAs. One could say of a tendency of “privatization” of *ad bellum* implications. Strikingly, being a DPAA entails a status-based liability very similar to those enshrined in IHL rules, including a duty of distinction while targeting¹³⁴. The liable human target can be neutralized, either killed (the likely outcome of measures taken in foreign land, where the defender does not exact substantial control) or captured, as long as necessity calls for, while there is ongoing pattern of armed aggression. In case of the self-defence capture, a least injurious option, the captured DPAA would not enjoy protection as a detainee caught in the actual “*theater-of-war*”, though would nonetheless be entitled to customary/human rights-based standards¹³⁵.

Assembling extreme *jihadists* and some *mujahedeens* equipped from the times of Soviet resistance in the 1980s, the Saudi Bin Laden has been, from the genesis, accompanied by his deputy Al-Zawahiri, the mastermind and headman of “*al’Qaeda al’Askariya*”¹³⁶ movement the purpose of which, as in the self promulgated Declaration of War of 1996, was to kill Americans and their allies, civilian and military indistinctly¹³⁷, so as to expel them from the “*Holy Lands*” and put an end to the unwarranted influence over corrupt/feeble Middle-Eastern regimes. Bin Laden gave orders to warlike actions from 1996 to September 2001¹³⁸. In the beginning of the OEF he narrowly escaped being hit in the *Tora Bora* Mountains in Afghanistan¹³⁹, following which he vanished until 2011. Meanwhile, even weakened and forced to lead a shuttered life, he had been still engaged in the plotting and ordering of terrorist strikes; accordingly, he relied on his trusted courier to convey messages to and collect info from other *Qaedists*¹⁴⁰. The wingman, Al-Kuwaiti, used to drive ninety minutes from the hideout before turning on mobile communications with other terrorist cells scattered across the world¹⁴¹; not to mention the 9/11 10th anniversary ongoing plans, irrespective of how incipient they still were (*continuing*, not temporally immediate, threat).

¹³³ Paust, *Permissible Self-Defence*...pp.571,576,580.

¹³⁴ Anderson, *Targeted Killing*...p.8.

¹³⁵ Paust, *Self-Defence Targeting*...pp.25-27.

¹³⁶ Mohamedou, *Non-Linearity*...pp.10-11.

¹³⁷ Id.

¹³⁸ Id.

¹³⁹ News26.

¹⁴⁰ News27.

¹⁴¹ Id.

Anyhow, it is evidenced that Bin Laden was the foremost DPAA and the top-senior of all active members within the structure of Al-Qaeda.

Significant footholds in domestic law must not be overlooked either. In 2001, the US-Congress authorized the president to “*use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons(...)*”¹⁴². This provision was tailored exactly to persons such as Bin Laden and its application is construed consistently with international law¹⁴³. Still, the AUMF, applied once again concretely on 2nd May/2011, does not contravene the long-standing ban on assassination, namely Executive Order-12,333 which mandates that “[*n*]o person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination”. The order showed that US-government eagerly wanted to keep distance from the mid-1970s controversies concerning covert plots orchestrated by the CIA to assassinate foreign high-ranking officials without express presidential approval¹⁴⁴. As Parks affirmed more than twenty years ago, Executive Order-12,333 was not intended to limit self-defence options against legitimate threats to national security of the United States and killing under such circumstances would not be classified as neither peacetime-assassination (murder of a foreign leader for political purposes) or wartime-assassination (killing by treacherous means)¹⁴⁵.

Reliance on Koh’s speech, affirming that the United States is *at war with Al-Qaeda, the Taliban and associated forces* **and** *may use force consistent with its inherent right of self-defence*¹⁴⁶, led Anderson, convinced that the best counterterrorism strategy lies under *jus ad bellum* considerations, to propound a naked/strong self-defence, that is, a self-defence alternative or independent from *in bello* constraints, in which the means and levels of force are not part of any armed conflict¹⁴⁷. As well, if successful, the defensive strike would not meet the threshold of armed conflict¹⁴⁸. Philip Alston assailed what he named a “robust” right of self-defence, because it is allegedly built

¹⁴² Authorization for the Use of Military Force-(AUMF).

¹⁴³ Lederman, The U.S. Perspective on....(OpinioJurisBlog)

¹⁴⁴ Raines, id., pp.229,231.

¹⁴⁵ Parks, Memorandum.

¹⁴⁶ Koh, ASIL speech.

¹⁴⁷ Anderson, Targeted Killing...pp.7-8.

¹⁴⁸ Id.,p.15.

upon a “just-cause”, then conflating elements of *jus ad bellum* and *in bello*¹⁴⁹. Albeit controversial, considering the possibility of armed attacks occurring without triggering the notion of armed conflict along with them, matters of self-defence are capable of being engaged before the outbreak of hostilities. Still, the criteria (immediacy, necessity and proportionality) for *jus ad bellum* are indeed different; there is no argument against that, and Anderson defends that these prongs remain 100% applicable, adding also *distinction*¹⁵⁰. A naked self-defence might be the exact presupposition of independency, rather than conflation as Alston suggested, of the two historical branches of the “laws of war”. Alston, however, in a referral to the law of State responsibility, rightly declared that there is no permissible invocation of self-defence as a means to justify violations of IHL¹⁵¹. Let it be clear that holding a military measure outside the framework of IHL does not violate it head-on, simply because it may not (yet) be applicable in the first place.

Lastly, a cursory word on how the necessity and proportionality principles, regulating the level of (re)action in self-defence, stand. They are not posited expressly in the Charter or any other legal document making their existence a matter of deduction from customary law¹⁵². In this point the *Caroline* incident also prescribed the defender-nation to demonstrate it “(...)did nothing **unreasonable** or **excessive**; since the act justified by the necessity of self-defence, must be **limited** by that necessity, and **kept clearly within it**”¹⁵³. The ICJ upheld often those limitative principles in relevant jurisprudence, just to name a few, *Nuclear Weapons Advisory Opinion* (§41), *Nicaragua* case (§176), *Oil Platforms* case (§43).

Necessity dictates that no other alternative is possible to avert an armed attack or the imminent threat thereof¹⁵⁴. Not all non-military, such as diplomatic, political or less injurious coercive measures must be exhausted; of course, there is a test of **effectiveness** of viable alternatives¹⁵⁵. As seen above, Schmitt displaces the immediacy prong after the first attack occurred, while the ability and intent to pursue the campaign linger on, by inversely strengthening necessity with the “*last window of opportunity*” test, the

¹⁴⁹ Alston, Report...p.15.

¹⁵⁰ Anderson, id.p.18.

¹⁵¹ Alston, id., p.14.

¹⁵² Gill/Fleck, id., p.196.

¹⁵³ As quoted in Sofer, id., p.218.

¹⁵⁴ Gray, id., p.150.

¹⁵⁵ Duffy, id., p.162.

definitive moment in which DPAAAs are at the cross-hairs of the defensive party¹⁵⁶. On the other hand, proportionality mandates that no more force is used than actually necessary to halt the attack or remove the threat of foreseeable future attacks¹⁵⁷. It is measured by the size, duration and target of the response¹⁵⁸ and the scale and effects of the measure undertaken should be roughly commensurate to the armed attack or the threat had it been successful¹⁵⁹. It is intuitive that necessity restricts or pushes forward the constraints on proportionality. Dinstein mentions of a demand for necessary counteraction so overwhelming that would justify waging a defensive war¹⁶⁰. Whereas *jus ad bellum* limits the initial resort to force, it is established that *jus in bello* does not impede overcoming the enemy and fighting until the end¹⁶¹.

Thereby, clearly other non-forceful measures were insufficient in the past to deter Bin Laden from mobilizing fighters and mounting devastating attacks, the scale and effects of which surpassed by far the surgical DEVGRU mission with ground-troops. On top of that, most likely the Abbottabad raid represented the last chance to get him dead or alive before a probable renewed protracted flight, had he been tipped off that troops were coming after him.

3.3. Non-Violation of Territorial Sovereignty

An important issue, upon which the legality of the present case relies, remains to be discussed. The raid took place in a sovereign territory wanting the participation or previous consent of the territorial State. Was there a violation of Pakistani sovereignty?

According to the kernel of the Charter (art.2(4)), territorial integrity and political independence occupy - along with the maintenance of peace/security, the development of friendly relations and the international co-operation(UN/purposes: art.1)- a sacrosanct place as peremptory norms the violation of which is solely acceptable in face of other norms detaining equivalent cogency¹⁶²

Territorial integrity is not an absolute interest; it cannot logically be if the preservation of sovereign jurisdiction over the landmass of one State comes at the

¹⁵⁶ Schmitt, Targeted..pp.537-538.

¹⁵⁷ Schmitt, Counter-Terrorism...p.20.

¹⁵⁸ Gray,id.,p.150.

¹⁵⁹ Gill/Fleck,id.,pp.196-197.

¹⁶⁰ Dinstein,id.,pp.208-209.

¹⁶¹ Kolb/Hyde,id.,p.16.

¹⁶² For an explanation of peremptory norms: Melzer, Targeted..pp.214-215.

sacrifice of the equally paramount integrity of another. This corresponds exactly to what self-defence is all about: an exception to the otherwise solid prohibition to a clash of military force among States¹⁶³. In the wake of the first violation of territorial integrity by the aggressor's armed attack it follows a defensive response that has in its ontological definition an extant authorization to intrude into the former's territory and force the abuse of its immunity to a standstill. Nothing in the phrasing of the Charter implies that consent is needed to act legitimately in self-defence¹⁶⁴; in fact, on the contrary, it is nonsensical to require it at all. It would virtually render the offended State helpless in the case of denial. Hardly any State would explicitly consent to military action within its borders, especially when it is the aggressor. Alternatively, had the attack been launched by NSAs, the territorial State would attempt to deny the necessity of forceful actions within the area it administers or to label them as aggressive rather than defensive.

Accession to the Charter includes, as a premise, consent from each State in advance¹⁶⁵. In principle, governments are able to pass legislation affecting strategic interests and the conduct of their nationals abroad, though they are barred from enforcing it¹⁶⁶. Extraterritorial law-enforcement measures depend on cooperation and consent, which are immaterial to a self-defence response, based on higher threshold of violent behavior and different grounds of urging necessity to act on foreign soil and prevent a greater catastrophe. The quality of relations involving the countries is at its worst, which makes it impossible for cooperation. Thus, the apparent impervious territorial immunity from direct interference yields to the exercise of self-defence to which 193 sovereign nations, US and Pakistan included, already gave express acquiescence¹⁶⁷.

Any other reasoning affording much weight to consent renders self-defence nigh-obsolete. Greater risks of going "all the way" and dismissing the whole set of restraining principles pertaining defensive counter-action loom if the only exception to the *contra-bellum* thrust becomes inoperative due to unthinkable cooperation between mistrustful parties/foes. Consent generally precludes responsibility¹⁶⁸, but even at the law-enforcement level, consent does not obviate all illegality. The agreement for foreign

¹⁶³ Lubell, id., pp. 26-27.

¹⁶⁴ Paust, Self-Defence Targeting... pp. 13-14.

¹⁶⁵ Id.

¹⁶⁶ Brownlie, Principles... p. 306.

¹⁶⁷ UN/Treaty Collection: <http://treaties.un.org/>

¹⁶⁸ Crawford, The Law of International Responsibility, pp. 439ff.

intervention in one's territory notwithstanding, a State cannot grant prerogatives it does not possess, like authorizing other nation to violate human rights the own government could not violate itself¹⁶⁹.

When it comes to attacks perpetrated by NSAs using other countries as safe haven or in flight to third countries from where they intend to pursue their vicious campaign, a comprehensive cooperation between intelligence, police and military agencies is desirable, though not mandatory. The attacked State, as of international comity, should, if possible, demand the territorial State to take matters into own hands and solve the issue or, through political, judicial and diplomatic channels, such as to request for extradition¹⁷⁰. Defensive measures are a matter of necessity, not of prior exhaustion of domestic remedies. If the impending necessity requires to strike immediately, without having time to ask for cooperation or even notify the third country¹⁷¹, which might endanger the secrecy of the mission and alert the targets, there is no reason to force the offended party to wait until the home country acts, considering that it will in a timely and satisfactorily manner.

Relating to Pakistan, it is possible to assume that some form of tacit acceptance exists for US cross-border operations from Afghanistan, spilling over the porous mostly common Pashtu areas, sprawling along the Federally Administrated Tribal Areas-(FATA), a cluster of semi-autonomous frontier provinces in which the extent of effective power the central government in Islamabad really exerts is fraught with doubts¹⁷². Estimated 30/40% of guerilla attacks on troops in the Afghan conflict are mounted from the FATA¹⁷³. The US has responded thereto either with a full-fledged drone-campaign, or by chasing, in "hot pursuit"¹⁷⁴ the Taliban insurgents back into Pakistan or, alternatively, at least since 2008, with a Joint Special Operation Task Force (JSOC: Navy-SEALs/Army's Delta Force)¹⁷⁵, of the same kind that was deployed in the wee hours of 2nd May against Bin Laden's refuge.

Yet, not that the Pakistani government expressly agreed to a written and binding instrument giving away part of its sovereignty to Western forces, either US alone or

¹⁶⁹ O'Connell, *Unlawful Killing*, pp.16-17.

¹⁷⁰ Lubell, *id.*, pp.45-46.

¹⁷¹ Paust, *Self-defense*..., pp.19,21.

¹⁷² Murphy, *id.*, pp.10-12.

¹⁷³ *Id.*, p.9.

¹⁷⁴ Lubell criticizes the misapplication of an institute originally used to persecute pirates at the high seas until they reached territorial waters, as not being a valid exception to the prohibition on the use of force(pp.72-73).

¹⁷⁵ Murphy, *id.*, pp.13-16.

NATO, but it has indulged to military operations targeting foreign fighters and has acted as if such consent for each individual operation is not required¹⁷⁶. An unconfirmed report leaked that, 10 years ago, then president George W. Bush and commander Pervez Musharraf covenanted the permissibility of unilateral operations to kill/capture Bin Laden in the eventuality he sought residence in Pakistan¹⁷⁷. In that scenario, which ended up materializing, Islamabad would vociferously decry it as a violation of its sovereignty, in a move to assuage domestic public opinion, but it would in fact simply look “the other way”¹⁷⁸. For the *Neptune Spear*, the US-Special Forces flew from the Bagram-base in Afghanistan, stopped shortly after at the staging Jalalabad-base before proceeding into Pakistan¹⁷⁹. Despite flying low and using anti-radar systems, their presence was eventually noticed by the Pakistani air force that went as far as scrambling their jets¹⁸⁰. However, eventually the JSOC was not intercepted since they had already left Pakistan¹⁸¹. One can only assume that these kinds of actions became common business, whereas the responses from Islamabad were likely more rhetorical.

It is not to be ignored that the US has much more leverage over its bilateral relationship with Pakistan than the other way around, making it hard to distinguish between tacit agreements and reluctant endurance. Thereby, in absence of clear consent the necessity prong shall conform to the “*unwilling/unable*” test. On the one hand, out of the various possible links connecting the NSAs to the official government, the unwillingness to react to a legitimate demand of an aggrieved third State by the dangerous conduct emanating from the former inner side hovers close to being actually complicit with the attacks¹⁸². While turning a blind eye to the misuse of its territory, the unwilling State strengthens the sense of impunity and total disregard to common international commitments. On the other hand, inability/incapacity to uncover, prevent or repress violent strikes relates to a either partially or fully failure of institutional mechanisms that should, otherwise, had worked. Besides, it is more likely that country lacks control over some part(s) of its landmass, rather than in its entirety.

¹⁷⁶ Id.14.

¹⁷⁷ News28.

¹⁷⁸ Id. See: this duplicitous conduct as pointed out in Murphy,id.,p.19.

¹⁷⁹ News29.

¹⁸⁰ News30

¹⁸¹ News30.

¹⁸² Lubell,id.,pp.40-42.

Inasmuch as sovereignty, concretely manifested in the form of territorial immunity, constitutes “only” one of the preferred values fleshed out in the Charter¹⁸³, it yields to other principles¹⁸⁴, e.g. the protection of international peace/security, as long as the country in question does not reasonably abide by the obligation to duly police/control what happens within the recognized frontiers, as adjudicated by the defunct P.I.C.J. in *S.S.Lotus*¹⁸⁵, and the successor, ICJ, in the *Corfu Channel*¹⁸⁶ precedents; simply put, nations must not let their territories become a safe haven for terrorism and/or serious transnational crime¹⁸⁷.

John Brennan, Obama’s administration senior counterterrorism adviser, despite acknowledging that Pakistan has been engaged in the fight against extremism, declared severely that it is “inconceivable” that Bin Laden did not rely on a “significant support system” in Abbottabad¹⁸⁸. Further, president Obama himself reaffirmed that the likelihood of a strong network helping him for so long has to be seriously investigated, by both countries¹⁸⁹. He did not want to jump to any conclusion whether it was someone inside at the high or lower echelons of government, or outside¹⁹⁰.

Anyway, some credence to these assertions must be had. The terrorist chief had been living unnoticed at the compound, roughly eight times the size of most houses in that neighborhood, a property the official owners could not afford, for at least 5 years¹⁹¹. The two/three families living inside were extra cautious by, e.g.: never appearing in public or accepting invitations of neighbors; burning trash inside instead of leaving it for collection; requiring that bills were sent to an offshore address; not even allowing kids to fetch footballs that were tossed astray over the fortified walls; despite visible wealth, there was no internet/telephone connection¹⁹². On top of that, the complex was located just down the road from the top-military academy in Pakistan, within 40 miles of the national capital.

¹⁸³ Paust, Self-Defense Targeting..p.20.

¹⁸⁴ Schmitt, Targeted...pp.540-541.

¹⁸⁵ “*It is well settled that a State is bound to use due diligence to prevent the commission within its domain of criminal acts against another nation or its people.(§4)*”

¹⁸⁶ Obligation “*not to allow knowingly its territory to be used for acts contrary to the rights of other states. §22(merits)*”.

¹⁸⁷ also:1970/“Friendly Relations”-Declaration.

¹⁸⁸ News31.

¹⁸⁹ News32.

¹⁹⁰ News32.

¹⁹¹ News7.

¹⁹² News7;Various data: News33/34.

The compound was shielded by reinforced walls, including a privacy wall around the balcony on the third-floor, high enough to keep someone over 6ft6(1.98m)tall hidden ¹⁹³. Indeed, someone very tall, nicknamed “the Pacer”, not visually identified, went on the patio regularly for circular walking tours, while CIA agents were observant from further afield¹⁹⁴. To any judicious and prudent observer it seemed crystal-clear that someone of highest importance, with numerous enemies, was dwelling in there. Nevertheless, for several years Pakistan denied this possibility and there were rumors indicating the participation of the Pakistani Inter-Services Intelligence-(ISI), a spy agency, in having smuggled Bin Laden from Afghanistan through the poorly guarded borders¹⁹⁵. It is too complicate to point the finger and establish beyond reasonable doubt where responsibility lies, though it transpires naturally the duplicitous commitment Pakistan said to have in combating terrorism domestically. It is not clear who rules the country, if the military or the civilians. All the area classified as FATA, covering the lengthy border with Afghanistan, is scarcely administrated by the central government. Many concerns, thus, indeed rose in sharing utterly critical information of Bin Laden’s whereabouts with unreliable partners whose allegiance has not been totally proven. It is supposed that the Pakistani authorities had, at a minimum, 5 years to do their job and finally gainsay where all suspicions were leading: Bin Laden took refuge right at their doorsteps. Both Shaun Gregory¹⁹⁶, a Pakistani scholar, and Leon Panetta¹⁹⁷, the CIA-top, stated that someone inside the official structure in that country was incompetent or deeply involved/complicit, thereby making it fairly that that South-Asian nation was, alternatively, unable or unwilling to take out Bin Laden. It does not mean that the raid created a state of war with Pakistan, though¹⁹⁸.

¹⁹³ News10.

¹⁹⁴ News10.

¹⁹⁵ News35.

¹⁹⁶ News34.

¹⁹⁷ News32.

¹⁹⁸ Paust, Self-Defense Targeting...pp.22-24.

4. “JUS IN BELLO”

4.1 Threshold for application and expansion of the “*theater-of-war*”

The application of the *lex specialis* of *jus in bello* (also known as international humanitarian law –IHL¹⁹⁹), relies vitally on the outbreak of an **armed conflict**. And the latter is not exactly the same as **war**. Traditionally, in the technical sense, war depended on a declaration that indicated a state of belligerency amongst nations (art.3,HCIII)²⁰⁰. It was very perilous to leave up the application of a body of international law contingent on the whim of governmental officials that, willingly, could use power animated only by reasons of national security and military necessity to the detriment of humanitarian considerations²⁰¹. Alternatively, war in a material sense corresponded to an all-out armed conflict that terminated thoroughly all *jus pacis* relations.

This is not the rule anymore²⁰². All four 1949-Geneva Conventions have identical common *triggering* mechanisms in their articles 2 and 3. The former provides that

“the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them”.

In case there is a formal acknowledgement of a state of war, even if unaccompanied by actual hostilities, the Convention(s) will, nonetheless, apply; the novelty refers, however, that the threshold of application was lowered to cover any empirical difference arising between two sovereign States and, for it is the unnatural course of events in the world order, leading to the intervention of their armed forces, **irrespective** of which legal basis invoked to justify that it is not “making war”, *how long the given conflict last or how much slaughter takes places*²⁰³

In its turn, *common art.3*, actually establishing a catalogue of minimum humanitarian protective rules to those not taking active part in hostilities, recognizes the existence of an “*armed conflict not of an international character occurring in the territory of one of the High Contracting Parties*”. Historically a system of gradation

¹⁹⁹ Cf. Melzer, Targeted...p.244(fn.9) for other meanings.

²⁰⁰ Dinstein, War...p.29.

²⁰¹ Melzer, id.p.246; also, Dinstein, id., p.32.

²⁰² Fleck, Handbook...p.45.

²⁰³ Pictet/ICRC, GCIV-Commentary, p.20.

existed: “rebellions” lay within the domestic affairs of States, whereas “insurgencies” implied the inability to easily exact jurisdiction over its territory, imposing, thus, a neutrality regime limiting foreign influence only on the side of governmental authorities. So, “belligerencies” depicted the scenario in which one of the contending parties had risen to a similar level of interstate war²⁰⁴. Despite the palpable reality that civil wars existed throughout history²⁰⁵, it took a while before nations could admit that it was indeed a legitimate concern of international law to lay down restraints on how they engaged in hostilities with their own peoples. It goes without saying that the *High Contracting Parties* to Geneva merely agreed upon a very limited spectrum of posited international injunctions²⁰⁶, coupled with an implicit higher threshold to the opening of hostilities of non-international character.

The ICTY-*Tadić* decision, concerning the former conflict in Yugoslavia, shed light as to the outbreak of an armed conflict: “*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*”(emphasis added)²⁰⁷. On the one hand, in international armed conflicts-(IACs), *organization* is presumed to exist within regular troops, while *protraction* is immaterial; on the other hand, in non-international armed conflicts-(NIACs) the bar was set higher to impede undue interference in national affairs. Firstly, reliance on the *organization* criterion rules out banditry, mob violence or a terrorist acting solo, due to the lack of (sufficient) command/control, communication structure, common policy (even if irreconcilable with IHL), recruitment system, weapons and ammunition supply²⁰⁸. Then, the criterion of *protraction* of armed violence, which after the ICTY-*Haradinaj* case relates rather to *intensity* than proper duration(§49), sweeps away from the core of armed conflict unorganized, short-lived insurrections²⁰⁹ and minor “*internal disturbances and tensions such as riots, isolated and sporadic acts of violence*”(art.1(2)APII). As indicia, intensity is evinced by type and quantity of heavy weaponry or vehicles, size of troops, extent of devastation provoked by shelling of human dwellings, high civilian casualties and mass evacuation²¹⁰ ...

²⁰⁴ Melzer, id., p.248.

²⁰⁵ Fleck, id., p.605.

²⁰⁶ Melzer, id., p.253.

²⁰⁷ Decision Defense Motion for Interlocutory Appeal(§70)

²⁰⁸ ILA-Report, pp.28-29.

²⁰⁹ *Tadić*(§562); ILA-Report, p.28.

²¹⁰ ICTY cases: *Boskoski*, §177; *Haradinaj*, §49.

The expression “Global War on Terror-(GWOT)” does not implicate the existence of an armed conflict of global battlefield, fought anywhere as it might please. “War” has been used before for rhetorical purposes²¹¹, as in “war” against drugs or AIDS. Real wars are not waged against common nouns, but proper nouns (identified State and NSAs), because only the latter “*can surrender and promise not to do it again*”²¹². Nevertheless, out of a plethora of distinct responses of counterterrorism measures ranging from domestic law-enforcement to intelligence, diplomacy, air-traffic security and border control²¹³, there are levels of violence, devastation and respective military counter-tactics that amount to armed conflict(s), though the appurtenant legal scenario needs to be ascertained on a casuistic-empirical basis²¹⁴. Any remaining doubt as to whether the Geneva Conventions are applicable to the clash between US and Al-Qaida, or whether fighters captured therein fall in some sort of legal “limbo” of protection, were remedied by the US-Supreme Court’s decision on “*Hamdan*”. According to this precedent, the expression **armed conflict of non-international character-(NIAC)** has to be construed in its literal meaning, i.e. in mutual exclusivity to international armed conflict-(IAC) and **not** as synonymous with internal²¹⁵. NIACs do usually spill over borders, sometimes they are fought entirely outside the territory of the warring State; accordingly, the best interpretation attached to common art.3 is that it was not intended to be geographically bound²¹⁶.

Obama presidency toned down the limitless GWOT rhetoric of the predecessor, in a way that it considers itself involved in an armed conflict against Al-Qaida [*also Taliban and associated forces*]²¹⁷ in Afghanistan and Pakistan (at least the surrounding FATA areas)²¹⁸ and arguably (though controversial) in Yemen. Whether it is classified as one wider armed conflict or multiple localized ones²¹⁹, it is a type of NIAC fought entirely outside US-territory, in a sense, a *transnational* armed conflict of, still, non-international character, since it does not (anymore) involve actual interstate exchange of force. There is no legal loophole to allow the existence of third-type of hostilities, because the trigger-mechanisms of common arts.2/3 are comprehensive enough to cover

²¹¹ Dinstein, id., p.3.

²¹² Rona, Interesting Times..., p.61.

²¹³ Melzer, id., pp.266-267.

²¹⁴ ICRC: IHL and Challenges... p.8.

²¹⁵ Hamdan (§§67-69).

²¹⁶ Lubell, Extraterritorial... pp.99ff (especially: C. Bassiouni (*apud*)fn.14, Chap14.)

²¹⁷ Koh, ASIL speech.

²¹⁸ ASIL, Background Note, pp.7-8.

²¹⁹ Id., pp.8-9ff.

any sort of ongoing and future armed conflicts²²⁰. Although sporadic terrorist acts certainly do not reach the threshold of violence²²¹, in the course of the protracted OEF, hostilities easily crossed that threshold in intensity, while Al-Qaida displayed, either alongside the Taliban or by itself, sufficient level of coordination, structure and command as an organized armed group party to the conflict capable of sustained and systematic offensive²²².

All the same, it is intuitive that the permissive rules of IHL warranting killing without warning and detaining for security reasons do not afford a blank-license to hunt down anyone considered an “enemy” anywhere, at any time. Armed conflicts require a limited, identified spatial dimension permitting those directly participating therein to carry out *intense, protracted, armed exchanges*²²³. Accordingly, military operations/acts-of-war designed to eliminate resistance and strike military objectives²²⁴ ought to be conducted within the **area-of-war**, encompassing the national territories of the warring opponents - land, territorial and maritime waters, air-space-, the high-seas and the exclusive economic zones, excluded neutralized/demilitarized/hospital or safety zones²²⁵. Military praxis however, prefers to restrict even further the actual conduct of hostilities to a narrow site: the “*area of operations*” or “*theater-of-war*”²²⁶.

One of the principal legal consequences of such spatial dimension is that belligerents must refrain from intruding into the territory of neutral States, which, on its turn, due to a whole set of rights and duties of impartiality and non-participation, can stand up with arms to foreclose eventual adverse misuse of its soil²²⁷. Notwithstanding, it has been argued from time to time that the conventional neutrality law (HCV/HCXIII), written over a century ago, according to which there was no option for States to freely violate it without risking countermeasures and being dragged into hostilities, does not reflect entirely the *usus* of States that would prefer a milder version of it in the form of *non-belligerency* that would allow them to actually favor one of the parties in non-martial matters, such as economy or diplomacy²²⁸. Conceded, this is not sufficiently established to amount to customary-status, though it seems logically to

²²⁰ Melzer, id., pp. 268-269.

²²¹ O’Connell, *Combatants*, pp. 113-114; Thynne, *Targeting*, p. 168.

²²² Thynne, id., pp. 167-168; 170-171.

²²³ O’Connell, id., p. 114.

²²⁴ Fleck, id., p. 57.

²²⁵ id., pp. 59-60.

²²⁶ Id., pp. 61-62.

²²⁷ Id., pp. 571-572, 581.

²²⁸ Id., pp. 572-573.

accrue from the current international system restraining use of force, as posited in the UN/Charter, pursuant to which the aggressor is outlawed, that the rest of the world community cannot treat equidistantly the violator and the victim of a breach of peace²²⁹.

This is especially true in cases of terrorism, which, if the confrontations amount to an armed conflict it shall be a NIAC and there is expressly **no** neutrality implications in clashes of such character²³⁰. *A fortiori*, neutrality is specifically not appurtenant to the conflict with Al-Qaida, since the Security-Council issued resolution n.1373 imposing a duty of forbearance of any action that actively or passively supports terrorist entities, including the provision of financial resources, **safe haven** and criminal impunity. One need not go to lengths as former president G.W. Bush's "*you are with us or you are with them*", but it is obvious that there is no possible justification layer to defend impartial treatment of renegade non-state armed groups and aggrieved national States.

Anyhow, regarding the Afghan NIAC, Pakistan cannot be classified as non-belligerent, let alone as full-status "neutral", simply because it is an important ally of the coalition forces, having lent parts of the territory to the passage of convoys and ammunitions countless times. Islamabad is involved in military action within national borders²³¹ aimed at resisting attempts, also by the Taliban and perhaps by the outliving Al-Qaida members in refuge, to destabilize central rule. It is, thus, hard to separate, in practice, where the geographic limits of OEF ends and domestic Pakistani "conflicts" begin. Cross-border operations against Al-Qaida and Taliban fighters inside Pakistani territory are already a reality²³². It is natural that operations, linked to the NIAC on the other side of the frontier, that spill over to Pakistan belong to that same existing NIAC²³³. In a way, terrorists are conscious of their inferior military power and, as typical in asymmetric structures of combat, have purposefully sought to disregard consolidated rules, intermingle with the civilian population and expand the spatial-continuum of battlefield in order to be able to call "game-on/game-off" at will²³⁴.

Clearly, such scenario is not equivalent to a combatant *on leave* outside the area-of-war that has effectively disengaged from battle neither is it equivalent to a fleeing terrorist fighter in Paris or London, where his capacity to wreak damage is outmatched by the close exercise of jurisdiction to contain and bring him to account. Lewis defends

²²⁹ Id.,pp.574-575.

²³⁰ Id.,p.579.

²³¹ O'Connell, Unlawful...p.21.

²³² Nanda, Introductory Essay...pp.520,533;Lubell,id.,p.255.

²³³ Thynne,id.,p.174.

²³⁴ Mohamedou, Non-Linearity...pp.2-3.

that the application of the *Tadić* criteria of protraction/intensity and organisation must not be strictly tied to unreasonable geographic limits in IACs or “transnational” NIACs, because they risk benefitting the same entities IHL toilsomely disfavors²³⁵. The existence of an armed conflict, according to him, should be assessed on the degree of violence the existing parties mutually exchange as a whole, not on the degree that might exist in only one specific locality²³⁶. In other words, once an armed conflict is underway, the “*war goes where the fighter goes*”, as ruled during WWII (e.g. the shooting down of Admiral Yamamoto’ aircraft, commander of the Japanese fleet, far from the hot-zones of hostilities²³⁷).

Qaidists like Osama Bin Laden and close aides fled to Pakistan with the purview of reassembling human and financial resources, to enjoy safe haven, while the “sanctuary” State is either unwilling or unable to perform international commitments, and should not magically regain immunity *qua* civilians. Therefore, it appears that a belligerent is permitted to expand the *area-of-operations* if necessary to properly exert self-defence²³⁸. It is a fact that the combat has already engulfed certain localities of Pakistan²³⁹ across the uncontrolled borders and that *jus ad bellum* may have closely implicated to this thrust. In any case, it does not matter to *jus in bello* whether this expansion was totally justified or not, whether it affected sovereign rights²⁴⁰, the hostilities paradigm is already applicable to the new *theater-of-war*, with the caveat that operations must be intimately attached to the OEF in Afghanistan.

4.2 Civilian/Combatant statuses²⁴¹

The touchstone of *armed conflict* relies on the concept of *hostilities*. Be it war in the former *de jure* sense or armed conflict in *de facto* sense, IHL does not bother with the motives that led to such a state of affairs, it condones the inevitable violence kept to

²³⁵ Lewis, *Boundaries of Battlefield*, pp.16-17.

²³⁶ *Id.*

²³⁷ *Id.* p.8.

²³⁸ Fleck. p.62.

²³⁹ Paust, *Self-Defense*. p.18.

²⁴⁰ Anderson, *Targeted Killing*...pp.11-12.

²⁴¹ The US Department of Defense has, already during the Gulf War, declared that API it is “generally regarded as a codification of the customary practice of nations, and therefore [as] binding on all”.[Meron, *Time has come*...p.681.]. Most of the 161 Rules of the ICRC/CLS repeat the wording of API. Thus, hereinafter, references will be made to its rules as expression of customary law, binding on all natures of conflict and regardless of the contracting parties, unless stated otherwise.

a level of *fair play*. **Hostilities**, “*the [collective] resort by the parties to the conflict to means and methods of injuring the enemy*”²⁴², is military violence internationally permitted. Accordingly, whoever can/cannot be **distinctly** targeted must be strictly defined, as well as whoever is bestowed with a right to participate in the hostilities and, finally, what happens to someone that unlawfully participates therein nonetheless.

Francis Lieber wrote in 1863 that “(t)he principle [of distinction] *has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.*”²⁴³. It was not until the 18/19th-centuries that the notion that wars were not waged against civilians and the population should stay out of hostilities as much as possible arose to the mainstream of military thinking²⁴⁴. Protection of civilians, dependent on always distinguishing combatants from non-combatants, is the bedrock of modern IHL²⁴⁵. Thus, the principle of distinction, whence the general immunity arising from the effects of hostilities (art.51(1)API) accruing to civilians draws its strength, amounts to one of the cardinal principles, together with unnecessary suffering, of customary-IHL²⁴⁶. Not strikingly the ICRC, in its Customary Law Study-(CLS), paid tribute to the principle of distinction by drafting it as Rule/1²⁴⁷.

Combatant is a term-of-art describing mainly the members of the *organized* armed forces, a defense organ, belonging to a party to the conflict²⁴⁸ and subject to responsible command and disciplinary system (art.43(1)API). Membership in the armed forces depends exclusively on a *formal integration* regulated by domestic law²⁴⁹, even if the singular individual does not have a functional duty of combat, i.e., whether he performs an indispensable function in the use of weapons/weapon-systems²⁵⁰. Each member of the armed units, with the exception of medical and religious personnel, has a **combatant privilege**, which includes a right to participate in hostilities (art.43(2)API) – roughly an entitlement to engage/attack enemy combatants not [yet] placed *hors-de-combat* or civilians participating directly in hostilities using lawful means and methods

²⁴² ICRC/DPH-Guidance,p.43.

²⁴³ As quoted in Sandoz,ICRC/API-Commentary,§1823.

²⁴⁴ Id.,§§1822-1823.

²⁴⁵ ICTY:*Kupreskic*, §521.

²⁴⁶ ICJ Nuclear Weapons(§§78,424).

²⁴⁷ CLS,pp.3-8.

²⁴⁸ Fleck,id.,pp.80-81.

²⁴⁹ Melzer, Responses to...p.844.

²⁵⁰ Fleck,id.

of warfare²⁵¹ – and the corollary post-capture immunity²⁵² from being prosecuted for lawful *acts-of-war* that would, otherwise, be ordinarily penalized by domestic law²⁵³. It means that the *primary-status* of combatant entails a *secondary-status* of **prisoner-of-war** (POW) if detained by the enemy side²⁵⁴(art.44(1)API). Additionally, anyone with combatant privilege is obliged to distinguish (her-)himself from the civilian population, traditionally clad in uniform and carrying arms openly (art.1,HIVR;art.4(A)(2)GCIII), on pain of forfeiture of POW-status (art.44(4)API). The drawback of being bestowed with the combatant privilege consists in the standing liability (or in NIAC, arguably, an “occupation hazard”) of being lawfully attacked²⁵⁵.

The onset of *guerilla*, militias, resistant movements and other irregular armed forces was not overlooked by IHL. In IAC they need to fulfill similar criteria to which primary-status of the regular State forces is submitted, namely: they must be organized, lack a duty of allegiance to the detaining power, belong to a party of the conflict, wear a distinctive emblem and carry arms openly (art.1,HIVR;art.4(A)(2)GCIII)²⁵⁶. Traditionally, they would have to act in accordance with the “*laws and customs of war*” (art.1(4)HIVR;art.4(a)(2)(d)GCIII). API has been severely criticized for having loosened to significant extent some of the original criteria of legitimate irregular forces – newly, transgressors of IHL would retain POW-status, albeit subject to prosecution for war crimes; and regarding compliance with the duty of distinction it suffices to carry arms openly while visible to the enemy and during each military engagement (art.44(3)API)²⁵⁷. This is one of the reasons for the denial of the US, among other major military powers, to ratify the protocol²⁵⁸; thus, these modifications can hardly be seen as consolidating customary law.

In NIAC the situation is even more convoluted. Whereas the regulation of membership of regular forces is assumed to be similar with that in IAC²⁵⁹, it is arguable whether there is a right to participate in hostilities in NIAC pertaining anyone²⁶⁰, but at least a truncated form (without POW-status) thereof should be recognized to members

²⁵¹ Hayashi, Continuous Attack Liability...,p.4.

²⁵² Id.,p.6.

²⁵³ Dinstein, Conduct of Hostilities,p.31.

²⁵⁴ Fleck,id.,pp.79,82.

²⁵⁵ Hayashi,id.,pp.4,9.

²⁵⁶ Dinstein, Conduct...pp.36-40.

²⁵⁷ Id.,pp.46-47.

²⁵⁸ Id.

²⁵⁹ ICRC/DPH-Guidance,p.31.

²⁶⁰ Id.,p.33(fn.52).

of governmental forces²⁶¹. The lack of POW-status is one of the remaining differences between international law regulating IAC and NIACs²⁶². NIACs constitute since the WWII the predominant form of warfare worldwide²⁶³. Understandably, States are reluctant to granting any form of legitimacy for oppositional groups to defy them with military force, which implies that no irregular forces can claim POW-status to their captured fighters²⁶⁴. In principle, anyone fighting the government, while not entitled to do so, would be classified as “unlawful/unprivileged combatant” liable to *domestic* criminal prosecution²⁶⁵. This terminology has been used by the US-Department of Defence Directives and the national Military Commissions Act applying to captured Taliban/Al-Qaida fighters²⁶⁶ detained in *Guantánamo*-Bay deprived of the POW-protection conferred by GCIII²⁶⁷. However, since IHL does not *per se* prohibit direct participation in hostilities(DPH) for groups of individuals outside the formal structure of the military units, this expression is better understood in relation to **domestic law** and should **not** be misconstrued to warrant a third category in-between combatants and civilians²⁶⁸.

Unlike JSOC troops (DELTA-Forces/Navy-SEALs) that clearly were lawful combatants under IHL²⁶⁹, Osama Bin Laden and his aides were not. As Dinstein pointed out, not even when Al-Qaida members were fighting alongside the Taliban in Afghanistan they could be classified as combatants²⁷⁰. Despite belonging to a party of the conflict and of the internal organization, they declined to distinguish themselves from the civilian population and relentlessly disregarded IHL compliance in the execution of terrorist attacks against the former²⁷¹(art.51(2)API), in the area of conflict and abroad, regardless of nationality. A stronger reason: the structure of international law regulating NIAC itself withholds any legal combatant-status to Bin Laden, irrespective of his continuous involvement in unlawful hostilities (of the worst form).

²⁶¹ Hayashi, id., p.8.

²⁶² Kolb/Hyde, Introduction to LOAC, p.259.

²⁶³ Fleck, id., p.605.

²⁶⁴ Fleck, id., pp.612-613, 627.

²⁶⁵ Dörmann, Unlawful Combatant, pp.46-47.

²⁶⁶ Solis, LOAC, pp.227-228.

²⁶⁷ Thynne, Targeting..., p.117.

²⁶⁸ Solis, id., pp.207-208; also, Melzer, Targeted, pp.309, 331-332.

²⁶⁹ However, if CIA agents were DPH, they would not benefit from international post-capture immunity (ASIL, Background... pp.27ff).

²⁷⁰ Dinstein, id., p.49.

²⁷¹ Id.

To say merely that he was an “unlawful combatant” is not sufficient to pinpoint his liability of being made the object of an attack.

Nor did he appear to be civilian. The latter is a term mutually exclusive (and fully complementary), with combatant²⁷². The way in which the definition of civilian (art.50(1)API) was drafted by alluding laconically to any person who does not belong to any of the combatants categories (art.4(A)(1)(2)(3)(6)GCIII/art.43API) has the advantage of being *ne varietur*²⁷³, i.e. by being a negative definition it does not vary in case any new definition of combatant ensues, leaving no loopholes that might jeopardize the protection due to peaceful, non involved civilians. The only way a group of civilians can immediately turn into legal combatants refers to a situation of a mass levy in unoccupied territories facing the onrushing of hostile troops in which the inhabitants spontaneously take up arms to defend the locality without having time to organize themselves, but they too must carry arms openly and abide by IHL (art.4(A)(6)GCIII). Anyhow, a genuine civilian has the exactly opposite status as a combatant, including no right of DPH, no duty to distinguish oneself from other civilians, a status-based standing immunity from direct attack and a conduct-based *ad hoc* liability (or hazard) to be attacked while engaged in DPH, and only then²⁷⁴.

The tendency of excessive “civilianization” of modern-day conflicts has put the principle of distinction anew under strain. There has always been some unavoidable form of civilian involvement in the *general war-effort*²⁷⁵. However, as more and more civilians participate in the actual conduct of military operations, the battleground has made foray into heavily populated areas²⁷⁶. Many activities were outsourced to civilian contractors or civilian intelligence, resulting in a serious twofold insecurity: innocent people at the wrong place and wrong time are at increased risk of being mistakenly targeted by trigger-happy combatants or for unknowingly having contributed directly to combat, just as regular troops, once trained to protect peaceful civilians, but frightened for their own security, are at risk of being attacked by people they cannot duly identify²⁷⁷.

²⁷² Sassòli/Bouvier, How does law protect in war...p.4(Chap.5).

²⁷³ ICRC/API-Commentary, §1914.

²⁷⁴ Hayashi, pp.4-5,9.(Combatants would have a conduct-based *ad hoc* immunity from attack if placed *hors-de-combat*).

²⁷⁵ ICRC:IHL and Challenges...p.15.

²⁷⁶ Id.

²⁷⁷ Melzer, Responses...p.833.

It is actually clear that the standing immunity/protection afforded to civilians is lifted only if and for such time as *they take a direct part in hostilities*-(DPH)(art.3GCI-IV;art.51(3)API;art.13(3)APII)²⁷⁸. Nevertheless, the theoretical quarrel is characterized basically by precisely which conduct amounts to DPH, the temporal limits and modalities that govern the loss of protection²⁷⁹. The *ICRC/DPH-Guidance*, though not a unanimous document, offers a balanced view fostering a “*clear and coherent interpretation of IHL consistent with its underlying purposes and principles*”²⁸⁰. To begin with, it is quite logical that the notion of DPH encompasses necessarily elements of *hostilities and direct*-[active²⁸¹] *participation* therein²⁸². There is a total assimilation between them: the overarching concept of *hostilities* corresponds exactly to the total sum of specific hostile acts engaged by all persons, either combatants (*de jure*) or civilians (*de facto*), during an armed conflict, with the intent to defeat the enemy; whereas *direct participation* refers to the same specific hostile acts *per se*, of each person considered individually²⁸³, it is considered on a case-by-case basis²⁸⁴.

Furthermore, individual hostile acts to qualify as DPH must cumulatively fulfill three requirements considered hereafter. Firstly, the harm likely to result (and not the one actually materialized) from its commission must attain a certain threshold either adversely affecting the military capacity of a party to the armed conflict, regardless of the quantitative gravity, or inflicting at least (minimum of gravity required) injury, death to people and destruction to objects protected with standing immunity. Hence, Bin Laden continuously committed command acts with high likelihood of begetting severe harm in terms of countless fatal and seriously wounded civilian people and their objects (soft targets) as well as he indiscriminately intended to diminish the military capacity of regular armed forces, of the countries he attacked, in responding effectively and timely to the eventuation of the attacks he masterminded.

Secondly, the act must directly provoke harm, individually or as an integral part of collective operations, in *one causal step*, meaning that indirect contributions far removed in time and place from the attacks (unless the causation of harm remains

²⁷⁸ ICRC/API-Commentary,§1942.

²⁷⁹ Melzer,id.

²⁸⁰ Melzer,id.,pp.835-836.

²⁸¹ The conventional terms “direct” and “active” participation should be understood as synonymous (ICTR/Akayesu-§629).

²⁸² ICRC/DPH-Guidance,p.43.

²⁸³ Id.,p.44.

²⁸⁴ ASIL/Background Note,p.18.

direct, e.g. by use of time-controlled bombs)²⁸⁵, like providing food, shelter, producing ammunition to the general war-effort do not suffice, whereas providing or transporting the ordnance, collecting information or training a team, all especially required to mount a *specific* operation aimed at reaching the threshold of harm subsume to the causal link requirement²⁸⁶. Accordingly, as the headman of Al-Qaida, it is not hard to refute that, although he was not physically present in the launching of terrorist attacks, since most of them required suicide-bombers, his contribution by far surpassed the mere war-sustaining activities of that organization; it was an integral part of the whole process that was likely to cause the threshold of harm in *one causal step*.

Thirdly, the last requirement of DPH is the belligerent-nexus of the [chain of] hostile act(s) imposing that, not only they become objectively linked to the conflict, but also that they are designed to directly cause the threshold of harm in support of one of the parties (or in its behalf) and, conversely, in detriment of the other counterpart(s), independently considered from any subjective hostile intent the person(s) considered might have²⁸⁷. General criminal violence, civilian unrest or inter-civilian violence at large with no nexus to the armed conflict (unless it triggers independent armed conflict(s)), legitimate individual self-defence, even during war, against unlawful assault and violence committed in the exercise of power over controlled, detained and/or vulnerable people not pertaining to the actual conduct of hostilities, all lack the required belligerent-nexus²⁸⁸. Hence, not only was the Al-Qaida leader supporting one party (his own group) to the detriment of another, he was acting on its behalf and organizing hostilities spearheaded by himself in a self-declared war.

Finally, it is important to underscore that the preparatory measures intimately linked as an integral part of the hostile acts, just as much as the deployment and return from the military-like acts perpetrated, constitute the sufficient temporal frontiers to lift the civilian-immunity, and not exclusively during the actual execution of the act²⁸⁹. Moreover, before and after these temporal restraints the civilian regains normal status-based immunity²⁹⁰. Any doubt arising in the moment of targeting whether activity-based

²⁸⁵ ICRC/DPH-Guidance, pp.51-57.

²⁸⁶ Id.

²⁸⁷ Id. pp.58-60. Acts can vest the belligerent nexus wanting specific knowledge, but not total unawareness of the link, or that people can be slyly forced to participate, though not completely deprived of their liberty of motion.

²⁸⁸ Id., pp.60-64.

²⁸⁹ Id., pp.65-68.

²⁹⁰ Id., pp.70-71.

loss of protection is pertinent to the case, a presumption of civilian status overrides DPH²⁹¹.

Howsoever Osama Bin Laden had lost protection against attack in the moment the Special Forces stormed his compound, and most likely he (just as his aides) was in situation of DPH when targeted, it does not seem right that his civilian-immunity was the norm, and loss of protection the exception, considered that the notion of civilian-DPH was drafted mainly to provide a sensible answer to spontaneous, sporadic or unorganized civilian active involvement in hostilities²⁹², whereas not being adequate to someone that is so integrated into an armed group party to the conflict and repeatedly incurs in DPH, with the result of assuming a *continuous combat function* (CCF)²⁹³. The “*revolving door*” by which civilians lose and regain protection in the intervals of their acts amounting to DPH is the proper, rather than a-normal, functioning of the temporary loss of immunity, and clearly does not befit members of organized armed groups²⁹⁴.

In NIACs the respect for the principle of distinction inevitably depends on identifying the parties thereto, which according to the essence of the treaty provisions dealing with these kinds of armed conflict, can be characterized by *State regular forces, dissident forces and other organized armed groups*, while civilians [as normal rule] “do not bear arms”(art.3,GCI-V;art.1,APII)²⁹⁵. If regular armed forces are deployed, they retain their combatant privilege while conducting hostilities on behalf of a State. What about the other side? It is problematic to think that the entire armies of NSAs remain part of the civilian population²⁹⁶, thus members unequivocally affiliated to the military wing (not political/administrative or even humanitarian wings) are *functionally* incorporated into battle with a *de facto* CCF, albeit divested of a legal entitlement to *de jure* combatant privilege under IHL²⁹⁷.

In other words, these individuals lose their civilian-status, unless they through conclusive behavior disengage from CCF in an armed group²⁹⁸, acquiring conversely attributes *qua* [combatant] membership-based standing attack liability²⁹⁹. Hayashi warns

²⁹¹ Id.,pp.75-76.

²⁹² Id.,p.44.

²⁹³ Id.,p.33.

²⁹⁴ Melzer, Responses...,pp.883-884.

²⁹⁵ ICRC/DPH-Guidance,pp.28-30.Cf. Critiques that the proposed assimilation is not clearly warranted. Hayashi,id.,pp.10-12.

²⁹⁶ Sassòli/Bouvier,id.,pp.1-2(Chap.5);ICRC/DPH-Guidance,p.28.

²⁹⁷ ICRC/DPH-Guidance,pp.32-34.

²⁹⁸ Id.,pp.71-72.

²⁹⁹ Hayashi,id.,p.14.

for the perils of a pseudo-status of “quasi-combatants” without a *right or fact* of DPH³⁰⁰. Besides, they are not duty-bound nor given incentives to actually distinguish themselves from the civilian population (perhaps it would be “suicidal” to clash openly with regular armed forces), which, ultimately, might threaten, instead of augmenting the importance of the principle of distinction³⁰¹. Especially the second statement, accruing from the lack of a right of DPH, is very weighty. It is unconceivable that on the short-run States will agree upon affording lawful combat privilege to non-State armed groups; nonetheless, it is possible to alleviate some of the problems by keeping a minimum acceptable compliance with IHL, based on which individuals could be rewarded post-conflict with amnesty for mere violations of domestic law, considered that no grave breaches of international law took place. On the other hand, I respectfully disagree partially with the first statement that CCF does not rely on a fact of DPH. Hayashi points to a passage in which the *continued intent* to carry out *unspecified hostile acts* is assimilated to the notion of CCF³⁰²; as a consequence, he fiercely opposes a strictly intent-based participation continuity and proposes a strictly function-based approach to circumvent many of the conceptual problems³⁰³. However, it is not clear that the document preferred an intent-based liability. In fact, the DPH-Guidance elsewhere already affirms that the criterion to membership in organized armed group is the *strictly functional* one³⁰⁴, translated into a *de facto* assumption of CCF³⁰⁵, expressed possibly by the *carrying of uniforms, distinctive signs, or certain weapons* and with the extant repeated acts of DPH³⁰⁶.

To sum up, Osama Bin Laden had not a civilian status; he was an “unlawful combatant” (pursuant to US-domestic law), founder and commander of an organized armed group party to a NIAC with a CCF therein. The fact that he was probably engaged in some form of DPH when he was killed does not alter the fact the he could be targeted at all times, within the expanded *theater-of-war*, unless he had previously conclusively disengaged from warlike activities.

³⁰⁰ Id.,pp.15-16.

³⁰¹ Id.,pp.16-18.

³⁰² Id.,p.13;ICRC/DPH-Guidance,pp.44-45.

³⁰³ Hayashi,Id.

³⁰⁴ Id.,p.33

³⁰⁵ Id.,p.72.

³⁰⁶ Id.,p.35.

4.3 Principles in targeting

It is the principle of military necessity that makes IHL particular. It allows slaying, injuring and wrecking in furtherance of military goals. In fact, it gives leeway for a belligerent to apply the amount of raw force appropriate to

“achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources”³⁰⁷”.

Meanwhile, it is counterintuitive that military necessity does not correspond to a juggernaut; resort thereto in a “*limited warfare*” context rather prescribes responsibility, as unnecessary and wanton destruction of non-valuable targets³⁰⁸, coupled with directly impinging harm against civilians must be absolutely recoiled from.

Hence, in application of the overarching rule of distinction, belligerents have a duty

“at all times to distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”(art.48 API).

Therefore, everyone/everything that carries the “civilian”-attribute received immunity from direct attack³⁰⁹, as only military objectives can be the ultimate goal of a military campaign. In its turn, military objectives correspond to

“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 definitive military advantage”(art.52(2)API).

Two elements build up the essence of a military objective. First of all, due to, alternatively, intrinsic characteristics (*nature* of weapons systems and cache, fortifications, combat vehicles etc.³¹⁰), geographic disposition (*location* of bridge or any built-up area³¹¹), or intended future use or present function (*purpose* or *use*, respectively, of otherwise civilian objects³¹²), the object at hand makes an *objective*

³⁰⁷ Id.,p.79.

³⁰⁸ Id.,p.50.

³⁰⁹ ICRC/API-Commentary,§2011.

³¹⁰ Id.,§2020.

³¹¹ Id.,§2021.

³¹² Id. §2022.

contribution to the military action of the *defending* part³¹³. Only military action will suffice, i.e. the actual “*war-fighting/defending capabilities*”, thus being far-fetched the mention to the equivocal “*war-sustaining capabilities*” in the US-Military Manual³¹⁴. Simultaneously³¹⁵, or simply cumulatively³¹⁶, a *definitive*, not potential or indeterminate³¹⁷ **military advantage**, being the subjective element pertaining to the *attacking* part³¹⁸, accrues from that object having its function discontinued, being struck, leveled to the ground or solely occupied by enemy forces. According to the ICRC/API-Commentary, “*a military advantage can only consist in ground gained and in annihilating or weakening the enemy armed forces*”³¹⁹, translated in the conclusion that *notional targets* aimed at shaking the morale, confidence and support of the civilian population are, to say the least, very doubtful, because there is no tangible military advantage obtained³²⁰.

Anyway, it is obligatorily a two-prong test, despite the difference between **contribution to military action** and **offering of a definitive military advantage** is slight, the total abandon of the two constitutive elements will allure the attacking part in claiming that civilian objects, while not normally helping with the military action, nonetheless presents some military advantage³²¹. Thus, the compound in Abbottabad, serving somewhat as Al-Qaida’s headquarters, and all information inside pointing to the identity of terrorist cells, the execution of past and the plotting of future attacks, contributed by way of its present use to the unlawful military action against soft and coalition targets, the neutralization of which granted an extraordinary military advantage in the “war” against Al-Qaida.

The term military objective does not encompass only objects, but also lawful human targets³²². As seen, they become military objectives by way of their statuses or, exceptionally, momentary or continuous action. Yet, particularly in *small-scale* operations directed toward a handful of selected individuals³²³, in which there is a clearly superior army, some voices advocate that there is a lesser necessity in using

³¹³ Fleck, Handbook of IHL,p.180.

³¹⁴ UCIHL, The Legal Regime...pp.29-30.

³¹⁵ ICRC/API-Commentary,§2018.

³¹⁶ Henderson, The Contemporary Law...p.50.

³¹⁷ Gill/Fleck, Handbook...p.253.

³¹⁸ Fleck, id.,180.

³¹⁹ ICRC/API-Commentary,§2218.

³²⁰ UCIHL, id.,pp.24-25.

³²¹ id.,p.16.

³²² Henderson,id.,p.43;Fleck,id.,pp.177-178.

³²³ Lubell,id.,pp.159-163.

awesome power against “weaker” belligerents³²⁴; hence, an attempt to arrest/detain should be preferred to targeting to kill³²⁵ when there is “manifestly no need to use lethal force”³²⁶. The particular asymmetric conflict structure brings the reality closer to peacetime operations, though still within an armed conflict³²⁷, as lethally engaging fighters buying groceries in a supermarket/shopping center or sitting in a restaurant³²⁸ would be completely uncalled for. Apparently, these aspirations suit better internal NIACs or occupation³²⁹ where the control/jurisdiction of the dominant belligerent propitiates moderation in military force. This is not commensurate to extraterritorial or transnational NIACs, such as the case at hand, and regardless of how appealing it may sound based on a humanitarian principle, as of *lex lata* there is no impediment at all to engage lethally lawful human targets.

Moreover, lawful targets need to be lawfully engaged. Just as direct attack against civilians and civilian objects, an indiscriminate attack, which in its essence does not distinguish properly between valid military objectives³³⁰, is just as illegal. It is immaterial whether the attacker wants to deliberately harm civilians or he recklessly demonstrates no concern to the duty of distinction³³¹. Indiscrimination in targeting was posited in art.51(4)(a-c)(5)(a)API, according to which there are basically two forms of indiscriminate attacks. The first type relates to those of a *nature to strike military objectives and civilians or civilian objects without distinction*, either due to the intrinsically indiscriminate nature of the particular means and methods-of-warfare used or due to the non-attempt at all to identify specific military objectives and direct attacks towards them³³² or to limit the effects of discriminate means/methods. Second type: *to treat clearly separated and distinct military objectives* collocated within populated civilian built-up areas as a *single entity*³³³, such as the practice of carpet-bombardment in WWII³³⁴, are also indiscriminate. Obviously the *Neptune Spear* did not resort to indiscriminate attacks, inasmuch as “small-scale” military operations specifically

³²⁴ Id.

³²⁵ UCIHL, Expert Meeting...pp.39-40.

³²⁶ ICRC/DPH-Guidance,p.82.

³²⁷ id.,pp.80-81.

³²⁸ UCIHL, Expert...p.40.

³²⁹ Id.,pp.30-39.

³³⁰ Gill/Fleck,id.,p.255.

³³¹ Dinstein,Conduct...,p.117.

³³² San Remo/NIAC-Manual.pp.20-21.

³³³ Id.

³³⁴ ICRC/API-Commentary,§1946.

individualized and aimed at single high-value persons, as a general rule, are extremely discriminate³³⁵.

Moving on into the principles governing the conduct of targeting in operational law, the next one prohibits discriminate attacks that are, however, disproportional. It is codified in art.51(5)(b)API. It appears that the collocation of proportionality as a subtype of indiscriminate attacks is somewhat incorrect³³⁶. The inaccuracy at the time the protocol was drafted, using the same wording of “*precautions in attack*” as a basis, is justified, however, in the extent that there is not much to separate extremely disproportionate attacks, wreaking extensive civilian losses and damage³³⁷, from indiscriminate attacks *per se*. Several critiques³³⁸ underscored the inadequacy of relating dis-proportionality with indiscrimination (and *extensive* with *excessive* “collateral-damage”), and they are mostly correct in that disproportional attacks are still discriminate, though just as well unlawful. Thereby, this additional constraint in IHL proscribes attacks 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”(art.51(5)(b)API).

Historically, as soon as an objective had been characterized as military, any extant damage and unavoidable injury caused to civilians fell under the umbrella of acceptable “collateral-damage”³³⁹. Clearly, this concept outrages our very notion of humanity. Hence, a compromise between military necessity and humanitarian requirements was drawn³⁴⁰, holding that a balance of both sides ought to govern permissibility of operations under armed conflict. It is a compromise, rather than the absolute prevalence of the principle of humanity, simply because it is impossible to exclude all probability that non-involved civilians are going to be hit in the crossfire³⁴¹. And it is impossible to always conduct hostilities far away from populated centers, which are never fully bereft of military objectives, and weapons always display a dud-

³³⁵ Melzer, Targeted...pp.355-356.

³³⁶ Id.,pp.356-357.

³³⁷ ICRC/API-Commentary,§1980.

³³⁸ Dinstein,Conduct...,p.120;Henderson,id.,p.244.

³³⁹ Dinstein,id.,p.119.

³⁴⁰ Gill/Fleck,id.,p.257.

³⁴¹ Dinstein,id.,p.119.

rate. Such acknowledgement that certain degree of involuntary harm will invariably impact on innocent lives makes it possible to wage war, how regrettable it might sound.

Thus, the crux of the issue, the tipping-point in which the “body count” nudges the balance to the side marking “disproportional”, depends rather on what a *reasonable* arbiter would have expected or should have known (foreseeability), not in hindsight, but in possession of the phased and incomplete information he secured in the midst of the “fog-of-war”, that is, in the shifting circumstances prevailing at the time, with allowance for honest mistakes³⁴².

On the side of the collateral-damage to civilian objects, incident [(non)-fatal] injury to civilian or any possible combination thereof, only non-targetable civilians are included, thereby excluding DPHs, non-combatant militaries or personnel *hors-de-combat*³⁴³, not forgetting that, in doubt, the civilian character will be automatically assumed (art.50(1),art.52(3)API). Beyond that, also indirect harm (not only direct/immediate) arising from the strike that was foreseeable, like widespread damage to the environment, has to be calculated³⁴⁴. Conversely, on the side of the military advantage, merely *concrete and direct* (perhaps meaning also *probable/reasonable/foreseeable/specific/perceptible/substantial /relatively close*) will be weighed against³⁴⁵. The political goals of the war, even national survival, do not permit wreaking more collateral-damage³⁴⁶. Additionally, it has to be borne in mind that the advantage accrues from the military attack as a whole (*overall* as in the Rome Statute-art.8(2)(b)(iv)), not considered only from isolated or parts thereof³⁴⁷.

Some argument that the security of the own attacking forces is comprised in the assessment³⁴⁸. Schmitt said that “*an attack in which the personnel or equipment are lost is self-evidently not as advantageous as one in which they survive to fight again*”, a statement to which Henderson apparently concurs, though he highlights that it does **not** form a **third-issue** in the proportionality balance **nor overrides** collateral-damage³⁴⁹.

In the raid last year, not only was the military advantage expected sky-high, as the actual advantage accruing from the operation was, indeed, justified. The collateral-damage was kept at a bare minimum. Allegedly, there were 22 people living the

³⁴² San Remo/NIAC-Manual,p.23;Henderson,id.,p.226.

³⁴³ Henderson,id.,p.206.

³⁴⁴ UCIHL, The Legal Regime...,p.48.

³⁴⁵ Henderson,id.,p.200;CLS,p.50(Rule14).

³⁴⁶ Henderson,id.,p.202.

³⁴⁷ CLS,pp.49-50(Rule14).

³⁴⁸ CLS,id.

³⁴⁹ Henderson,id.,p.204.

compound at the moment the SEALs stormed in³⁵⁰, of which 17 survived. Four of the deceased were not protected by the proportionality scope: besides 54 year-old Bin Laden-(CCF), his personal courier, Al-Kuwaiti, and his brother, Abrar, were killed in the function of Al-Qaida's headman closest aides-(CCF/DPH), just as his son Khalid, who plunged at the commando (probably DPH). The only incidental death appears to have been Abrar's wife, Bushra, hit while standing next to her husband³⁵¹. Accounts of women having been used as *human-shields* circulated the media³⁵². If they were used involuntarily, there is absolutely no relevance to proportionality-assessment, since an act bereft of volition cannot be interpreted in detriment of someone that did not contribute to the shielding of military objectives in any way. Voluntary human-shields spark more controversy in the regard that those women might have willingly attempted to obstruct the operation. However, unless they were actually assisting the lawful targets, such as diverting attention to facilitate an attack³⁵³, it is generally believed that the conduct of human-shields, regardless of imposing a time-consuming "*moral pause*"³⁵⁴, does not constitute real violence *against* the other party nor does reach the threshold of harm to amount to DPH³⁵⁵, especially in situations where the attacker has the upper hand. By standing deliberately within the danger zone, the human-shield assumes more risk upon (her-)himself³⁵⁶, but retains full civilian-status. Therefore, the woman casualty was included at the time the proportionality was gauged, and no matter how lamentable, it was **not excessive** enough to tarnish the raid.

Finally, avoidable collateral-damage, despite being proportional, will not be permissible³⁵⁷, imposing, rather, a duty to take *precautions in attack* (art.57,API). Precautionary measures constitute an extra protective-layer with the purview of avoiding and, in any event, minimizing incidental injury/damage to civilians³⁵⁸; lest avoidable repercussions to civilian life are ignored altogether, an option that does not cater the humanitarian scope of IHL, those measures strengthen compliance with the principle of proportionality at the final desired stage.

³⁵⁰ News36.

³⁵¹ News36.

³⁵² News37.

³⁵³ Henderson,id.,p.218.

³⁵⁴ Id.,p.217.

³⁵⁵ ICRC/DPH-Guidance,p.57.

³⁵⁶ Id.

³⁵⁷ Henderson,id.,p.198.

³⁵⁸ Gill/Fleck,id.,pp.259-260.

A double set of obligations emanate thence to commanders and ground-troops alike. A responsible military senior-officer must take *constant care* and has clearly a *duty of verification, a duty to collect sufficient information and a duty to clarify the nature of the objective*³⁵⁹. Equally, the officers charged with carrying out the mission, although not possessing the overall overview of the military situation, if taken by surprise of a turn of events affecting the nature of the objective or the ratio of proportionality, must call off the attack³⁶⁰.

The issuance of warning, one precautionary suggestion, to the residents of the compound in Pakistan would have blatantly jeopardized the success of the counterterrorism mission. Moreover, the choice of warlike means was extensively discussed resulting in the original plan to bomb the place eventually being discarded for concerns with avoidable civilian casualties, difficulties in identification of the deceased and the amount of ordnance needed to level the entire ground³⁶¹. The Special Commando (DELTA-Forces/Navy -SEALs/DEVGRU), then, became the natural option to secure the military advantage anticipated, while at the same time assuring the least possible scenario of incidental injury and unnecessary fatalities. The raid was, as a matter of law, aimed at military objectives, discriminate, and proportional; beyond that, the feasible, practicable or practically possible³⁶² precautions were undertaken timely.

4.4 Means/Methods-of-warfare

It remains to be discussed whether *Neptune Spear* has employed any prohibited means or methods-of-warfare. Limitation to the brutal power of weapons in real life, known as “*temperamenta belli*” by Grotius³⁶³, is a response to the risks of total war, the unfettered type of warfare in which the level of force is more than admissible and “*necessaria ad finem belli*”³⁶⁴. Therefore, the lawfulness of the warlike means and methods are gauged in keeping with the extent of the principle of *military necessity*, counterbalanced in the light of the principle of *humanity*.

³⁵⁹ Gill/Fleck, id., pp.207-211.

³⁶⁰ Id., p.212.

³⁶¹ News38.

³⁶² San Remo/NIAC-Manual, pp.26-27.

³⁶³ ICRC/API-Commentary, §1383.

³⁶⁴ Fleck, id., 119.

This idea was conveyed firstly as “(t)he right of belligerents to adopt means of injuring the enemy is not unlimited”(art.22,HIVR). Seventy years later, a **basic rule** codified that “(i)n any armed conflict, the right of the Parties to the conflict to choose methods or means-of-warfare is not unlimited”(art.35(1)API).

According to Bouttruche, the expression “**means**”(of-warfare) comprises, traditionally, *weapons, weapons-system or platforms employed for the purposes of attack*³⁶⁵, whereas “**methods**”, a new term in positive law, designates the *way or manner in which weapons are used*³⁶⁶ as well as *any specific, tactical or strategic ways of conducting hostilities* with the purpose weakening and overwhelming the enemy, even if not directly related to weapons³⁶⁷. In this legal opinion the only proscribed methods analyzed, due to their particular relevance in special commando raids, are *perfidy* and *denial-of-quarter*, which, if utilized in the course of the operation at hand, would leave an irremediable illegality stain.

Firstly, however, a brief word on the weapon used by the DEVGRU-team to gun down Bin Laden. Some restriction on weaponry was set forth because military necessity is not commensurate to senseless cruelty; it abhors *superfluous injury (maux superflus)* or *unnecessary suffering*³⁶⁸(art.35(2)API). By all indications, the weapon used at the scene to shoot a “double tap” to the terrorist leader’s chest and head was a M-16 type, manufactured by the German “Heckler and Koch”, namely HK416 rifle³⁶⁹. It belongs to the gamut of combat lawful weaponry and it is actually used by several armed forces worldwide³⁷⁰.

Now the focus switches to methods-of-warfare. A certain amount of deception is inescapable in war. In that way, it is permissible to employ cunning stratagems, including, but not limit to, *camouflage, decoys, mock operations and misinformation* with the goal to mislead the enemy and make him act recklessly (art.37(2)API). This set of tactics constitutes permissible “ruses-of-war” that encompasses also surprise attacks and ambushes as well as inciting the adversary troops to rebel, mutiny or desert through the discredit of loyalty and morale³⁷¹. However, *perfidy* separates itself from

³⁶⁵ Sassòli/Bouvier,id.,p.32(Chap10)

³⁶⁶ Id.

³⁶⁷ Id.

³⁶⁸ Fleck,id.,p.120.

³⁶⁹ News39.

³⁷⁰ News39.

³⁷¹ Dinstein,Conduct...,pp.206-207.

permissible ruses, as tradition (art.23(b)HIVR), as long as the deception level includes *treachery*³⁷². In the same token, art.37(1)API exhorts

“(i)t 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.”

Hence, illegality lies precisely in instilling in the enemy combatant a false trust regarding the existence of peremptory protection under IHL and exploring this induced misconception with the necessary eventuation of death, wounds or capture³⁷³. The pivotal example at this point, which is the classical “wartime-assassination”³⁷⁴, refers to the feigning of civilian/non-combatant status (art37(1)(c)), in order to approach the enemy without the underlying hostile intent of the mission being noticed or giving him opportunity to mount guard. Accordingly, undercover operations, using *plain clothes* troops, the sole purpose of which is the targeted killing of a selected individual are **always** unlawful, since they misuse the standing civilian-immunity, jeopardizing the wholesale protection due to genuine civilians³⁷⁵. Nonetheless, the Special Commando acted on surprise (the very success of the operation depended thereon), a perfectly acceptable ruse-of-war, without inviting the confidence of Bin Laden that he would be protected or that he should accord protection to apparent “civilians”, while donning a distinguished military uniform.

Whereas the prohibition of perfidy relies on ensuring minimal *good faith* among clashing parties in the heat of hostilities, the prohibition of denial-of-quarter appeals to a humanitarian sentiment to show mercy to the enemy that offer no longer resistance³⁷⁶. It is founded on the belief that a former enemy rendered *hors-de-combat* because of wounds, sickness, maritime or aerial distress, i.e. **defenceless**, or that simply laid down his arms, possibly after fighting to the limit of his strength and energy, must not be liquidated³⁷⁷. Traditionally, it is proscribed “*to declare that no quarter will be given*” (art.23(1)(d)HIVR), while recently the preferred wording implies that “*it is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to*

³⁷² Id.,pp.198-199.

³⁷³ Fleck,id.,pp.227-228.

³⁷⁴ Melzer,Targeted...,pp.371-272.

³⁷⁵ Id.,p.373.

³⁷⁶ ICRC/API-Commentary,§1588.

³⁷⁷ Id.,§§1591-1594.

conduct hostilities on this basis”(art.40API)³⁷⁸. Etymologically quarter derives from the French “*quartier*” meaning also the *quartering and encampment of a body of troops*, which in the case of a denial thereof, amounts to granting no protection, security, accommodation because the antecedent value, life, has not been spared³⁷⁹.

Originally the proscription of the deliberate tactic of leaving no survivors (deliberate in foresight, as in opposition to the accidental battlefield scenario in which hostilities are fought to the *last man*) was aimed at the commanders, the only ones entrusted with the competency of issuing such comprehensive behests, even if the order was not meant to be actually implemented, but only as psychological terror (threat of denial-of-quarter) driven against the inferiorly equipped party with the purview of accelerating withdrawal, rendition or capitulation³⁸⁰. However, the actual implementation of the order translated into attacking belligerents *hors-de-combat* (art.41API) is mentioned in tandem throughout this section in the ICRC/API-Commentary. Equally, the ICRC/CLS clusters both together under the same rubric of “*denial-of-quarter*”(Chapter15: rules46-47). Thus, killing surrendering enemies carries similar unlawfulness as the superior order to wipe them out and it is tantamount to a grave breach, namely murder/assassination. Ordering that no quarter will be given represents multiple violations of attacking persons *hors-de-combat*³⁸¹.

All things considered, the practice of targeting killing during an armed conflict stands very closely to a denial-of-quarter. It is in tension with IHL in at least four of its stages, which I would henceforth name the **ontological, ethical, strategic** and **tactical** incongruities.

Firstly, a military engagement, the sole means of accomplishment requires a certain killing of the target(s), violates the nature (**ontology**) of war. Granted, the conduct of hostilities prompts the relaxation of situations in which it is permissible to kill/injure persons involved therein; putting in other words, that death becomes one of the normal/trivialized fallouts of any act-of-war. A right to participate in hostilities, nevertheless, does not entail a “license-to-kill” the enemy under any circumstances. The “St. Petersburg Declaration” set forth in the preamble that

³⁷⁸ Additionally, APII makes a similar mention at the last part of art.4(1).

³⁷⁹ Id,§1591(fn.8)

³⁸⁰ Id.

³⁸¹ CLS,pp.162-163(Rule46).

“the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy(...) for this purpose it is sufficient to disable the greatest possible number of men.”

Accordingly, the weakening of the opposing troops will implicate undermining its conditions to further resist, usually by way of disabling soldiers. Able-bodied militaries will not often be rendered *hors-de-combat*, unless through grave injuries that likely result in their demise. In sum, killing the enemy is one of the commonplace forms of weakening the military forces, albeit slaying cannot be the goal in itself.

Secondly, it is assumed in **ethics**, by the famous words of Rousseau (“Social Contract”), that war

“is a relation -not between man and man: but between state and state; and individuals are enemies only accidentally: not as men, nor even as citizens: but as soldiers; not as members of their country, but as its defenders”.

Inasmuch as not individuals *as such* are the enemies, but only to the extent that they act in defence of one of the warring parties, certain **anonymity** seems to be required. Hence, the singling out of one (unlawful)combatant contravenes the ethical compromise of not making the “enemy”, actually, *an enemy*. Statman responds to this critique of “named killing” through asserting that agents acting on behalf of one of the parties are not killed by who they are (“name”), but rather for the proficient role they play in hostilities³⁸². This is especially true in counterterrorism during armed conflicts, in which the agents of the non-State party not only are not morally “blameless soldiers” only doing the bidding of polities³⁸³; the leaders, considering the military value in toppling them, are as well usually **irreplaceable** in the chain-of-command.

Moreover, in level of the warlike **strategy** (*planning*), genuine targeted killings impinge criminal responsibility for war crimes to the senior officials that ordered them. A raid, such as the one in Abbottabad, should always leave the *capture* option (**quarter**) on the table; although, bearing in mind the military logic that is attached to the goal, it is more prone to end up in *killing*. Conversely, at the **tactics** (*execution*) of a mission under IHL, the combatants at the scene are obliged to grant quarter to an enemy at the point of surrender; otherwise, they commit a war crime too³⁸⁴. Thus, an enemy gunned

³⁸² Statman, Targeted..., p.190.

³⁸³ Id., p.191.

³⁸⁴ CLS, p.164(Rule47)

down, but not killed, rendered *hors-de-combat* through wounds, must not be “finished off”³⁸⁵.

Obviously, considering the planning, the rule of thumb is that of *reasonableness*³⁸⁶. Melzer sets it rightly that commanders must not plan the operation making it virtually impossible to the adversary to offer surrender, though that does **not** mean surprise attacks of *instant lethality* or *weapon-systems incapable of taking prisoners*, such as explosives launched from an unmanned drone, are outlawed³⁸⁷. Bombing a place deemed to constitute a military objective, the destruction of which confers an advantage, implicates that those inside might not even be aware that they are being under attack; thus, the offer and acceptance of surrender are most of the time impracticable, but it does not make the operation illegal, since it was not based on an actual order of “*no survivors*” and no-one came around afterwards to “finish the job” if someone is “only” wounded under debris.

On the other hand, feasibility of capture augments as soon as troops are on the ground, exactly the case of the Bin Laden operation, simply because human beings can make a full assessment of the situation and accord quarter to non-resisting individuals. There is, nonetheless, also a mitigation of the obligation to take prisoners. Mainly the position transpired by the US/UK Military Manuals is that the part “taking” surrender is not required to go out to receive surrender in the midst of battle³⁸⁸. The burden rather befalls the part “offering” surrender, requiring her to come forward, after having lain down arms and usually displaying signals such as holding hands up above the head or waving the white flag, in order to demonstrate that the offer is *unconditional*; only then, the obligation is absolute. One cannot reject unconditional surrender³⁸⁹. Therefore, last-minute surrender as in the encounter of onrushing troops might be difficult to accept³⁹⁰.

Anyway, it is uncontroversial that all persons, regardless of POW-status entitlement, benefit from the legal protection imposing grant of quarter³⁹¹; cumulatively, that a commander cannot put to death prisoners merely because their presence retards

³⁸⁵ Melzer, Targeted...p.371.

³⁸⁶ Parks, Memorandum.

³⁸⁷ Melzer, id., p.370.

³⁸⁸ CLS, p.168(Rule47).

³⁸⁹ Id.

³⁹⁰ Id.

³⁹¹ CLS, p.169(Rule47).

the military maneuver or diminishes the power of resistance. In case he is not able to transport them, prisoners should be disarmed and released in safety³⁹²

Neptune Spear, then, did not *deny quarter* to Osama Bin Laden. Ground-troops were preferred over dropping an explosive device from an offshore location. The planning included a possibility, albeit not likely, of capture. It was not a genuine targeted killing operation with sole purpose to kill: it aimed rather to neutralize and weaken Al-Qaida's supreme leadership by disabling Bin Laden and destroying his capabilities to continue unlawfully engaging (continuously) in hostilities. The burden of demonstrating an unconditional offer of surrender fell on him, not the SEALs. He should have made it clear and feasible.

In fact, nothing slightly suggested he ever housed any intention to giving himself in. If his resistance was arguably sufficient to justify killing him at "*law-enforcement modus*" that requires **much more** caution and imminent danger; "*ad maiore ad minus*", his resistance was plainly compatible to ongoing hostilities. Resisting until the end is what everyone expected from Bin Laden. Accounts pointed he was retreating³⁹³ in the moment he went back inside his bedroom. Had he wanted to surrender, he should have come forward with his hands in the air, certainly **not** return to his hideout. The US position is unequivocal in this respect, an enemy combatant retreating is considered to be still engaging in hostilities³⁹⁴. Finally, Bin Laden belonged to a terrorist organization that openly flouted IHL rules, thus he never held good faith by waging hostilities in the way Al-Qaida has done, by attacking civilians and denying quarter, for instance. Even if he, at the last-minute, wanted to surrender in order to save his life, it is still hard to conceive that his offer, which could easily have been stained with perfidy to put the Special Commando off guard, then to use this leverage to violate confidence, would have been an absolute unconditional surrender.

³⁹² Id.

³⁹³ News40.

³⁹⁴ CLS,p.169(Rule47).

5. CONCLUSION

Whereas it is permissible, but not entirely recommended, and utterly contradictory for failing to fulfill the custodial and higher societal values of accountability, to kill in order to arrest or prevent escape,

Whereas it is permissible to kill a dangerous felon presenting actual and immediate threat to life/limb, equally on the verge of committing a violence offence, in defense of self and others, including the law-enforcement officials themselves, and that the conduct of Bin Laden probably subsumed this scenario,

Whereas the deprivation of the right to life in the strictly proportional circumstances set above, and that no more life-threatening force is employed than necessary, is not considered arbitrary (extra-judicial execution); hence, not amounting to a violation of due-process rights,

Whereas the terrorist group known as Al-Qaida has launched a campaign of armed attacks against US interests, allies and “soft targets”, acknowledged by the international community, and still has lingering intent and (weakened, but real) capability of keeping on the offensive, a right of national self-defence vests,

Whereas there is nothing expressly and implicitly in the Charter of the United Nations interdicting defence of territorial integrity, political sovereignty and (arguably) nationals against non-state actors and that direct participants in armed attacks can be neutralized with necessary and proportional military force,

Whereas the obligation to exact (criminal) jurisdiction lay with Pakistani authorities and they were either unable or unwilling for at least 5 years to live up to international duties,

Whereas the US and coalition forces are engaged in a transnational armed conflict of non-international character in the Operation Enduring Freedom in Afghanistan with Al-Qaida and that cross-border operations into Pakistan -which is not a neutral/non-belligerent party, rather a partner- intimately related to it are already a reality based on an expansion of the “theater-of-war”,

Whereas Osama Bin Laden satisfied the functional criteria of membership in an organized armed group with a continuous combat function, implying that he was liable to be made the object of attack at anytime, anywhere inside the theater-of-war, unless unequivocally disengaged,

Whereas the *Neptune Spear Operation* complied with operational law principles of discrimination of military objectives, proportionality of civilian casualties and precautions in planning and execution,

Whereas there was no resort to proscribed means or methods-of-warfare, particularly perfidy or denial-of-quarter,

All foregoing arguments considered, I am of the opinion that *Neptune Spear Operation*, carried out by JSOC-Special Forces, in Abbottabad, Pakistan (2nd,May,2011), and the death of Al-Qaida leader Osama Bin Laden that ensued as one of the main objectives thereof were **legal/lawful** in accordance with applicable international law.

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