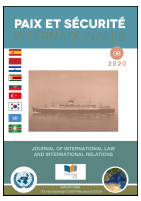
Estudios

TARGETED KILLINGS OF SUSPECTED TERRORISTS IN THE LIGHT OF THE RIGHT OF SELF-DEFENCE



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Abstract: The aim of this paper is to examine and discuss if the use of drones -when used as an offensive weapon to end the life of suspected terrorists- validly falls within the scope of application of Article 51 of the UN Charter. In order to do so, the requirements established by the mentioned Charter will be duly analysed. Consequently, we will be able to conclude if drones are or are not fulfilling the legal requirements requested by the right of self-defence, adjusting in the latter case the interpretation of international law to the particular national interests of some countries.

Keywords: drones, counter terrorism measures, self-defence, principle of proportionality.

Resumen: El objetivo de este artículo consiste en examinar y discutir si el uso de aviones no tripulados -cuando se utilizan como estrategia para acabar con la vida de terroristas- queda enmarcado, válidamente, dentro del ámbito de aplicación del artículo 51 de la Carta de la ONU. Consecuentemente, los requisitos establecidos por la mencionada Carta serán debidamente analizados. Ello nos permitirá concluir si los drones cumplen o no con los requisitos legales exigidos -fundamentalmente- por el derecho a la legítima defensa, ajustando en caso contrario la interpretación del Derecho Internacional a los intereses nacionales de algunos países.

Palabras clave: aviones no tripulados, medidas anti-terroristas, legítima defensa, principio de proporcionalidad.

Résumé: Cet article a pour fin l'analyse et la discussion de savoir si l'usage d'engins non pilotés, lorsqu'ils sont utilisés comme stratégie de guerre afin d'éliminer des terroristes ps, s'ajuste aux conditions marquées par l'article 51 de la Charte des Nations Unies. L'étude des exigences du droit de légitime défense permettra conclure si l'utilisation de drones telle qu'on la connaît de nos jours peut se justifier au regard du droit à la légitime défense ou si, au contraire, l'interprétation faite 1 Ph. D. Associate Professors, Department of Law and Internacional Relations, FAculty of Social Sciences and Communication, Universidad Europea de Madrid. Paix et Securité Internationales ISSN 2341-0868, Num. 3, janvier-décembre 2015, pp. 143-164 DOI: http://dx.doi.org/10.25267/Paix_secur_ int.2015.i3.07 143 par certains pays ne se conforme pas à la lettre et l'esprit de la Charte des Nations Unies. MOTS-CLÉS : engins non pilotés, mesures contre le terrorisme, légitime défense, principe de proportionnalité I. WHAT ARE UNMANNED AERIAL VEHICLE OR UNMANNED AIRCRAFT SYSTEMS?

Unmanned aerial vehicles, commonly known as drones, are aircrafts that do not have a human pilot. Within this context, the US Department of Defense defines these peculiar planes as "powered, aerial vehicles that do not carry a human operator, use aerodynamic forces to provide vehicle lift, can fly autonomously or be piloted remotely, can be expandable or recoverable, and can carry a lethal or non-lethal payload."2 However, the UAV Association declared that the term "Unmanned Aircraft Systems" (UAS) is a more suitable one as it embraces all different aspects that compounds this vehicle.3 In any event, it is important to stress that this kind of vehicle sustained by aerodynamic lift, without an on-board crew, cannot be considered a new invention. During the First World War, UAS were tested although not used in combat.4 In 1926, a report carried out by the New York Times mentioned that planes, which navigated autonomously with a high level of precision, were able to "blow a small town inside out."5 Within the context of the Second World War, another important step was taken regarding the topic hereby discussed, as the US Military "refitted B-24 bombers filled to double capacity with explosives and guided by remote control devices to crash at selected targets in Germany and Nazi-controlled France."6 After, throughout the Korean War and the Vietnam War, the US Armed Forces used UAVs for Intelligence, Surveillance and Reconnaissance (ISR) purposes. Further 2 Cfr. BONE, E., BOLKCOM, C., "Unmanned Aerial Vehicles: Background and Issues for Congress", Report for Congress, 2003. 3 From our point of view, UAS is an appropriate term as aircrafts with no pilot on board involves, among others, the use of ground stations. Therefore, an adequate concept should not only refer to the air vehicle itself. 4 Vid. Infra, footnote 17. 5 Information hereby provided: <http://www.thenation.com/article/166124/brief-history- drones#>. Nevertheless, it has to be highlighted that those aircrafts were more similar to cruise missiles, although those nascent UAVs were designed with the intention of using them further on, once they had fulfilled their mission; a feature that strongly distinguishes from the formers. 6 Ibidem. However, the technology at that time used had strong deficiencies, as they were not, strictly speaking, self-piloted during take-offs. In fact, it was when the plane reached a cruising altitude when the pilots had to parachute. on, as Jeremiah Gertler clarifies, pilotless aircrafts were able to "deliver payloads and flew its first flight test as an armed UAV in 2002."7 We can assert without a doubt, that the US Government has played an important role in developing UAS. Nevertheless, Israel has carried out an outstanding work too. During the military operations that took place in Lebanon, in 1982, the referred country used UAS successfully for many operations, constituting a turning point in the development of this kind of technology.8 Nowadays, these aircrafts piloted through a remote pilot station or through an on-board computer9, are significantly used -gaining, in many occasions, a heated reputation- in the military field "[...] not only due to technological sophistication, but also due to perceived military requirements to support national objectives."10 Indeed, the military dimension of drones is reaching, these days, unprecedented rates.11 The escalation of violence after 9/11 crystallizes in, among others, large- scale

military attacks launched by the US military forces, through the use of pilotless aircrafts, against presumed terrorists targets located, among other territories, in Afghanistan and Yemen. Likewise, in Pakistan, the US government has ordered drone missile strikes as a consequence of the ineffective previous counter-terrorism measures there applied.12 Unfortunately, the implementation of such technology at the beginning of the new century grew at an outstanding rate, falling substantially since 2009. Be that as it may, we have to point out that "drone strikes are reported to occur almost once a day and target mainly six countries (Afghanistan, Pakistan, Yemen, Somalia, Libya and Gaza)"13, being US, Israel and UK, the countries 7 Cfr. GERTLER, J., "US Unamanned Aerial Systems", The Drone Wars of the 21st Century: Costs and Benefits, Oxford University Press, 2014, at 29. 8 Ibid. at 30. 9 These planes still need to be guided by a pilot located in a pilot station -usually called as a ground control station- or through a pre-programmed flight plan. Nevertheless, in the following years, the idea is to produce aircrafts with capacity to take decisions, being the pilot only in charge of monitoring what those are doing. Information hereby provided: <http://www.theuav.com>. 10 Information hereby provided: <http://isis-europe.eu/sites/default/files/publications- downloads/esr63_perspectivesUAVs_Dec2012MH.pdf>. 11 Vid. BROOKS, R., "Drones and the International Rule of Law", Georgetown University Law Center, 2013, 1-21, at 9. 12 According to the information provided by The Guardian: "targeted killings have been a hallmark of this administration's counterterrorism strategy. Obama sharply increased the use of armed drones (begun under George W Bush), which have conducted lethal strikes against alleged terrorists in Pakistan, Yemen and Somalia". Information hereby provided: <http://www.theguardian.com/ commentisfree/2014/may/23/obama-drone-speech-one-year-later>. 13 Ibidem. that have developed most this technology for mainly targeted killings14, notably trespassing the ISR's area. Notwithstanding the foregoing, the utilization of UAVs cannot only be regarded as a weapon-delivery system. This true statement is linked to the fact that drones are increasingly having multiple civil applications, such as fire fighting, surveillance activities, etc.15, which will surely "foster job creation and a source for innovation and economic growth for the years to come"16, as the European Commission has envisaged. Returning to the issue in hand, which refers to the reliance on unmanned aerial vehicles for combat operations, this transformational technology will definitely change, if it has not already done so, the way in which wars have been traditionally fought and won. And this -as it will be seen- has, of course, a strong legal repercussion. Taking all this into consideration, it is important to highlight that the aim of this paper is to examine and discuss if the use of drones, when countries argue that they are fighting against terrorism, validly fall within the scope of application of Article 51 of the UN Charter. In other words, the purpose of this article is to analyse if the argument of self-defence raised, mainly, by the US and its allies is a legal one when using unmanned aerial vehicles as a counter terrorism measure. In order to do so, the requirements established by the UN Charter, such as the principle of proportionality, will

be examined in detail. After such analysis, we will be able to conclude if drones -when used as an offensive weapon to end the life of suspected terrorists- are or are not fulfilling the legal requirements requested by the right of self-defence, adjusting in the latter case the interpretation of international law to the particular national interests of some countries. In any case, before doing this, it is important to stress a few basic ideas/considerations that may give us a hint on the huge controversy that surrounds the use of pilotless aircrafts in specific combat operations. 14 Targeted killings are seen as the main US strategy when fighting against terrorism, especially since the attacks of 9/11. Two examples of this new trend is the effective killing of Osama bin Laden in May 2011 and, a few months later, the drone strike addressed to Anwar al-Awlaki, an American-born Yemeni cleric and al-Qaeda propagandist. 15 The Commission issued a Communication, in April 2014, to enable the progressive integration of Remotely Piloted Aircraft Systems into the European civil airspace. Information hereby provided: <http:// eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0207&from=EN>. 16 Ibidem. II. GENERAL CONSIDERATIONS WHEN PERPETRATING ARMED ATTACKS WITH UAS President Bush alluded, during a speech made in December 2001, to the existence of UAS as a vital and necessary military component that has changed radically the dimension of the battlefield. The following words were pronounced just after the attacks of 9/11 within the context of the conflict of Afghanistan: "The Predator is a good example. This unmanned aerial vehicle is able to circle over enemy forces, gather intelligence, transmit information instantly back to commanders, and then fire on targets with extreme accuracy. Before the war, Predator had sceptics, because it did not fit the old ways. Now it is clear the military does not have enough unmanned vehicles. We're entering an era in which unmanned vehicles of all kinds will take on greater importance". Afghanistan is not the only country that has suffered the use of unmanned aircrafts. Other areas, such as: Kosovo in 1999 or Iraq in 2003, have been affected in the recent past by the use of this controversial military technology. Since then, an open discussion has appeared, as on the one hand -among numerous arguments17- scholars state that those "[...] are arguably cheaper to procure, and they eliminate the risk to a pilot's life"18 but, on the other hand, they cause civilian casualties becoming this a crucial issue that needs to be tackled seriously. In other words, it is important to mention that, according to many scholars, the use of UAS can be extremely effective when trying to kill suspected terrorists; however, taking into account that the fight against terrorism is now seen as a global concern, several challenges and questions inevitably arise -despite the fact that transparency has been pledged by the current US President- when referring, in particular, to the targeted killings carried out by unmanned aerial vehicles.19 Those challenges are mainly linked with the killings of 17 Another important argument is the following one: "autonomous weapons systems, by preventing casualties on their own side and simultaneously removing war and its more dramatic consequences from the meticulous and commonly not particularly benevolent media attention it otherwise receives,

clearly reduce the "political cost" of the use of force". Cfr. GUTIÉRREZ ESPADA, C., CERVELL HORTAL, M.J., "Autonomous weapons systems, drones and international law", Revista del Instituto Español de Estudios Estratégicos, n. 2, 2013, 1-19, at 4. 18 Information hereby provided: <http://fas.org/irp/crs/RL31872.pdf>. Other arguments should be mentioned: "UAVs protect the lives of pilots by performing the "3-D" missions - those dull, dirty, or dangerous missions that do not require a pilot in the cockpit. However, the lower procurement cost of UAVs must be weighed against their greater proclivity to crash, while the minimized risk should be weighed against the dangers inherent in having an unmanned vehicle flying in airspace shared with manned assets". Ibidem. 19 This was said on 2013 in a speech made at the National Defense University. The following year, civilians that drone strikes cause, emerging these combat operations as the current hallmark of the US administration's counterterrorism strategy.20 Moreover, the lack of spatial closeness between the drone pilot and the drone (that is controlled remotely) does not challenge the attribution of the specific act (the killings) to the State itself. The pilot is an organ of the State as stated in Article 4 of the Draft on State Responsibility (2001)21. Related to all the above, it is important to notice that, as a key outcome, there are many questions that remain unanswered in this area: Who can be considered an enemy combatant potentially subjected to be killed by a drone strike? Who is able to authorize those attacks? Are there geographical constraints when carrying out this kind of operations? If civilian casualties occur, who assumes responsibilities? Furthermore, can those attacks be considered as a violation of international law? As previously said, the US Government has dramatically increased the use of aircrafts without an on board pilot in these last years22, trying consequently -through the Justice Department- to provide answers to some of the above questions. In this sense, it was said that three requirements had to be duly accomplished in order to lawfully use lethal force against a foreign country: 1) the targeted individual must pose an imminent threat; 2) the capture needs to be infeasible; and 3) the operation must be carried out in accordance with war principles.23 at the US Military Academy (West Point), President Barak Obama repeated the same idea: "[A]s I said last year, in taking direct action, we must uphold standards that reflect our values. That means taking strikes only when we face a continuing, imminent threat, and only where [...] there is near certainty of no civilian casualties, for our actions should meet a simple test: we must not create more enemies than we take off the battlefield. I also believe we must be more transparent about both the basis of our counterterrorism actions and the manner in which they are carried out. We have to be able to explain them publicly, whether it is drone strikes or training partners. [...] when we cannot explain our efforts clearly and publicly, we face terrorist propaganda and international suspicion, we erode legitimacy with our partners and our people and we reduce accountability in our own government. Information hereby provided: <http://www.washingtonpost.com/politics/full-text-of-president- obamas-commencement-address-at-west-point/2014/05/28/cfbcdcaa-e670-11e3-afc6-a1dd9407

abcf_story.html>. 20 Information hereby provided: <http://www.theguardian.com/commentisfree/2014/may/23/ obama-drone-speech-one-year-later>; <http://www.nytimes.com/2014/06/26/world/use-of-drones -for-killings-risks-a-war-without-end-panel-concludes-in-report.html?_r=1>. 21 International Law Commission, Responsibility of States for Internationally Wrongful Acts, 2001 (Draft). 22 The New America Foundation states that, during the government of the former US President, only 50 or less drone attacks took place in Pakistan, whereas the current US Head of State has ordered more than 300. 23 Document hereby provided: <http://fas.org/irp/eprint/doj-lethal.pdf>. Regarding the abovementioned criteria, which at first sight could be seen as reasonable ones, thorny issues immediately emerge when analysing them in detail: how can it be determined the threat of an imminent attack, taking into account that terrorists acts have normally a secret nature? The UN Charter refers to self-defence when a real harm takes place, but nothing is said about a potential one. The second requirement is also controversial, as the referred White Paper argues: "[...] capture would not be feasible if it could not be physically effectuated during the relevant window of opportunity or if the relevant country were to decline to consent to a capture operation". Within the context of this paper, the last prerequisite acquires the greatest relevance, insofar it is linked with the fact that lethal operations carried out by the United States have to strictly "[...] comply with the four fundamental law- of-war principles governing the use of force: necessity, distinction, proportionality, and humanity (the avoidance of unnecessary suffering)."24 Bearing this in mind, do drone strikes fulfil this last condition even if collateral damage takes place? In essence, is this third criterion not legally fulfilled in case of civilian casualties? If so, which are the implications? Concerning this particular point, the above-mentioned White Paper states that "[...] it would not be consistent with those principles to continue an operation if anticipated civilian casualties would be excessive in relation to the anticipated military advantage."25 From our point of view, the word "excessive" strongly deteriorates the US Government's determination when complying with the referred requirements, as it constitutes a vague expression, potentially subjected to a wide or, even worse, malicious interpretation. In any event, the mentioned document emphasis the following idea: "[...] there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict-such as pilotless aircraft or so-called smart bombs-as long as they are employed in conformity with applicable laws of war."26 Therefore, it is imperative to analyse the applicable regulation in order to determine if drone strikes comply with the legal provisions. For that reason, as mentioned before, Article 51 of the UN Charter will be analysed hereunder27. 24 Ibidem. 25 Vid. Supra. footnote 22. 26 Vid. Supra, footnote 22. 27 In either case, not all are legal considerations. Indeed, many people think that drone attacks are very unpopular as with the use of this technology the flames of anti-Americanism are fanned. Other criticisms are based on a lack of transparency and information about how and on which legal bases targeted killings caused by

drones take place. III. ANALYSING ARTICLE 51 OF THE UN CHARTER First of all, we have to stress that drones are not a prohibited weapon under international law, which means that the lawfulness of a response in self-defence using drones will be determined by the degree of compliance with the requirements established by Article 51 of the UN Charter: having suffered an armed attack for which a State can be held responsible and the response shall be immediate, necessary, proportional, temporary and subsidiary to the action decided by the UN Security Council (this body has to be informed of the measures taken in self-defense; the Security Council is the main organ responsible for the maintenance of international peace and security according to Article 24 of the UN Charter). In the light of the above, we have to discuss how the right of self-defence is affected by the "war against terrorism" declared by the United States and its allies against this unknown enemy that appeared in 2001. In the context of this perpetual war, the use of drones raises a specific relevance. Moreover, it is important to mention that, despite of the efforts made by scholars28 and international organizations29, there is no legal definition of the word "terrorism". Several international conventions30 state what a terrorist attack is but no consensus has been reached to define the concept of "terrorism". The lack of legal definition implies highlighting certain peculiarities when linking terrorism with the right of self-defence. 28 Cfr. ALCAIDE FERNÁNDEZ, J., et. al, Las actividades terroristas ante el Derecho Internacional contemporáneo, Tecnos, Madrid, 2000, at 50; RAMÓN CHORNET, C., Terrorismo y respuesta de fuerza en el marco del Derecho Internacional, Tirant lo Blanch, Valencia, 1993, at 36-37; HOFFMAN, B., A mano armada. Historia del terrorismo, Editorial Espasa, Madrid, 1999, at 62-63; HIGGINS, R., "The general international law of terrorism", en HIGGINS, R., Y FLORY, M., Terrorism and International Law, London y New York, 1997, at 27. 29 Information hereby provided: A/57/270; A/RES/49/60; A/RES/56/88; A/59/565. 30 (1963) Convention on Offences and Certain Other Acts Committed On Board Aircraft, (1970) Convention for the Suppression of Unlawful Seizure of Aircraft, (1971) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, (1973) Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, (1979) International Convention against the Taking of Hostages, (1980) Convention on the Physical Protection of Nuclear Material, (1988) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, (1988) Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, (1991) Convention on the Marking of Plastic Explosives for the Purpose of Detection, (1997) International Convention for the Suppression of Terrorist Bombings, (1999) International Convention for the Suppression of the Financing of Terrorism, (2005) International Convention for the Suppression of Acts of Nuclear Terrorism, (2010) Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation 1. ARMED ATTACK Even though the particular interpretation made by the USA on their "war on terrorism", the terrorist phenomenon as such does not give rise to the activation of

Article 51 of the Charter. Indeed, terrorist acts are the ones that must be taken into account when assessing whether a State has or not the right to respond. The International Court of Justice made it clear: "in the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack."31 Therefore, the relation between terrorism and the right of self-defence must be based on the intensity of the attack, seen from the perspective of individual acts attributable to a State. It should be assessed whether the terrorist acts rise to the level of sufficient intensity and severity to qualify an armed attack within the meaning of Article 51.32 That implies that its intensity and effects are such that they would be classified as an armed attack if they were carried out by regular armed forces. 2. ATTRIBUTABLE TO A STATE Even if the United States does not link the use of drones for targeted killings with the international responsibility of a specific State, the use of armed forces without the consent of the territorial State can only be justified if the latter has an international responsibility regarding the acts committed by these individuals (self- defence). The draft of the International Law Commission on State Responsibility33 defines the attribution of a particular conduct to a State. In regards of terrorist attacks, Article 8 states that "the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct." Acting on the instructions requires that an organ of the State, contracts or induces individuals or groups, who do not belong to the formal structure of the state, to act 31 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14, § 195. 32 Ibidem. 33 Responsibility of States for Internationally Wrongful Acts, 2001, GA/RES/56/83, Annex. as auxiliary. The International Court of Justice analysed this particular situation in the Nicaragua case: "the Court finds it established that, on a date in late 1983 or early 1984, the President of the United States authorized a United States government agency to lay mines in Nicaraguan ports; that in early 1984 mines were laid in or close to the ports of El Bluff, Corinto and Puerto Sandino, either in Nicaraguan interna1 waters or in its territorial sea or both, by persons in the pay and acting on the instructions of that agency, under the supervision and with the logistic support of United States agents."34 The second assumption of attribution of acts carried out by individuals to a State is when they act under its direction or control. Effective control is required according to the International Law Commission and the International Court of Justice: "The Court has taken the view that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. Al1 the forms of United States participation mentioned above,

and even the general control by the respondent state over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant state. Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that state had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."35 Following the declarations made by the International Court of Justice, Lamberti states that "[...] the actions of the armed groups must always be kept distinct from the acts of assistance or acquiescence performed by the state. If the armed groups act independently as private individuals, with no connection, even unofficial, with the military organization of the state, and if the state does no more that give 34 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14, § 80. 35 Ibid, § 115. various kinds of assistance (organizational, financial, military) or simply tolerate the presence of these groups in its territory, the conduct of armed bands cannot constitute an international wrongful act because it cannot be attributed to a state. The conduct of the state is certainly unlawful under international law, but it is not itself a use of force, still less an armed attack in the sense of Art. 51."36 Thus, the attribution or terrorist acts to a State depends on the degree of involvement of the same in the planning, preparation and execution of the attacks. This participation must be important and fundamental for the reaching of the pursued goal. 3. SAFE HAVENS So, do we have to deny that providing a safe haven to terrorists does not activate the right of self-defence? This point of view is fought by most American scholars. Following the International Court of Justice's Advisory Opinion on the Wall in Palestinian Occupied Territory, Murphy argued that the Court's interpretation implies that: 1) A State may provide or supply arms, logistical support and provide sanctuary to a terrorist group; 2) this group can inflict violence of any severity level to another State, even with weapons of mass destruction; 3) the attacked State has no right to respond in self-defence because the assistance provided by the host State cannot be considered as an armed attack within the meaning of Article 51 of the Charter; 4) the victim State cannot use self-defence against a terrorist group because this behaviour cannot be attributed to the host State if there is no proof that a terrorist group was sent by the latter.37 Wedgwood argues that Article 51 is restricted to the armed attack perpetrated by one State against another. This does not fit with the applicable international legal provisions, especially since 2001, when it was found that non-State actors can use force comparable to those State actors: "any use of force by a private transnational terror network [...] is illegal. But its illegality and qualification as a war crime does not change the fact that it also constitutes an armed attack under Article 51."38 36 Cfr. LAMBERTI ZANARDI, P.L., "Indirect Military Aggression", in, CASSESE, A. (Ed.), The Current Legal Regulation of the Use of Force, Martinus Nijhoff Publishers, Dordrecht/Boston/

Lancaster, 1986, 111-119, at 113. 37 MURPHY, S.D., "Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?", American Journal of International Law, Vol. 99, No. 1, 62-76, at 66; the ICJ Advisory Opinion on the Israeli Security Fence and the Limits. 38 WEDGWOOD, R., "The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self- Several UN resolutions stress there is an obligation for the States to refrain from organizing, tolerating, provoking or helping to realize acts of terrorism against another State39. Thus, although constituting a violation of the international obligation to refrain from tolerating terrorist activities in the territory of the State, providing safe haven cannot be considered, however, as an armed attack according to Article 51 of the UN Charter. The analysis of international law and the practice of the Security Council support this conclusion.40 4. IMMEDIACY Article 51 of the UN Charter is in the centre of a doctrinal debate as to whether, beside the conventional rule that recognizes the inherent right of self- defence against an armed attack, a natural right of self-defence recognized by customary international law remains with a more permissive content that authorizes the exercise of anticipatory self-defence. There are two clearly opposing positions regarding the nature of the right of self-defence. According to Corten, points of view are more or less restrictive depending on the importance given to customary law.41 Indeed, scholars proposing an extensive approach based on the international custom consider the State practice as the main source of the principle of self- defense, which implies that great importance is given to political decisions and the organs that take them. According to that, the principle would be formed according to the practice of the most powerful States and will be in line with their interests. This entails in the same way that we will have to accept the possibility of creating instant custom. Supporters of the restrictive approach however put in the forefront the law, understood as the one formed both by custom and written law. Being the premise that States are equal in rights, the formal source has to change or new Defense", American Journal of International Law, Vol. 99, No. 1, 52-62, at 58; in the same way, see Ch. J. Tams, "Light Treatment of a Complex Problem: The Law of Self-Defense in the Wall Case", European Journal of International Law, 2005, vol. 16, nº5, 963-978. 39 Information hereby provided: UNGA Resolution 2625 (XXV); UNGA Resolution 2734 (XXV). 40 GONZÁLEZ VEGA, J., "Los atentados del 11 de septiembre, la operación "Libertad duradera" y el derecho de legítima defensa", Revista Española de Derecho Internacional, 2001, 247-271, at 255-256; in the same way, ACOSTA ESTÉVEZ, J. B., "La operación Libertad Duradera y la legítima defensa a la luz de los atentados del 11 de septiembre de 2001", Anuario Mexicano de Derecho Internacional, vol. VI, 2006, 13-61, at 40-41. 41 CORTEN, O., "The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate", European Journal of International Law (2005), vol. 16, No. 5, 803-822, at 804. custom has to be created for the law to evolve. For the scholars that argue that the inherent right of self-defence refers to the customary nature of the right, prior to the adoption of the UN Charter, the use of self-defence was allowed for the protection of nationals abroad, as well as an anticipatory self-defence.

Thus, this doctrine assumes that under customary international law anticipatory self-defence is permitted against imminent danger. Therefore, the Webster doctrine allowing preventive action as self-defence was assimilated to an aspect of the right of self-preservation. For instance, Bowett argues that "action undertaken for the purpose of, and limited to, the defense of a State's political independence, territorial integrity, the lives or property of its nationals cannot by definition involve a threat or use of force."42 The author points out that although it is generally accepted that Article 51 incorporates the content of self-defence under the Charter of the United Nations, it can be argued that the customary right of self-defence is in force for the member States of the referred Organization: "We must presuppose that rights formerly belonging to member status continue except in so far as obligations inconsistent with those existing rights are assumed under the Charter [...] It is, therefore, fallacious to assume that members have only those rights which the Charter accords to them; on the contrary they have those rights which general international law accords to them except and in so far as they have surrendered them under the Charter."43 In addition, some authors recognize that there are situations in which it is possible to support a right of self-defence against an imminent attack. Thus, as argued by Bowett or Waldock, the English sentence in Article 51 if an armed attack occurs should not be interpreted as only if an armed attack occurs since the Charter does not say the latter. Therefore, reactive self-defence, understood as a response to an armed attack, would be only one form of self-defence allowed by the Charter. Another one would be anticipatory self-defence.44 However, the Charter does not say only if an armed attack occurs nor or threatens. Therefore, other scholars argue that the right of self-defence is applicable exclusively when there is a prior armed attack. As an exception to the prohibition of the use of force contained in Article 42 Cfr. BOWETT, D., Self-Defense in International Law, New York, F.A. Praeger, cop. 1958, at 185-186. 43 Ibid. at 184-185. 44 Vid. KOLB, R., Ius contra bellum, Helbing & Lichtenhahn/Bruylant, Bâle-Genève-Munich/Bruxelles, 2003., at 193, quoting C. H. M. Waldock, "The Regulation of the Use of Force by Individual States in International Law", Recueil des Cours de l'Académie de Droit International, Tome 81 II, 1952, 451-515, at 497-498. 2.4, legal provision 51 has to be interpreted narrowly. The limits of self-defence in Article 51 would be meaningless if a broader interpretation was retained. They also claim that before the Charter, customary law allowed uniquely a restricted right of self-defence.45 Following this reasoning, self-defence was conceived as an exception to the prohibition in Article 2.4; therefore, it is an exceptional right, a privilege. Indeed, the aim of the referred Charter is the use of force to be under the control of the Organization -monitored, in particular, by the Security Council- and, says Brownlie, proof of that is the requirements of temporality and subsidiarity, as well as the obligation for the State to inform the Council immediately.46 Another argument would be that, since the use of armed force was not forbidden by the classical international law, conventional nor customary law, both aggression and the use of force were legitimate without being relevant if they were conducted for offensive or defensive purposes. Consequently,

a rule authorizing the use of force in self- defence (such as Article 51) only makes sense if that use is prohibited.47 That is what ruled the International Law Commission: "The absolutely indispensable premise for the admission of a self-contained concept of self-defence, with its intrinsic meaning, into a particular system of law is that the system must have contemplated as a general rule the general prohibition of the use of force by private subjects and hence admits the use of force only in cases where it would have purely and strictly defensive objectives, in other words, in cases where the use of force would take the form of resistance to a violent attack by another. Another element —which, in logic, is not so indispensable as the foregoing, but has been confirmed in the course of history as its necessary complement — is that the use of force, even for strictly defensive purposes, is likewise admitted not as a general rule, but only as an exception to a rule under which a central authority has a monopoly or virtual 45 Vid. BROWNLIE, I., International Law and the Use of Force by States, Oxford University Press, Oxford, 1963 (repr. 2002), at 264 and following; Eduardo Jiménez de Aréchaga, "International Law in the Past Third of a Century", Recueil des Cours de l'Académie de Droit International de La Haye, Tome 159, 1978-I, 9-343, at 96 and following; J. L. Kunz, "Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations", American Journal of International Law, Vol. 41, 1947, 872-879, at 878; M. Bothe, "Terrorism and the Legality of Pre-emptive Force", European Journal of International Law, 2003, vol. 14, nº 2, at 227-240. 46 Ibid. at 273-274. 47 Vid. PASTOR RIDRUEJO, J. A., Curso de Derecho Internacional Público y Organizaciones Internacionales, 14ª edición, Tecnos, Madrid, 2010, at 624; REMIRO BROTÓNS, A., et al., Derecho internacional. Curso General, Tirant Lo Blanch, Valencia, 2010, at 672. monopoly on the use of force so as to guarantee respect by all for the integrity of others."48 The International Law Commission's reasoning implies that, having legally regulated self-defence, the Charter excludes any other concept more permissive to authorize its use for preventive purposes. The International Court of Justice confirmed the narrow concept of self-defence in the mentioned Nicaragua case: "[The] reference to customary law is contained in the actual text of Article 5 1, which mentions the "inherent right" (in the French text "droit naturel") of individual or collective self-defence, which "nothing in the present Charter shall impair" and which applies in the event of an armed attack. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. In the case of individual self-defence, the exercise of this right is subject to the state concerned having been the victim of an armed attack".49 In regards to drones, Gutiérrez Espada and Cervell Hortal seem to suggest that the leader targeted by a drone should be the leader of an actual on going attack; if so, the drone strike could be justified by the right of self-defence.50 We must disagree with this interpretation. A pre-emptive response

is a legitimate response to an aggression that is about to take place. The test of the armed attack under Article 51 of the UN Charter would be fulfilled in cases where the attack is imminent and there is certainty about its happening. Pre-emptive self-defence is always lawful. Nonetheless, when the United States argue that they act in self-defence in Pakistan, they understand that these actions are taken in order to prevent further attacks. It is difficult to meet the requirement of immediacy when self-defence is used in response to terrorist attacks because these are characterized by immediacy in its execution. The consensus shown by the international community in 2001 to accept the US right of self-defence lasted what the shock for the events lasted. Although 48 Report of the International Law Commission on the work of its Thirty-second session, 5 May - 25 July 1980, Official Records of the General Assembly, Thirty-fifth session, Supplement No. 10 (A/35/10). 49 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14, § 80. 50 Vid. GUTIÉRREZ ESPADA, C., Y CERVELL HORTAL, M. J., op. cit., at 19. it was thought that the acceptance of the quasi-unanimity of the states induced to think that a new international custom was being conceived, this conclusion has not been confirmed for several reasons. One of them is that the response of the coalition that intervened in Afghanistan was so disproportionate (coming to overthrow the Taliban government) that many countries raised their voices and stopped supporting the intervention. In addition, the reaction of the international community was not similar regarding other terrorist attacks (for instance, in Madrid, London or Bali). Operation Enduring Freedom in Afghanistan, in 2001, was launched to prevent and avoid terrorist attacks in the future. So, according to the United States, there was a risk of repetition of such actions that required defensive measures. If we consider that there was a chain of attacks on going, this argument could be accepted; several attacks launched in a reasonable period of time and against the same target (a State) could be accepted as an ongoing armed attack. But in 2001, there were no further attacks coming. Neither are they in Yemen or Pakistan. It is difficult to believe that future actions are part of a chain of attacks, which would be characterized by temporal proximity in their development. Moreover, it is mandatory to determine which one is the first attack from which to start counting. If anticipatory self-defence is difficult to sustain, much more complex is to do so regarding a posteriori self-defence. If we use the following example given by Kretzmer, we can analyse self-defence a posteriori: "In November 2002 a car travelling in a remote part of Yemen was destroyed by a missile filed from an unmanned Predator drone. Six people in the car, all suspected members of al-Qaeda, were killed. While the US did not publicly acknowledge responsibility for the attack, officials let it be known that the CIA had carried it out. One of the men killed, Qaed Salim Sinan al Harethi, was said to be a former bin Laden security guard who was suspected of playing a major role in the October 2000 attack on the US destroyer Cole, in which 17 sailors were killed."51 After the terrorist attacks on September 11, 2001, the United States declared that they should use the right to exercise self-defence a posteriori. A month after, a letter was sent to the

Security Council by the US government, stating the following: "since 11 September, my Government has obtained clear and compelling 51 Cfr. KRETZMER, D., "Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?", European Journal of International Law, 2005, Vol. 16 No. 2, 171-212, at 171-172. information that the Al-Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks. There is still much we do not know. Our inquiry is in its early stages. We may find that our self-defence requires further actions with respect to other organizations and other states." The American declaration has been regarded as a wilful and contra legem interpretation of the right of self-defence.52 The American statement raises some questions. The first one is that self- defence can be invoked in the future. Therefore, it is not alleged in reference to an actual armed attack but against an armed attack that has already happened and ended. This leads to the lack of temporal connection between the attack and the response in self-defence. In this case we would forget the customary requirement of immediacy, delaying the response until the State attacked sometime before decides -subjectively, of course- that it is time to fight back. What self-defence a posteriori actually advocates is that any armed attack by one State against another would be likely to receive a response ad infinitum. And how would we evaluate this? Until five years later? Until ten years later? For example, would it be considered lawful today a US response against Pakistan because of that country's alleged involvement in the attacks of 11 September 2001? Certainly not. So, when the United States argues being acting in self-defence for the targeting and killing of an Al-Qaeda leader, even if this individual played a major role in a terrorist attack carried out more than 10 years ago, there is no right to exercise self-defence. In fact, that should be considered as a retaliation measure prohibited by international law. Kretzmer provides us with another example of self-defence using drones: "The [US] Yemen attack came two years after Israel adopted a policy of 'targeted killings' of Palestinians alleged to be active members of terrorist organizations involved in organizing, promoting or executing terrorist attacks in Israel and the Occupied Territories. This policy commenced with the attack on Hussein 'Abayat and was followed by a series of attacks culminating recently in the attacks on the Hamas leaders Ahmed Yassin and Abdel Aziz Rantisi. In many of these attacks innocent bystanders were killed or wounded. This policy has been officially acknowledged and is at the time of writing being defended by the 52 Vid. VALLARTA MARRÓN, J. L., "El derecho inmanente a la legítima defensa individual o colectiva en caso de ataque armado. ¿Se justifica una interpretación extensiva para incluir medidas preventivas y punitivas? Una visión israelí", Anuario Mexicano de Derecho Internacional, vol. IX, 2009, 69-115, at 97. government before the Supreme Court of Israel."53 The Israeli policy of targeted killings cannot be justified with Article 51. The International Court of Justice made clear that the Israeli argument of being acting in self-defence failed because of the lack of the international element of the armed attack and, since a State cannot invoke the right of self-defence against himself, the Israeli arguments were not acceptable. Indeed, the Palestinian territory is an occupied territory and, therefore,

its administration is under Israeli control.54 In regards of the actions of Israel in Lebanon against Hezbollah, the attribution of the Hezbollah actions to the Lebanese government remains doubtful. Hezbollah is not a de jure an organ of the Lebanese State, nor could Lebanon be attributed a responsibility on the basis of an organic de facto relationship. Cannizzaro denies that Hezbollah may have a sufficient degree of autonomy to be considered a subject of international law because to do so, it should exercise exclusive control of the territory as well as being comparable to a new territorial entity possessing sovereignty. Therefore, there should have been a process of insurrection and authorities should have had provided some stability in that territory. Clearly, this is not the case of Lebanon, whose unity was never contested.55 Consequently, the Israeli use of drones against Hezbollah leaders follows the same reasoning mentioned above. IV. IS THE PRINCIPLE OF PROPORTIONALITY DULY ACCOMPLISHED? When trying to determine if the legal provision 51 of the UN Charter is being duly satisfied or not, it is crucial not only to examine the above legal aspects, but also the following criterion of fairness and justice: the principle of proportionality. Why is the mentioned principle a basic element when applying article 51? As suggested by Aurescu, the proportionality of the reaction in self-defense has two dimensions56. The first one, "quantitative", expresses a correspondence between the gravity of the attack suffered and the scale of the reaction, which 53 Cfr. KRETZMER, D., op. cit., at 172. 54 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, p. 136, § 139. 55 Vid. CANNIZZARO, E., "Entités non-étatiques et régime international de l'emploi de la force. Une étude sur le cas de la réaction israélienne au Liban », Revue Générale de Droit International Public, 2007, vol. 111, nº2, 333-352, at 335. 56 Vid. AURESCU, B., "Le conflit libanais de 2006. Une analyse juridique à la lumière de tendances contemporaines en matière de recours à la force", Annuaire Français de Droit International, LII, 2006, p. 154. must be limited in its object to the restoring of the existing situation before the aggression. On the other hand, the "qualitative" dimension was analyzed by the International Court of Justice in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons: the use of armed force in self-defense has to meet the requirements of the law applicable to armed conflicts. Therefore, self-defense might not authorize the use of means that are opposite to the principles and the content of International Humanitarian Law57. This principle of proportionality entails that the impact of retaliation measures has to be evaluated. A similar idea is contained in an open-letter written in 2003 by Moreno Ocampo, the former Chief Prosecutor of the International Court of Justice: "(...) A crime occurs if there is an intentional attack directed against civilians (principle of distinction) (...) or an attack is launched on a military objective in the knowledge that the incidental civilian injuries would be clearly excessive in relation to the anticipated military advantage (principle of proportionality)58". Be that as it may, when considering if the right of self-defence has been breached it is crucial to combine the interpretation of the above principle with another one: the principle of necessity,

which implies that the use of force must be consistent with the achievement of legitimate military objectives. Therefore, these two principles have to be duly respected when exercising the right of self-defence. Not doing this will entail the violation of international legal provisions. In this regard, we should mention that Israel has been accused of not fulfilling those in, among others, the attack launched in Gaza in 2006 after an Israelite soldier was captured. Returning to our topic, when using drones, we have seen that civilian casualties take place. In this regard, we have to mention what Human Rights Watch has said: "the impact on civilians must be carefully weighed under the principle of proportionality against the military advantage served; all ways of minimizing the impact on civilians must be considered; and attacks should not be undertaken if the civilian harm outweighs the definite military advantage, or if a similar military advantage could be secured with less civilian harm".59 Thus, when pilotless aircrafts are injuring or killing civilians, article 51 of the UN Charter is frontally violated. 57 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226. 58 This letter was published during the Irak invasion of 2003. 59 This idea has been posed by Human Rights Watch in the following document: <http://www.hrw. org/news/2006/08/01/questions-and-answers-hostilities-between-israel-and-hezbollah>. Without doubt, the abovementioned principle is interlocked with human rights regulation when it refers to the killings of civilians. Along the same line, Philip Alston understands that "[...] the legality of a killing outside the context of armed conflict is governed by human rights standards, especially those concerning the use of lethal force [...]. [A] targeted killing in the sense of an intentional, premeditated and deliberate killing by law enforcement officials cannot be legal because, unlike in armed conflict, it is never permissible for killing to be the sole objective of an operation"60. Thus, airstrikes that have perpetrated targeted killings and caused death, in a non-armed conflict area, must be subjected to the application of relevant legal provisions, such as: Article 3 of the Universal Declaration of Human Rights (UDHR), Article 6 of the ICCPR, Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, etc. The last legal document above mentioned contemplates the possibility of a legitimate use of force provided that the principle of proportionality is duly complied. Regarding the issue here discussed, problems arise when acknowledging that drone strikes always occur far beyond the borders of the country that has ordered the attack. Thus, as explained before, can the use of force be legal if it is perpetrated in another State unable to pursue the crimes itself or unwilling to help the State of the victim? Forgetting sovereign considerations, can we understand that the victim State has no other possibility but to display its force against the suspected terrorist? As Kretzmer suggests, "[...] it could not do so if its aim were to punish the suspected terrorist for past acts or to deter potential terrorists from acting"61. This is obvious. However, as the author argues, what will happen if a State has evidence that the alleged terrorist is planning an attack against people in its territory? Within this context, is the use of force absolutely necessary?62 It does not seem like it. In this respect, a suitable

question should be taken into account: "how can one decide if lethal force is necessary to prevent a possible future attack about which one knows nothing?"63 Either way, we must highlight that regarding the ICCPR, no one shall be arbitrarily deprived of his life. Therefore, can a pre- emptive attack be considered as an arbitrary life deprivation? In this regard, the Human Rights Committee declares the following: "The Committee is concerned by 60 See paragraph 33. 61 Cfr. KRETZMER, D, op. cit., at 179. 62 Ibid. at 180. 63 Cfr. BROOKS, B., op. cit., at 21. what the State party calls 'targeted killings' of those identified by the State party as suspected terrorists in the Occupied Territories. This practice would appear to be used at least in part as a deterrent or punishment, thus raising issues under article 6 [...]. The State party should ensure that the utmost consideration is given to the principle of proportionality in all its responses to terrorist threats and activities. State policy in this respect should be spelled out clearly in guidelines to regional military commanders, and complaints about disproportionate use of force should be investigated promptly by an independent body. Before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted"64. Consequently, the Committee argues that the use of force should be considered as a strategy of last resort. Therefore, States have to ensure that the basic rights of persons within its jurisdiction are duly protected. This, of course, includes territories under its occupation or control. At the same time, they have to implement counterterrorism measures to prevent, among others, instability. In parallel, the strategies implemented when fighting against terrorism have to successfully overcome the test of proportionality and necessity. All this previous considerations provide a challenging and complex scenario difficult to solve in a dramatic real-life event, in particular when drones are used. V. CONCLUSIONS The use of drones for extrajudicial targeted killings during the permanent war against terrorism implemented by the United States and some of its allies to different groups since 2001, hardly fits the requirements of the right of self- defense (Article 51) alleged by the perpetrators. The lack of legal definition on terrorism implies that the phenomenon (terrorism) is not the enemy; to raise a response in self-defense, terrorist acts are the ones that should be taken into consideration. These acts, under certain circumstances, could reach the level of intensity necessary to be qualified as an armed attack according to Article 51 but their attribution to a particular State is difficult to establish; the groups or individuals targeted by drones are not acting on behalf of a public authority nor on the instructions or the effective control of any specific State. 64 See Concluding Observations of the Human Rights Committee: Israel. Available at: <http://adalah. org/upfiles/ConcludingObservations/HRC-Concluding%20Observations%20(2003).pdf>. Regarding the condition of immediacy of the response in self-defense, the use of drones is not a response to any specific attack; the argument to be in "war against terrorism" hampers the acceptance of self-defense: there is no response, there is a war. However, even recognizing there is a war, is it highly doubtful that the use of drones for targeted killings respects the law applicable to armed conflicts and particularly International Humanitarian Law

(another requirement for self- defense). The amount of civilian casualties shows that this "collateral damage" is clearly excessive in relation with the anticipated military advantage. Moreover, if proportionality is not respected, neither is necessity; targeted extrajudicial killings of individuals suspected to be terrorists entailing per se the killing of civilian hardly harmonizes with the achievement of legitimate military objectives.

I. WHAT ARE UNMANNED AERIAL VEHICLE OR UNMANNED AIRCRAFT SYSTEMS?

Unmanned aerial vehicles, commonly known as drones, are aircrafts that do not have a human pilot. Within this context, the US Department of Defense defines these peculiar planes as "powered, aerial vehicles that do not carry a human operator, use aerodynamic forces to provide vehicle lift, can fly autonomously or be piloted remotely, can be expandable or recoverable, and can carry a lethal or non-lethal payload."2 However, the UAV Association declared that the term "Unmanned Aircraft Systems" (UAS) is a more suitable one as it embraces all different aspects that compounds this vehicle.3

In any event, it is important to stress that this kind of vehicle sustained by aerodynamic lift, without an on-board crew, cannot be considered a new invention. During the First World War, UAS were tested although not used in combat.4 In 1926, a report carried out by the New York Times mentioned that planes, which navigated autonomously with a high level of precision, were able to "blow a small town inside out."5 Within the context of the Second World War, another important step was taken regarding the topic hereby discussed, as the US Military "refitted B-24 bombers filled to double capacity with explosives and guided by remote control devices to crash at selected targets in Germany and Nazi-controlled France."6 After, throughout the Korean War and the Vietnam War, the US Armed Forces used UAVs for Intelligence, Surveillance and Reconnaissance (ISR) purposes. Further

on, as Jeremiah Gertler clarifies, pilotless aircrafts were able to "deliver payloads and flew its first flight test as an armed UAV in 2002."7 We can assert without a doubt, that the US Government has played an important role in developing UAS. Nevertheless, Israel has carried out an outstanding work too. During the military operations that took place in Lebanon, in 1982, the referred country used UAS successfully for many operations, constituting a turning point in the development of this kind of technology.8

Nowadays, these aircrafts piloted through a remote pilot station or through an on-board computer9, are significantly used -gaining, in many occasions, a heated reputation- in the military field "[...] not only due to technological sophistication, but also due to perceived military requirements to support national objectives."10 Indeed, the military dimension of drones is reaching, these days, unprecedented rates.11 The escalation of violence after 9/11 crystallizes in, among others, large- scale military attacks launched by the US military forces, through the use of pilotless aircrafts, against presumed terrorists targets located, among other territories, in Afghanistan and Yemen. Likewise, in Pakistan, the US government has ordered drone missile strikes as a consequence of the ineffective previous counter-terrorism measures there applied.12 Unfortunately, the implementation of such technology at the beginning of the new century grew at an outstanding rate, falling substantially since 2009. Be that as it may, we have to point out that "drone strikes are reported to occur almost once a day and target mainly six countries (Afghanistan, Pakistan, Yemen, Somalia, Libya and Gaza)"13, being US, Israel and UK, the countries

that have developed most this technology for mainly targeted killings14, notably trespassing the ISR's area. Notwithstanding the foregoing, the utilization of UAVs cannot only be regarded as a weapon-delivery system. This true statement is linked to the fact that drones are increasingly having multiple civil applications, such as fire fighting, surveillance activities, etc.15, which will surely "foster job creation and a source for innovation and economic growth for the years to come"16, as the European Commission has envisaged.

Returning to the issue in hand, which refers to the reliance on unmanned aerial vehicles for combat operations, this transformational technology will definitely change, if it has not already done so, the way in which wars have been traditionally fought and won. And this -as it will be seen- has, of course, a strong legal repercussion.

Taking all this into consideration, it is important to highlight that the aim of this paper is to examine and discuss if the use of drones, when countries argue that they are fighting against terrorism, validly fall within the scope of application of Article 51 of the UN Charter. In other words, the purpose of this article is to analyse if the argument of self-defence raised, mainly, by the US and its allies is a legal one when using unmanned aerial vehicles as a counter terrorism measure. In order to do so, the requirements established by the UN Charter, such as the principle of proportionality, will be examined in detail. After such analysis, we will be able to conclude if drones -when used as an offensive weapon to end the life of suspected terrorists- are or are not fulfilling the legal requirements requested by the right of self-defence, adjusting in the latter case the interpretation of international law to the particular national interests of some countries. In any case, before doing this, it is important to stress a few basic ideas/considerations that may give us a hint on the huge controversy that surrounds the use of pilotless aircrafts in specific combat operations.

II. GENERAL CONSIDERATIONS WHEN PERPETRATING ARMED ATTACKS WITH UAS

President Bush alluded, during a speech made in December 2001, to the existence of UAS as a vital and necessary military component that has changed radically the dimension of the battlefield. The following words were pronounced just after the attacks of 9/11 within the context of the conflict of Afghanistan: "The Predator is a good example. This unmanned aerial vehicle is able to circle over enemy forces, gather intelligence, transmit information instantly back to commanders, and then fire on targets with extreme accuracy. Before the war, Predator had sceptics, because it did not fit the old ways. Now it is clear the military does not have enough unmanned vehicles. We're entering an era in which unmanned vehicles of all kinds will take on greater importance". Afghanistan is not the only country that has suffered the use of unmanned aircrafts. Other areas, such as: Kosovo in 1999 or Iraq in 2003, have been affected in the recent past by the use of this controversial military technology. Since then, an open discussion has appeared, as on the one hand -among numerous arguments17- scholars state that those "[...] are arguably cheaper to procure, and they eliminate the risk to a pilot's life"18 but, on the other hand, they cause civilian casualties becoming this a crucial issue that needs to be tackled seriously. In other words, it is important to mention that, according to many scholars, the use of UAS can be extremely effective when trying to kill suspected terrorists; however, taking into account that the fight against terrorism is now seen as a global concern, several challenges and questions inevitably arise -despite the fact that transparency has been pledged by the current US President- when referring, in particular, to the targeted killings carried out by unmanned aerial vehicles.19 Those challenges are mainly linked with the killings of

civilians that drone strikes cause, emerging these combat operations as the current hallmark of the US administration's counterterrorism strategy.20

Moreover, the lack of spatial closeness between the drone pilot and the drone (that is controlled remotely) does not challenge the attribution of the specific act (the killings) to the State itself. The pilot is an organ of the State as stated in Article 4 of the Draft on State Responsibility (2001)21.

Related to all the above, it is important to notice that, as a key outcome, there are many questions that remain unanswered in this area: Who can be considered an enemy combatant potentially subjected to be killed by a drone strike? Who is able to authorize those attacks? Are there geographical constraints when carrying out this kind of operations? If civilian casualties occur, who assumes responsibilities? Furthermore, can those attacks be considered as a violation of international law? As previously said, the US Government

has dramatically increased the use of aircrafts without an on board pilot in these last years22, trying consequently -through the Justice Department- to provide answers to some of the above questions. In this sense, it was said that three requirements had to be duly accomplished in order to lawfully use lethal force against a foreign country: 1) the targeted individual must pose an imminent threat; 2) the capture needs to be infeasible; and 3) the operation must be carried out in accordance with war principles.23

Regarding the abovementioned criteria, which at first sight could be seen as reasonable ones, thorny issues immediately emerge when analysing them in detail: how can it be determined the threat of an imminent attack, taking into account that terrorists acts have normally a secret nature? The UN Charter refers to self-defence when a real harm takes place, but nothing is said about a potential one. The second requirement is also controversial, as the referred White Paper argues: "[...] capture would not be feasible if it could not be physically effectuated during the relevant window of opportunity or if the relevant country were to decline to consent to a capture operation". Within the context of this paper, the last prerequisite acquires the greatest relevance, insofar it is linked with the fact that lethal operations carried out by the United States have to strictly "[...] comply with the four fundamental law- of-war principles governing the use of force: necessity, distinction, proportionality, and humanity (the avoidance of unnecessary suffering)."24 Bearing this in mind, do drone strikes fulfil this last condition even if collateral damage takes place? In essence, is this third criterion not legally fulfilled in case of civilian casualties? If so, which are the implications? Concerning this particular point, the above-mentioned White Paper states that "[...] it would not be consistent with those principles to continue an operation if anticipated civilian casualties would be excessive in relation to the anticipated military advantage."25 From our point of view, the word "excessive" strongly deteriorates the US Government's determination when complying with the referred requirements, as it constitutes a vague expression, potentially subjected to a wide or, even worse, malicious interpretation. In any event, the mentioned document emphasis the following idea: "[...] there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict- such as pilotless aircraft or so-called smart bombs-as long as they are employed in conformity with applicable laws of war."26 Therefore, it is imperative to analyse the applicable regulation in order to determine if drone strikes comply with the legal provisions. For that reason, as mentioned before, Article 51 of the UN Charter will be analysed hereunder27.

III. ANALYSING ARTICLE 51 OF THE UN CHARTER

First of all, we have to stress that drones are not a prohibited weapon under international law, which means that the lawfulness of a response in self-defence using drones will be determined by the degree of compliance with the requirements established by Article 51 of the UN Charter: having suffered an armed attack for which a State can be held responsible and the response shall be immediate, necessary, proportional, temporary and subsidiary to the action decided by the UN Security Council (this body has to be informed of the measures taken in self-defense; the Security Council is the main organ responsible for the maintenance of international peace and security according to Article 24 of the UN Charter).

In the light of the above, we have to discuss how the right of self-defence is affected by the "war against terrorism" declared by the United States and its allies against this unknown enemy that appeared in 2001. In the context of this perpetual war, the use of drones raises a specific relevance.

Moreover, it is important to mention that, despite of the efforts made by scholars28 and international organizations29, there is no legal definition of the word "terrorism". Several international conventions30 state what a terrorist attack is but no consensus has been reached to define the concept of "terrorism". The lack of legal definition implies highlighting certain peculiarities when linking terrorism with the right of self-defence.

1. ARMED ATTACK

Even though the particular interpretation made by the USA on their "war on terrorism", the terrorist phenomenon as such does not give rise to the activation of Article 51 of the Charter. Indeed, terrorist acts are the ones that must be taken into account when assessing whether a State has or not the right to respond. The International Court of Justice made it clear: "in the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack."31

Therefore, the relation between terrorism and the right of self-defence must be based on the intensity of the attack, seen from the perspective of individual acts attributable to a State. It should be assessed whether the terrorist acts rise to the level of sufficient intensity and severity to qualify an armed attack within the meaning of Article 51.32 That implies that its intensity and effects are such that they would be classified as an armed attack if they were carried out by regular armed forces.

2. ATTRIBUTABLE TO A STATE

Even if the United States does not link the use of drones for targeted killings with the international responsibility of a specific State, the use of armed forces without the consent of the territorial State can only be justified if the latter has an international responsibility regarding the acts committed by these individuals (self- defence). The draft of the International Law Commission on State Responsibility33 defines the attribution of a particular conduct to a State. In regards of terrorist attacks, Article 8 states that "the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

Acting on the instructions requires that an organ of the State, contracts or induces individuals or groups, who do not belong to the formal structure of the state, to act

as auxiliary. The International Court of Justice analysed this particular situation in the Nicaragua case: "the Court finds it established that, on a date in late 1983 or early 1984, the President of the United States authorized a United States government agency to lay mines in Nicaraguan ports; that in early 1984 mines were laid in or close to the ports of El Bluff, Corinto and Puerto Sandino, either in Nicaraguan interna1 waters or in its territorial sea or both, by persons in the pay and acting on the instructions of that agency, under the supervision and with the logistic support of United States agents."34

The second assumption of attribution of acts carried out by individuals to a State is when they act under its direction or control. Effective control is required according to the International Law Commission and the International Court of Justice: "The Court has taken the view that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. Al1 the forms of United States participation mentioned above, and even the general control by the respondent state over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant state. Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that state had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."35

Following the declarations made by the International Court of Justice, Lamberti states that "[...] the actions of the armed groups must always be kept distinct from the acts of assistance or acquiescence performed by the state. If the armed groups act independently as private individuals, with no connection, even unofficial, with the military organization of the state, and if the state does no more that give

various kinds of assistance (organizational, financial, military) or simply tolerate the presence of these groups in its territory, the conduct of armed bands cannot constitute an international wrongful act because it cannot be attributed to a state. The conduct of the state is certainly unlawful under international law, but it is not itself a use of force, still less an armed attack in the sense of Art. 51."36

Thus, the attribution or terrorist acts to a State depends on the degree of involvement of the same in the planning, preparation and execution of the attacks. This participation must be important and fundamental for the reaching of the pursued goal.

3. SAFE HAVENS

So, do we have to deny that providing a safe haven to terrorists does not activate the right of self-defence? This point of view is fought by most American scholars. Following the International Court of Justice's Advisory Opinion on the Wall in Palestinian Occupied Territory, Murphy argued that the Court's interpretation implies that: 1) A State may provide or supply arms, logistical support and provide sanctuary to a terrorist group; 2) this group can inflict violence of any severity level to another State, even with weapons of mass destruction; 3) the attacked State has no right to respond in self-defence because the assistance provided by the host State cannot be considered as an armed attack within the meaning of Article 51 of the Charter; 4) the victim State cannot use self-defence against a terrorist group because this behaviour cannot be attributed to the host State if there is no proof that a terrorist group was sent by the latter.37

Wedgwood argues that Article 51 is restricted to the armed attack perpetrated by one State against another. This does not fit with the applicable international legal provisions, especially since 2001, when it was found that non-State actors can use force comparable to those State actors: "any use of force by a private transnational terror network [...] is illegal. But its illegality and qualification as a war crime does not change the fact that it also constitutes an armed attack under Article 51."38

Several UN resolutions stress there is an obligation for the States to refrain from organizing, tolerating, provoking or helping to realize acts of terrorism against another State39. Thus, although constituting a violation of the international obligation to refrain from tolerating terrorist activities in the territory of the State, providing safe haven cannot be considered, however, as an armed attack according to Article 51 of the UN Charter. The analysis of international law and the practice of the Security Council support this conclusion.40

4. IMMEDIACY

Article 51 of the UN Charter is in the centre of a doctrinal debate as to whether, beside the conventional rule that recognizes the inherent right of self- defence against an armed attack, a natural right of self-defence recognized by customary international law remains with a more permissive content that authorizes the exercise of anticipatory self-defence. There are two clearly opposing positions regarding the nature of the right of self-defence. According to Corten, points of view are more or less restrictive depending on the importance given to customary law.41

Indeed, scholars proposing an extensive approach based on the international custom consider the State practice as the main source of the principle of self- defense, which implies that great importance is given to political decisions and the organs that take them. According to that, the principle would be formed according

to the practice of the most powerful States and will be in line with their interests. This entails in the same way that we will have to accept the possibility of creating instant custom. Supporters of the restrictive approach however put in the forefront the law, understood as the one formed both by custom and written law. Being the premise that States are equal in rights, the formal source has to change or new

custom has to be created for the law to evolve.

For the scholars that argue that the inherent right of self-defence refers to the customary nature of the right, prior to the adoption of the UN Charter, the use of self-defence was allowed for the protection of nationals abroad, as well as an anticipatory self-defence. Thus, this doctrine assumes that under customary international law anticipatory self-defence is permitted against imminent danger. Therefore, the Webster doctrine allowing preventive action as self-defence was assimilated to an aspect of the right of self-preservation. For instance, Bowett argues that "action undertaken for the purpose of, and limited to, the defense of a State's political independence, territorial integrity, the lives or property of its nationals cannot by definition involve a threat or use of force."42 The author points out that although it is generally accepted that Article 51 incorporates the content of self-defence under the Charter of the United Nations, it can be argued that the customary right of self-defence is in force for the member States of the referred Organization: "We must presuppose that rights formerly belonging to member status continue except in so far as obligations inconsistent with those existing rights are assumed under the Charter [...] It is, therefore, fallacious to assume that members have only those rights which the Charter accords to them; on the contrary they have those rights which general international law accords to them except and in so far as they have surrendered them under the Charter."43

In addition, some authors recognize that there are situations in which it is possible to support a right of self-defence against an imminent attack. Thus, as argued by Bowett or Waldock, the English sentence in Article 51 if an armed attack occurs should not be interpreted as only if an armed attack occurs since the Charter does not say the latter. Therefore, reactive self-defence, understood as a response to an armed attack, would be only one form of self-defence allowed by the Charter. Another one would be anticipatory self-defence.44 However, the Charter does not say only if an armed attack occurs nor or threatens. Therefore, other scholars argue that the right of self-defence is applicable exclusively when there is a prior armed attack. As an exception to the prohibition of the use of force contained in Article

2.4, legal provision 51 has to be interpreted narrowly. The limits of self-defence in Article 51 would be meaningless if a broader interpretation was retained. They also claim that before the Charter, customary law allowed uniquely a restricted right of self-defence.45

Following this reasoning, self-defence was conceived as an exception to the prohibition in Article 2.4; therefore, it is an exceptional right, a privilege. Indeed, the aim of the referred Charter is the use of force to be under the control of the Organization -monitored, in particular, by the Security Council- and, says Brownlie, proof of that is the requirements of temporality and subsidiarity, as well as the obligation for the State to inform the Council immediately.46 Another argument would be that, since the use of armed force was not forbidden by the classical international law, conventional nor customary law, both aggression and the use of force were legitimate without being relevant if they were conducted for offensive or defensive purposes. Consequently, a rule authorizing the use of force in self- defence (such as Article 51) only makes sense if that use is prohibited.47 That is what ruled the International Law Commission: "The absolutely indispensable premise for the admission of a self-contained concept of self-defence, with its intrinsic meaning, into a particular system of law is that the system must have contemplated as a general rule the general prohibition of the use of force by private subjects and hence admits the use of force only in cases where it would have purely and strictly defensive objectives, in other words, in cases where the use of force would take the form of resistance to a violent attack by another. Another element —which, in logic, is not so indispensable as the foregoing, but has been confirmed in the course of history as its necessary complement — is that the use of

force, even for strictly defensive purposes, is likewise admitted not as a general rule, but only as an exception to a rule under which a central authority has a monopoly or virtual

monopoly on the use of force so as to guarantee respect by all for the integrity of others."48

The International Law Commission's reasoning implies that, having legally regulated self-defence, the Charter excludes any other concept more permissive to authorize its use for preventive purposes. The International Court of Justice confirmed the narrow concept of self-defence in the mentioned Nicaragua case: "[The] reference to customary law is contained in the actual text of Article 5 1, which mentions the "inherent right" (in the French text "droit naturel") of individual or collective self-defence, which "nothing in the present Charter shall impair" and which applies in the event of an armed attack. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. In the case of individual self-defence, the exercise of this right is subject to the state concerned having been the victim of an armed attack".49

In regards to drones, Gutiérrez Espada and Cervell Hortal seem to suggest that the leader targeted by a drone should be the leader of an actual on going attack; if so, the drone strike could be justified by the right of self-defence.50 We must disagree with this interpretation. A pre-emptive response is a legitimate response to an aggression that is about to take place. The test of the armed attack under Article 51 of the UN Charter would be fulfilled in cases where the attack is imminent and there is certainty about its happening. Pre-emptive self-defence is always lawful. Nonetheless, when the United States argue that they act in self-defence in Pakistan, they understand that these actions are taken in order to prevent further attacks. It is difficult to meet the requirement of immediacy when self-defence is used in response to terrorist attacks because these are characterized by immediacy in its execution. The consensus shown by the international community in 2001 to accept the US right of self-defence lasted what the shock for the events lasted. Although

it was thought that the acceptance of the quasi-unanimity of the states induced to think that a new international custom was being conceived, this conclusion has not been confirmed for several reasons. One of them is that the response of the coalition that intervened in Afghanistan was so disproportionate (coming to overthrow the Taliban government) that many countries raised their voices and stopped supporting the intervention. In addition, the reaction of the international community was not similar regarding other terrorist attacks (for instance, in Madrid, London or Bali).

Operation Enduring Freedom in Afghanistan, in 2001, was launched to prevent and avoid terrorist attacks in the future. So, according to the United States, there was a risk of repetition of such actions that required defensive measures. If we consider that there was a chain of attacks on going, this argument could be accepted; several attacks launched in a reasonable period of time and against the same target (a State) could be accepted as an ongoing armed attack. But in 2001, there were no further attacks coming. Neither are they in Yemen or Pakistan. It is difficult to believe that future actions are part of a chain of attacks, which would be characterized by temporal proximity in their development. Moreover, it is mandatory to determine which one is the first attack from which to start counting.

If anticipatory self-defence is difficult to sustain, much more complex is to do so regarding a posteriori self-defence. If we use the following example given by Kretzmer, we can analyse self-defence a posteriori: "In November 2002 a car travelling in a remote part of Yemen was destroyed by a missile filed from an unmanned Predator drone. Six people in the car, all suspected members of al- Qaeda, were killed. While the US did not publicly acknowledge responsibility for the attack, officials let it be known that the CIA had carried it out. One of the men killed, Qaed Salim Sinan al Harethi, was said to be a former bin Laden security guard who was suspected of playing a major role in the October 2000 attack on the US destroyer Cole, in which 17 sailors were killed."51

After the terrorist attacks on September 11, 2001, the United States declared that they should use the right to exercise self-defence a posteriori. A month after, a letter was sent to the Security Council by the US government, stating the following: "since 11 September, my Government has obtained clear and compelling information that the Al-Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks. There is still much we do not know. Our inquiry is in its early stages. We may find that our self-defence requires further actions with respect to other organizations and other states." The American declaration has been regarded as a wilful and contra legem interpretation of the right of self-defence.52

The American statement raises some questions. The first one is that self- defence can be invoked in the future. Therefore, it is not alleged in reference to an actual armed attack but against an armed attack that has already happened and ended. This leads to the lack of temporal connection between the attack and the response in self-defence. In this case we would forget the customary requirement of immediacy, delaying the response until the State attacked sometime before decides -subjectively, of course- that it is time to fight back.

What self-defence a posteriori actually advocates is that any armed attack by one State against another would be likely to receive a response ad infinitum. And how would we evaluate this? Until five years later? Until ten years later? For example, would it be considered lawful today a US response against Pakistan because of that country's alleged involvement in the attacks of 11 September 2001? Certainly not. So, when the United States argues being acting in self-defence for the targeting and killing of an Al-Qaeda leader, even if this individual played a major role in a terrorist attack carried out more than 10 years ago, there is no right to exercise self-defence. In fact, that should be considered as a retaliation measure prohibited by international law. Kretzmer provides us with another example of self-defence using drones: "The [US] Yemen attack came two years after Israel adopted a policy of 'targeted killings' of Palestinians alleged to be active members of terrorist organizations involved in organizing, promoting or executing terrorist attacks in Israel and the Occupied Territories. This policy commenced with the attack on Hussein 'Abayat and was followed by a series of attacks culminating recently in the attacks on the Hamas leaders Ahmed Yassin and Abdel Aziz Rantisi. In many of these attacks innocent bystanders were killed or wounded. This policy has been officially acknowledged and is at the time of writing being defended by the government before the Supreme Court of Israel."53 The Israeli policy of targeted killings cannot be justified with Article 51. The International Court of Justice made clear that the Israeli argument of being acting in self-defence failed because of the lack of the international element of the armed attack and, since a State cannot invoke the right of self-defence against himself, the Israeli arguments were not acceptable. Indeed, the Palestinian territory is an occupied territory and, therefore, its administration is under Israeli control.54

In regards of the actions of Israel in Lebanon against Hezbollah, the attribution of the Hezbollah actions to the Lebanese government remains doubtful. Hezbollah is not a de jure an organ of the Lebanese State, nor could Lebanon be attributed a responsibility on the basis of an organic de facto relationship. Cannizzaro denies that Hezbollah may have a sufficient degree of autonomy to be considered a subject of international law because to do so, it should exercise exclusive control of the territory as well as being comparable to a new territorial entity possessing sovereignty. Therefore, there should have been a process of insurrection and authorities should have had provided some stability in that territory. Clearly, this is not the case of Lebanon, whose unity was never contested.55 Consequently, the Israeli use of drones against Hezbollah leaders follows the same reasoning mentioned above.

IV. IS THE PRINCIPLE OF PROPORTIONALITY DULY ACCOMPLISHED?

When trying to determine if the legal provision 51 of the UN Charter is being duly satisfied or not, it is crucial not only to examine the above legal aspects, but also the following criterion of fairness and justice: the principle of proportionality. Why is the mentioned principle a basic element when applying article 51?

As suggested by Aurescu, the proportionality of the reaction in self-defense has two dimensions56. The first one, "quantitative", expresses a correspondence between the gravity of the attack suffered and the scale of the reaction, which

must be limited in its object to the restoring of the existing situation before the aggression. On the other hand, the "qualitative" dimension was analyzed by the International Court of Justice in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons: the use of armed force in self-defense has to meet the requirements of the law applicable to armed conflicts. Therefore, self-defense might not authorize the use of means that are opposite to the principles and the content of International Humanitarian Law57.

This principle of proportionality entails that the impact of retaliation measures has to be evaluated. A similar idea is contained in an open-letter written in 2003 by Moreno Ocampo, the former Chief Prosecutor of the International Court of Justice: "(...) A crime occurs if there is an intentional attack directed against civilians (principle of distinction) (...) or an attack is launched on a military objective in the knowledge that the incidental civilian injuries would be clearly excessive in relation to the anticipated military advantage (principle of proportionality)58".

Be that as it may, when considering if the right of self-defence has been breached it is crucial to combine the interpretation of the above principle with another one: the principle of necessity, which implies that the use of force must be consistent with the achievement of legitimate military objectives. Therefore, these two principles have to be duly respected when exercising the right of self-defence. Not doing this will entail the violation of international legal provisions. In this regard, we should mention that Israel has been accused of not fulfilling those in, among others, the attack launched in Gaza in 2006 after an Israelite soldier was captured.

Returning to our topic, when using drones, we have seen that civilian casualties take place. In this regard, we have to mention what Human Rights Watch has said: "the impact on civilians must be carefully weighed under the principle of proportionality against the military advantage served; all ways of minimizing the impact on civilians must be considered; and attacks should not be undertaken if the civilian harm outweighs the definite military advantage, or if a similar military advantage could be secured with less civilian harm".59 Thus, when pilotless aircrafts are injuring or killing civilians, article 51 of the UN Charter is frontally violated.

Without doubt, the abovementioned principle is interlocked with human rights regulation when it refers to the killings of civilians. Along the same line, Philip Alston understands that "[...] the legality of a killing outside the context of armed conflict is governed by human rights standards, especially those concerning the use of lethal force [...]. [A] targeted killing in the sense of an intentional, premeditated and deliberate killing by law enforcement officials cannot be legal because, unlike in armed conflict, it is never permissible for killing to be the sole objective of an operation"60. Thus, airstrikes that have perpetrated targeted killings and caused death, in a non-armed conflict area, must be subjected to the application of relevant legal provisions, such as: Article 3 of the Universal Declaration of Human Rights (UDHR), Article 6 of the ICCPR, Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, etc.

The last legal document above mentioned contemplates the possibility of a legitimate use of force provided that the principle of proportionality is duly complied. Regarding the issue here discussed, problems arise when acknowledging that drone strikes always occur far beyond the borders of the country that has ordered the attack. Thus, as explained before, can the use of force be legal if it is perpetrated in another State unable to pursue the crimes itself or unwilling to help the State of the victim? Forgetting sovereign considerations, can we understand that the victim State has no other possibility but to display its force against the suspected

terrorist? As Kretzmer suggests, "[...] it could not do so if its aim were to punish the suspected terrorist for past acts or to deter potential terrorists from acting"61. This is obvious. However, as the author argues, what will happen if a State has evidence that the alleged terrorist is planning an attack against people in its territory? Within this context, is the use of force absolutely necessary?62 It does not seem like it. In this respect, a suitable question should be taken into account: "how can one decide if lethal force is necessary to prevent a possible future attack about which one knows nothing?"63 Either way, we must highlight that regarding the ICCPR, no one shall be arbitrarily deprived of his life. Therefore, can a pre- emptive attack be considered as an arbitrary life deprivation? In this regard, the Human Rights Committee declares the following: "The Committee is concerned by

what the State party calls 'targeted killings' of those identified by the State party as suspected terrorists in the Occupied Territories. This practice would appear to be used at least in part as a deterrent or punishment, thus raising issues under article 6 [...]. The State party should ensure that the utmost consideration is given to the principle of proportionality in all its responses to terrorist threats and activities. State policy in this respect should be spelled out clearly in guidelines to regional military commanders, and complaints about disproportionate use of force should be investigated promptly by an independent body. Before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted"64.

Consequently, the Committee argues that the use of force should be considered as a strategy of last resort. Therefore, States have to ensure that the basic rights of persons within its jurisdiction are duly protected. This, of course, includes territories under its occupation or control. At the same time, they have to implement counterterrorism measures to prevent, among others, instability. In parallel, the strategies implemented when fighting against terrorism have to successfully overcome the test of proportionality and necessity. All this previous considerations provide a challenging and complex scenario difficult to solve in a dramatic real-life event, in particular when drones are used.

V. CONCLUSIONS

The use of drones for extrajudicial targeted killings during the permanent war against terrorism implemented by the United States and some of its allies to different groups since 2001, hardly fits the requirements of the right of self- defense (Article 51) alleged by the perpetrators.

The lack of legal definition on terrorism implies that the phenomenon (terrorism) is not the enemy; to raise a response in self-defense, terrorist acts are the ones that should be taken into consideration. These acts, under certain circumstances, could reach the level of intensity necessary to be qualified as an armed attack according to Article 51 but their attribution to a particular State is difficult to establish; the groups or individuals targeted by drones are not acting on behalf of a public authority nor on the instructions or the effective control of any specific State.

Regarding the condition of immediacy of the response in self-defense, the use of drones is not a response to any specific attack; the argument to be in "war against terrorism" hampers the acceptance of self-defense: there is no response, there is a war.

However, even recognizing there is a war, is it highly doubtful that the use of drones for targeted killings respects the law applicable to armed conflicts and particularly International Humanitarian Law (another requirement for self- defense). The amount of civilian casualties shows that this "collateral damage" is clearly excessive in relation with the anticipated military advantage. Moreover, if proportionality is not respected, neither is necessity; targeted extrajudicial killings of individuals suspected to be terrorists entailing per se the killing of civilian hardly harmonizes with the achievement of legitimate military objectives.

References

Cfr. BONE, E., BOLKCOM, C., "Unmanned Aerial Vehicles: Background and Issues for Congress"

From our point of view, UAS is an appropriate term as aircrafts with no pilot on board involves, among others, the use of ground stations. Therefore, an adequate concept should not only refer to the air vehicle itself.

Vid. Infra, footnote 17.

Nevertheless, it has to be highlighted that those aircrafts were more similar to cruise missiles, although those nascent UAVs were designed with the intention of using them further on, once they had fulfilled their mission; a feature that strongly distinguishes from the formers.

Ibidem. However, the technology at that time used had strong deficiencies, as they were not, strictly speaking, self-piloted during take-offs. In fact, it was when the plane reached a cruising altitude when the pilots had to parachute.

Cfr. GERTLER, J., "US Unamanned Aerial Systems", The Drone Wars of the 21st Century: Costs and Benefits

se planes still need to be guided by a pilot located in a pilot station -usually called as a ground control station- or through a pre-programmed flight plan. Nevertheless, in the following years, the idea is to produce aircrafts with capacity to take decisions, being the pilot only in charge of monitoring what those are doing.

paix et securite internationale

Vid. BROOKS, R., "Drones and the International Rule of Law",

According to the information provided by The Guardian: "targeted killings have been a hallmark of this administration's counterterrorism strategy. Obama sharply increased the use of armed drones (begun under George W Bush), which have conducted lethal strikes against alleged terrorists in Pakistan, Yemen and Somalia"

targeted killings are seen as the main US strategy when fighting against terrorism, especially since the attacks of 9/11. Two examples of this new trend is the effective killing of Osama bin Laden in May 2011 and, a few months later, the drone strike addressed to Anwar al-Awlaki, an American-born Yemeni cleric and al-Qaeda propagandist.

The Commission issued a Communication, in April 2014, to enable the progressive integration of Remotely Piloted Aircraft Systems into the European civil airspace.

Another important argument is the following one: "autonomous weapons systems, by preventing casualties on their own side and simultaneously removing war and its more dramatic consequences from the meticulous and commonly not particularly benevolent media attention it otherwise receives, clearly reduce the "political cost" of the use of force". Cfr. GUTIÉRREZ ESPADA, C., CERVELL HORTAL, M.J., "Autonomous weapons systems, drones and international law"

This was said on 2013 in a speech made at the National Defense University.

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he New America Foundation states that, during the government of the former US President, only 50 or less drone attacks took place in Pakistan, whereas the current US Head of State has ordered more than 300.

Ibidem

Vid. Supra. footnote 22.

In either case, not all are legal considerations. Indeed, many people think that drone attacks are very unpopular as with the use of this technology the flames of anti-Americanism are fanned. Other criticisms are based on a lack of transparency and information about how and on which legal bases targeted killings caused by drones take place.

Cfr. ALCAIDE FERNÁNDEZ, J., et. al, Las actividades terroristas ante el Derecho Internacional contemporáneo, Tecnos, Madrid, 2000, at 50; RAMÓN CHORNET, C., Terrorismo y respuesta de fuerza en el marco del Derecho Internacional, Tirant lo Blanch, Valencia, 1993, at 36-37; HOFFMAN, B., A mano armada. Historia del terrorismo, Editorial Espasa, Madrid, 1999, at 62-63; HIGGINS, R.,

Information hereby provided: A/57/270; A/RES/49/60; A/RES/56/88; A/59/565.

(1963) Convention on Offences and Certain Other Acts Committed On Board Aircraft, (1970) Convention for the Suppression of Unlawful Seizure of Aircraft, (1971) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, (1973) Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, (1979) International Convention against the Taking of Hostages, (1980) Convention on the Physical Protection of Nuclear Material, (1988) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, (1988) Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, (1991) Convention on the Marking of Plastic Explosives for the Purpose of Detection, (1997) International Convention for the Suppression of Terrorist Bombings, (1999) International Convention for the Suppression of the Financing of Terrorism, (2005) International Convention for the Suppression of Acts of Nuclear Terrorism, (2010) Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation

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Responsibility of States for Internationally Wrongful Acts, 2001, GA/RES/56/83, Annex.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14, § 80.

Cfr. LAMBERTI ZANARDI, P.L., "Indirect Military Aggression", in, CASSESE, A. (Ed.), The Current Legal Regulation of the Use of Force, Martinus Nijhoff Publishers, Dordrecht/Boston/Lancaster, 1986, 111-119, at 113.

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CORTEN, O., "The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate"

Cfr. BOWETT, D.

Vid. KOLB, R., Ius contra bellum, Helbing & Lichtenhahn/Bruylant, Bâle-Genève-Munich/Bruxelles, 2003., at 193, quoting C. H. M. Waldock, "The Regulation of the Use of Force by Individual States in International Law

Vid. BROWNLIE, I., International Law and the Use of Force by States, Oxford University Press, Oxford, 1963 (repr. 2002), at 264 and following; Eduardo Jiménez de Aréchaga, "International Law in the Past Third of a Century", Recueil des Cours de l'Académie de Droit International de La Haye, Tome 159, 1978-I, 9-343, at 96 and following; J. L. Kunz, "Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations", American Journal of International Law, Vol. 41, 1947, 872-879, at 878; M. Bothe, "Terrorism and the Legality of Pre-emptive Force",

Ibid. at 273-274.

Vid. PASTOR RIDRUEJO, J. A., Curso de Derecho Internacional Público y Organizaciones Internacionales, 14ª edición, Tecnos, Madrid, 2010, at 624; REMIRO BROTÓNS, A., et al., Derecho internacional. Curso General,

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Vid. GUTIÉRREZ ESPADA, C., Y CERVELL HORTAL, M. J., op. cit., at 19.

Cfr. KRETZMER, D., "Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?",

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Cfr. KRETZMER, D., op. cit., at 172.

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Vid. CANNIZZARO, E., "Entités non-étatiques et régime international de l'emploi de la force. Une étude sur le cas de la réaction israélienne au Liban

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This letter was published during the Irak invasion of 2003.

Cfr. KRETZMER, D, op. cit., at 179.

Cfr. BROOKS, B., op. cit., at 21.

Ibid. at 180.