THE ENEMY CRIMINAL LAW AS THE LEGAL FOUNDATION OF THE WAR ON TERROR

O DIREITO PENAL DO INIMIGO COMO O FUNDAMENTO LEGAL DA GUERRA AO TERROR

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ABSTRACT

In this article, we explore the relation between the war on terror, the theory of the enemy criminal law and the state of exception. The main effort is to link the enemy criminal law to the war on terror and then expose how the relation between them creates a permanent state of exception. To reach this goal, we first explain the enemy criminal law; then the approach of the White House against terrorism, and finally, we demonstrate how the concentration of power at the executive branch of the American government is turning the state of exception into the rule. The problem is often posed this way: can western democracies fight terrorism without losing their core values (privacy, freedom of speech, due process of law), or will they have to forsake democracy in order to protect themselves? This article aims to contribute to the debate about international law and the international protection of human rights.

KEYWORDS: International Law; Human Rights; Terrorism; State of Exception.

RESUMO

Neste artigo, nós exploramos a relação entre a guerra ao terror, o direito penal do inimigo e o estado de exceção. O esforço principal é ligar o direito penal do inimigo a guerra ao terror para então demonstrar como a relação entre ambos cria um estado de exceção permanente. Para alcançar este objetivo, nós explicamos primeiro a teoria do direito penal do inimigo; depois, analisamos a abordagem da Casa Branca contra o terrorismo e, finalmente, demonstramos como a concentração de poder no Executivo americano está transformando o estado de exceção na regra. O problema é geralmente colocado dessa forma: podem as modernas democracias ocidentais combater o terrorismo sem perder seus valores fundamentais (privacidade, liberdade de expressão, devido processo legal), ou elas terão que abandoná-los para assegurar a existência de suas sociedades? Este artigo busca contribuir para o debate sobre direito internacional e a proteção internacional dos direitos humanos.

PALAVRAS-CHAVE: Direito Internacional; Direitos Humanos; Terrorismo; Estado de Exceção.

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I. INTRODUCTION

The events of September 11 and the subsequent war on terror have fundamentally changed our political and legal orders, despite the surface appearance of a return to "normalcy" and the preoccupation with the economy and its melodramatic episodes. But on reflection, we realize that this normalcy contains not only more frequent terrorist attacks and the unprecedented expansions of the security apparatus, but also massive invasions of privacy and abridgments of rights, ever escalating cyber-attacks against public and private institutions, drone strikes and "extrajudicial killings". Singly and in conjunction these developments in both the available technology and in the sphere of ideas, fundamentally challenge our up to now confident narratives of "progress" and of the emergence of a cosmopolitan order - despite all the fits and starts with which this Kantian project was burdened right from the beginning. The new developments calls into question our constitutive notions of political order and of the ends of the state and governments, as the promise of the "end of history[3]" has become hollow[4].

The *aporia* we seem to reach has been in the making for quite some time, even though their conjuncture was a genuine surprise as various unlikely events and developments when conjoined are even less likely to give us confidence that "managing" those developments can be done through law and the proliferation of regimes and global governance structures, as we notice in both domains some serious legitimacy problems that cannot be fixed by greater transparency, reporting requirements and the promulgation of best practices, or by some new "constitutional moments" tying the grant of further discretionary powers to the executive to more exacting majorities.

Such a "Foucauldian" vision of the new form of governmentality[5] and its incompatibility with notions of democratic legitimacy and accountability could be dismissed as a dystopia, were it not for some further disturbing observations. Agamben's argument on the "state of exception" which has become permanent comes here to mind. Similarly, the attempts of creating greater accountability by protecting whistle blowers by statute if certain governmental practices violated the law obviously failed, given the unrelenting effort of e.g. the US government to hunt down and prosecute Edward Snowden "misuse of governmental property", if not treason. Thus something more seems to be required than "muddling through" and hoping for the best. What seems urgently needed is first of all a more coherent diagnosis of the ills

[3] See Francis Fukuyama, *The End of History and the Last Man* (New York: Free Press, 1992).
How strong these ideas are can be seen however by their ability to inform the analysis and narrative of more critical scholarship such as John Ikenberry, *Liberal Leviathan: The Origins, Crises and Transformation of the American World Order* (Princeton: Princeton University Press, 2011). For him the "liberal order" will not only be durable but is (in true right Hegelian fashion) also "in order" despite some (minor) flaws.

[4] For a criticism of teleological" notions of mankind's destiny see Friedrich Kratochwil, *The Status of Law in World Society: Meditations on the Rule and role of Law* (Cambridge, Engl. Cambridge Universty Press, 2014) chaps. 5 and 9.

[5] Michel Foucault, *The Birth of Biopolitics: Lectures at the College de France 1978-79* transl. by Graham Burchell (New York: Palgrave Macmillan, 2008).

that have befallen us and are threatening to undermine the foundations of civil life. Thus, neither well-intended partial reforms – centering on best practices or a further judicialisation – nor a new "democratic" vision relying on new institutions with a global reach, as social movements, global civil society, e-democracy are promising, unless such reforms are informed by an analysis of the constitutive and regulative misfires that characterize our present predicament.

To that extent, the present paper understands itself as a modest contribution to a "big problem" that usually stays out of sight because of the limitations of disciplinary understandings that in a way prejudge the solutions. What is needed is to rethink the interaction of conflicting values that underlie our social orders which law tries to mediate through its claim to supreme authority in a polity (*Herrschaftsverband*) either through its "subjection" of all members to "the law" or through a list of accepted sources[6]. This subjection need not be perfect and can be contested but certain limits have to be recognized either as to the forms of conflict which are (dis)-allowed (such as taking up arms) or to the institutions empowered to make an authoritative decision.

Phrasing the problem in such a Weberian way (perhaps even Hobbesian fashion, which however in realist analysis often degenerates into reification), is useful, as long as we do not mistake ideal types for simple representations of "reality". Rather ideal types are heuristic devices for illuminating empirical problems including those created by our conceptualizations. We take therefore the construct of the "enemy criminal law" as our prism for examining several international and constitutional problems, which states have to face at the moment. This allows us to analyze the problem of safeguarding the "rule of law" in a more "republican version", or a *Rechtsstaat*[7] in the Kantian tradition, rather than the dominant "liberal" tradition. The idea of an "enemy criminal law" was first proposed by the German penologist Günther Jakobs and his ideas match pretty closely the legal stance which the U.S. administration took in justifying its measures in the war on terror, and which also France and the UK are also adopting. While we leave the tracing of the pedigree of these ideas to intellectual or legal historians – establishing either the "migration" of Jakobs' conceptualization or their (surprising) independent emergence in two different arenas – we shall limit ourselves to the conceptual issues which the enemy criminal law creates for the legitimacy of political systems using legal principles for the justifications of their policies which are likely to engender counter-moves that could undermine the conventions (written or unwritten) on which the international system is based.

From these initial remarks, the steps of the argument can be derived. After a brief outline of Jakobs' Enemy Criminal Law (section II) we discuss the War on Terror

[6] Here enacted laws, customs or treaties (among loosely federated rulers or full-blown states) can have "constitutional" authority even if they lack the power postulated by a Hartian rule of recognition or a Kelsenian "Grundnorm". See H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon, 1963); Hans Kelsen, *Principles of International Law* 2nd ed by Robert Tucker, New York: Holt Rinehart and Winston1966).

[7] While these two concepts are not used in an identical fashion there is sufficient overlap for our purposes here.

(section III) by focusing on the Authorization to Use Military Force, the Patriot Act, the Torture-memoranda, the kill-list and signature strikes, to each of which we devote a subsection. We then broaden the analysis for assessing the implications of the state of exception as the rule (section IV). A brief conclusion (section V) ends this essay.

II. THE ENEMY CRIMINAL LAW

Before the events of Sept 11, and the subsequent conceptual changes spawned by the war on terror, the discussion among criminal lawyers in Germany was fueled by a controversy Günther Jakobs had stated. He had elaborated a theory[8] which distinguished between people who have rights and those who do not, by differentiating between a "citizen criminal law" from an "enemy criminal law". The first means a criminal law which is based on the idea of rights among all citizens, and that also includes guarantees for the rights of ordinary transgressors who have caused harm, but did not intend to bring the whole political system down; the second consists in a law that is based on securing the rights of law-abiding citizens and on the right of the state to impose sanctions for the protection of all, without, however extending this guarantee of rights to the individuals considered "enemies" of the public order. The "enemy" as defined by Jakobs is the individual who severed his ties to the legal system in the name of other values, such as a criminal organization (the mafia, drug cartels), a political ideology (left-wing, right-wing), or a religion (extremists). In general, the enemies are those who do not conduct their actions according to the established laws of a free and open society, acting in a systematic fashion against the legal prescriptions.

Jakobs relies on the notion that the function of laws is to stabilize people's expectations concerning their behaviour *vis*-à-*vis* each other, so that everyone can act by presupposing that others will also act in accordance with the law. But the cognitive reassurance of law must be provided by the citizens themselves, otherwise, there would be no possibility for the legal system to claim a concrete existence: law as a social construction demands the belief of its recipients[9]. Those who recognize the validity and legitimacy of the system, have an interest in predictable behavior. While demanding their rights they are also willing to fulfill their duties towards others by acting like real citizens. Enemies, however, are not part of this consensus, since they do

[8] "Soon before the events of September eleven 2001, in a conference about the actual state of the science of german criminal law, I made a reference to the overt or covert aspect of the 'surveillance spirit' of criminal law, and I offered some measures against the frictions between the prevention of future actions and the normative reactions to already consummated facts, i.e., I proposed an Enemy Criminal Law *versus* a Citizen Criminal Law". G. Jakobs, *On the Theory of the Enemy Criminal Law*, *in Current Developments of Criminal Sciences in Germany,* 2013, 08, K.Ambos, M.L. Böhm. (all translations were made by the authors)

[9] "When a normative system, as legitimate as it can be, does not guide the conduct of its recipients, it lacks social reality.…It is the identical situation of Law itself and of the institutions it creates, and, especially, that of the person: if there is no longer the serious expectations that has permanent effects over the guidance of a conduct, of a personal behaviour – determined by rights and duties – the person degenerates until it becomes a mere postulate". G. Jakobs, *Enemy Criminal Law: Notions and Criticism*, 2009, 09.

not recognize the legal system and act willfully to destroy it. Consequently, they could not ask for rights. It would be impossible to establish a community if everybody started to act without restraint, or become a free-rider of the social order while undermining it. This would, in short, be the proverbial Hobbesian state of nature, as Jakobs suggests[10]. For him, the enemy is trying to erode the normative foundations of society, pushing it into complete anomie, while law-abiding individuals, can demand that their right to security must be preserved[11] , including the rights to life, to freedom, and to physical and psychological integrity, etc[12].

To the "citizen criminal law" the "accused" becomes part of the process that imposes a penalty by providing and rebutting information. Therefore, the convicted is "punished" and can accept the verdict, or at least "see the reason" why he was convicted (even if he considers the actual decision erroneous). The imposition of a sanction allows the counterfactual revalidation of the legal system whose order has been violated[13] and allows the perpetrator after he has "payed his debts" to become again part of society [14].

But since the state depends upon these shared presumptions among the subjects, it might even become necessary to act preemptively through a prospective judgment when facing a possible societal collapse[15]. The anticipation of penal custody to the

[10] "No normative context…exists by itself. On the contrary, it has also to determine the contours of the society. Only then it can be considered real…Hobbes attributed to all human beings, in the state of nature, an *ius naturale* to everything, meaning, in modern terminology, an *ius* in respect to which there's no correspondent obligation". G. Jakobs (Note 8), 30.

[11] "The Citizen Criminal Law is a right concerning the common individual. He is still considered a person. But the Enemy Criminal Law is 'law' in another sense. Certainly, the State has the right to enforce security when confronted by individuals who persistently commit crimes…Even more: the citizens have the right to demand from the State adequate measures, that is, they have the right to security". G. Jakobs (Note 8), 28.

[12] "For a norm to determine the configuration of a society, the conduct in conformity with it really must be expected in all of its fundamental aspects. This means that the calculations of the people living in society should have as a starting point the fact that everybody else will behave according to the norm, that is, without infringing it…Without sufficient cognitive reassurance, the efficacy of the norm fades away and turns into an empty promise, to the extent that it no longer offers a social configuration that is susceptible to be experienced". G. Jakobs (Note 8), 32.

[13] "Crime and sanction are found on the same level: crime is a repudiation of society's structure, while sanction is a rejection of this repudiation – it is the confirmation of the structure. From this point of view, the execution of the sanction accomplishes its goals: it confirms society's configuration…The theory of criminal law as protecting norm's effectiveness shows its importance, especially for the objectives of the criminal sanction: crime is a violation of the norm's effectiveness, and the sanction is the elimination of the violation." G. Jakobs*, What does the criminal law protect? in, Criminal law and Functionalism*, 2005, 50-51, A. Callegari, N. Giacomolli.

[14] See Fritjof Haft, *Der Schulddialog: Prolegomena zu einer pragmatischen Schuldlehre im Strafrecht* (Freibur-Muenchen: Karl Alber, 1978).

[15] "[The enemy] is the individual that with his behaviour…has moved away, lastingly, or at least decidedly, from the Rule of Law, and no longer offers the minimum cognitive reassurance to be treated as a person. [In this case] the penal custody advances further in time, to the planning stage, and the criminal sanction is imposed based on facts that would be committed, and not on what actually happened. The legislator's reasoning is this: somebody else hurts me because of the lack of legality (*status injusto*) of his behaviour,

moment of the planning-stage of the *iter criminis* (usually not punishable) then becomes possible. While all this might sound rather Hobbesian, a closer reflection shows that it is also not far from the Kantian concept of state of "lawlessness", developed in the Perpetual Peace:

> It is usually accepted that a man may not take hostile steps against any one, unless the latter has already injured him by act. This is quite accurate, if both are citizens of a law-governed state. For, in becoming a member of this community, each gives the other the security he demands against injury by means of the supreme authority exercising control over them both. The individual…who remains in a mere state of nature deprives me of this security and does me injury by mere proximity. There is perhaps no active (*de facto*) molestation, but there is a state of lawlessness (*status injustus*) which, by its very existence, offers a continue menace to me. I can therefore compel him, either to enter into relations with me under which we are both subject to law, or to withdraw from my neighbourhood[16].

In fact, Jakob's central ideas are based on a particular reading of social contract theories, such as that of Rousseau and Fichte. For them, every criminal is in a way an enemy because the violation of the contract is an attempt to destroy the civilized society, and therefore, those who commit a crime should lose their rights. However, differences among Rousseau, Hobbes and Kant also exist. For Hobbes, the criminal should be treated in a different way from the *enemy*: according to Hobbes, only treason against the sovereign was considered the act of an enemy[17]; according to Kant, only those who refuse to join the social contract should to be treated as enemies. So, for Hobbes and Kant, it was possible to make a distinction between a law that would be applied to common criminals and a specific kind of law that would be applied to those considered enemies. This creates some conceptual confusion, since precisely around this time the "enemy", i.e., the external foe, is no longer considered a subject outside of the law, but can be fought only as long as he is the agent of the other sovereign, and deserves protection after he has laid down his arms (a problem we will come back in the conclusion). Since the external foe (*polemios*) and the personal enemy (*echtros*) are clearly distinct ascriptions, the question is how the "enemy" of the social order is to be thought of. According to Jakobs, since the state is a social construction – just as is citizenship – if the individual does not recognize the state as a legitimate organization, the state won't recognize the individual as a citizen[18]. Here his Kantian influence comes

that threatens me constantly. A further formulation: an individual who does not admit to enter in a state of citizenship, cannot partake on the benefits of the concept of person". G. Jakobs (Note 8), 35.

16 I. Kant, *Perpetual Peace*, 2010, 56-57.

17 "Also facts of hostility against the present state of the Commonwealth are greater crimes, than the same acts done to private men; for the damage extends itself to all…crimes the Latines understand by Crimina Laesae Majestatis." T. Hobbes, *Leviathan*, 2015, 245.

18 "The State can act in two ways against criminals: It can see them as someone who has made a mistake, or individuals who must be stopped from destroying the legal system altogether… As it has been shown,

to the fore – if the individual insists on a permanent state of lawlessness that threatens the rest of society, society must treat him as an enemy[19]:

> The exclusion [of personhood] occurs because the individual no longer offers any guarantee of a future behaviour according to the law, that is, because his personality is not sufficiently grounded in a cognitive manner. The exclusion does not fall over the individual as a tragic and undeserved destiny. Because every single normative institution has to be cognitively cemented, the dangerous individual – like everybody else – has the obligation to show that, in some respects, he is reliable…The cognitive trust is the condition of inclusion. In other words, personhood is not a mere concession from society, nor a mere self-development, but it is much more than this; it is the product of the relation in which both parties, society and the individual, will contribute necessarily to it…Law is linked to the power to coerce, being coercion, conceptually, the hetero-administration, that is: depersonalization. Law is linked, consequently, to the power to exert coercion[20].

Some critics of Jakobs say that the enemy criminal law is not really law, since it does not protect – but instead, suppresses – rights; nevertheless, for Jakobs, the enemy criminal law is indeed law, not only because it represents the right to security of the citizens, but also because it can coerce those who do not justify the presumption that they will act according to the rules, as Kant suggested[21]. For Jakobs, if the cognitive reassurance is not provided by the individual, the state can only restore order through force, since the criminal sanction can no longer be used to revalidate counterfactually what isn't considered valid in the first place by the enemy. Thus the only thing that's left is pure coercion applied by the state[22]:

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the personhood, as an exclusive normative construction is unreal. It will only be real when the expectations that are directed towards a person can also be realized…Who does not give a cognitive reassurance of his personal behaviour cannot expect to be treated like a person, but the State must not treat him as a person, since otherwise, it would weaken the right to security of common citizens". G. Jakobs (Note 8), 40.

[19] "The proposition 'in a democracy, everyone has the right to be treated as a person' is incomplete…The responsibility to render sufficient cognitive support is the duty of the individual, at least with regard to the provision, widely reliable, of fidelity to the legal order. Consequently, the correct formulation is as it follows: 'everyone who conforms their actions to the legal order with certain reliability has the right to be treated as a person' and who else doesn't, will be hetero-administered, meaning that he won't be treated as a person". G. Jakobs (Note 8), 58.

[20] G. Jakobs (Note 7), 11.

[21] "[Kant] on The Metaphysics of Morals mentions freedom as the only innate right (*angeborene Recht*), understood as 'independence from the arbitrariness imposed by others', linking law to the power to coerce and, according to his conception, law is 'the set of conditions under which one's will can be reconciled with someone else's will as a general right of freedom' and the 'coercion' imposed in the face of the 'unjust' is an 'obstacle against an obstacle to freedom' being therefore 'in order with the law'. This connection between law and coercion is exposed by Kant". G. Jakobs (Note 7), 02.

[22] "If the cognitive foundation is not present, then security must be restored coercively. This is how the dangerous individual must be handled: as an enemy. A society that is not capable – to use a frequently criticized expression – to neutralize its enemies, will fall. If it does not fall, it's because it is still able to neutralize such people (even if, for shame or pudency, this society gives its own actions some other name)". G. Jakobs

> Those who want to be treated as persons must offer in exchange a cognitive reassurance that they will behave predictably. Without this reassurance, or if it is expressly denied, criminal law ceases to be a reaction from society against one of its members and it becomes a reaction against an adversary. This doesn't mean that "anything goes", that excessive measures will be applied; instead, it is possible to recognize a potential personality to the adversary, so in the fight against them, it won't be possible to exceed the necessary measures[23].

In this aspect, the war on terror apparently goes further than the enemy criminal law suggests: the practice of enhanced interrogation techniques and signature strikes exceed the counter-measures mentioned by Jakobs. However, since he did not established clear limits for resorting to these measures, they do not seem incompatible with his theory either. For instance, he argues that "the punishment [for the terrorist] well before causing any harm or his harsh interrogation don't fit on a perfect Rule of Law…[as] they belong to a state of exception"[24]. The enemy criminal law characterizes a state of exception in a constitutional order when it is subjected to threats it cannot effectively address. All these arguments were validated by Putin during a speech he gave in 2001 about terrorism in Chechnya[25].

The enemy criminal law has four characteristics, which are all present in the war on terror:

> The criminal law of the enemy follows distinct rules from those of the criminal law of the citizen…The characteristics of the enemy criminal law are: (1) wide progression of the limits of punishment, that is, the change of perspective from the action that was actually practiced to the action that supposedly will be practiced…(2) lack of a proportional reduction of the penal sanction imposed in advance…(3) the passage from a criminal law that focus on common criminality to a legislation that targets enemies…(4) the suppression of due process rights, in which the incommunicability of the detainee is the classic example[26].

The first characteristic can be easily identified in the war against terrorism. Although criminal law is usually retrospective, being imposed after the fact, in the

(Note 7), 12.

[23] G. Jakobs. *The Science of Law and the Science of Criminal Law*, 2003, 66.

[24] G. Jakobs (Note 8), 69.

[25] "At the end of the day most issues in Chechnya, like in many other parts of the planet, can be solved by political means. With terrorists, we will resolve these issues by force. Terrorists […] use the Western institutions and Western ideas of human rights and the protection of civilians to further their own ends, but they do it not in order to promote these ideas, not to protect the Western values and Western institutions, but in order to fight them. Their ultimate goal is destruction. That should be understood and taken into account, and we cannot ignore it in forming public opinion." V. Putin. *Answers to Questions Following Russian-Belgium Talks*, 2001. Available at: http://en.kremlin.ru/events/president/transcripts

[26] G. Jakobs (Note 24), 68.

case of the "enemy" it is necessary to act *preemptively* because terrorism is not a mere crime, but an attempt to destroy the social order as such. As Condolezza Rice explained before the National Comission on Terrorist Attacks Upon the United States, "usually in law enforcement you wait until a crime is committed and then you act. We cannot afford, in terrorism, to wait until a crime is committed[27]". However, what Ms. Rice did not explain was how one can prevent terrorist attacks, by using penal custody against someone *who has not done anything visible or perceptible indicating his "systemic enmity"*.

Such a prospective use of criminal law usually entails the problematic "profiling" of suspects, and that means that minorities will nearly inevitably become the target. During the Cold War, marxists were associated with subversive activities; after Oklahoma, right-wing militias were seen as a threat; in the era of global jihad, muslims are the main suspects[28]. The implications are even more ominous when we consider the huge waves of immigration which took place in the last 30 years, and that minorities now comprise a large part of western societies. Many of them did not integrate completely, but live apart from the rest, with their own rules. Admittedly, this is when things start to get problematic: people following different principles, distancing themselves from the rule of law, acting in accordance with a different set of norms[29], carving out their identities from values that are incompatible with a democratic society.

For example, "a plurality of French Muslims (46 percent) and a crushing majority of British Muslims (81 percent) considered themselves Muslims first, identifying with their respective European nations only to a secondary extent"[30]. In this case, multiculturalism is in danger of morphing into a destructive force instead of being a constructive one[31]: "In Germany's most disadvantaged neighborhoods, radical Islam is quietly taking root. In Neukölln (Berlin), for example, unemployment stands at 24 percent, and lawmakers complain that the large Turkish and Arab communities are building parallel societies, instead of integrating into German society"[32]. Minorities that aren't absorbed or integrated, start to espouse violent views and extremist opinions

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[27] C. Rice. *National Commission on Terrorist Attacks upon the United States*, 2004. Available at: http://www.9-11commission.gov/.

[28] "Islam has a problem today. The places that have trouble accommodating themselves to the modern world are disproportionately Muslim. In 2013, of the top 10 groups that perpetrated terrorist attacks, seven were Muslim". F. Zakaria. *Islam Has a Problem Right Now, Washington Post*, 2014. Available at: http://www.washingtonpost.com.

[29] "Sharia councils in the UK say they deal strictly with family matters, such as marriage and child custody battles, but there is concern that they constitute a parallel legal system."*Sharia courts creating dual justice system in UK?* Available at: www.rt.com

[30] D. Frum. *Will This Time Be Different? Atlantic,* 2015. Available at: http://www.theatlantic.com.

[31] "Adding to all of this, is the explosive power of *cultural pluralism*. Either all the different cultures are mere sums of the same legal community, being in fact the multiple faces of the same culture; or – and this is the dangerous variant – the differences forge the identity of each member and then the common legal basis is reduced to a simple instrument to make social life viable." G. Jakobs. (Note 25), 70.

[32] S. Somaskanda. *The Firestarter of Berlin*, *Foreign Policy*, 2014. Available at: http://www.foreignpolicy.com.

about the world, fomenting an environment of lawlessness: "A pair of Pew surveys in the mid-2000s, for example, found that substantial minorities of Muslims in every European country surveyed did not rule out violence against civilian targets perceived as anti-Islamic"[33]. Furthermore, one impressive statistic is that "more British Muslim men have joined ISIS and the Nusra Front than are serving in the British armed forces[34]", proving that non-assimilated minorities are willing to fight for the enemies of western states. The mayor of Roterdam, Ahmed Aboutaleb, himself a muslim, said that immigrants who aren't willing to integrate should leave Europe[35]. The question then should be: what happens if they don't leave? How should western democracies deal with people who have citizenship but don't relate to their own country?

In the United States, the threat of terror attacks has contributed to the expansion of the so called "patriot groups" throughout the country. This seems to support Jakobs' arguments that terrorism drives society to the brink of a state of anarchy, when citizens no longer trust the government to protect them[36]. The Department of Homeland Security already classifies the "patriot groups" as one of the most dangerous organizations in America, coming close to Islamic terrorism[37]. In the face of home-grown terrorism[38] and the danger of jihadists returning home[39] what should be done? "Preventive detention for suspects? Marks on personal identification documents? Expatriation for extremists? All of those ideas are already under consideration"[40]. The depersonalization proposed by Jakobs seems to have found a champion in the British government, that strips the citizenship of individuals who have traveled to combat zones to fight alongside groups that are openly against western democracies[41]. In the *Queen's Speech*, delivered after the victory of the Conservative Party in the 2015 British elections, the Tories unveiled the *Extremism Bill*, aiming to "promote social cohesion and protect people by tackling extremism [and] combat groups and individuals who reject our

[33] D. Frum (Note 30), 2015.

[34] M.A. Weaver. *Her Majesty's Jihadists*. *The New York Times Magazine*, *2015*. Available at: www.nyt.com.

[35] D. Raven. *Mayor of Rotterdam tells unhappy Muslims to 'pack your bags', Mirror*, 2015. Available at: http://www.mirror.co.uk.

[36] "President Obama, who addressed the nation in a rare Oval Office speech following the shootings, continues to receive negative marks for handling terrorism and dealing with Islamic State militants. Despite his call for greater gun restrictions aimed at keeping high-powered guns out of terrorist hands, the Post-ABC poll finds record high opposition to a ban on assault weapons." S. Clement, *Americans doubt U.S. can stop 'lone wolf' attacks, The Washington Post*, *2015*. Available at: www.washingtonpost.com

[37] D. Carter *et al*. *National Consortium for the Study of Terrorism and Responses to Terrorism*. 2014, 07. Available at: http://www.start.umd.edu.

[38] International Security. *Homegrown Extremism: 2001-2015*. Available at: http://securitydata.newamerica.net/

[39] "Our Intelligence Community believes that thousands of foreigners – including Europeans and some Americans – have joined [ISIS] in Syria and Iraq. Trained and battle-hardened, these fighters could try to return to their home countries and carry out deadly attacks." B. H. Obama, *We Will Degrade and Ultimately Destroy ISIL*, 2014. Available at: http://www.whitehouse.gov.

[40] Spiegel Editorial*, The Extremist Trap, 2014.* Available at: http://www.spiegel.de/international.

[41] C. Lynch, J. Trindle, *Tearing Up the Magna Carta, Foreign Policy*, 2015. Available at: http://foreignpolicy.com/.

values and promote messages of hate.[42]" The French Prime-Minister Manuel Valls also employed the contratualist underpinnings of the enemy criminal law after the attacks: "You are French because you adhere to a community. [The loss of citizenship] applies to terrorists who have been convicted of especially grave crimes, and it is because they have broken the contract…it is a way of consolidating the national pact.[43]"

Throughout the years, many terrorist attacks were carried out in the U.S. and Europe. There were 9/11, the Madrid bombings, the London bombings, the Boston bombings, Fort Hood, Toulouse, Ottawa, Sidney, Copenhagen, Chattanooga, Paris, San Bernardino, Brussels, Orlando and Nice. The pattern is the same: muslims who do not identify with western values and start to relate to violent religious ideology, promoted by al Qaeda, ISIS, Taliban, Hamas, Hezbollah and many others[44] which are competing for dominance and hegemony over the Islamic narrative[45].

In the United States, politicians have already proposed the surveillance[46] and profiling[47] of members of muslim communities. In Europe, politicians are looking for restrictions in the Schengen Zone to curb the free movement of potential terrorists who hold an European passport[48]. Another approach is the preventive prison of returnees from the conflict zones in Syria and Iraq. But while many countries have tried *in absentia* their own citizens who joined the ranks of terrorist organizations, Denmark follows a different approach, preferring to integrate the perpetrators back into society[49]. It is doubtful whether this kind of restorative justice can work[50], but it is certainly unjust: while former jihadists are free to come and go in Denmark, Kurt Westergaard, the cartoonist who drew an image of the muslim prophet 10 years ago went into hiding, since he was sentenced to death by a *fatwa*.

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[42] *The Queen's Speech, 2015, 62. Available at: https://www.gov.uk/government/.*

[43] A Nossiter. *French Proposal to Strip Citizenship Over Terrorism Sets Off Alarms. New York Times*. Availaible at: www.nyt.com

[44] U.S. Department of State, Bureau of Counterterrorism. *Foreign Terrorist Organizations*. Available at: http://www.state.gov.

[45] V. Nasr. *The War For Islam*. Foreign Policy, 2016. Available at: www.foreignpolicy.com

[46] "In the wake of the recent attacks in Paris and San Bernardino, California, U.S. Representative Peter King is renewing his call for enhanced surveillance of mosques across the United States…'This is nothing against Muslims…But the fact is, [mosques are] where the threat is coming from, and we're kidding ourselves. We have this blind political correctness which makes no sense'." M. Gorman. *Representative Peter King Calls for Better Surveillance of Mosques*, 2015. Available at: www.newsweek.com

[47] "Donald Trump said Sunday that in the wake of the mass shooting in Orlando, it's time for the United States to start looking at racial profiling as a preventative tactic. 'Well I think profiling is something that we're going to have to start thinking about as a country…Other countries do it, you look at Israel and you look at others, they do it and they do it successfully." E. Schultheis, *U.S. must "start thinking about" racial profiling*, 2016. Availbale at: www.cbsnews.com

[48] G. Cañas. *Los seis grandes de la UE plantean reforzar el control a los yihadistas*, *El País*, 2014. Available at: http://internacional.elpais.com.

[49] A. Higgins. *For Jihadists, Denmark Tries Rehabilitation*, *New York Times*, 2014. Available at: http://www.nytimes.com/.

[50] "So far, only six Danish returnees—identified by the head of the Aarhus program as 'Syria volunteers'—have opted to undergo the deradicalization process. None have completed it." B. Taub. *What Happens to Former ISIS Fighters*? *The New Yorker*, 2015. Available at: www.newyorker.com.

Norway, in turn, was attacked in 2011 by Anders Behring Breivik, a Norwegian citizen who killed 77 people, most of them young members of a pro-immigration party. Breivik was motivated by his views on politics, affirming that he neither recognized the Norwegian Constitution nor the Norwegian legal system, as he declared when declining judicial review of his verdict by a superior Court[51] which sentenced him to 21 years in jail. The sanction raises the further question of what to do after his release if his convictions remain unchanged. It is for this reason that Jakobs defends the security custody[52] as a remedy to deal with terrorists, instead of sentencing them to a certain amount of years. The security custody focuses on the individual's dangerousness (a lasting state of anti-sociability). Although 21 years in prison is a shockingly lenient sentence for someone who killed 77 people, the Norwegian Prime-Minister affirmed that Norway wouldn't change its policy because of the terrorist attacks. The Breivik case also shows how hard it is to fight terrorism through profiling: Brevik was a common Norwegian citizen, an organic farmer, who had a license to carry weapons and buy large amounts of fertilizers that were used to make bombs. Thus profiling falls short as a strategy to prevent terrorism, as it is too indiscriminate or looks for the wrong clues instead, and thereby is likely to corroborate the terrorist narrative and alienate those profiled still further. That does not mean that prevention is not important in fighting terror, but the focus should be more on the appropriate reaction to it. Terrorists avoid direct conflict because they know that although they cannot win militarily, they can drag states into situations that will drain their resources and will spread fear among the population. This means that terrorism can only win with the help of its adversary who miscalculates his response in the face of public demand for security[53]. The fight against terrorism is particulaly hard for democratic societies because their way of life is in danger: finding the exact balance between freedom and security is not an easy task. An enemy who does not use uniforms, but moves among civilians in order to commit barbaric acts, poses an unprecedented threat to the western model of political organization. The enemy criminal law elaborated by Günther Jakobs is a proposal to protect democracy in the face of the terrorist menace, but his system of criminal law operates with the logic of a state of exception.

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[51] "After being sentenced Friday to 21 years in prison for the July 22 attacks that killed 77 people in Norway, Anders Behring Breivik was asked how he wished to respond to the ruling. Did he wish to appeal? Did he want some time to think about it? Flanked by his attorneys, he shuffled some papers, pulled the microphone toward him, and denounced the proceedings. 'As I explained in my first statement to the court on April 16, I do not recognize this court as legitimate. I do not recognize this court as it has received its mandate from political parties that support multiculturalism. The verdict is in my eyes illegitimate. At the same time, I cannot appeal the verdict, for to appeal would be to legitimize this court'." E. Groll, *Breivik Won*, *Foreign Policy*, 2012, emphasis added. Available at: http://foreignpolicy.com/.

[52] G. Jakobs (Note 8), 22.

[53] "Terrorist outrages, when they occur, are bound to become more deadly. Increasingly, we will be under pressure to abridge our laws and liberties in order to suppress the terrorists. It is a pressure that should be resisted." D. Fromkin. *The Strategy of Terrorism*, *Foreign Affairs*, 1975. Avaliable at: http://www.foreignaffairs.com/.

After examining the concept of the enemy criminal law, the following section deals with its application in practice.

III. THE WAR ON TERROR

The attacks of 9/11 killed nearly three thousand people on american soil and therefore they were considered an act of war which demanded a powerful reaction. President Bush compared Radical Islam to Imperialist Japan (as both represent patriarchal cultures that oppress women and that are politically motivated by suicidal martyrdom) to make his case that if America was able to change the latter, it could also change the former[54]. Those who did not agree with this approach were accused of "cultural condescension", since they apparently thought that muslims could not live up to the task of managing a democracy. Furthermore, since democracies do not wage war against one another[55], spreading democracy throughout the world would prevent future wars. To improve the odds of this bet, it was necessary to change the rules of the game. In this way, a new interpretation of the national and international legal order had to be adopted, so that traditional rights could not be applied to suspects linked to al Qaeda and its affiliates.

By depriving national and international rights to terrorists, the Bush administration implemented the enemy criminal law by making it the legal foundation of the war on terror. The traditionally embraced belief in progress, of being on the way to a world community realizing the "rule of law" was abruptly ended by this new form of warfare, where the West had to fight a stateless enemy, who was not protected by domestic or international law. Consequently, the U.S. government legalized the use of enhanced interrogation techniques, indefinite detention, and signature strikes. Since these enemies are not legal persons, but mere individuals in a natural state, the government decides what to do with them, in order to protect its (law-abidding)

[54] "The sacrifices of Americans have not always been recognized or appreciated, yet they have been worthwhile. Because we and our allies were steadfast, Germany and Japan are democratic nations that no longer threaten the world...Our commitment to democracy is also tested in the Middle East, which is my focus today, and must be a focus of American policy for decades to come. In many nations of the Middle East - countries of great strategic importance - democracy has not yet taken root. And the questions arise: Are the peoples of the Middle East somehow beyond the reach of liberty? Are millions of men and women and children condemned by history or culture to live in despotism? Are they alone never to know freedom, and never even to have a choice in the matter? I, for one, do not believe it. I believe every person has the ability and the right to be free. Some skeptics of democracy assert that the traditions of Islam are inhospitable to the representative government. This 'cultural condescension' as Ronald Reagan termed it, has a long history. After the Japanese surrender in 1945, a so-called Japan expert asserted that democracy in that former empire would 'never work'." G.W. Bush. *Remarks by President George Bush at the 20th Anniversary of the National Endowment for Democracy*, 2003. Available at: http://www.ned.org/george-w-bush/.

[55] "*Even though liberal states have become involved in numerous wars with nonliberal states, constitutionally secure liberal states have yet to engage in war with one another*. No one should argue that such wars are impossible; but preliminary evidence does appear to indicate that there exists a significant predisposition against warfare between liberal states". M. Doyle. *Kant, Liberal Legacies, and Foreign Affairs*. *Philosophy & Public Affairs*, 1983, p. 213.

citizens. Significantly, most of the changes in the legal order happened through the interpretation of laws and conventions by government lawyers, and not through legislative activity, revoking laws, amending the Constitution, or denouncing treaties.

The strategy is not new, as it evokes what Madeleine Albright said when she confronted the claims about the illegality of the Kosovo war[56]. Thus the legal framework for the war on terror consists mainly in (re)-interpretations of norms without changing a single word of them. There is no need for legislative action because lawyers serve as legal counsellors designing policies, even if they are thereby circumventing elementary safeguards on the rule of law. As government employees, these lawyers have to work for their client, i.e. the administration, and that's what the specialists at the Department of Justice and the Department of Defense did: they found a way to keep the existing law but changing its meaning without creating a political backlash. As Ron Wyden, the senior Senator for Oregon, stated: "*It's almost as if there are two laws in America*. And the American people would be extraordinarily surprised if they could see *the difference between what they believe a law says and how it has actually been interpreted in secret*"[57]. It is, therefore, instructive to study the specific "re-interpretations" in greater detail.

A - The authorization for the use of military force (AUMF)

The first action after 9/11 taken by the U.S. government was the Authorization for Use of Military Force (AUMF), passed as a joint resolution by the U.S. Congress on September 14, 2001, and signed by President Bush on September 18, 2001. It "authorize(s) the use of United States Armed Forces against those responsible for the recent attacks launched against the United States".

John Yoo, then Deputy Assistant Attorney General of the Department of Justice, provided the "right" interpretation of the Authorization for the Use of Military Power. No doubt, Yoo was doing his job as a government lawyer, when he suggested ways of circumventing the limits imposed by this law on the Executive. In his memorandum *The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them*, Yoo claims that the President has an inherent constitutional power to use military force, independently of the authorization by Congress[58]. The memo also charges those, who oppose the right of the President to wage war independently of Congress with not understanding the distinction between

[56] "James Rubin latter claimed that Madeleine Albright had been seeking the commitment of Robin Cook, the British Foreign Secretary, who had said that they had problems with their lawyers saying [the Kosovo war] was illegal. Albright's response was to 'Get more lawyers'." C. Sampford. R. Thakur, *Resposibility to Protect and Sovereignty*, 2013, Kindle Edition.

[57] J. Weiler, *American Police State(s)*, *Huffington Post*, 2014, emphasis added. Available at: http://www.huffingtonpost.com/.

[58] J. C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them*, 2001. Available at: http://www.lawfareblog.com/.

"declaring war" and "making war"[59].

The Constitution of the United States provides in Article 2 that "the President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States". According to Yoo, "these powers give the President broad constitutional authority to use military force in response to threats to the national security and foreign policy of the United States." Thus, the Executive Branch can apparently wage war without Congressional restraints. Obama did not agree with this rationale when he was a U.S. Senator[60], but after becoming President he declared war against ISIS unilaterally, on the grounds of the original AUMF. However, he has tried to assuage the criticism by issuing a new AUMF version, entitled *Joint Resolution to authorize the limited use of the United States Armed Forces against the Islamic State of Iraq and the Levant*, which was supposed to legitimize retroactively his declaration of war. Nevertheless, this inconsistent atitude creates severe normative and practical problems. The *practical problem* is illustrated by the infighting of the administration for keeping the schedule of pre-announced[61] withdrawals[62], despite the fact that the circumstances on the ground[63] would have counseled otherwise[64]. As to the *normative problem*, Harold Koh pointed out that "the President's goal of 'refining, then repealing' [Bush's] AUMF is both achievable and sustainable without undermining the security of the American people[65]". The objective of this proposal is to "tighten the language of [Bush's] AUMF to narrow substantive scope and improve accountability[66]" of the U.S. government. Nevertheless, the White House Press Secretary Josh Earnest admitted that the language employed in Obama's AUMF elaborated to "degrade and ultimately destroy ISIL" is intentionally broad because "it's important that there aren't overly burdensome constraints that are placed on the Commander-in-Chief who needs the flexibility to be

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[59] J. C. Yoo (Note 58).

[60] "-The President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation…History has shown us time and again, however, that military action is most successful when it is authorized and supported by the Legislative branch. It is always preferable to have the informed consent of Congress prior to any military action'." C. Savage. *Barack Obama's Q&A*. *Boston.com*, 2007. Avaliable at: http://www.boston.com/.

[61] Obama could have renegotiated Bush's *Status Of Forces Agreement*, demanding more troops to remain in the country after the 2011 deadline, what could have averted the rise of the Islamic State. See S. Page. *Panetta: '30-year war' and a leadership test for Obama, USA Today, 2014*. Available at: www.usatoday.com.

[62] "The president…doesn't believe in his own strategy and doesn't consider the [Afghanistan] war to be his. For him, it's all about getting out". R. Gates. *Duty: Memoirs of a Secretary at War*, 2015, Kindle Edition.

[63] V.P. Fortna. *Do Terrorists Win? Rebels' Use of Terrorism and Civil War Outcomes*, *International Organization*, 2015, 21. Available at: http://journals.cambridge.org.

[64] V. Felbab-Brown. *Blood and hope in Afghanistan: A June 2015 update*, *Brookings Institution*, 2015, emphasis added. Available at: http://www.brookings.edu.

[65] H. H. Koh. *Statement Before the Senate Foreign Relations Committee Regarding Authorization for Use of Military Force After Iraq and Afghanistan*, 2014, 05. Available at: www.foreign.senate.gov.

[66] H. H. Koh (Note 65), 14.

able to respond to contingencies that emerge in a chaotic military conflict like this[67].” What this analysis leaves out is that the “President’s goals” are not sustaining his own policies and that there is a widening gap between ideas and practices when it comes to ending the “Forever War”.

B - Patriot Act

The Patriot Act was the most controversial legislation enacted after 9/11. It authorized innumerable prerogatives to fight terrorism that encroached upon civil liberties. The National Security Agency (NSA) scandal, caused by Edward Snowden’s disclosures, was a direct result of the Patriot Act implementation[68], since it had authorized the unprecedented gathering of information. In this context, one of the most daunting aspects of the NSA are the secret Foreign Intelligence Surveillance Courts (FISC), responsible to grant warrants for investigations to collect data for the agency. On closer inspection these courts appear however to be mere *pro forma* institutions, instead of being a real check in order to balance the surveillance power of the State: “In 2012, the government requested its imprimatur for surveillance 1,856 times, an increase of 5% over its 2011 petitions. The court approved every request in both years”[69]. But while it all started under the Bush administration, “the massive surveillance programme has continued under the Obama administration, at home as well as abroad. And the culture of intense secrecy persists”[70]. In fact, the Obama administration has been more aggressive in prosecuting journalists and whistleblowers than any previous administration[71]. It is also well in line with Jakobs argument that if a state does not make a clear distinction between the citizen criminal law and the enemy criminal law, the whole system will be contaminated by the provisions of the latter, leading to unjust treatment of those who aren’t enemies, undermining the rule of law.

However, the United States Court of Appeals for the Second Circuit, declared that section 215 of the Patriot Act is unconstitutional because it “cannot bear the weight the government asks us to assign to it”, and that it does “not authorize the telephone metadata program”[72]. The decision put pressure on Congress, as many provisions of the surveillance program were about to expire. U.S. legislators passed therefore a new law called *USA Freedom Act* that transferred the bulk of phone records from the N.S.A

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67 The White House. *Office of the Press Secretary, Daily Briefing by the Press Secretary Josh Earnest*, 02/11/15. Available at. www.whitehouse.gov.

68 American Civil Liberties Union. *Rein in the surveillance state*, 2014. Available at: https://www.aclu.org/.

69 S. Ackerman. *Fisa chief judge defends integrity of court over Verizon records collection, The Guardian*, 2013. Available at: http://www.theguardian.com.

70 E. McAskil, J. Broger. G. Greenwald. *The National Security Agency: surveillance giant with eyes on America*, *The Guardian*, 2013. Available at: http://www.theguardian.com/

71 A. Hunt, *Under Obama, a Chill on Press Freedom*, *New York Times*, 2014. Available at: http://www.nytimes.com.

72 *United States Court of Appeals*. *ACLU v. Clapper,* 2015, 82. Available at: http://pdfserver.amlaw.com.

to private companies, allowing access to this information with a specific court order[73]. While defenders of the dragnet program claim that the use of the "meta-data" foiled terrorist attempts, the record does not bear this out. *The President's Review Group on Intelligence* confirmed that "the information contributed to terrorist investigations using section 215 telephony meta-data was not essential to preventing attacks[74]". *The Privacy and Civil Liberties Oversight Board*, pointed out that proponents of this practice could "not identify a single instance involving a threat to the United States in which the telephone records program made a concrete difference in the outcome of a counterterrorism investigation. Moreover, we are aware of no instance in which the program directly contributed to the discovery of a previously unknown terrorist plot or the disruption of a terrorist attack[75]." The question from now on is how the reform of the investigative powers will deal with the new trends of terror, like the lone wolf[76] and the ever-increasing use of social media[77].

C- The torture memos

The first document of the "torture memos" was authored by John Yoo in January 9, 2002, and is entitled *Application of Treaties and Laws to al Qaeda and Taliban Detainees*:

> We conclude that these treaties [laws of armed conflict] do not protect members of the al Qaeda organizations, which as a non-state actor cannot be a party to the international agreements governing war. We further conclude that these treaties do not apply to the Taliban militia… Because of the novel nature of this conflict, moreover, we do not believe that al Qaeda would be included in non-international forms of armed conflict to which some provisions of the Geneva Conventions might apply. Therefore, neither the Geneva Conventions nor the War Powers Act regulate the detention of al Qaeda prisioners captured during the Afghanistan conflict.…Afghanistan's status as a failed state is ground alone to find that the members of the Taliban militia are not entitled to enemy POW status under the Geneva Conventions[78].

[73] M.D. Shear. *In Pushing for Revised Surveillance Program, Obama Strikes His Own Balance*. New York Times, 2015. Available at: www.nyt.com

[74] R. A. Clarke *et al*. *Liberty and Security in a Changing World - Report and Recommendations of The President's Review Group on Intelligence and Communications Technologies*, 2013, 104-105. Available at: https://www.whitehouse.gov/

[75] D. Medine *et al*. *Report on the Telephone Records Program Conducted under Section 215 of the USA Patriot Act and on the Operations of the Foreign Intelligence Surveillance Court*, 2014, 11. Available at: http://justsecurity.org.

[76] U.S. Department of State. *Bureau of Counterterrorism*, *Country Reports on Terrorism*, 2015, 08. Available at: http://www.state.gov.

[77] See J.M. Berger, J. Morgan. *The ISIS Twitter Census - Defining and describing the population of ISIS supporters on Twitter*, *Brookings Institution*, 2015. Available at: http://www.brookings.edu.

[78] J. C. Yoo. *Applications of Treaties and Laws to al Qaeda and Taliban Detainees*, 2002, 01-02. Available at: http://nsarchive.gwu.edu.

The argument is clear: enemy combatants don't have any rights because they don't recognize the the national (U.S.) or international (U.N.) legal order. As the enemy criminal law determines, an individual ceases to be a a subject of rights when his actions signal a definitive rupture with the existing laws. Thus suspected terrorists cannot claim subjective rights, such as due process of law and limited pre-trial detention, like the ones in Guantanamo. This is the crude logic of the enemy criminal law when applied to the enemy combatant and also to the states that are suspected to harbour them, in which case they lose their right to sovereignty. As Alberto Gonzales stated in a memo of January 25, 2002, "[Afghanistan] was in widespread material breach of its international obligations"[79], therefore it could not denounce the invasion of its territory by foreign troops, nor ask for the application of the Geneva Conventions to its nationals. By interpreting the Geneva Conventions in such a way as to avoid their application for suspects of terrorism, Yoo had argued:

> It appears that the drafters of the Conventions had in mind only two forms of armed conflicts that were regarded as matters of general international concern at the time: armed conflicts between Nation States (article 2); and large scale civil war within a Nation States (article 3)[80].

The United States declared the "war on terror" but at the same time, it defined it as a specific kind of war, one that does not relate to any previous armed conflict. Therefore, it is a war that is not regulated by any conventions. This interpretation justified the treatment of those detained on the suspicion of belonging to al Qaeda or to the Taliban, allowing the use of "enhanced interrogation techniques"[81]. This interpretation also granted immunity for those who had ordered or executed such acts[82]. Despite Yoo and Gonzales rationale, Colin Powell expressed his dissent in a memo of January 26, 2002, stating that if the U.S. President declared the Geneva Conventions inapplicable to prisoners suspected of belonging to al Qaeda and the Taliban it would "reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the laws of war for our

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[79] A. Gonzales. *Application of the Geneva Convention on Prisioners of War to the Conflict with al Qaeda and the Taliban,* 2002. Avaliable at: http://nsarchive.gwu.edu.

[80] J. C. Yoo (Note 78), 08.

[81] "The nature of the new war places a high premium on other factors, such as the hability to to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against american civilians…In my judgment, this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisioners". A. Gonzales (Note 81).

[82] "By concluding that the GPW [Geneva Convention Relative to the Treatment of Prisoners of War] does not apply to al Qaeda and the Taliban…substantially reduces the threat of domestic criminal procedure under the War Crimes Act (18 U.S.C. 2441)…A determination that the GPW is not applicable to the Taliban would mean that Section 2441 woukd not apply to actions taken with respect to the Taliban. [The President] determination would create a reasonable basis in law that Section 2441 does not apply, which would provide a solid defense to any future prosecution." A. Gonzales (Note 81).

troops, both in this specific conflict and in general.[83]" It also could "provoke some individual foreign prosecutors to investigate and prosecute our officials and troops.[84]" Powell suggested instead that applying the Geneva Conventions to the conflict in case "presents a positive international posture, preserves U.S. credibility and moral authority by taking the high ground.[85]" As we know, Powell lost the argument, and former President Bush endorsed the position of Yoo and Gonzales in a memo of February 7, 2002, declaring "I also accepted the legal conclusion of the Department of Justice and determine that common article 3 of the Geneva Convention does not apply to either al Qaeda or Taliban detainees[86]". Furthermore, "I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisioners of war under article 4 of Geneva.[87]" Nonetheless, Bush committed himself to the position claiming that "our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment[88]".

The justifications for torture were first discussed in a memo by Jay S. Bybee of the Office of Legal Counsel in the Justice Department. The memorandum of August 1, 2002, entitled *Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340-A*, circumvents the *United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*. It argued first, that Title 18 of the United States Code (US penal code) §§ 2340-2340-A defines torture as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control." But Part IV of the memo - after analyzing "international decisions regarding sensory deprivation techniques" - concluded that "there is a wide range of such techniques that will not rise to the level of torture[89]"; in other words, it established a set of procedures that would not legally be considered torture, since "these cases make clear that…they do not produce pain or suffering of the necessary intensity to meet the definition of torture.[90]"

On December 2, 2002, William J. Haynes, of the General Counsel of the Department of Defense, issued an action-memo entitled *Counter-Resistance Techniques*, to aid in the interrogation of detainees at Guantanamo Bay, establishing

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[83] C. Powell, *Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan*, 2002, 02. Available at: http://nsarchive.gwu.edu.

[84] C. Powell (Note 83), 03.

[85] C. Powell (Note 83), 03.

[86] G. W. Bush, *Humane Treatment of al Qaeda and Taliban Detainees*, 2002. Available at: http://nsarchive.gwu.edu/.

[87] G. W. Bush (Note 86).

[88] G. W. Bush (Note 86).

[89] J.S. Bybee, *Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340-A,* 2002. Available at: http://news.findlaw.com/nytimes/docs/.

[90] J.S. Bybee (Note 89).

three categories of counter-resistance techniques. Category I techniques would consist in the use of "fear related approaches such as yelling at the detainee [and] deception techniques such as multiple interrogations[91]"; Category II techniques would consist in the "use of stress positions such as the proposed stading for four hours, the use of isolation for up to thirty days, and interrogating the detainee in an environment other than the standard interrogation booth…as long as no severe physical pain is inflicted and prolonged mental harm intended[92]." Other techniques were also allowed such as "deprivation of light, the placement of a hood over the detainee's head during transportation and questioning, and the use of 20 hours interrogation" as the "exposure to cold weather or water is permissible with appropriate medical monitoring. The use of wet towel to use the misperception of suffocation would also be permissible if not done with specific intent to cause prolonged mental harm"[93]. This set of methods came to be known as "enhanced interrogation techniques" which were based on the training of American personnel to resist torture in case of capture by enemy forces not abiding by the Geneva Conventions. As the *Senate Armed Services Committee Inquiry into the Treatment of Detainees in U.S. Custody* explains:

> In December 2001, more than a month before the President signed his memorandum, the Department of Defense (DoD) General Counsel's Office had already solicited information on detainee "exploitation" from the Joint Personnel Recovery Agency (JPRA), an agency whose expertise was in training American personnel to withstand interrogation techniques considered illegal under the Geneva Conventions. JPRA is the DoD agency that oversees military Survival Evasion Resistance and Escape (SERE) training. During the resistance phase of SERE training, U.S. military personnel are exposed to physical and psychological pressures (SERE techniques) designed to simulate conditions to which they might be subject if taken prisoner by enemies that did not abide by the Geneva Conventions. As one JPRA instructor explained, SERE training is "based on illegal exploitation (under the rules listed in the 1949 Geneva Convention Relative to the Treatment of Prisoners of War) of prisoners over the last 50 years. The techniques used in SERE school, based, in part, on Chinese Communist techniques used during the Korean war to elicit false confessions, include stripping students of their clothing, placing them in stress positions, putting hoods over their heads, disrupting their sleep, treating them like animals, subjecting them to loud music and flashing lights, and exposing them to extreme temperatures. It can also include face and body slaps and until recently, for some who attended the Navy's SERE school, it included waterboarding[94].

[91] W. Haynes. *Counter-Resistance Techniques*, 2002. Available at: http://www2.gwu.edu.
[92] W. Haynes (Note 91).
[93] W. Haynes (Note 91).
[94] Senate Committee on Armed Services. *Inquiry into the Treatment of Detainees in U.S. Custody*, 2008, xiii. Available at: http://www.armed-services.senate.gov.

The use of the Joint Personnel Recovery Agency and the objectives of the Survival Evasion Resistance and Escape training in extracting information from "unlawful combatants" subverted however the purpose of this program by legalizing torture[95]. The C.I.A responding to a request by the Senate Select Intelligence Committee, affirmed that "the program, including interrogations of detainees on whom EITs [enhanced interrogation techniques] were used, did produce valuable and unique intelligence that helped thwart attack plans, capture terrorists and save lives.[96]" Of course, if all there is to this problem are questions of effectiveness then the International Community might as well get rid of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, as the whole point is to insure that a government is committed to maintain freedom and security, instead of choosing between one or the other. Furthermore since effectiveness claims are shrouded in secrecy the factual claims are hard to corroborate.

President Obama signed the Executive Order 13491 on January 22, 2009, rescinding Executive Order 13440, which allowed enhanced interrogations techniques, and fulfilled one of the promises he made on the campaign trail. Whether actual practice has substantially changed remains to be seen, particularly since the hiring of "private contractors" who do the "dirty work" on foreign soil leaves many loopholes.

D - Signature strikes and the kill list

The first drone strike probably took place on October 20, 2001[97]. After fifteen years, one thing is certain: The U.S. President has now become dependent on signature strikes carried out by drones, because combat troops were withdrawn and political resistance to new engagements is mounting. To that extent, having drone operators working in military bases inside the U.S. seemed the right choice. The Bush administration "began arming unmanned aircraft to hunt al Qaeda leaders in Afghanistan immediately after the Sept. 11 attacks[98]", and in 2008 the Executive established a low standard for drone strikes, defining criteria based solely on the characteristics of people who are believed to be terrorists. This shift in American foreign policy enabled the broad use of the signature strikes[99]. Despite the fact that

[95] "Typically, those who play the part of interrogators in SERE school neither are trained interrogators nor are they qualified to be. These role players are not trained to obtain reliable intelligence information from detainees. Their job is to train our personnel to resist providing reliable information to our enemies. As the Deputy Commander for the Joint Forces Command (JFCOM), JPRA's higher headquarters, put it: 'the expertise of JPRA lies in training personnel how to respond and resist interrogations – not in how to conduct interrogations'." Senate Committee on Armed Services (Note 95), xiii.

[96] C.I.A. *Fact Sheet Regarding the SSCI Study on the Former Detention and Interrogation Program, 2014. Available at: https://www.cia.gov/.*

[97] M. Zenko, *Targeted Killings and Signature Strikes, Council on Foreign Relations*, 2012. Available at: http://blogs.cfr.org/zenko.

[98] A. Entous, S. Gorman. J. Barnes, *U.S. Tightens Drone Rules, Wall Street Journal*, 2011. Available at: http://www.wsj.com/

[99] E. Schimitt. D. Sanger. *Pakistan Shift Could Curtail Drone Strikes, New York Times*, 2008. Available at:

such policies were shaped by the Bush presidency, the Obama administration took advantage of it and increased the use of drones in the war on terror:

> The Obama administration markedly stepped up the use of drones. Since Obama's inauguration in 2009, the CIA has launched 330 strikes on Pakistan – his predecessor, President George Bush, conducted 51 strikes in four years…Across Pakistan, Yemen and Somalia, the Obama administration has launched more than 390 drone strikes…eight times as many as were launched in the entire Bush presidency[100].

The drones are used in signature strikes[101] – also called terrorist-attack-disruption strikes or TADS – which target suspects selected according a profile[102]. This method is akin to the enemy criminal law since it acts preemptively against someone who has not done anything yet but is considered a potential terrorist because of his personal characteristics. For example, "people in an area of known terrorist activity, or found with a top Qaeda operative, are probably up to no good"[103]:

> [By] utilizing signature strikes, it was no longer necessary for targets to have been involved with specific plots or actions against the United States. Their potential to commit future acts could be a justification for killing them. At times, simply being among a group of "military-aged males" in a particular region of Pakistan would be enough evidence of terrorists activity to trigger a drone strike[104].

In fact, the signature strike is a "shoot first-ask later" policy, since it considers "all military-age males in a strike zone as combatants…unless there is explicit intelligence posthumously proving them innocent"[105].

On the other hand, if the U.S. government has an identified target, his name will be included in the kill list that results from a secret proceeding conducted by the National Security Council. If the capture of the suspect is not feasible, then the

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http://www.nytimes.com/.

100 J. Serle. *More than 2,400 dead as Obama's drone campaign marks five years, The Bureau of Investigative Journalism*, 2014. Available at: http://www.thebureauinvestigates.com/.

101 "Beginning in the closing months of the Bush administration, the Agency had begun targeting people based on patterns of life, rather than specific intelligence. The CIA said that 'military aged males' who were part of a large gathering of people in a particular region or had contatcts with other suspected militants or terrorists could be considered fair targets for drone strikes. A positive ID was not necessary to strike, only some of the 'signatures' the Agency had developed to identify suspected terrorists". J. Scahill. *Dirty Wars*, 2013, 249.

102 "The term 'military-age male' is not defined in military doctrine, though it is routinely used by military officials in counterinsurgency operations to describe individuals who are deemed guilty not based on evidence, but rather on their demography." M. Zenko (Note 97).

103 J. Becker. S. Shane. *"Kill List" Proves a Test of Obama's Principles and Will*, *New York Times*, 2012. Available at: http://www.nytimes.com.

104 J. Scahill (Note 101), 352.

105 J. Becker. S. Shane (Note 104).

White House gives the green light for a predator drone to hunt the suspect down. The current administration is so hooked on the practice of targeted killing that it has transformed the earlier *ad-hoc* elements "into a counterterrorism infrastructure capable of sustaining a seemingly permanent war"[106].

The most notorious case of a targeted killing was Anwar al-Awlaki, an American citizen, killed by a drone strike in Yemen in contravention of the Fifth Amendment that reads "no person shall be…deprived of life, liberty, or property, without due process of law". It was indeed a suppression of a constitutional right because "in the case of Awlaki, the target had not been indicted in any US court and faced no known charges"[107]. Anwar al-Awlaki, the son of immigrants from Yemen, was born in Las Cruces, New Mexico and became iman in a mosque at Falls Church, Virginia, where he met three of the 9/11 hijackers. He also had exchanged e-mails with Nidal Malik Hassam, who later killed 13 soldiers at Fort Hood Military Base. Of course, these facts did not go unnoticed, since "undoubtedly, Awlaki's mosques seemed to attract an array of characters who would go on to become terrorists"[108]. Although Awlaki was investigated because of his possible influence on the jihadists who had planned the attacks in 2001, "the investigation [of the 9/11 Comission] did not produce any evidence that was considered strong enough to support criminal prosecution"[109].

In 2004 Anwar al-Awlaki went to Yemen, and he was later linked to the regional al Qaeda branch; he also uploaded videos to the internet calling for jihad against the US. When his name was added to the kill list in 2010 his father went to court to contest the order issued by the White House, since his son, as an American citizen, had the constitutional right to due process. In September 30, 2011, Anwar was killed by a drone strike in al-Jawf, Yemen, without a judicial decision. The case of Anwar al-Awlaki is a clear example of the enemy criminal law and the depersonalization it entails. As CIA director Leon Panetta stated: "This individual was clearly a terrorist and yes, he was a citizen, but if you are a terrorist, you're a terrorist"[110].

Eric Holder, then the Attorney General, justified al-Awlaki's killing in a speech at Northwestern University, and the Department of Justice also released a White Paper to explain the legal rationale for the operation. Holder explained that the U.S. is a nation at war; he also argued that it is preferable to capture suspected terrorists but that there are situations when the government has the authority and the responsibility to defend the United States through the appropriate use of lethal force. Holder specified three criteria which would allow for the use of lethal force against an American citizen on foreign soil: first, that the American government has determined that the individual poses an imminent threat to the security of the U.S.; second, that capturing this individual is

[106] G. Miller. *Plan for hunting terrorists signals U.S. intends to keep adding names to kill lists*, *Washington Post*, 2012. Available at: http://www.washingtonpost.com.
[107] J. Scahill (Note 101), 505.
[108] J. Scahill (Note 101), 41.
[109] J. Scahill (Note 101), 68.
[110] J. Scahill (Note 101), 503.

unfeasible; and third, that the operation is in accordance with the principles of the law of war. It is, therefore, necessary to understand what the term imminent threat means. According to the White Paper of the Department of Justice "The condition that an operational leader present an imminent threat of violent attack against the United States does not require the United States to have clear evidence that a specific attack on U.S. persons or interests will take place in the immediate future[111]". The fact that the DOJ affirms that no clear evidence is necessary for including a suspect in the kill-list indicates an attitude very much in line with the relativization of rights present in the enemy criminal law. Jakobs' proposal to extend penal custody to the planning stage of the *iter criminis* also found acceptance in the guidelines of the DOJ: "Delaying actions against individuals continually planning to kill Americans until some theoretical end stage of the planning for a particular plot would create an unacceptably high risk that the action would fail and that American casualties would result.[112]" This leads to the concept of "imminent threat", which is a component of self-defense. In criminal law, this legal concept is a compound of four objective elements: an unjust aggression – which is actually happening or about to happen - against the victim or a third party, that must be repelled by any means available, employed with moderation. Besides, criminal law does not recognize self-defense against the planning of a crime, since it does not fit into the notion of "imminent". According to Harold Koh[113]:

> Under the principle of self-defense that is inherent in the President's Commander-in-Chief authority, the President has long been understood to have constitutional authority to act reasonably in self-defense against any threat. Read in light of international law, that constitutional authority would clearly include the right to act against "imminent" threats, a term defined in the famous *Caroline* case as applying to situations in which the "necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation".

President Obama himself said the operation was an act of self-defense, since al-Awlaki was defined as an imminent threat to American lives; and just like the man, who is shooting randomly at innocent people on the streets, can be killed by a police officer without the necessity of due process[114], so the government can kill those who

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[111] Department of Justice. *White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of al Qaeda or an Associated Force*, 2011. Availabe at: http://msnbcmedia.msn.com/.

[112] Department of Justice (Note 111).

[113] H. H. Koh, (Note 65), p. 8.

[114] "When a U.S. citizen goes abroad to wage war against America and is actively plotting to kill U.S. citizens, and when neither the United States, nor our partners are in a position to capture him before he carries out a plot, his citizenship should no more serve as a shield than a sniper shooting down on an innocent crowd should be protected from a SWAT team". B.H. Obama, *Remarks by the President at the National Defense University*, 2013. Available at: http://www.whitehouse.gov

plot terrorist attacks against America. The UK[115] and France[116] have recently also availed themselves of this interpretation of self-defense. The question is how international law will control such actions[117] in the face of drone proliferation[118], since "if other states were to claim the broad-based authority that the United States does, to kill people anywhere, anytime, the result would be chaos.[119]"

Let us consider now the second criterion: the feasibility to capturing suspected terrorists. According to the DOJ White Paper, "capture would not be feasible if it could not be effectuated during the relevant window of opportunity, or if the relevant country were to decline to consent to a capture operation…Feasibility would be a highly fact-specific and potentially time-sensitive inquiry." The case of Mohanad Mahmoud al-Farekh, an American citizen on the kill-list for being an operative for al Qaeda, who was captured in Pakistan in 2014[120], indicates that it is possible to use intelligence and non-lethal force to neutralize terrorist threats; still, this is an exception to the rule.

The third criterion concerns the legality of the operation under the laws of war. According to the DOJ, the war on terror is an armed conflict against a non-state actor, i.e., a non-international armed conflict (NIAC):

> A conflict between a nation and a transnational non-state actor, occurring outside the nation's territory, is an armed conflict 'not of international character' (quoting common article 3 of the Geneva Conventions) because is not a clash between nations…What makes an non-international armed conflict distinct from an international armed conflict is the legal status of the entities opposing each other[121].

The DOJ also points out that "the AUMF itself does not set forth an express geographical limitation on the use of force it authorizes", allowing the U.S. to take the

[115] "Mr Cameron said intelligence agencies had identified a direct threat permitting the UK to respond under the 'inherent right of self-defence' contained in the Charter of the United Nations." M. Wilkinson. *David Cameron: Britain mounted fatal air strike in Syria*. *The Telegraph*, 2015. Available at: http://www.telegraph.co.uk

[116] "Légitime défense ou exécution extrajudiciaire? Le décès, s'il est avéré, du djihadiste Salim Benghalem au cours d'une frappe française en Syrie, pose question." Le Figaro. *Syrie: la France aurait visé un cadre français de l'État islamique*. Available at : www.lefigaro.fr

[117] "Earlier this year, the New America Foundation reported there is evidence that eight other countries — the United States, South Africa, France, Nigeria, Britain, Iran, Israel and China — have placed weapons onto unmanned aircraft. At that time, the United States, Britain and Israel were the only three nations that had fired a missile from a drone during a military operation, the foundation said." T. Craig, *Pakistan begins drone warfare on its own soil*. *Washington Post*, 2015. Available at: www.washigntonpost.com

[118] M. Zenko, S. Kreps. *Limiting Armed Drone Proliferation*. *Council of Foreign Relations*, 2015. Available at: www.cfr.org.

[119] ACLU. *Statement of Professor Philip Alston, John Norton Pomeroy Professor of Law, NYU School of Law, former U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, 2010.* Available at: www.aclu.org

[120] M. Mazzetti. E. Schmitt. *Terrorism Case Renews Debate Over Drone Hits*. *New York Times*, 2015. Available at: http://www.nytimes.com.

[121] Department of Justice (Note 111).

war on terror virtually to anywhere. Since "there is little judicial or other authoritative precedent that speaks directly to the question of the geographic scope of a non-international armed conflict in which one of the parties is a transnational, non-state actor…the Department looks to principles and statements from analogous contexts[122]" when justifying the expansion of the war on terror. To the DOJ, any attack launched by the U.S. against al Qaeda and its associated forces outside the war zone, "would be consistent with international legal principles of sovereignty and neutrality if it were conducted, for example, with the consent of the host nation's government or after a determination that the host nation is unable or unwilling to suppress the threat posing by the individual targeted.[123]" The political arrangements involved in these operations, however, are never explained. For instance, while the Pakistani government publicly denounced the drone strikes in Waziristan as a violation of its sovereignty[124], leaked documents show that behind closed doors the government supports these kind of strikes[125]. The killing of the Taliban Leader Mullah Mansour, is the lastest example of the complicated nature of these arrangements[126].

The White Paper also asserts that any such lethal operation by the United States would comply with four principles governing the use of force: necessity, distinction, proportionality and humanity. After examing the practice of signature strikes - also called crowd-killings[127] - is hard to take these arguments seriously. The White House also pointed to Somalia and Yemen as successful templates of the current counterterrorism approach[128], but the advance of the Houthis in Yemen and the resilience of al-Shabab in Somalia show otherwise.

Thus, although the present U.S. administration always reaffirms its commitment to legal principles, it acts according to its own interpretation of international law, just as the previous one. In fact, "Mr. Obama has avoided the complications of detention by deciding, in effect, to take no prisoners alive. While scores of suspects

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122 Department of Justice (Note 111).

123 Department of Justice (Note 111).

124 "Pakistan's call for an end to strikes comes amid a rift with Washington…It says that drone strikes represented a 'clear red line for Pakistan'…A statement repeated the stance that drone strikes were 'unlawful, against international law and a violation of Pakistan's sovereignty'." M. Mardell. *Pakistan summons US envoy over drone strikes*, *BBC News*, 2012. Available at: http://www.bbc.com/.

125 "Despite repeatedly denouncing the CIA's drone campaign, top officials in Pakistan's government have for years secretly endorsed the program and routinely received classified briefings on strikes and casualty counts, according to top-secret CIA documents and Pakistani diplomatic memos". B. Woodward. G. Miller. *Secret memos reveal explicit nature of U.S., Pakistan agreement on drones*, *Washington Post*, 2013. Available at: http://www.washingtonpost.com/.

126 "Taliban leader Mullah Akhtar Mansour has been killed, after the US targeted him in a drone strike… Pakistan's government said on Sunday the drone strike was a violation of its sovereignty." *Taliban leader Mullah Akhtar Mansour killed, Afghans confirm.* 2016. Available at: www.bbc.com

127 "Signature strike has gotten to be sort of a pejorative term. They sometimes call it crowd killing. And it makes a lot of people uncomfortable". M. Zenko (Note 97).

128 "This strategy of taking out terrorists who threaten us, while supporting partners on the front lines, is one that we have successfully pursued in Yemen and Somalia for years." B.H. Obama (Note 39).

have been killed under Mr. Obama, only one has been taken into American custody, and the president has balked at adding new prisoners to Guantánamo[129]". Furthermore, severe constitutional issues arise. The above mentioned authorization of drone strikes are discussed in secret proceedings within the Executive Branch, which arrogates to itself the functions of the Judiciary:

> American militants like Anwar al-Awlaki are placed on a kill or capture list by a secretive panel of senior government officials, which then informs the president of its decisions, according to officials. There is no public record of the operations or decisions of the panel, which is a subset of the White House's National Security Council, several current and former officials said. Neither is there any law establishing its existence or setting out the rules by which it is supposed to operate. The panel was behind the decision to add Awlaki, a U.S-born militant preacher with alleged al Qaeda connections, to the target list[130].

When the suspect is a non-american militant, these secret proceedings are less strict since "the decision is made within the intelligence community and normally does not require approval by high-level NSC officials"[131]. According to the Presidential Policy Guidance (PPG) for conducting armed drone operations outside areas of active hostilities [132], "if the United States considers an operation against a terrorist identified as a U.S. person, the Department of Justice will conduct an additional legal analysis to ensure that such action may be conducted against the individual consistent with the Constitution and laws of the United States." Eric Holder explains what the "additional legal analysis" actually is:

> Some have argued that the President is required to get permission from a federal court before taking action against a United States citizen who is a senior operational leader of al Qaeda or associated forces. This is simply not accurate. "*Due process" and "judicial process" are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process…*The Constitution's guarantee of due process is ironclad, and it is essential – but, as a recent court decision makes clear, it does not require judicial approval before the President may use force abroad against a senior operational leader of a foreign terrorist organization with which the United States is at war – even if that individual happens to be a U.S. citizen[133].

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[129] J. Becker. S. Shane (Note 103)

[130] M. Hosenball. *Secret panel can put Americans on "kill list"*, 2011, emphasis added. Available at: http://www.reuters.com/.

[131] M. Hosenball (Note 130).

[132] *U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities*, 2013. Available at: https://www.whitehouse.gov/the-press-office/2013

[133] E. Holder. *Attorney General Eric Holder Speaks at Northwestern University School of Law*, 2012, emphasis added. Available at: http://www.justice.gov/.

Consequently, since there is a difference between *due process* and *judicial process*, it is not unconstitutional for the National Security Council to be an inquisitor for the Executive, as long as it conducts the process established according to their own rules in secret. But whatever the criteria for the finding might be, it does not solve the problem that the Executive branch is *the accuser and the judge at the same time*, and that it hands down a sentence on the life of a human being who was not convicted of a crime in a fair trial by an independent court. All it takes is the President's senior national security advisors and a few lawyers of the executive branch provide the "authoritative" interpretation of the applicable rules for the "case". There's also another problem: if the NSC has enough time to deliberate in a legal procedure about the risks a suspect poses to national security, the threat cannot be considered imminent, exposing the contradiction of the self-defense argument based on the *Caroline* case. This contradiction can only be dismissed if we acknowledge that the understanding of "self-defense" has undergone a conceptual mutation, being now comprised of sixteen different principles[134] in order to allow a broad range of possibilities for the use of lethal force in the war on terror.

IV. THE STATE OF EXCEPTION AS THE RULE

The state of exception theory was well explained by Giorgio Agamben. According to the italian professor, "the voluntary creation of a permanent state of emergency (although eventually not declared in a technical sense) has become one of the essential practices of contemporary States, including the democratic ones"[135]. In this sense, the U.S. government has been operating in a state of exception since the adoption of the emergency measures taken in response to 9/11, without having to change (or nullify) the American Constitution[136].

This state of exception concentrates immense power in the Executive branch which can now engage in military action anywhere in the world without Congressonal authorization. The irony of it all is that the measures taken by the American government could bring about the feared normative erosion mentioned by Jakobs, since "the exceptional measures, that are justified in order to protect the democratic Constitution, are the same that lead to its demise"[137].

The state of exception in modern democracies means that the Constitution lives alongside a parallel set of rules that operates outside constitutional limits. But this

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[134] D. Bethlehen. *Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack By NonState Actors*, 2012. Available at: http://www.un.org/law/counsel/

[135] G. Agambem. *State of Exception*, 2012, 13.

[136] "The novelty in the 'order' of President Bush is the radical nullification of all the legal status of the individual, creating this way, an unnameable and unclassifiable being. The captured talibans in Afghanistan, not only do not deserve POW status according the Geneva Conventions, and neither they have the status of indicted under the american laws". G. Agambem (Note 135), 14.

[137] G. Agambem (Note 135), 20.

creates a conundrum: if the Constitution has to be suspended in the face of terrorist threats, what is left to fight for anyway? Terrorists are clearly against democracy since they fight for values of their own; but if democratic governments react to these threats by betraying their own principles, what values are protected in this conflict? If the state of exception has taken over the legal order, then terrorists can claim that they are fighting an authoritarian society, not a democratic one, and, therefore, it is a legitimate fight. "The State of Exception" is, of course, a controversial theory, and some scholars link it to a theory of law, while others link it to that of politics[138]. When Jakobs links the enemy criminal law to the right to security, he is clearly choosing the legal version. But Agamben suggests that both theoretical approaches are wrong, since they miss the crucial point:

> The simple topographic opposition (inside/outside) that is implicit in these theories seems insufficient to deal with the phenomenon it should explain. If the characteristic of the state of exception is the (total or partial) suspension of the legal system, how can this suspension be comprehended inside the legal system itself? How come an anomie can be inscribed in the legal order? And if, on the other hand, the state of exception is just a *de facto* situation, and as such, alien or contrary to the law; how is it possible for the legal system to have a gap precisely in relation to such an important situation? And what is the meaning of this gap? In fact, the state of exception is not in the inside nor the outside of the legal system and the problem with its definition relates to a level, or a zone of indifference in which inside and outside are not mutually exclusive, but instead, they become indistinguishable. The suspension of the norm does not mean its abolishment and the area of anomie created by it still relates to the legal system[139].

The suspension of the legal system by the political power in order to preserve the system itself from a grave threat is the task of the "commissary dictatorship":

> The specific contribution made by Schmitt's theory is exactly the possibility of the articulation between the state of exception and the legal order. It is a paradoxical articulation nonetheless, since what has to be inscribed in law is something essentially exterior to it, that is, nothing less than the suspension of the legal order itself (therefore the contradictory formulation: "In strict sense…there's still an order, even if it is not a legal one")…The commissary dictatorship, as it "suspends the Constitution to defend its existence" (Schmitt, 1921, p. 136), has, ultimately, the function to create the conditions that "allow the application of law" [140].

[138] "The diversity of legal traditions are divided between those who try to insert the state of exception within the legal system and those who consider it outside this system, that is, as a political phenomenon or as an extra-legal phenomenon." G. Agambem (Note 136), 38.

[139] G. Agambem (Note 135), 39.

[140] G. Agambem (Note 135), 55.

The United States government today seems to embody the commissary dictatorship, i.e, a government that suspends the Constitution in order to protect it, as the distinction made between "due process" and "judicial process" suggests. But if the enemy criminal law is the legal foundation of the war on terror, the crucial question is not if there is a state of exception, but how long it will last [141]. If the American government continues to employ targeted killings and mass surveillance, it will rely *de facto* on a distinction between the citizen criminal law and the enemy criminal law as proposed by Jakobs. It is therefore not surprising that "White House counterterrorism adviser John Brennan is seeking to codify the administration's approach to generating capture/kill lists, as part of a broader effort to guide future administrations through the counterterrorism processes that Obama has embraced.[142]" In this way, the state of exception is able to to maintain a legal appearance for an indefinite period of time.

Agamben's interpretation is, of course, not unanimously accepted in the academia; instead, there is a large amount of criticism to his take on Schmitt. As Mary Dudziak points out, the growing interest in Schmitt's work relates to the realization that the emphasis on public security in times of crisis can undermine the rule of law and ultimately lead to a dictatorship[143]. The famous parallel is made between the demise of the Weimar Republic and the Nazi takeover in 1933. However, this parallel demands a more updated analysis of the current situation:

> Some scholars have objected to the turn to Schmitt. Bruce Ackerman argues that reliance on his work has made discussions of emergency power melodramatic when they need to be taken seriously. For the legal scholar Kim Lane Scheppele "the institutional elaboration of a new international system that has occurred since Schmitt's time makes his ideas seem all the more dangerous, and yet, the more dated." The legal scholars Eric Posner and Adrian Vermeule see the embrace of Schmitt as tied to a broader phenomenon – the tendency of scholars to view emergency powers through the "lens of Weimar"[144].

But even authors sympathetic to this criticism have absorbed Schmitt's theory and concepts. For instance, "Posner and Vermeule draw from what they consider to be the 'marrow' of Schmitt's ideas, and incorporate them into their analysis of executive power. Their simoultaneous rejection and embrace of Schmitt illustrates the way references to him became a language for discussing executive power.[145]" Nonetheless,

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[141] "Among senior Obama administration officials, there is a broad consensus that such operations [targeted killings] are likely to be extended at least another decade. Given the way al Qaeda continues to metastasize, some officials said no clear end is in sight"G. Miller (Note 106).

[142] G. Miller (Note 106).

[143] M.L. Dudziak. *War Time: An Idea, Its History, Its Consequences*. Oxford University Press, 2013, p. 116.

[144] M.L. Dudziak (Note 143), 116.

[145] M.L. Dudziak (Note 143), 116.

we think it is necessary to further study Schmitt's "Theory of the Partisan[146]" and establish its links to Jakobs' "Enemy Criminal Law", something that – for editorial reasons – cannot be done within the framework of this paper.

Another way of dealing with the terrorist threat and the state of exception, is looking at international institutions instead of national ones. The international community[147], viewed through the lens of global constitutionalism, should emphasize humanity – and not states – as the source of international law[148]. In this case, international human rights could counteract abuses perpetrated by national governments. But little heed is paid by this approach to the fact that not every problem can be solved by an assignment of rights[149] – both theoretically and practically. Theoretically because ways of constituting a political community cannot be determined in terms of individual subjective rights, as Rousseau and Kant were well aware of (not to belabor Hobbes again), simply because the rights of a corporation are not the same as those of its members and they cannot easily derived from them. Thus, the right of sending and receiving ambassadors belongs to the state and not to individuals who have "delegated" it, and the right to grant a diploma is that of a university not of the professors, even if it is the latter who have examined the candidate and made a decision. Furthermore, since every right conceptually implies correlative duty-bearers - absent an imperial order - the specification of who has to do what is mediated and dependent upon functioning states living up to these obligations. But here the practical difficulties abound when trade-offs have to be made among rights and in setting priorities in their implementation. This is particularly true when we deal with failed states and the legal order faces determined oppositions by terrorists, fundamentalist, racist supremacists, etc. This is why Hannah Arendt not only insisted on the "right to have rights" as member of a community but was rather unenthussiastic about the notion of human rights, as she had seen that absent a functioning political system the ascription of rights is hollow. As little as a political system can do without law, as little can a legal system exist if it lacks political institutions translating law into policies. The tendency to concentrate only on the legal dimension and think that the proliferation of norms and "dispute

146 C. Schmitt. *Theory of the Partisan: Intermediate Commentary on the Concept of the Political.* Telos Press Publishing, 2007.

147 "The legal subjects within the framework of the contemporary international legal order are widely conceived as an international community. The international community might be a precondition or, on the contrary, the result of the constitutionalization of the international legal order…A community can be distinguished from a mere agglomeration on account of the closeness and the common objectives of its component entities. A community is, in short, integrated. It possesses members, and it is not made up of only isolated actors." A. Peters. *Membership in the Global Constitutional Community, in The Constitutionalization of the International Law,* 2012, 153. J. Klabbers, A. Peters, G. Ulfstein.

148 "Global constitutionalists abandon the idea that sovereign states are the material source of international norms. In consequence, the ultimate normative source of international law is – from a constitutionalist perspective – humanity, not sovereignty." A. Peters (Note 147), 154-155.

149 "Under the premise that international human rights are international constitutional rights, the recent expansion of international human rights in various dimensions is a manifestation of the constitutionalization of international law." A. Peters (Note 147), 167.

settling mechanisms" alone can do the trick is to submit to the myopia of legalism. If it is not clear to everyone who the duty-bearers are, and a direct moral instuition of *what is right* is not available but hotly contested, subjective rights can be easily manipulated by lawyers. They then serve as "hired guns" of the respective government (which are not simply going out of business because of the denser and denser web of supra-national obligations) and can even write out of existence individuals and groups[150]. Thus, "rights" crucially depend on vibrant and well institutionalized processes but become barren without them. Whether just claiming rights as human rights and giving them a Kantian "teleological interpretation" is sufficient or even promising is rather problematic, considering the fundamental challenges we face.

V. CONCLUSION

The effort now should be aimed to restore democratic concepts like human dignity. This is not a naïve position about the threats that democracy faces; terrorism is more alive than ever as the recent attacks in Brussels and Orlando have shown, but it does not mean that we are inevitably trapped between two extremes. "In other words, the problem of the rule of law is thus neither one of efficiency nor one of simply protecting the law's purity. It entails attending to the task of preserving the integrity of law, which can only be safeguarded if the institutional arrengements are capable of dealing reasonably well with the *twin dangers* of anarchy and unrestrained power[151]".

For these purposes, the conceptualization of friend and enemy might not be that helpful, despite the fact that it identifies some important problems. After all, the use of the word "enemy" relies on a near essentialist ascription. Modern international law was careful to distinguish – as even Schmitt still does – the enemy (*polemios*), i.e. the soldier serving his sovereign, from the personal enemy (*echthros*). As such, the "foreign enemy" is protected as soon as he lays down his arms and thus we cannot mistreat him or seek revenge for what he has done to us before. Of course this distinction becomes less and less helpful if protection is extended because of humanitarian reasons to "irregulars" who nevertheless still have to abide by certain requirements (command structure, wearing at least a sign if not an uniform) in order to profit from this protection. In that case several new issues arise: what is personal or command responsibility; what is an "irregular" as opposed to a "terrorist"? While some cases might be easy to decide (when the irregulars targets governmental agents or institutions) many others are not. It is here that often the "wish becomes the father of thought" which assures us that we can master these problems by the "further development" of law (the technocratic hope), or that general human progress eventually will result in a "cosmopolitan order". Unfortunately, neither speculation will do.

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[150] For a further discussion See Friedrich Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge, Engl.: Cambridge University Press, 2014), chap. 7

[151] F. Kratochwil. "Has the Rule of Law Become a Rule of Lawyers?" in *The Puzzle of Politics*, Routledge, 2011, p. 143-144.

The first one already Kant debunked by pointing to the "scandal of reason" i.e., that norms and principles do not come with rules for their application – or, if we try to formulate them, we end up in an infinite regress. Instead, what is required is "judgment" and knowing the rules and proliferating them might be more a sign of stupidity (Kant explicitly uses the word *Dummheit* in this context[152]) than relying on some commendable common sense, precisely because expertise alone cannot provide the algorithms for most dilemmas of the world of praxis.

The second one is little more than a pious hope and represents more a religion - even if clad in a secularized garb – rather than a helpful guide in resolving particular situations. If we reason from the "end", from a manifest destiny, then of course, everything becomes resolvable since everything which furthers the achievement of this end is "progressive", and everything else "reactionary". However, as should be obvious, the dangers of totalitarianism or jihadist thinking are then just around the corner. Besides, even if we could all agree on one end – and dismiss the insights of Weber's remarks about the multiplicity of values which are usually at stake and which cannot neatly be ordered because of their incommensurability but resemble a struggle among giants – the problem arises that it is the "tone that makes the music". In other words, there are also conflicting strategies to reach such an end, and that law has not only to determine a goal (or rather various goals) but it has also to prescribe *specific ways of going about it*, so that no simple ends-means rationality is applicable. The fact that Kant clearly saw the first problem but came back several times to a teleological solution[153] for all "mankind" (*fata volentem ducunt, nolentem trahunt*[154]) attests to the emotional pull of the second fallacy. In our troubled times this means that we must recognize that the notion that the history of mankind evolves towards a predestined "end" has to be given up, as has perhaps the myopia that there are clear-cuts periods of war and peace. While the latter distinction is useful as an ideal type for heuristic purposes, it hardly reflects actual historical experience and mistaking an ideal type for historical reality has its price. Only by refusing the image of a world free of conflicts, or relying on the phantasy of knowing the "end of history", it is possible to actually take our fate in our own hands and "begin to develop a politics…that recognizes both total war and total peace as rare and that accepts that a murky middle ground is likely to be the norm for many years to come, as has been all along[155]." If this "murky middle-ground" should be filled with the enemy criminal law is something that should be discussed by academics and politicians alike[156].

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[152] Immanuel Kant, *Kritik der Reinen Vernunft*, A134-135; B 173-174.

[153] For a further discussion See Friedrich Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge, Engl.: Cambridge University Press, 2014), chap. 7

[154] Immanuel Kant, *Perpetual Peace*, "First Supplement" in H.S Reis, *Kant: Political Writings*, 2nd ed.(Cambridge, Engl.: Cambridge University Press, 1977) at 112

[155] R. Brooks. *There's No Such Thing as Peacetime*, *Foreign Policy*, 2015. Avaliable at: http://foreignpolicy.com.

[156] See e.g. Robert Jervis assessment of Senate Committee's report on CIA's role in the Detention and Interrogation Program in Robert Jervis, "*The Torture Blame Game*", *Foreign Affairs,* vol. 94, No. 3 (2015):

The real risk facing democracies seems the unwillingness to debate openly the issues revolving around terrorism. In an ideal world, the right approach consists in striking a balance between security and freedom, preventing terrorist acts and keeping society free and safe. But in the real world, things aren't that clear, and some dubious trade-offs have to be made. If it's true that "security forces need to be successful one hundred per cent of the time but terrorists need to be successful only once", pressure is mounting on police and on intelligence agents who already let terrorists slip through the cracks of the security apparatus. The refugee crisis – used as a military strategy[157] – will only put a strain on a system that is already overwhelmed[158]. If that's the case, it seems contradictory to support mass migration and at the same time ignore its consequences. One appropriate solution would be the promotion of "industrial incumbators zones" for refugees in middle-eastern countries[159]. But in the era of globalization, where citizenship no longer means unquestioned loyalty, where borders have lost much of their capacity of "caging populations", and mass-destruction technologies are up for sale[160], there are no easy answers. If we have to find a solution for all this, we should start by talking openly about the problems that besiege our societies. Is profiling, mass surveillance, preemptive detention, enhanced interrogation techniques and drone

120-27.

157 "The complex security situation in Europe 'has only grown more serious and more complicated' in recent months, said Air Force Gen. Philip M. Breedlove, the Supreme Allied Commander, Europe, and commander of U.S. European Command. 'Russia and the Assad regime are deliberately weaponizing migration from Syria in an attempt to overwhelm European structures and break European resolve', he said. More than 1 million refugees or economic migrants arrived in Europe last year, fleeing Syria, Afghanistan, Iraq and parts of Africa, according to Breedlove's written testimony. There is concern that terrorists might look to recruit from within the population of refugees, he said." L. Ferdinando. *Russia, Instability Threaten U.S., European Security Interests*, 2016. Available at: www.defense.gov

158 "The influx of millions of refugees into Europe complicates intelligence operations, not only because ISIS or other jihadi groups may be infiltrating the flow of refugees. The authorities are being confronted with large, newly arrived diasporas in which the authorities have no intelligence sources. Many of the refugees are young men with little or no education who are coming from violent environments…The fact that authorities in France and other countries in Europe are dealing with such huge numbers of potentially dangerous individuals reflects broader societal problems. It indicates the presence of alienated, self-isolating communities where the violent ideologies emanating from the Middle East find resonance and recruits. Some are likely to be attracted by ISIS's line that this is the beginning of the end-of-time showdown between believers and infidels. The Paris attacks will only serve to deepen this social divide. A growing number of people in France are becoming convinced that a large portion of the country's Muslim population has turned against French society and that new policies are needed. There is sharp debate about what these new policies should be". B. M. Jenkins. *Why the Paris Terrorists Couldn't Be Stopped*, 2015. Available at: www.slate.com

159 "An effective refugee policy should improve the lives of the refugees in the short term and the prospects of the region in the long term, and it should also serve the economic and security interests of the host states. Jordan offers one place to begin. There, a reconsidered refugee policy would integrate displaced Syrians into specially created economic zones, offering Syrian refugees employment and autonomy, incubating businesses in preparation for the eventual end of the civil war in Syria, and aiding Jordan's aspirations for industrial development." A. Betts, P. Collier. *Help Refugees Help Themselves*, 2015. Available at: www.foreignaffairs.com

160 D. Butler, V. Ghirda. *Nuclear black market seeks IS extremists*, 2015. Available at: www.washingtonpost.com

strikes the right approach to our predicament? Do they signal the end of democracy as we know it[161]? Since total security is a phantom, are we willing to take risks to preserve our individual rights and accept the possibility of terrorist attacks as part of our current situation? These are real issues that cannot be simply dismissed or that will be easily solved by experts, be they of law, terrorism, or whatever. One thing is certain: life is not risk-free and we should be asking which risks are worth taking.

[161] For an interesting discussion of how such a debate will have to transcend the fixation on rules and also the discussion interpretation (Kant's auctoritatis interpositio) see Nikolas Rajkovic, *"Rule, Lawyering and the Politics of Legality: Critical Sociology and International Law's Rule"*, Leiden Journal of International Law, vol. 27 (2014): 331-52.