

TARGETED KILLINGS IN THE U.S. POLICY^(*)

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1. Introduction

In the State of the Union Address 2013 President Obama dealt with the subject of targeted killings of terrorists, carried out mainly by unmanned aircrafts armed with missiles and remotely controlled, the so-called drones¹.

Indeed President Obama focused his counter-terrorism strategy on the use of drones. As drone operations increase from year to year due to their efficiency in the war on terror, so does the interest in the research for their legal basis².

On that occasion Obama pledged to develop a more open policy about targeted killings; he also stated that detention and prosecution of alleged terrorists were carried out according to U.S. laws. Furthermore, in order to prevent violent attacks against the United States, U.S. citizen members of Al-Qaeda or affiliate groups could become legitimate targets. The Address was not appreciated by human rights and civil liberties organizations: they asked for full openness in the administration’s action and still affirmed targeted killings infringed upon human rights.

The ongoing reference of the U.S. administration to the Authorization for Use of Military Force is criticized too³. Indeed the U.S. counter-terrorism policy since the beginning of the war on terror has been based on the Authorization for Use of Military Force passed by the Congress at almost unanimity on September 14, 2001. By virtue of this Authorization the President of the United States was authorized “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons”⁴.

Because of the military advance of “Isis” terrorism in Iraq and Syria, in August 2014 the U.S. administration has launched a new military campaign against the so-called “Islamic State”. In February 2015 President Obama has asked for a new formal authorization from the Congress to wage the war⁵.

^(*) Reworked and updated version of the speech given on April 19, 2013, at the workshop “*Human Rights and the Use of Drones in International Law*” at Fordham University in New York, U.S.

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¹ See Claire Finkelstein, Jens David Ohlin, Andrew Altman, *Targeted killings: Law and Morality in an Asymmetrical World*, Oxford, Oxford University Press, 2012.

² See Carla Crandall, *Ready...Fire...Aim! – A Case for Applying American Due Process Principles before Engaging in Drone Strikes*, 24 Fla J. Int’l L. 55, 55-90 (2012).

³ See Dan Robinson, *Critics Continue to Press Obama on Targeted Killing Policy*, February 14, 2013, available at <http://www.voanews.com/content/critics-continue-to-press-obama-on-targeted-killing-policy/1604092.html>.

⁴ See *Authorization for Use of Military Force (AUMF)*, S. J. Resolution 23, Public Law 107-40, September 18, 2001, 115 Stat. 224, available at <http://www.fas.org/sgp/crs/natsec/RS22357.pdf>. It is based on section 5 (b) of *The War Powers Act*, Public Law 93-148, 93rd Congress, H. J. Res. 542, November 7, 1973, named also *War Powers Resolution*, available at http://avalon.law.yale.edu/20th_century/warpower.asp; <http://thecre.com/fedlaw/legal22/warpow.htm>.

⁵ See New York Times Editorial, *Obama Seeks an Expansive War Authorization to Combat ISIS*, February 11, 2015, available at http://www.nytimes.com/2015/02/12/opinion/obama-seeking-an-expansive-war-authorization-congress.html?_r=0.

Indeed it had already thought that the AUMF 2001 was out-of-date and the debate on the obsolescence of the AUMF 2001 had yielded the need of a new authorization by the Congress⁶.

2. Defining targeted killings

Anyway, what does “targeted killing” exactly mean?

This expression concerns the planned killing of alleged terrorists by the government if their capture is impossible⁷. Targeted killing is a monopoly neither of the Obama administration nor of the United States. In this type of operation a government kills the target not necessarily in a war contest⁸ and sometimes does so without the approval of the sovereign State where the action is carried out. The lack of approval of the sovereign State is often deemed not to be inconsistent with international law if the State itself is unable or unwilling to confront the threat from alleged terrorists.

According to the interpretation already followed by the Bush administration, the slaying of individuals who represent a threat for the United States is lawful. Such killings are different from assassinations for political reasons on behalf of the government, forbidden by President Reagan’s Executive Order no. 12333⁹. As a result of vagueness of the prohibition considered in such Order, Reagan himself ordered to kill Libyan leader Muammar Gaddafi by an aircraft strike.

The United States carries out targeted killings mainly by drones; such death tools, deadly effective, are employed against terrorists in Afghanistan as well as in other countries.

Targeted killings are carried out in order to avoid terrorist attacks. The United States usually does not require that the country where the terrorist is found arrest the terrorist himself. In such countries where the control of the territory is weak and the law enforcement is deemed unreliable to the point where such countries are unable or unwilling to arrest terrorists; or those countries are suspected of not apprehending in a timely fashion the terrorist and, in the meantime, before said terrorist is extradited, the preparation of a terrorist attack continues or the attack might have already occurred¹⁰.

In order to carry out targeted killings President Obama approved a list of terrorists to be killed or apprehended. As I mentioned earlier, such strategy was chosen not only by the Obama administration. For years Israel has been exploiting targeted killings¹¹. Furthermore President Bush

⁶ See Beau D. Barnes, *Reauthorizing the “war on terror”: the legal and policy implications of the AUMF’s coming obsolescence*, 211 Mil. L. Rev. 57 (2012), 57-114.

⁷ See Toren G. Evers Mushovic, Michael Hughes, *Rules for When There Are No Rules: Examining the Legality of Putting American Terrorists in the Crosshairs Abroad*, 18 New Eng. J. Int’l & Comp. L. 157 (2012), 157; W. Jason Fisher, *Targeted Killing, Norms and International Law*, 45 Col. J. Transnat’l L. 711 (2006-2007), 715.

⁸ See Laurie R. Blank, *Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications*, 38 Wm. Mitchell L. Rev. 1655 (2011-2012), 1656-1657.

⁹ President Ronald Reagan on December 4, 1981, issued the Executive Order no. 12333 (available at <http://www.archives.gov/federal-register/codification/executive-order/12333.html>), still in force, which part 2.11 explicitly forbids to carry out assassinations on behalf of the government of the United States: “No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination”. Indeed the Order is not very clear and the U.S. administration interprets it on the strength of November 2, 1989, Parks Memorandum (*Memorandum on Executive Order 12333 and Assassination*, Colonel W. Hays Parks, Special Assistant for Law of War Matters to The Judge Advocate General of the Army, available at http://www.hks.harvard.edu/cchrp/Use%20of%20Force/October%202002/Parks_final.pdf) that distinguishes assassinations for political reasons, forbidden by such Order, and lawful killings of individuals or groups who represent a threat for the United States. See Mark V. Vlasic, *Assassination & Targeted Killing – A Historical and Post-Bin Laden Legal Analysis*, 43 Geo. J. Int’l L. 259 (2011-2012), 259-333.

¹⁰ See Gabriella Blum, Philip B. Heymann, *Laws, outlaws and terrorists: lessons from the war on terrorism*, Cambridge, Massachusetts, MIT Press, 2010, 69.

¹¹ See Steven R. David, *Targeted Killing. The Israeli Experience*, in Christopher Ford, Amichai Cohen, *Rethinking the Law of Armed Conflict in an Age of Terrorism*, Lanham, Maryland, Lexington Books, 2012, 71-98; Emanuel Gross, *The Struggle of Democracy Against Terrorism*, Charlottesville, Virginia, University of Virginia Press, 2006, 220-239.

authorized the killing of Al-Qaeda senior leaders secretly since few days after 9/11¹², even though the exact number of such activities was much less than the same one of the Obama administration¹³.

The U.S. government bases targeted killings on extensive interpretation of powers granted by the Congress with the Authorization for Use of Military Force; the United States believes it is at war and therefore considers every means of defense (and attack) at its disposal¹⁴.

Targeted killings are thought to be a necessity due to the elusive nature and the transnational peculiarity of the enemy that the United States faces. However the question arises whether or not such activities are lawful by domestic and international law. Indeed they are carried out without respecting a sovereign State's boundaries and do not allow targets to defend themselves in a court of law. Furthermore, the number of innocent civilians killed and involved in such activities is not clear.

3. Targeted killings against U.S. citizens.

Further critical issues for the U.S. administration concern the inclusion of U.S. citizens in the list of individuals to be captured or killed¹⁵ and the resulting killing of them.

On September 30, 2011, a U.S. citizen of Arab origin, Anwar Al-Awlaki, was killed by drones in Yemen¹⁶. For the first time drones killed U.S. citizens too.

Moreover in 2010 Al-Awlaki's father, since it was rumored that his son had been put in the list of people to be hit by drones, contacted the Center for Constitutional Rights and the American Civil Liberties Union. Civil liberties activists sued the U.S. administration because of the inclusion of Al-Awlaki in the aforementioned list. They objected to the President's authority to carry out targeted killings: in this way the Constitution and the international law are violated. According to them the killing of a U.S. citizen out of the war zone is quite similar to an extrajudicial execution. They also claimed that the U.S. government could not consider the entire world as a battlefield; therefore U.S. citizens suspected of terrorism not found on the battlefield were entitled access to constitutional guarantees and could not become targets for the government¹⁷. In addition, civil liberties activists claimed that Al-Awlaki, U.S. citizen who was in Yemen, far from the Afghanistan and Iraq war zones, should have enjoyed constitutional guarantees. The case was rejected because of the lack of standing of Al-Awlaki's father¹⁸. Activists then renounced to appeal the decision. However, as a result of the trial, the government began to lift the veil of secrecy that had characterized targeted killings¹⁹.

¹² See W. C. Banks, *The United States a decade after 9/11*, in Victor V. Ramraj, Michael Hor, Kent Roach, George Williams, *Global Anti-Terrorism Law and Policy*, Cambridge-New York, Cambridge University Press, 2nd ed., 2012, 463-470.

¹³ See John Yoo, *Assassination or Targeted Killings After 9/11*, 56 N. Y. L. Sch. L. Rev. 57 (2011-2012), 57-79: according to him Bush authorized targeted killings of Al-Qaeda leaders secretly since few days after 9/11 even though the number of such killings carried out by the Obama administration in one year was far more the deal of those ones throughout all eight years of the Bush administration. Furthermore see W. Jason Fisher, *Targeted Killing, Norms and International Law*, 712, who describes some of these operations carried out by President Bush, since the killing of six members of Al-Qaeda in Yemen at the beginning of November of 2002.

¹⁴ See Arianna Vidaschi, *Osama bin Laden: l'ultimo targeted killing*, Dir. pubb. comp. eur., III, 2011, 1196-1229.

¹⁵ See Toren G. Evers Mushovic, Michael Hughes, *Rules for When There Are No Rules*, 158.

¹⁶ See Benjamin R. Farley, *Targeting Anwar Al-Aulaqi: A Case Study in U.S. Drone Strikes and Targeted Killing*, 2 Nat'l Sec. L. Brief 57 (2011-2012), 57-88; Lesley Wexler, *Litigating the Long War on Terror: The Role of Al-Aulaqi v. Obama*, 9 Loy. U. Chi. Int'l L. Rev. 159 (2011-2012), 159-176; Mark V. Vlasic, *Assassination & Targeted Killing*, 329-332; Steve Coll, *Kill or Capture*, in *The New Yorker*, August 2, 2012, available at <http://www.newyorker.com/online/blogs/comment/2012/08/kill-or-capture.html>.

¹⁷ See Toren G. Evers Mushovic, Michael Hughes, *Rules for When There Are No Rules*, 169-170; John Yoo, *Assassination or Targeted Killings After 9/11*, 62.

¹⁸ See *Al Aulaqi v. Obama*, 727 F. Supp 2d (D.D.C. 2010), available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2010cv1469-31.

¹⁹ See Lesley Wexler, *Litigating the Long War on Terror*, 171-176; Jack Goldsmith, *Power and Constraint*, New York, W. W. Norton & Company, 2012, 197-198.

Therefore the slaying of U.S. citizens without full and fair trial raises strong criticism from human rights organizations. Such operations would be unconstitutional because of the breach of the due process of law, according to the U.S. Constitution Fifth Amendment²⁰. Conversely, their legality has been recognized by the government.

4. The Obama administration's point of view: Attorney General Eric Holder's speech and the U.S. citizens targeted killings Memorandum

The Obama administration's point of view is deduced first of all by several statements on the subject, made over time by members of the government. The most important of them was the Attorney General Eric Holder's public speech on March 5th, 2012²¹. Furthermore, at the beginning of February 2013, NBC News, as a result of a leak, disclosed a classified Memorandum about targeted killings against U.S. citizens developed by the Department of Justice in 2012²².

The comparison between the Holder's speech and the Memorandum is very interesting.

Holder asserts the U.S. government right to kill U.S. citizens who represent an "imminent" threat for the country; the President may use military force abroad against members of a terrorist organization on which the United States is waging war.

Holder argues the legality of killing U.S. citizen in a foreign country who is a "senior operational leader of Al-Qaeda or associated forces" and is actively involved in planning attacks to kill Americans. According to Holder the targeted killing is lawful if there are three conditions: first of all, the U.S. administration has determined, after a careful examination, that the individual represents an "imminent threat of violent attack" against the United States; secondly, his capture is "not feasible"²³; finally, the operation is carried out according to the applicable law of war principles. The imminence of the attack is assessed taking into account the following: first of all, Al-Qaeda's leaders constantly plan attacks against the United States; then, they do not act like a regular army seeing that they do not wear uniforms and do not carry weapons or move military forces openly in preparation for an attack; finally, their ability to deploy a devastating attack has been amply demonstrated. Therefore an imminent terrorist attack does not require time, place and manner of attacks to be known; indeed waiting to acquire such information would constitute an unacceptable risk of death to U.S. citizens.

Such position fully reproduces the idea that the United States deals with a war emergency. The idea that there is an ongoing armed conflict not against a specific nation but rather against nations, organizations and even individuals dates back to the aforementioned Authorization for Use of Military Force on September 14, 2001. This was essentially the position taken by the Bush administration in order to justify all violations of the international law.

Therefore, seeing that throughout the war to kill an enemy is allowed and conceiving the fight against terrorism as an armed conflict, the slaying of terrorists in the place where they are discovered becomes lawful. However, this situation seems different from any other prior event in history: a State that solemnly wages a war against terrorist organizations and even individuals.

John Brennan, since 2013 chief of the CIA, issued statements quite similar to the Holder's speech. On February 7, 2013, Brennan stood before the Senate Intelligence Committee to give

²⁰ See M. D. Ramsey, *Meet the New Boss: Continuity in Presidential War Powers?*, 35 Harv. J. L. & Pub. Pol'y 863 (2012), 867.

²¹ See the Eric Holder's speech on March 5, 2012, available at <http://www.cfr.org/terrorism-and-the-law/holders-speech-targeted-killing-march-2012/p27562>.

²² See *Department of Justice White Paper. Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qaida or An Associated Force*, available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.

²³ See David Cole, *The Taint of Torture: The Roles of Law and Policy in Our Descent to the Dark Side*, 49 Hous. L. Rev. 53 (2012), 67: according to him the word "feasible" is not clear and raises the question if a "not feasible" capture is impossible or just too costly.

explanations about the above mentioned Memorandum²⁴. Brennan, who is the major promoter of targeted killings, defended the legality of the use of drones. In the same period Obama ordered the delivery of confidential documents to Congress related to targeted killings.

But what does the Memorandum exactly include? It aims at outlining the legal basis on which the U.S. administration grounds targeted killings of citizens abroad if deemed senior operational leaders of Al-Qaeda or associated forces. According to the Memorandum, the U.S. administration does not need to find the evidence of an imminent attack against the United States in order to kill individuals deemed dangerous; U.S. citizens may be hit if simply take part in the ongoing Al-Qaeda terrorist plot against the United States. Then an imminent threat of attack, according to the Memorandum, does not require the United States to have the evidence that a specific attack against U.S. citizens or interests takes place in the near future. In order to carry out targeted killings a high level official of the U.S. government determines that a U.S. citizen suspected of terrorism has been recently engaged in activities that constitute an imminent threat of violent attack and there is no evidence that he has abandoned or renounced these activities. However, it is not explained what kind of these “activities” are and what “recently” means.

The Memorandum deals with three conditions proposed by Holder in his speech with few differences and adds some other considerations. It states that U.S. officials may considerate lawful to kill a suspect, if the attempt to capture him implies an unreasonable risk to the U.S. personnel involved in the operation and the capture is not feasible. The killing of a U.S. citizen who joined terrorists is then regarded as an act of “national self-defense” not inconsistent with the Fifth Amendment. Finally, the Memorandum states that targeted killings do not violate the prohibition of assassination on behalf of the government according to the Executive Order no. 12333.

5. Bush administration’s counter-terrorism policy

Accordingly, in order to determine their compatibility with international and domestic law, rules applicable to targeted killings should be made explicit. Actually the U.S. administration, both Bush and Obama, chose the paradigm of war. The problematic nature of this choice is clear; the biggest concerns involve the difficulty of identifying the target, which does not wear military uniforms, as well as the fact that the action happened out of a context of war.

But could such operations be justified in a different way?

Indeed, the killing of a suspect by police is usually justified in limited cases, for instance when serious physical harm is thought to befall to those who want to stop it or to innocent bystanders. Similarly, in peacetime, the right of life could not be derogated and the violation of this right is sanctioned by international law. Otherwise terrorists treated as enemy soldiers in an army are thought to be legitimately killed, even though they do not pose an imminent threat. In the first case, by the law enforcement model, terrorists would be criminals to be captured and processed; actually the ordinary criminal law seems to not apply to individuals who hide in countries far away. In the second case, the international human rights law, whose standards are similar to the law enforcement model, should be applied. In the third case, instead, the international humanitarian law, which is adopted in armed conflict, applies and the killing of enemy is lawful throughout military operations.

However, taking a step back and looking briefly at the aftermath of 9/11 terrorist attacks is important. As a result the United States waged war against Afghanistan because it was giving support to terrorists and arrested a large number of individuals. Detention operations quickly turned into long-term detention facilities without judicial guarantees and far from the war zone, as the Guantanamo Bay Prison in Cuba and other places. Such individuals were classified as “enemy combatants” by the U.S. in order to create a new category of combatants not protected by

²⁴ See the newspaper article on February 7, 2013, entitled *CIA Chief Nominee to Face Questions on Drone Policy*, available at <http://www.voanews.com/content/cia-nominee-faces-questions-on-drone-policy/1598807.html>.

international humanitarian law. According to the U.S. administration, the Third and Fourth Geneva Convention, governing respectively the position of war prisoners and civilians in wartime, did not apply.

According to the Third Geneva Convention a member of military forces of a nation is a “lawful combatant” and therefore, if captured, he should be regarded as war prisoner, a status that implies an advantageous situation for prisoners²⁵.

Moreover on the battlefield a “lawful combatant” can kill or be killed, but no one can prosecute or punish him because of the actions that are supposed to be carried out during a war, with the exception of war crimes. Otherwise, a nation can prosecute and convict a “lawful combatant” who has committed war crimes, but provides a fair trial for him.

Conversely, the legal position of “unlawful combatants” is governed by the Fourth Geneva Convention, within the category of civilians. Actually terms “unlawful combatants” are not included in the Geneva Convention even though this Convention protects all unlawful combatants, namely all those fighters not allowed standing on a battlefield. A typical example of this kind of combatant is a spy or a saboteur. This category includes those civilians who take part in the hostilities while not integrated into regular military forces or any other armed forces which have the minimum requirements to ensure that its members, once captured, can be included among war prisoners. Due to aforementioned considerations, guerrillas, insurgents or members of terrorist groups operating in war zones should be included in the category of “unlawful combatants”. A different placement could be also chosen; such individuals could be treated as common criminals and therefore be subject to the ordinary criminal justice system with the same guarantees. Anyway, international law does not allow a third category of combatants.

Otherwise the U.S. administration believed these individuals to be removed from international and domestic law guarantees; then they were questioned by a kind of torture method. Individuals, caught in a war zone (or sometimes in the United States too) and become captives in the military prison of Guantanamo, were submitted to inhuman treatment, because of both the denial of the fundamental right of legal defense and physical conditions in which prisoners lived²⁶; furthermore, among methods of interrogation there was the waterboarding, a kind of torture according to the international law²⁷. Torture and violations of Geneva Conventions also occurred in Afghanistan and Iraq²⁸. In addition to such deplorable situations there was the practice of the U.S.

²⁵ According to the Third Geneva Convention, on the one hand prisoners are required to disclose only the name, surname, date of birth, rank and serial number (article 17, paragraph 1), while any physical or mental torture against them is forbidden (article 17, paragraph 4), on the other hand they enjoy a number of rights, including to keep their personal belongings (article 18), to be provided for an accommodation equivalent to those of military forces of the nation that keeps them in custody (article 25), to be supplied with an adequate amount of food, water (article 26) and clothes (article 27), to keep in contact by letter with their families (articles 70 and 71) and to undergo any medical treatments (article 30).

²⁶ See Karen Greenberg, *The least worst place. Guantanamo's First 100 days*, Oxford-New York, Oxford University Press, 2009; Human Rights Watch (Organisation), *Locked up alone. Detention Conditions and Mental Health at Guantanamo*, New York, 2008, 20-21; Tommaso Edoardo Frosini, *Lo stato di diritto si è fermato a Guantanamo*, Dir. pubbl. comp. eur., 2005, IV, 1651-1652; J. Steyn, *Guantanamo Bay: the Legal Black Hole*, 53 Int'l & Comp. L. Q., 2004, 7-8; Joseph Lelyveld, “*The Least Worst Place*”: *Life in Guantanamo*, in Richard C. Leone, Greg Anrig Jr., *The War on Our Freedom: Civil Liberties in an Age of Terrorism*, New York, PublicAffairs, 2003, 111; *Report of the International Committee of the Red Cross (ICRC) on the treatment by the coalition forces of prisoners of war and other protected persons by the Geneva Conventions in Iraq during arrest, internment and interrogation*, February 2004, available at <http://cryptome.org/icrc-report.htm>; finally see many reports of Amnesty International available at www.amnesty.org.

²⁷ See Peter Jan Honigsberg, *Our Nation Unhinged: The Human Consequences of the War on Terror*, Berkeley, California, University of California Press, 2009, 75-76; Gleen Greenwald, *How Would A Patriot Act? Defending American Value from a President Run Amok*, San Francisco, California, Working Assets, 2006, 52-53.

²⁸ See John E. Owens, *Congressional acquiescence to presidentialism in the “war on terror”*. *From Bush to Obama*, in John E. Owens, Riccardo Pelizzo, *The “War on Terror” and the growth of executive power? A comparative analysis*, New York, Routledge, 2010, 59-60; Walter M. Brash, *America's Unpatriotic Acts: the Federal Government's Violation of Constitutional and Civil Rights*, New York, Peter Lang, 2005, 25-26; Richard Falk, *Human Rights: A Descending*

intelligence to deport suspected terrorists, with the consent of the State from which the compulsory transfer occurred, in countries, especially North African and Middle Eastern, that do not respect human rights. These individuals, once deported, were subjected to secret interrogations characterized by various kinds of violence and torture. These operations are named “extraordinary renditions”.

Targeted killings are thought to be included within this framework too; they were implemented by the United States under the Bush administration in different theaters of war, such as Pakistan and Yemen, carried out on the assumption that the war on terrorism does not have any borders and allows hitting enemy combatants wherever they are²⁹.

However, the government claims to fight terrorism by substantially trampling fundamental rights of people was partially cut down by the Supreme Court action, which re-established a certain degree of legality in what had initially looked like a legal black hole³⁰. The Supreme Court recognized the jurisdiction of federal courts over Guantanamo base disagreeing with the government’s point of view, reaffirming the right of habeas corpus for Guantanamo prisoners too and denying legality to the category of enemy combatants, invented by the executive branch. The Supreme Court still did not rule on the legality of targeted killings³¹.

In addition, the United States waged war against some countries in order to hit terrorist supporters. At the beginning it was clear that international humanitarian law should have applied. However the Bush administration decided that Geneva Conventions did not apply to terrorists. Thereafter, since the United States started to hit terrorists outside of the war theater, the application of the international humanitarian law has become more questionable.

However Bush administration policy showed the United States as a bully and arrogant power that, while claiming to export its model of democracy in the world, did not care to trample human rights, even within the own legal system.

Indeed the strength of democratic countries struggling against terrorism has to be recognized especially in values that these democracies are upholding. Attacks against a democracy cannot be carried out in spite of the principles of the democracy itself.

6. About terrorism

In order to better understand the complexity of the question about which rules apply in the fight against international terrorism, to make some brief considerations on terrorism itself seems appropriate.

The core of terrorism is represented by the spread of panic and insecurity³² and the phenomenon has usually political roots³³.

Spiral, in Richard A. Wilson, *Human rights in the War on Terror*, Cambridge-New York, Cambridge University Press, 2005, 232-233; Wayne McCormack, *Legal responses to terrorism*, Newark, New Jersey, LexisNexis, 2005, 571, 596-597; Noam Chomsky, *Hegemony or survival: America’s quest for global dominance*, New York, Metropolitan Books, 2003, 26-27. See also David Cole, James X. Dempsey, *Terrorism and Constitution, Sacrificing Civil Liberties in the Name of National Security*, New York, New Press, 2006, 190-191: after the disclosure of pictures that testify the torture in Abu Ghraib, a prison near Baghdad, in April 2004 the Bush administration tried to attenuate, affirming such situations as episodic; notwithstanding in June 2004 the liability of the U.S. government for Abu Ghraib tortures appeared clearly.

²⁹ See Gabriella Blum, Philip B. Heymann, *Laws, outlaws and terrorists*, 78.

³⁰ See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush*, 553 U.S. 723 (2008). In regard to them see Tullio Fenucci, *Sicurezza nazionale e diritti di libertà negli USA*, Bari, Cacucci, 2014, 99-114, and the bibliography there mentioned.

³¹ See Mike Dreyfuss, *My Fellows American, We are Going to Kill You: the Legality of Targeting and Killing U.S. Citizens Abroad*, 65 Van. L. Rev. 249 (2012), 275.

³² See James Bovard, *Terrorism and Tyranny: Trampling Freedom, Justice and Peace to Rid the World of Evil*, New York, Palgrave Macmillan, 2003, 6; Michael Freeman, *Order, Rights and Threats: Terrorism and Global Justice*, in Richard A. Wilson, *Human rights in the War on Terror*, 44-46.

Although terrorism is danger to democracy, it is not always thought to threaten the survival of the nation itself. So the reaction of legal orders must be balanced and proportionate and does not unduly compromise fundamental rights of individuals. Moreover citizens need to receive the guarantee that the government action, aimed at bringing the situation back to normal, is limited in the time to results to be achieved.

The same phenomenon of terrorism is difficult to classify; the same violent behavior could be considered terrorism in some circumstances and act intended to establish a new constitutional legal order in others.

In any case, the term terrorism means certainly a type of criminal activity, such as classified both domestic and international law. Nevertheless establishing the content and the range of the concept is problematic.

The first use of the word terrorism dates back to the French Revolution and in particular to years 1793-1794, namely the period of the Committee of Public Safety led by Robespierre; that time, characterized by summary trials that brought to gallows thousand people, is just known as the "Terror"³⁴. The origin of the term thus seems linked to a form of State terrorism³⁵.

However, after terrorist attacks by anarchists in some European countries in the late nineteenth century the word began to take on a different meaning: the use of violence in order to strike terror in the context of an organized community. Since then the terrorism has most frequently been associated to forms of violence against the State rather than the State violence. Nevertheless, sometimes the term state terrorism is still used to describe the violent behavior of a State as a form of government in territories under its authority or to indicate that a State provides aid for terrorists who direct their activities against other States or the same terrorist act carried out by a State against other States.

The core of terrorism is the development of violence for political ends. Terrorism is a crime to be distinguished sharply from actions of soldiers in armed conflicts; indeed it is defined by deliberate purpose to hit third parties and strangers so the identity of victims or targets of violence is often secondary or insignificant in relation to the aim pursued by the terrorists, which is to frighten³⁶.

7. Differences among terrorism, ordinary crimes and armed conflicts

Common crime, civil war as well as war between States are different from terrorism. Indeed the identification of which behaviors should be included among offenses related to terrorism is important; such identification allows to distinguish among similar actions that are reflected in common crimes, such as kidnapping and murder, as well as those behaviors that are considered lawful under international law, as killings by soldiers throughout military action.

The difference between terrorism and common crime is thought to be based on the political aim³⁷. On the domestic front the terrorism seems to include all actions aimed at the subversion of a specific legal order; a definition of terrorism could be formulated as the use of violence by those who are armed against unarmed people.

³³ See M. Laudi, *Voce Terrorismo (diritto interno)*, Enc. dir., XLIV, Milano, Giuffrè, 1992, 356; A. F. Panzera, *Voce Terrorismo (dir. internazionale)*, ibidem, 370.

³⁴ See Chiara Di Stasio, *La lotta multilivello al terrorismo internazionale. Garanzia di sicurezza versus tutela dei diritti fondamentali*, Milano, Giuffrè, 2010, 17; Gerard Chaliand, Arnaud Blin, *Storia del terrorismo*, Torino, Utet, 2007, 93; M. Ronco, *Voce Terrorismo, Nov. ssimo Dig. it.*, Appendice VII, Torino, Utet, 1987, 754.

³⁵ See Laura K. Donohue, *Terrorism and the counter-terrorism discourse*, in Victor V. Ramraj, Michael Hor, Kent Roach, *Global Anti-Terrorism Law and Policy*, Cambridge-New York, Cambridge University Press, 1st ed. 2005, 16.

³⁶ See David Bonner, *Executive Measures, Terrorism and National Security. Have the Rules of the Game Changed?*, Aldershot, England, Ashgate, 2007, 17.

³⁷ See Roberta Barberini, *La definizione internazionale di terrorismo*, Quest. Giust., 2002, 1354; *idem*, *Il giudice e il terrorista*, Torino, Einaudi, 2008, 9.

Nevertheless this definition seems to be insufficient. Therefore a more detailed definition of terrorist activity should be sought in order to better distinguish it from criminal activities which instead differ from the former.

Terrorist attacks can be carried out against individuals representing institutions or against helpless and unaware citizens; the most important target of a terrorist attack is the will of causing terror and insecurity in a specific community. Therefore, the choice of victims has a symbolic value, both when the attack is taken against individuals who embody institutions of a country and when it affects individuals chosen only because of their nationality; in both cases the characteristic of the terrorist attack is the ideological motivation that underlies the action.

Notwithstanding the matter is not so easy to identify. Based upon domestic criminal laws, it is possible to identify what terrorism is; conversely, it is complicated to define terrorism at the international level in order to establish which actions are included and which not. The lack of a uniform definition at the international level to identify exactly what terrorism means and what acts should be qualified under this label allows States to unilaterally balance their responses to terrorism in a way that sometimes threatens human rights and produces negative effects on the fight against terrorism itself.

In this regard, it seems appropriate to distinguish terrorism from guerrilla and revolutions in general. Indeed, guerrilla is adopted by organized groups, directed against military targets with classic warfare methods; otherwise, terrorism is defined by the activity of individuals who make no distinction between military and civilian targets, and who do not comply with ordinary war rules and strategies. Nevertheless, sometimes it is difficult to distinguish terrorism from guerrilla and insurgent movements if terrorist methods are used by parties involved in an armed conflict, especially civil or independence wars.

Terrorism is different from domestic armed conflicts too. When the terrorism is associated to a riot or revolution, punitive State intervention would be justified against rebels, which would be treated as criminals, not prisoners of war. The possible victory of rebels that would impose a new constitutional legal order is not affected by these considerations³⁸.

Within an armed conflict, there are some differences if an organization is labeled as a terrorist group or a party in a civil war. Indeed a group, which does not have the status of party in a conflict and is labeled as a terrorist group, will violate international humanitarian law and commit crimes of war and against humanity much more easily. Instead, groups of fighters, not labeled as terrorists but rather treated as combatants in an armed conflict may be more motivated to comply with international humanitarian law, both in order to strengthen the legitimacy of their group and in order to claim a decent treatment for their members in the event of capture by enemies. The qualification of terrorist, however, implies that the group or organization in question is not to be granted the recognition of the legitimate party in a conflict, favoring thus a degeneration of methods of combat.

Nowadays international legal order prefers to identify war disregarding formal elements and concentrating on the situation of the use of armed force. Notwithstanding the originality of the situation after 9/11 is given by the confusion that has arisen between terrorism and war; indeed both war and terrorism do not represent new kinds of violence³⁹. Before 9/11 the distinction between terrorism and war was more clearly discerned. In particular, the difference between international war and terrorism was clear. Things changed very quickly when President Bush launched the so-called "war on terror". The confusion between terrorism and war continues with Obama.

Notwithstanding there is a set of serious consequences in identifying an act as war or terrorism. For instance, throughout armed conflict certain acts of violence directed against military

³⁸ See Santi Romano, *L'instaurazione di fatto di un ordinamento costituzionale e la sua legittimazione*, in Santi Romano, *Lo Stato moderno e la sua crisi*, Milano, Giuffrè, 1969, 27-29.

³⁹ See Jelena Pejic, *Armed conflict and terrorism: there is a (big) difference*, in Ana Maria Salinas De Frias, Katja L. H. Samuel, Nigel D. White, *Counter-terrorism. International Law and Practice*, New York, Oxford University Press, 2012, 171.

targets and enemy army are allowed in order to prevail over enemies, otherwise the international humanitarian law prohibits the use of the violence against civilians and civilian targets⁴⁰. Terrorist attacks instead are never allowed to be directed either against civilian or military targets.

So the terrorist emergency seems to have changed the meaning of the word war. In the past the war was a struggle between States or at most between a sovereign State and non-State actors or different factions; instead the war on international terrorism has broken the connection between war and States. Indeed, due to the transnational nature of terrorism and the undefined scope of targeted killings carried out in many countries, the war against international terrorism shows typical characteristics of the particular type of international war named “world war” without the typical feature of such type of war, namely the presence of a clash between many nations in arms in different regions of the world. Therefore, the war on terrorism looks like a struggle no longer only among States but between States and organizations working secretly or even against single individuals. Furthermore the scope of the war does not have boundaries well defined but is potentially widespread to the whole world. So, is the “war on terror” a new type of war?

Moreover, the leveling of terrorism to a war emergency rather than a domestic crime to be addressed by police and criminal measures (which, however, would be impractical for terrorists hidden in countries far away) requires a different approach to the problem with different consequences. Indeed, the presence of a war scenario involves the application of international humanitarian law and not the ordinary criminal law. Among advantages of choosing an approach of war there is no doubt that it allows to kill those who appear as fighters, seeing that in war is legal to kill your enemy. But could a State decide freely to consider and tackle terrorism as an act of war instead of a criminal one?

Nevertheless, the decision to deal with the struggle against international terrorism as war emergency, endorsed by the U.S. administration with both President Bush and Obama, had an impact on fundamental rights, the protection of which was limited, just to war emergency.

8. Military force against terrorism in the history of the United States

Moreover, the idea that international terrorism could be dealt with by military force was not new in the history of the United States. Military force was used by the Reagan administration in 1985 to force the Egyptian plane in which terrorists responsible for the hijacking of the cruise ship “Achille Lauro” were travelling, to land at the military base of Sigonella in Sicily⁴¹; similarly in 1986 President Reagan ordered bombing Libya in retaliation for a terrorist attack in which American soldiers were killed. Both actions were regarded as an expression of self-defense by the United States and disapproved by the rest of the world. Indeed there are some other cases of use of the military force to fight terrorism by the United States not long before 9/11 attacks; for instance, in 1998 President Clinton ordered missile strikes in Afghanistan and Sudan as a reaction to attacks on U.S. embassies in Africa by the international terrorist network Al-Qaeda.

Compared to situations previously examined, the originality of 9/11 was the formal choice, solemnly resolved by the U.S. government, to deal with international terrorism as a war emergency. However the United States often carried out unilateral military actions to respond to terrorist attacks, using as a justification for its actions self-defense against unlawful attacks according to the article 51 of the United Nations Charter⁴².

⁴⁰ See Jelena Pejic, *Armed conflict and terrorism*, 172.

⁴¹ See Philip B. Heymann, *Terrorism and America: A Commonsense Strategy for a Democratic Society*, Cambridge, Massachusetts, MIT Press, 1998, 19-34.

⁴² The article 51 of the United Nations Charter establishes: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security”.

Therefore 9/11 attacks were considered by the United States an act of war and, accordingly, had to be addressed. The United States, in this way, did not intend to prosecute criminals and subject them to criminal proceedings for their actions but to kill without trial all those who were considered enemies in the war declared in the aftermath of the attacks.

Actually the U.S. administration established the legality of such behavior on the power given to soldiers throughout a war to kill their enemies.

9. Bush's preventive war and Obama's targeted killings: a feasible similarity

To doubt the legitimacy of the war paradigm does not mean diminishing the danger of international Islamic terrorism. Individuals who become terrorists and depart for their mission of death are very often people who previously have led a normal life, apparently integrated into the Western life style. For such individuals willing to sacrifice their lives on behalf of religious fanaticism, the threat of criminal penalties, which may include the death penalty, would not have any deterrent effect. Nevertheless to deal with a similar phenomenon, on the one hand, every legal order should introduce measures to combat terrorism without compromising disproportionately the balance between freedom and security, and, on the other hand, international cooperation should be intensified. Indeed, individually, each State is unable to adequately address this challenge. Just a greater international cooperation is needed, the Bush administration chose a unilateral strategy to combat terrorism by attacking countries considered terrorist supporters.

The U.S. administration, with strategy to combat the international terrorism and countries considered to favor or to have favored it, expanded the concept of defensive war to include military action in order to prevent mere threats of future attacks. This was the Bush administration's strategy; but similar considerations could be made for the Obama administration's strategy, precisely because of the theorization of an "imminent threat of violent attack" regardless of the attack is really going to happen.

On September 2002 the U.S. administration presented to the Congress the annual report about the national security strategy⁴³; it consisted of a collection of public speeches by President Bush given between September 2001 and September 2002, in which U.S. political and military strategies in the struggle against international terrorism were illustrated. This paper for the first time talked about preventive military actions against other States in order to protect national security; threats to national security were such as to justify a preventive military intervention when they materialized in support of terrorist groups by the State or in the procurement of weapons of mass destruction to be used in terrorist attacks.

Due to several violations of international law President Bush's counter-terrorism policy could be negatively judged, differently to draw a judgment upon President Obama's one is much more complicated.

On 22 January 2009 President Obama, as soon as took his office, issued three Executive Orders by which he seemed to mark significant differences with his predecessor in the management of the struggle against international terrorism⁴⁴.

With the first one, the Executive Order no. 13491, President Obama revoked the previous Executive Order no. 13440 of President Bush⁴⁵. In that Order President Bush reaffirmed what he

⁴³ See *The National Security Strategy of the United States of America September 2002*, available at <http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/>.

⁴⁴ See *Executive Order 13491 of January 22, 2009, Ensuring Lawful Interrogations*, *Federal Register* Vol. 74, No. 16, Tuesday, January 27, 2009; *Executive Order 13492 of January 22, 2009, Review and Disposition of Individuals Detained At the Guantanamo Bay Naval Base and Closure of Detention Facilities*, *Federal Register* Vol. 74, No. 16, Tuesday, January 27, 2009; *Executive Order 13493 of January 22, 2009, Review of Detention Policy Options*, *Federal Register* Vol. 74, No. 16, Tuesday, January 27, 2009. They are available at <http://www.archives.gov/federal-register/executive-orders/2009-obama.html>. On these Orders see Peter M. Shane, *The Obama Administration and the Prospects for a Democratic Presidency in a Post-9/11 World*, 56 N. Y. L. Sch. L. Rev. 27 (2011-2012), 33-34; D. Jenkins, *The closure of Guantanamo Bay: what next for detainees?*, *Pub. Law*, January 2010, 46-47.

had established on February 7, 2002: members of Al-Qaeda, Taliban and associated forces were “unlawful enemy combatants”, so they were not war prisoners protected by the Third Geneva Convention; the Article 3, common to all Geneva Conventions, also applied to detention and interrogation carried out by the CIA in the U.S. The latter circumstance meant that such programs and interrogations complied with obligations imposed on the United States by the above mentioned Article 3 as long as they did not consist of torture, murder, inhuman or degrading treatment, rape and other forms of abuse or abusive treatment, by a narrow interpretation of that Article.

The most important Order was no. 13492, by which President Obama settled the closing of the Guantanamo prison within one year and the transfer of all prisoners; furthermore that Order granted the right of habeas corpus to prisoners, as the Supreme Court decision *Boumediene v. Bush* had declared on June 12, 2008. This Executive Order, moreover, banned the definition of enemy combatants by which the Bush administration had denied prisoners the guarantees of Geneva Conventions; instead, the application of Geneva Conventions on the treatment of war prisoners to all persons held in custody by the U.S has been explicitly foreseen. This Order reaffirmed the prohibition of torture and stopped the use of military commissions.

Finally, the Executive Order no. 13493 established a Special Interagency Task Force on Detainee Disposition with the task of identifying legitimate options for the placement of individuals captured or arrested in armed conflicts or counter-terrorism operations.

So, at the beginning of his first presidency, Obama reestablished the importance of fundamental rights; furthermore he wanted to end the unilateralism that characterized the President Bush’s counter-terrorism policy⁴⁶. Nevertheless President Obama did not maintain all his promises⁴⁷.

Then there are the targeted killings. After the disclosure of the Memorandum on targeted killings of U.S. citizens, the interpretation of the imminence of the threat far beyond its real meaning raises the suspicion that this distortion of the meaning of the word “imminent” may lead to the same results of the Bush’s preventive war theory: rather than defense or self-defense, the use of drones looks like a strategy of attack.

10. Question targeted killings

So, on the one hand, President Bush’s policy was negatively characterized by repeated violations of international law (the most serious of which was the use of torture), on the other hand, there are the targeted killings, which have become the keystone of the whole struggle against terrorism under the Obama administration.

Indeed, even though the Obama administration has decided to ban the illegal definition of enemy combatants, nevertheless the paradigm of war still justifies targeted killings.

In this regard, the operation that led a group of U.S. elite soldiers to kill bin Laden was a real targeted killing without the use of drones; this operation was carried out in Pakistani without local

⁴⁵ See Executive Order 13440 of July 20, 2007, *Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency*, Federal Register Vol. 72, No. 141, Tuesday, July 24, 2007, available at <http://www.archives.gov/federal-register/executive-orders/2007.html>.

⁴⁶ See Federico Fabbrini, *Lotta al terrorismo: da Bush a Obama, passando per la Corte Suprema*, Quad. cost., 2011, 98; David Cole, *What to Do About Guantanamo?*, The New York Review of Books, vol. 15, October 14, 2010, 48.

⁴⁷ On May 15, 2009, military commissions revived, even though such choice of President Obama was matched by a commitment to ensure defendants a full and fair process, excluding the statements by inhumane methods could be used as evidence before them. On March 7, 2011, President Obama issued an Executive Order (*Executive Order 13567 of March 7, 2011, Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force*, Federal Register Vol. 76, No. 47, Thursday, March 10, 2011, available at <http://www.archives.gov/federal-register/executive-orders/2011.html>) by which he approved new military trials against suspected terrorists still held at Guantanamo and indefinite detention of individuals who are considered a threat to the national security of the United States. Furthermore Guantanamo is still open.

authorities being previously warned and was accompanied by concerns related to the failure of capture of the terrorist alive⁴⁸.

Because of the peculiarity of the attack, that took place without the knowledge of the sovereign State over the territory where the operation occurred, the U.S. government again seemed to have taken a unilateral approach not different from the one that characterized the former government. The military operation against bin Laden was the conclusion of a spectacular manhunt that lasted for years, which can be considered as unique seeing that the responsibility burden on the target of the hunt. As a result governments and the main media of most countries in the world did not criticize the United States for the action but mostly celebrated the event. Even though the peculiarity of the situation is understandable, notwithstanding concerns about the legitimacy of the bin Laden's killing remain. The U.S. administration decided it was an act of war, although in the early statements President Obama had defined bin Laden as a criminal.

Targeted killings raise other considerations too. The slaying with unmanned drones does nothing but repeat with different techniques what secret services had already done in the past and by other means. For example, during the Cold War the CIA set up a series of covert operations, among which the most famous were the disastrous landing at the Bay of Pigs in an attempt to overthrow the Fidel Castro's regime and several attempts to kill him. To this one should add operations during the Vietnam War in order to try to catch and kill communist militants and the support to the Mujahedeen in Afghanistan against the Soviet Union army⁴⁹.

However secret operations by security services have always been considered essential for the protection of national security. From this prospective, killings by drones are really nothing new but for the high degree of sophistication reached by this technology.

So, the weakest point in relation to the violation of human rights in the age of President Bush was certainly the use of torture, while for the Obama administration could be systematic targeted killings.

Anyway there is a really important moral and legal difference to be made between torture, which is always illegal and morally reprehensive, and killings, which can sometimes be lawful. The killing of people, respecting international humanitarian law, is legal throughout a war. Laws of war work in order to limit violence to combatants, who can fight each other with the knowledge that doing so may result in death.

Then the problem of targeted killings is the legal justification in order to avoid seeming State assassinations. Apparently the best way to justify such attacks is found in the paradigm chosen by the U.S. administration, namely the application of the law of war; nevertheless, as already mentioned, it is questionable that these killings are legitimate operations of war.

However, while targeted killings are criticized and raise questions of compatibility with the U.S. and international law, in regard to the illegality of torture there can be no doubt. Indeed, after 9/11 many laws changed but neither international nor national legal systems, including the United States, changed and repealed laws prohibiting torture.

Nonetheless, despite torture being an absolute evil both morally and legally, if an individual is tortured and then it turns out that he is innocent, the damage done is terrible while the individual is still alive. Otherwise, what happens if the suspected terrorist is recognized innocent after the targeted killing? The answer that terrorists are comparable to soldiers in a war is not convincing; the international humanitarian law identifies lawful and unlawful combatants but there are no specific rules to identify terrorists who appear in civilian clothes and maybe mixed with the population.

11. Conclusions

⁴⁸ See Luis E. Chiesa, Alexander K. A. Greenawalt, *Beyond War: Bin Laden, Escobar, and the Justification of Targeted Killing*, 69 Wash. & Lee L. Rev. 1371 (2012), 1371-1470.

⁴⁹ See Afsheen John Radsan, Richard Murphy, *Evolution of Law and Policy for CIA Targeted Killing*, 5 J. Nat'l Sec. L. & Pol'y 439 (2012), 457.

Nevertheless the international terrorism, in the image imprinted by devastating events of 9/11, is a threat to the peaceful conduct of life for individuals. Furthermore repeated terrorist attacks on a large scale can in some cases also represent a threat to the survival of the nation itself. Targeted killings, according to the Obama administration, are being carried out as a last resort, taking account of the danger of individuals involved.

As already mentioned, it is generally believed that damage inflicted by the terrorism on democratic ideals is purely symbolic and there is not a true capacity to destroy the foundations of democratic States⁵⁰. By this opinion, a terrorist attack, however bloody, cannot shake a democracy. Nevertheless, if the statement is true for established democracies, the situation is different in those countries already characterized by instability of government. In that case, terrorism can become a crucial factor in the collapse of the State structure. But this statement, of course, cannot apply to the United States. Otherwise, military approach and violations of human rights are more harmful to the democracy than the terrorism itself.

Indeed, not only terrorism but also any other emergency, that raises the need to address exceptional times and requires the introduction of special measures, does not allow the suppression of constitutional principles and the disregard for international law. The core of fundamental rights of individuals should be an insurmountable barrier in all times.

Nevertheless, the problem does not have an easy solution.

At the time of international terrorism emergency, the rule of law is thus subject to two different threats, one by the evil of terrorism and the other one by the remedy for this evil, namely measures in order to combat the terrorist emergency.

Another issue is the duration of the emergency as a result of the 9/11 attacks. Indeed, the international terrorism after 9/11 caused a situation of permanent emergency, in sharp contradiction with the concept of emergency itself, characterized by a lack of permanence. The occurrence of such situation leads us to distinguish an emergency arising from international terrorism by the classical concept of a state of emergency, instead characterized by impermanence. Nevertheless a link between both situations remains: the introduction of measures which restrict fundamental rights. The unspecified duration of measures taken, however, makes even more important the protection of the core of fundamental rights of individuals. The classic state of emergency was presented as necessary to cope with the temporary emergency situation but implied the early restoration of the ordinary functioning of constitutional bodies and the protection of freedom as soon as the emergency stopped.

The emergence of international terrorism, instead, is a permanent threat and therefore requires that the balance between public security and civil liberties is set so as to ensure the survival of the core of fundamental rights. Some restriction of civil liberties must be painfully accepted on behalf of the best interest of protecting citizens; nevertheless the core of civil liberties should be never jeopardized under any circumstances.

So, how to establish when the war on international terrorism is over? Will the war against international terrorism continue until the U.S. President kills all suspected terrorists on his list? Then the question of how long the emergency lasts result in the question of how long the U.S. President decides that targeted killings should be continued?

Reasonableness and proportionality, as well as the real need for their use, are very important in order to comply with the rule of law measures which restrict civil liberties.

The same criteria should apply to targeted killings. Furthermore the public opinion should receive more information on reasons underlying the inclusion in these lists. Are targets really so dangerous as to justify the introduction of such drastic measures? Is the danger detected on an accurate intelligence supported by documentary evidence or based on mere rumors? The recently released Memorandum does not seem to give satisfactory answers to these questions.

⁵⁰ See Mariona Llobet, *Terrorism: Limits Between Crime and War. The Fallacy of the Slogan "War on Terror"*, in Aniceto Masferrer, *Post 9/11 and the State of Permanent Legal Emergency*, New York, Springer, 2012, 111-112.

Anyway targeted killings should be undertaken if there is not any other possibility to capture suspected individuals without undue risks for the life of pursuers.

The challenge of this new type of emergency lies in the way in which States are prepared to face it. In the past, the restriction of fundamental rights was amply justified on its temporary nature and no one doubted that the situation was a merely exceptional and temporary emergency one. The traditional war was seen as a temporary emergency that justified the introduction of exceptional measures, the war on terrorism instead seems to be a permanent emergency. Therefore the need to deal with permanent emergency situations requires a new approach to the problem. An emergency response that leads to generalized suspension of fundamental rights indefinitely would be an unacceptable price to pay for the rule of law, with the result that two centuries and more of history would be canceled. Indeed the modern constitutionalism is designed to protect individuals from the abuse of political power. Furthermore, human rights are commonly considered inherent in individuals and preexisting State; so States could not dispose of them as required.

On the other hand there is a widespread awareness that is no easy feat to fight terrorism respecting principles of constitutional legal orders as well as guaranteeing the security of citizens to the maximum extent possible without violating their fundamental rights.

Furthermore, on behalf of national security, is the killing of individuals, not because of their actions but rather only for suspected membership of a terrorist group, legal? There is an obvious parallel with the legality of slaying a soldier due to enemy army belonging, regardless of its real capacity of damage when he is killed. So the problem of identification rises again, easy to solve for soldiers identified because of uniforms, problematic for militants of terrorist groups, especially mixed with the population.

Otherwise, is the war policy supported by the U.S. government the right position, perhaps believing that 9/11 attacks started a new kind of war never known before in the history⁵¹? Is the struggle against international terrorism a new kind of war as a terrorist group before 9/11 attacks had never shown such a great capacity of destruction as Al-Qaeda?

An affirmative answer to these questions could be a possible explanation and justification of the situation. In doing so perhaps drone attacks could be justified as acts of war and the concept of war could be reformulated due to groups of transnational terrorists so powerful as to threaten the stability of the international legal order; in doing so the traditional observation that acts of terrorism, even though serious, could not threaten any deeply democratic State may be refused.

But an affirmative answer is hard to be given.

Probably a clear regulation of targeted killings at domestic and international level would be required and the U.S. administration should reassure the world that targeted killings are really carried out as a last resort and the evaluation of targets is carried out with a particularly rigorous assessment⁵².

⁵¹ See Samuel Walker, *Presidents and Civil Liberties from Wilson to Obama. A Story of Poor Custodians*, Cambridge-New York, Cambridge University Press, 2012, 476-477.

⁵² Politicians of both US most important parties have considered to create a special "drone court" within the federal judiciary, which reviews decisions taken by the executive; see Scott Shane, *Debating A Court to Vet Drones Strike*, February 8, 2013 (available at <http://www.nytimes.com/2013/02/09/world/a-court-to-vet-kill-lists.html?ref=opinion>) and the editorial *A Court for Targeted Killings*, February 13, 2013 (available at <http://www.nytimes.com/2013/02/14/opinion/a-special-court-is-needed-to-review-targeted-killings.html?ref=opinion>). Nevertheless such idea has been considered as a mistake; by the way see Neal K. Katyal, *Who Will Mind the Drones?*, February 20, 2013 (available at http://www.nytimes.com/2013/02/21/opinion/an-executive-branch-drone-court.html?_r=0): according to him the creation of a national security court, within the executive branch by experts in the field, appears more appropriate. According to this view, a court set up by ordinary judges would not work, among other things, because of the lack of jurisdiction in matters of national security, the speed of decision required for such situations, to be used to deciding on matters of domestic law and only on facts that have already happened and not in advance. Instead, a court set up by experts within the executive branch and whose decision to be reviewed by the Congressional Intelligence Committees could be the best possible solution; the President may not take into account the decision of such court but then he should explain his behavior before the Congress.

Finally we must never forget the killing of innocent civilians⁵³. That seems an almost unresolvable problem. Could a clear regulation really avoid the killing of too many innocent civilians, accidentally victims of the “war on terror”?

⁵³ In January 2015 two hostages of Al-Qaeda, Warren Weinstein, an American kidnapped in 2011, and Giovanni Lo Porto, an Italian seized in 2012, were accidentally killed in a remote area in Pakistan. See Peter Barker, *Obama Apologizes After Drone Kills American and Italian Held by Al Qaeda*, April 23, 2015 (available at http://www.nytimes.com/2015/04/24/world/asia/2-qaeda-hostages-were-accidentally-killed-in-us-raid-white-house-says.html?_r=0).