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THE IMPACT OF NEW FORMS OF
AGGRESSION ON INTERNATIONAL LAW

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INDEX

1	The Impact of New Forms of Aggression	4
2	Conceptualizing Aggression	9
2.1	Historical Development of the Prohibition on Aggression	10
2.2	Aggression and Use of Force in the UN System	13
2.3	Aggression as a Crime	21
2.3.1	The Development from the London Charter to the Kampala Amendments	21
2.3.2	The Crime of Aggression and Non-State Actors	27
2.3.3	A Case for Internal Aggression?	30
3	Self-Defence against Non-State Actors	33
3.1	Self-Defence in the UN Charter	35
3.2	Armed Attack Requirement of Self-defence	39
3.2.1	Magnitude (Ratione Materiae)	39
3.2.2	Time of Occurrence (Ratione Temporis)	41
3.2.3	Ratione Personae	44
3.3	Necessity and proportionality	57
3.3.1	Necessity	57
3.3.2	Proportionality	61
4	New Forms of Aggression	65
4.1	Terrorist Groups	66
4.1.1	The US and the War on Terror	66
4.1.2	Terrorism as Crime Against Humanity	72
4.1.3	Similarities between Piracy and Terrorism	73
4.2	Cyber-attacks	79
4.2.1	Cyber-attacks as armed attacks	79
4.2.2	Cyber-attacks as war crimes	81

4.3	Rebel groups and Guerrilla	84
4.4	Use of Force by Private Contractors	88
4.5	Drones and Autonomous Weapons.....	92
4.5.1	Extraterritorial Law Enforcement Operations.....	92
4.5.2	Drone Policies.....	95
4.5.3	Lethal Autonomous Weapons Systems (LAWS)	97
5	Conclusion: New Rules Needed?	102
	References.....	109
	Sources of law	121

1 THE IMPACT OF NEW FORMS OF AGGRESSION

As the world gets more complex over time, new issues start to rise along with unforeseen phenomena. This is certainly the case of international law on use of force, which has always been the most delicate part and, therefore, the most rigid with respect to the necessities of an evolving reality. In this work, I am going to examine the legal challenges posed by new forms of aggression, such as terrorist attacks, cyber-attacks, drones, lethal autonomous weapons systems, guerrilla groups or private military and security companies. I am going to review the attempts made by legal scholars to include such new actors and weapons in a legal body crippled by politics, interests and loopholes ready to be exploited. I will mostly take into account the *ius ad bellum*, i.e. the right to go to war, which usually revolves around the legal concepts of aggression, self-defence and authorization of use of force by the UN Security Council (henceforth UN SC). By leaving aside the last one, which, by definition, is mainly left to the discretion of the UN SC, I will first focus on aggression, as the gravest form of armed attack and international crime of States and leaders. I will first search for a definition of aggression and review all the discussion around it, by starting from its historical roots and arriving at the current codification and use in the UN Charter and practice, i.e. as an event triggering Security Council action under Article 39, as an armed attack giving rise to self-defence under Article 51 and as a use of force prohibited under Article 2 paragraph 4. However, as I have mentioned above, aggression is not only a category of use of force used in *ius ad bellum*, it is also a crime deriving from the Rome Statute of the International Criminal Court, as amended in 2010 in Kampala, where the State parties decided to transpose into international criminal law the same definition developed by the UN General Assembly in 1974, which was already 36 years old and conceived from its inception as a mere guideline for the actions of the Security Council. As a result, I will show this definition is unfit to prosecute, for instance, terrorists, who are not leaders of States. Indeed, the main impression emerging from this analysis will be that of

aggression as a political crime aimed at punishing the infringement upon the sovereignty of a State by another State.

Then, being aggression the gravest form of armed attack and being armed attack a valid legal justification to act in self-defence under Article 51 of the UN Charter, I will depict an anatomy of self-defence in chapter 3. I am going to dissect the many requirements and conditions it contains, by trying to identify how far it has been stretched in response to new forms of aggression. Therefore, I will point out the three requirements needed for an armed attack to verify and for self-defence to be lawfully claimed, i.e. a sufficient magnitude, a near time of occurrence and an agency recognized under international law. Precisely this last requirement will deserve attention, since the body of international law is notoriously shaped around the legal personality of States, which undoubtedly impose themselves as dominant actors. Unfortunately, when it comes to facts, the emergence of new actors with material capabilities to perform relevant actions in the international setting poses new challenges to existing laws. Those non-State actors are able to intervene and affect international law in many different ways, but, for the purpose of the present work, I will take into account their ability to use force in the forms of aggression and armed attack. One of the most crucial issues, in any case, is related to the need to link those non-State actors to States, since aggression, as mentioned before, is still regrettably tied to States. Hence, the question of attribution assumes a central role in determining whether and against whom States are able to act in self-defence. Unfortunately, since the International Court of Justice has pronounced on the matter in the famous case *Nicaragua*, the requirements for attribution are really strict and seem to have only partially eased after 1984, with the Shultz doctrine (see below) and with the position taken by Antonio Cassese, as President of the International Criminal Tribunal for the former Yugoslavia, in the seminal decision in the Tadić case (Prosecutor v. Dusko Tadic - Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995). Clearly, when acting in self-defence, States shall always respect the criteria of necessity and proportionality, which I am going to consider in detail.

In Chapter 4, I will single out five possible new forms of aggression that could represent a challenge to the current framework, both from a *ius ad bellum* and from a *ius in bello* point of

view. These new forms are: attacks by terrorist groups, cyber-attacks, attacks by rebel or guerrilla groups, private contractors and by drones or autonomous weapons.

Violent non-State actors, such as terrorist groups or pirates, had always been repressed within the framework of law enforcement operations, i.e. without making any reference to war, aggression or self-defence. Since 9/11, however, the rhetoric has changed, especially as far as terrorists are involved. The US has waged a global "war on terror" and stepped up its efforts in fighting terrorist groups, through new measures that appeal to the framework of war and humanitarian law, in order to avoid the burden of the ordinary human rights regime, under which, for example, the practice of targeted killings would be largely unlawful or, at least, would require too many procedural safeguards (Alston, 2006). I will, therefore, try to identify whether the rhetorical change corresponds to an actual change in State practice, whether this change complies with international law, whether it relies on an overstretched interpretation and whether it requires new rules to cover possible loopholes in the current system. One possible change when speaking of terrorist attacks involves self-defence and the promotion by the US of what has been known in 1984 as the "Shultz" doctrine (from the name of Reagan's Secretary of State), which advocated a right to intervene in self-defence against a State that is either unwilling or unable to prevent terrorists from using its territory as a base to launch attacks against the victim State. I am also going to examine recent events, such as the recent missile launch by the Trump administration in Syria last April. Moreover, I will expose some innovative approaches to terrorism that try to give new interpretations of current provisions, such as the 2010 Kampala amendment of the Rome Statute of the International Criminal Court or those dealing with piracy in the 1982 UN Convention on the Law of the Sea, so as to derive from them new possible tools to cope with terrorism.

When speaking of cyber-attacks, then, the main questions are about whether and under which conditions we may consider them as armed attacks for the purposes of Article 51 of the UN Charter. Indeed, not all cyber-attacks are equal and their consequences may cover a huge range of possibilities. For instance, what would enable us to consider a cyber-attack as a use of force and, thus, as an act prohibited under Art. 2(4) of the UN Charter, is the eventuality in which the perpetrator of the attack gains a military advantage over the victim State. Yet, a use of force in itself is neither an armed attack nor an act of aggression. In order to qualify as such,

the cyber-attack should provoke death or physical damage, e.g. by cutting the power to a hospital or derailing a train. At this point, the only obstacle remaining would be the attribution of the action to a State, which remains difficult, since one should prove the existence of such a strong tie between the individuals materially carrying out the attack and the State.

Another form of violence that is not really new, but has still a largely ambiguous relationship with current *ius ad bellum*, is the one of rebel or guerrilla groups. Indeed, international law protects in a clear way the principle and right to self-determination. The main question here will be to what extent could those groups be protected by international law and, hence, shielded from self-defence reactions or subsidized by third States without any sanction or liability. Indeed, such self-determination exceptions seem to be crafted for people struggling under foreign domination or occupation, which is not the case of many groups operating today in a context where colonies are almost entirely wiped out.

Then, I will move on to examine Private Military and Security Companies, as far as their legal status in conflicts is concerned. Among the many issues regarding private contractors, one is tied to *ius in bello*. In particular, the main question is their legal status under humanitarian law, so as to determine whether they are members of States' regular armed forces, people accompanying regular armed forces, civilians occasionally taking part in hostilities in a direct way, and so on. Since much of the literature on the phenomenon focuses on *ius in bello*, I am going to try to derive their impact on *ius ad bellum* from the one they are believed to have in the former. The main orientation in the doctrinal debate seems to be that, unless they are *de facto* or legally integrated into regular armed forces, they have to be considered as civilians for as long as they do not participate directly in hostilities. But under a *ius ad bellum* point of view, mounting an aggression by means of private contractors, regardless of whether they are integrated into regular armed forces, is actually giving rise to hostilities and, therefore, substantively qualifiable as an act of aggression.

More or less the same applies to drones and lethal autonomous weapons systems (LAWS), which give rise to criticalities especially in *ius ad bello*. As for drones, they are usually used in extraterritorial law enforcement operations, such as targeted killings. After briefly reviewing the legality of such operations, which has to be assessed under international human rights law (otherwise, we would be speaking of war operations), I will analyse the drone

policies of the major international actors and try to point out how the use of drones may impact or interact with *ius ad bellum*. Then, I will move on to LAWS, which pose the notorious issue of the “accountability gap”, due to their autonomous decision-making. Several members of the international community have voiced their concerns about that and even proposed to consider LAWS as intrinsically unlawful, like chemical weapons. However, as I am going to point out, the autonomous decision-making is in no way an evil comparable to the mass destruction and cruelty imposed by weapons that are illegal in themselves. Rather, it is the asymmetric distribution of risks and benefits deriving from the use of LAWS that gives rise to moral concerns. But some legal scholars see State liability as a solution. The problem will be examined first under a *ius in bello* perspective, and then transposed by analogy to *ius ad bellum*.

Finally, I am going to review some suggestions of amendment or of creative interpretation of key provisions of international law on the use of force, in order to solve or smoothen much of the issues I take into account in this work.

2 CONCEPTUALIZING AGGRESSION

In order to establish whether or not the changing conditions under which violence is used in the contemporary world are challenging the current legal order, it is necessary to review the legal categorization of uses of force, starting from the gravest form, i.e. aggression.

Aggression is a historical concept of international law entailing the triggering of a war by a State against another State, through whatsoever mean. The definition is unsurprisingly vague, since the same concept of aggression is subject to disputes over the details of its functioning. For instance, it has never been specified whether the actual use of force is needed in order for an aggression to materialize, or whether a threat is sufficient to bring it about (Dinstein, 2015). It goes without saying that there have been several attempts to define and codify it in a universal way. Below, I will attempt to go over all these attempts and try to sketch a general definition of aggression according to the current consensus in the international community.

2.1 HISTORICAL DEVELOPMENT OF THE PROHIBITION ON AGGRESSION

In the nineteenth and early twentieth centuries, States were supposed to have a right to wage war against other States that was inherently descending from their sovereignty and even constituting a crucial part of it. There could have been legitimate reasons – according to the conception of the time –, such as non-compliance of the aggressed with some provisions of international law, but war was thought to be possible even with no justification (Dinstein, 2011).

However, the unrestricted possibility to resort to aggression and, therefore, to challenge the sovereignty of other States, was in contrast with the rationale of international law itself. Sovereignty, indeed, is the paramount principle of international law and is meant to protect its main subjects, i.e. States, by granting them the basic right to exist. Yet, the freedom of aggression is the exact negation of this right (Dinstein, 2011).

That is why, bilateral treaties on the renunciation of the use of force or non-aggression pacts were frequent in the nineteenth and early twentieth century. They were meant to give mutual reassurance by committing the parties to always resort to peaceful dispute settlement methods, or at least to try them before waging war. Some States created webs of bilateral treaties to avoid receiving an aggression, like Germany with the 1925 Locarno Treaty of Mutual Guarantee or the US with the Bryan Peace Treaties (Dinstein, 2011). More specifically, the issue of aggression entered the international debate for the first time following the First World War, in particular as far as Article 227 of the Treaty of Versailles is concerned (Bruha, 2017, p. 144). The Article goes as follows:

The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.

A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one

appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan [...] (Treaty of Versailles, 1919)

The text can be considered as pioneering the developments that will be exposed below, although explicit references to the crime of waging wars of aggression were avoided and, eventually, the US put a reservation on the possibility to bring a head of State before an international tribunal, in order not to set a precedent that might have given rise to a slippery slope (Bruha, 2017, p. 144).

However, the same treaty contains also the most far-reaching attempt to regulate the right to go to war in the early twentieth century, which is linked to the 1919 Covenant of the League of Nations (contained in Part I of the Treaty of Versailles), whose Article 10 committed its members to “*respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League*” (Covenant of the League of Nations, 1919). Article 12 compelled them to submit any serious dispute to the League’s Council, before resorting to force, whereas Article 15 stated that, whenever a member did not abide by the safeguarding procedure of Article 12, the Council or the Assembly of the League were entitled to issue recommendations. The compliance with a recommendation passed with a unanimous vote by the Council (or a qualified majority vote by the Assembly) granted the targeted member an immunity from belligerent actions by other League members. As a result, the Covenant of the League of Nations represented the first attempt to regulate the right to go to war, although not to abolish it. The above-mentioned procedures, indeed, were meant to act as a safety valve or a cushion to contain conflicts, but in no case did they outlaw war in itself. In 1924, an attempt was made to overcome the loopholes of the Covenant through the adoption of the Geneva Protocol on the Pacific Settlement of International Disputes by the Assembly of the League of Nations. The cornerstone provision, in that case, was Article 2, which proscribed resort to war, with the only exception of a reaction to aggression or of authorization by the Council or the Assembly of the League (Dinstein, 2011, p. 84). But the Protocol did not stop at that, since it explicitly labelled wars of aggression as international crimes (Dinstein, 2011, p. 125). Unfortunately, it never entered into force after its adoption.

The real turning point was in 1928 with the General Treaty for Renunciation of War as an Instrument of National Policy, or more easily known as Kellogg-Briand Pact. With the entry into force of the treaty, war was generally outlawed among signatories except but in cases of violations of either international law or the treaty provisions, or in case of self-defence, granted by formal reservations exchanged among the parties and expressed especially by the United Kingdom (Ronzitti, 2006, p. 343). Thus, war was still possible against aggressors, States that were not parties to the treaty and States in breach of the treaty provisions or of international law provisions (a case in which a war could be deemed as a sanction and, therefore, an instrument of international policy) (Dinstein, 2011). In short, the Treaty did not address in an overarching way the boundaries of self-defence and of war as an instrument of international policy. Moreover, the prohibition on aggression was neither universal nor extended to forcible measures short of war, i.e. extraterritorial operations such as abductions or targeted killings, which will be taken into account below.

The progressive clarification of the concepts of aggression and self-defence will take place in several steps, by means of resolution 3314/1974 of the UN General Assembly, several ICJ judgments, the 2010 Kampala amendments to the 1998 Rome Statute of the International Criminal Court and, most importantly, the customary law deriving from the practice of States.

2.2 AGGRESSION AND USE OF FORCE IN THE UN SYSTEM

The 1945 Charter of the United Nations was drafted having among its aims the correction of the drawbacks of the Kellogg-Briand Pact (Dinstein, 2011, p. 85). Indeed, Article 2(4) of the Charter provides for a general prohibition on the “*threat or use of force against the territorial integrity or political independence of any State*” by all UN members (UN Charter, 1945), so as to include even acts short of war and threats, as confirmed by the International Court of Justice in the 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons:

The notions of ‘threat’ and ‘use’ of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal – for whatever reason – the threat to use such force will likewise be illegal (Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996).

It is important to stress that the wording “*any State*” is meant to include also States which are not members of the United Nations. Therefore, the Charter aims at achieving a universal prohibition on inter-State use of force, also in light of Article 2, paragraph 6, which prescribes:

The Organization shall ensure that States which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security. (Article 2(6), Charter of the United Nations, 1945)

Hence, the scope of the ban here is indirectly and potentially extended to the whole world. This may seem to run against Article 35 of the 1969 Vienna Convention on the Law of Treaties, which rules out the imposition of any treaty obligation on third States, in line with the historical reliance of most of international law on consent. Yet, Article 2(6) is imposing a duty on UN Members and on the same United Nations to act in order to contain non-Members

whenever their behaviour is detrimental to international peace and security (Dinstein, 2011, p. 92).

Article 2(4) is speaking of “*use of force*”, without mentioning aggression, and is still confined to State actors, as it refers to “*all members*” and the “*territorial integrity and political independence of any State*”. Some authors, therefore, deem the UN too much focused on inter-state violence and ill-equipped to deal with the new challenges posed by transnational non-State actors (Mullerson, 2002, p. 155). However, as the Charter continues and moves on to concrete actions to safeguard peace and security, it starts to use more specific concepts and to forego the narrow reference to States. Aggression, indeed, appears in Article 39 alongside two other categories that can be used by the Security Council as a basis to act under Chapter seven of the Charter, i.e. threats to the peace and breaches of the peace:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security (Art. 39, Charter of the United Nations, 1945).

If the distinction, especially between a breach of the peace and an act of aggression, is far from clear, it is noteworthy to consider that in no occasion the Security Council has decided to act by labelling a use of force as an act of aggression, not even to address Saddam Hussein's invasion of Kuwait. The Charter seems to suggest that an act of aggression is the gravest form of use of force, even if the Security Council's decision on how to label a forcible act does not affect the scope of its powers on the matter. In any case, one of the most significant developments is perhaps the practice of authorization of uses of force, i.e. a substantial delegation of the Security Council's power to use force to States and regional organizations (Mullerson, 2002, pp. 154-5).

Another occasion in which the Charter deals with solutions to enforce international peace and security is in Article 51, devoted to individual self-defence. In that occasion, which will be taken into account especially in the next section of this work, in order to analyse the options available to States to react to violent non-State actors, the Charter refers to “*armed attacks*” to identify all the possible acts that may give rise to lawful forcible reactions.

The existence of different nuances represents a break with the pre-Charter period, when aggression and self-defence were conceived as the only two categories of use of force, i.e. when any forcible action could be either undertaken as legitimate self-defence against aggression or labelled as an unlawful act of aggression itself (Bowett, 1961, p. 249). Yet, in that period, the definition of aggression was more blurred than ever, as the opposition of the US to the inclusion of the right to self-defence in the Kellogg-Briand Pact testifies. Indeed, it objected that difficulty in defining self-defence mirrors the one in defining aggression (US Government, 1928-9).

In 1968, the works of the Fourth Special Committee on the Question of Defining Aggression (1968-74) highlighted how the difficulties in formulating such a definition were linked to self-defence. Indeed, Norway stated that: “*Any enlargement of the definition of aggression would entail a corresponding enlargement of the concept of self-defence*” (UN Doc. A/AC.134/SR.52–66, 37). Precisely, the main source of strains was the extension of self-defence to some cases of indirect aggression, by means of non-State armed groups supported or directed by another State. This broader understanding of aggression was supported by Australia, Canada, Italy, Japan, the United Kingdom and the United States (UN Doc. A/AC.134/SR.52–66).

Nevertheless, the key misunderstanding was on what kind of concept the Committee was entrusted to define, since some States perceived the terms “use of force”, “aggression” and “armed attack” as progressively narrowing down in the scope of their meanings, whereas others treated them as functional equivalents. In the end, the former vision prevailed, with potentially far-reaching implications. In fact, by viewing the three concepts as concentric circles, any “armed attack” triggering self-defence under Article 51 would be categorized as an “act of aggression” for the purposes of Article 39.

The definition of aggression worked out by the UN General Assembly in 1974 with resolution 3314 is another cornerstone legal source delimiting the scope of the “armed attack” category, used for establishing the limits of self-defence, but also and especially the definition of aggression as a crime (Ruys, 2010, p. 138). Indeed, the text of the definition will be picked up and transplanted with no modification in the Resolution on the Crime of Aggression, adopted in Kampala on 11 June 2010, in order to make that crime justiciable for the purposes of the Rome Statute of the International Criminal Court, through the introduction of the new Article

8 *bis*. After many years of deadlock and two Special Committees set up with little or no result, the General Assembly was able to progress on the topic thanks to the changed equilibria following decolonization. A new “South-East” Alliance, championed by the USSR, successfully passed for the first time in 1967 the resolution 2330 on the “*Need to expedite the drafting of a definition of aggression in the light of the present international situation*” (with a large abstention from the Western States). The resolution instituted the third Special Committee on the Question of Defining Aggression, within which three drafts emerged: one by the non-aligned countries, one by the Western ones and another by the USSR. The first was the most ambitious, since it gave a wide definition of aggression, but even embarked on the attempt to criminalize it and to define also self-defence. On the contrary, the Western draft aimed at providing for mere non-binding guidelines for the exclusive use of the Security Council, in order to determine acts of aggression for the purposes of Article 39 of the UN Charter. Finally, the USSR’s draft was combining the ambitious defining attempt of the non-aligned countries with the careful approach of the Western members in the choice of the legal nature of the act (i.e., a non-binding set of guidelines for the Security Council). In 1973 a consolidated text was obtained from the three, which slowly managed to win the approval by acclamation by the General Assembly, on 14 December 1974 (Bruha, 2017, pp. 152-4). Obviously, being the result of such diverse intentions, the consolidated text came to the final approval with several loopholes and contradictions.

A first compromise between the law-making capacity of the resolution, favoured by the non-aligned countries, and the “guideline” status, favoured by the Western ones, is represented by the choice to annex the definition of aggression to the resolution, instead of incorporating it into the text (Bruha, 2017, p. 155). Another issue was on whether the first use of armed force would be enough to qualify as aggression or an “aggressive intent” had to be shown. The former stance was preferred by the USSR, whereas the second was defended by the West. Article 2, in the end, has been shaped as follows:

The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has

been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity (UN GA Definition of Aggression, 1974)

The West eventually accepted the “objective” definition proposed by the USSR and based on practical evidence, but the use of the expression “*other relevant circumstances*” grants the Security Council enough discretion to throw in political evaluations and give another label to the use of force in question (Bruha, 2017, pp. 156-7). Another loophole may be found in Article 5(1), which states that:

No consideration of whatever nature, whether political, economic, military or otherwise, may serve as justification for aggression (UN GA Definition of Aggression, 1974)

Yet, in this regard, it is important to note that the restriction is valid only for acts of aggression and not for uses of force in general, so that, in order to justify an attack, it is sufficient not to label it as an aggression (Bruha, 2017, p. 157).

In any case, Article 1 provides for a general definition of aggression, which is worth examining, since it is largely inspired by Art. 2(4) of the UN Charter, with few differences:

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition (UN GA Definition of Aggression, 1974)

The main difference with the formulation of Art. 2(4) is, in this case, the absence of any reference to the threat of force, which is in some way coherent with the jurisprudence of the International Military Tribunal in Nuremberg. Furthermore, the wording here includes an explicit reference to “armed” force, in order to rule out any extension of the concept to economic and ideological aggression, which had been supported in the previous years by the Southern States.

In Article 3, the UN GA chooses to enumerate acts that should fall within the definition of aggression

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein. (UN GA Definition of Aggression, 1974)

Nevertheless, as Article 4 reminds, the list is non-exhaustive. Therefore, full discretion is granted to the Security Council in both expanding and restricting (by virtue of the aforementioned “*other relevant circumstances*”) that list. The landmark passage of this resolution is undoubtedly Article 3(g), which deals with indirect aggression, i.e. an attack perpetrated by non-State actors whose activity can be attributed to a State, according to the

criteria that will be analysed below (see 3.2.3.a). Clearly, as the reasoning in the following sections will show, an indirect aggression means that the victim State is able to invoke self-defence under Article 51 of the UN Charter both against the non-State actor and, especially, against its host State. This is even more important if we consider that, in both the Nicaragua and the DRC v. Uganda cases, the International Court of Justice has deemed Article 3(g) “to reflect customary international law” (Dinstein, 2011, p. 124). This Article, as it will be discussed below, has been wholly transplanted into Article 8 bis of the Statute of the International Criminal Court in the Kampala amendment of 2010, so that it is also part of the working definition of the crime of aggression. Moreover, it has also been the main ground of confrontation in the Special Committee between the USSR and the non-aligned countries, on one side, and the West, on the other. The former was more inclined not to recognize the possibility of indirect aggression, by means of irregular armed groups, whereas the latter fought in order to put such an attack on the same legal footing. It is also interesting to note that, in the draft version, the text referred to “*organizing, supporting or directing armed bands or irregular or volunteer forces that make incursions or infiltrate into another State*”, thereby entailing a broader scope with respect to the mere “*sending*” and lifting the constraints of the gravity threshold. The only accommodation made to the Western position is represented by the addition of the expression “*or its substantial involvement therein*” (Bruha, 2017, p. 165).

If we accept the above-mentioned “concentric circles” view of the concepts of aggression and armed attack, then two limitations will be imposed *a fortiori* on the latter, i.e. the “*sufficient gravity*” threshold of Article 2 and the conception of aggression as a crime of States against other States, as Articles 1-3 seem to define it (Ruys, 2010, p. 138).

As for the liability and responsibility arising from aggression, Article 5(2) tries to establish both in a quite confusing way:

A war of aggression is a crime against international peace. Aggression gives rise to international responsibility (UN GA Definition of Aggression, 1974)

The first sentence clearly condemns a war of aggression as a crime against peace, but the second one links acts of aggression to a vague “*international responsibility*”, without specifying

whether this is State responsibility (i.e., a mere wrongful act) or individual criminal responsibility (i.e., a crime against peace).

As for the historical legacy and impact of the definition, if one had to strike a balance, then it may turn out to be a little disappointing. The Security Council, indeed, has never referred to that definition, but, by analysing the cases in which it has been willing to use the term “aggression” (although never as a ground to trigger Art 39), it may be derived that the body considers as such only acts listed in Art. 3(a) and (b) of the definition, not necessarily involving a large-scale use of force (Bruha, 2017, p. 169). The General Assembly, instead, has mentioned it on several occasions (e.g., Israel’s occupation of the Syrian Golan Heights [Res. ES-9/1] or South Africa’s occupation of Namibia [Res. 37/233A]) and has also deemed as included within aggression all the cases of non-violent annexation (Bruha, 2017, p. 169). Finally, as we will see below, the International Court of Justice has once referred to the 1974 UN GA definition of aggression in the case *Nicaragua*, where, on the one hand, it deemed the text as reflecting customary law but, on the other hand, gave it a narrow interpretation, especially as far as article 3(g) is concerned.

2.3 AGGRESSION AS A CRIME

2.3.1 THE DEVELOPMENT FROM THE LONDON CHARTER TO THE KAMPALA AMENDMENTS

The prohibition on aggression alone would risk becoming dead letter without a credible enforcement and punishment mechanism, as for every other legal norm. That is why, in the twentieth century, the international community has sought to make aggression a justiciable crime of leaders. After the labelling of wars of aggression as international crimes in the above-mentioned 1924 Geneva Protocol on the Pacific Settlement of Disputes, the first concrete attempt to criminalize aggression is represented by the 1945 London Charter setting up the International Military Tribunal of Nuremberg and by the judgments of the latter (Dinstein, 2011, pp. 125-6). Article 6 of the Charter extends the jurisdiction of the Tribunal to, among others, war crimes, which are therein specifically defined as the “*planning, preparation or waging of a war of aggression, or a war in violation of international treaties*” (London Charter, 1945). Incidentally, it is interesting to note, for the purposes of the discussion in the following parts of this work, that the act of planning of a war of aggression is, in itself, already a crime. Article 6 goes on setting out individual criminal responsibility for “*leaders, organizers, instigators and accomplices*” involved at any level in such war crimes (Dinstein, 2011, p. 126). The reasoning of the Tribunal in its judgment started from this article, deeming that it was a restating of already-existing international law, and in particular of the principles and norms contained in the Kellogg-Briand pact, so as to reject the accusation of *ex post facto* criminalization (Dinstein, 2011, p. 127). According to the Tribunal, aggression is “*not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil as a whole*”, since, as it is pointed out, a war ends up negatively affecting the whole world (International Military Tribunal, 1946). The Nazi officials under trial were accused by Count One of the indictment of “*conspiring or having a Common Plan to Commit Crimes Against Peace*”, which were more specifically defined in

Count Two as “*planning, preparing, initiating, and waging wars of aggression against a number of other States*” (IMT, 1946). Thus, for the first time, the idea of aggression appears on the international scene as a justiciable crime of leaders, meaning, in the jurisprudence of the Tribunal, anyone connected or consenting to the commission of the crime and holding “*a high political, civil or military position in Germany or in one of its Allies*” (Control Council Law No. 10, 1945). To be precise, the International Military Tribunal of Nuremberg uses the wording “*war of aggression*”, which in some instances is believed to have a slightly different meaning from an “*act of aggression*”. The latter, which is a broader concept including also acts short of war, will be included in the 1954 Draft Code of Offences against the Peace and Security of Mankind by the International Law Commission. Nevertheless, the distinction will be clarified in a successive step, in the above-mentioned UN GA resolution 3314, whose Article 5(2) assigns the status of “crime against international peace” – thereby potentially giving rise to individual criminal liability – to wars of aggression, while confining to the domain of State responsibility all other acts of aggression short of war (Dinstein, 2011, p. 135).

By no means the London Charter and the judgments of the International Military Tribunal will produce an agreed definition and use of the legal concept ready to be incorporated into international law or enforced in international courts. First and foremost, because ambiguity will shroud the idea of aggression at least up to resolution 3314/1974 of the UN General Assembly, which, in some way, has picked up the legacy of the Nuremberg judgment. In fact, the work on the resolution has been closely tied to the one on the 1954 Draft Code of Offences against the Peace and Security of Mankind, prepared by the International Law Commission upon request of the General Assembly in 1947, set aside until the approval of resolution 3314 and approved in its final text by the Commission only in 1996. That code was directly descending from the activity of the Nuremberg Tribunal, since, in Article 2(1), it listed among the offences against the peace and security of mankind the following:

Any act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations (Draft Code of Offences against the Peace and Security of Mankind, 1954)

The article might be seen also as a primitive attempt to define aggression in a residual way. That is to say, as any use of force left out from the safe harbours of individual or collective self-defence and authorization by the Security Council, which is curiously not specifically mentioned. Further speculation may be done on the sentence “*including the employment [...] of armed force*”, which may be intended as suggesting that there can be acts of aggression other than uses of armed force. Below, in fact, I am going to analyse the example of internal aggression, but it is also worth remembering that the UN GA has used the label of aggression also for non-violent annexations (see above). The reference, in any case, may be seen as part of the above-mentioned turning from “wars” to “acts” of aggression. But it is in Article 16 of the 1996 final version of the Draft Code that the Commission inserts the criminalization of aggression, in a way that is not so different from Article 6 of the London Charter:

An individual who, as a leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for the crime of aggression (Draft Code of Crimes against Peace and Security of Mankind, 1996).

The commentary by the Commission specifies that this article is “*drawn from the relevant provision of the Charter of the Nurnberg Tribunal as interpreted and applied by the Nurnberg Tribunal*” (International Law Commission, 1996, p. 43). Moreover, it reiterates that only States may commit aggression, but, in order to do that, they need a leadership that willingly embarks on such a crime. That is why, only individuals having sufficient authority or taking part into an organization can be subject to criminal liability (International Law Commission, 1996, p. 43). On the other hand, the US Military Tribunal in the *High Command* case has set out as the only criterion the “power to shape or influence the policy” that leads to liability, thereby excluding any individual occupying relevant positions but passively consenting to the execution of criminal orders (McDougall, 2017, pp. 89-90). However, it is interesting to note that no conviction for crimes of aggression has been carried out after World War II and that no reference to such crimes has been included in the Statutes and jurisdictions of the *ad hoc*

criminal tribunals set up by the Security Council for Yugoslavia and Rwanda, but also of the hybrid criminal tribunals, such as those for Sierra Leone or Cambodia (Dinstein, 2011, p. 131).

The turning point may be identified in the 1998 Rome Statute of the International Criminal Court, which in Article 5(1) lists the crime of aggression among the grave international crimes, over which the Court has jurisdiction, although it was the only one left without a clear definition. Indeed, the task of developing such a definition was postponed to a successive amendment of the Statute, which did not materialize until 2010, when the Kampala amendments were adopted and Article 8 *bis* on the definition of the crime of aggression was included, so as to activate the jurisdiction of the Court on it – although not retroactively. The text of the article defines an “act of aggression” as:

[...] the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations (Statute of the International Criminal Court, 1998, as amended in 2010)

This formulation is highly adherent to the one of Article 2(4) of the UN Charter on the prohibition of the use of force, with only two remarkable differences: first, it makes a more complete reference to inconsistencies with the whole Charter, and not just to its purposes. Second, it leaves out threats of use of force, so that they cannot constitute a crime of aggression and, hence, be subject to the jurisdiction of the Court (Dinstein, 2011, p. 139). Then, it goes on with a non-exhaustive list of examples:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein. (Statute of the International Criminal Court, 1998, as amended in 2010)

As it is evident, the formulation is mostly a “cut and paste” of the definition provided by the 1974 resolution n. 3314 of the UN General Assembly. This entails that the parties that met in Kampala deemed such a resolution and the whole list of acts of aggression to be declaratory of existing customary international law (Dinstein, 2011, p. 139).

Another element to notice is that Article 8 *bis* of the Rome Statute seems to blur again the distinction between acts and wars of aggression, which had been drawn so clearly in resolution 3314. Indeed, paragraph 1 of the article states that:

For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations (Statute of the International Criminal Court, 1998, as amended in 2010)

Evidently, the text seems to follow in the footsteps of the International Law Commission, whose approach in the Draft Code of Crimes against Peace and Security of Mankind seemingly ends up criminalizing all acts of aggression, even short of war. Nevertheless, to a closer look,

Article 8 *bis*, paragraph 1, carefully sets a threshold of “*character, gravity and scale*” in order for an act of aggression to give rise to individual criminal liability.

The approach followed in the Kampala conference treats such acts of aggression as a subset of uses of force, which, due to their higher gravity – “*the most serious and dangerous form of the illegal use of force*” (Resolution RC/Res. 6, Understandings Regarding the Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression) –, may give rise also to state responsibility (Ruys, 2016, p. 189). The persistence of such a separation, however, may be redundant, as it probably is a legacy of the pre-Charter period, when “aggression” and “aggressive wars” were attached to all the uses of force that did not constitute self-defence (Ruys, 2016, p. 189). The distinction as it is now, instead, seems to confirm the existence of the “act of aggression” as an autonomous normative legal concept, and not just as one of the three factual types of uses of force that the SC can use to act under Article 39 (which, by the way, has never been the case) (Ruys, 2016, p. 190). Yet, the judicial scrutiny up to now has mostly focused on the examination of potential breaches of the prohibition on use of force, by avoiding assessing the verification of possible acts of aggression (Ruys, 2016). Therefore, according to Ruys, the Kampala amendment has missed the chance to remove the possible ambiguities surrounding the existence of multiple concepts (i.e., “use of force”, “crime of aggression” and “act of aggression”) and, therefore, to streamline the *jus contra bellum*.

Last but not least, it is necessary to point out that any crime falling within the competences of the International Criminal Court stems from “dual obligations”, i.e. falling upon both States and their agents (Akande & Tzanakopoulos, 2017). That is to say, each crime corresponds to an internationally wrongful act (let us say, a “State crime”), giving rise to State responsibility, and an individual crime of the leaders/actors whose decisions and/or actions have materially led to the breach of international law by the State. Clearly, States are structures made up of individual agents, who can be held accountable along with the States they serve. Usually, a conviction by the ICC and the consequent finding of the commission of a crime imply also the correspondent State responsibility, which, however, is not up to the Court to determine. Yet, State responsibility remains implicit and beyond the scope of the judgment of the ICC in all the cases but the one of aggression. That, in fact, is the only individual crime that requires the commission of an internationally wrongful act by a State as a *conditio sine qua non*, rather than

merely implying it. As a consequence, when judging a crime of aggression, the Court has to make an incidental determination about State responsibility, which can undermine the validity of the whole judgment when that is going to ascertain the responsibility for acts of aggression by States not parties to the Rome Statute or not consenting to the Kampala amendments (Akande & Tzanakopoulos, 2017). Instead, for individual crimes, the Court can exert its jurisdiction as long as the crime happens on the territory of a State party.

Therefore, the double nature of international crimes, i.e. the individual and the “collective” one (the international responsibility of the State/organization) has to be stressed. Indeed, it can become an issue when, in the case of the crime of aggression, the individual crime is tightly and inextricably linked to the collective crime, due to the above-mentioned jurisdictional issues.

2.3.2 THE CRIME OF AGGRESSION AND NON-STATE ACTORS

It is worth examining also how the crime of aggression may be applied also to non-State organizations, in addition to individual and States. Michael Anderson, in fact, moves a major criticism to this Kampala definition of aggression, in that it fails to take into account the new developments regarding international uses of force that are central to this work. That is to say, this last definition is still narrowly focused on State actors and, thus, runs the risk of not encompassing many modern conflicts, even under an overstretched account of statehood (Anderson, 2011, p. 418). Worse than that, the attempt to include non-State actors in the scope of the Kampala definition of the crime of aggression by overstretching the meaning of statehood might give rise to undesirable trickle-down effects, such as the creation of hybrid entities halfway between States and non-States, with dangerous upshots on sovereign equality, or the extension of typical State privileges like sovereign immunity and the right of self-preservation to non-State actors (Anderson, 2011, p. 418). The concern is serious, since, as will be shown below, non-State actors are now able to act on an international scale and use force in a way that would constitute a crime if perpetrated by a State. Nevertheless, the similarities in their ability

to act do not necessarily entail falling under the same legal personality, which carries a series of distinct rights and obligations (Anderson, 2011, p. 422).

From a technical point of view, the same operation of extending the concept of statehood to, e.g., terrorist groups would not be simple and straightforward. Article 1 of the 1933 Montevideo Convention on Rights and Duties of States lists four requisites needed to obtain statehood. These are a permanent population, a defined territory, an effective government and the ability to enter into relations with other States (Anderson, 2011, p. 422). For instance, groups like Al-Qaeda would fail the test, as they operate within the territory of a host state, without either a permanent population or an effective government and, hence, with no possibility to enter into relations with other States. More questionable may be the case of the Islamic State, which represents the first example of a terrorist group with a territorial autonomy, a resident population and a State-like organizational structure that exerts authority on a territory independently from other States. One could argue that the only requirement they do not meet is the ability to enter into relations with other States, due to the lack of acceptance and recognition by the international community. Moreover, what is distinctive about statehood is a legitimate use of force, which complies with both internal and external norms, but, as resolution 39/159 of the UN General Assembly clarifies, terrorist actions shall always be deplorable (Anderson, 2011, p. 429).

In any case, even the redrafting of the formulation of the crime of aggression, in such a way as to include violent non-State actors, might result in an excessive broadening of the discretionary margins of prosecution of the International Criminal Court, especially due to the difficulties in finding a common definition of terrorism (Anderson, 2011, p. 449). Anderson's suggestion in this regard is enabling the prosecution of all non-State actors that are able to use force like a State (Anderson, 2011, p. 449).

It has also been argued that not all uses of force should be punished, since in the international arena they are mainly a political phenomenon and, hence, they may deserve a political assessment, rather than a judicial one (Creegan, 2012). The same idea of aggression as a crime infringing on the political independence and sovereignty of a State is a political construction (Creegan, 2012, p. 62). Indeed, by applying the principle of harm, according to which an act that provokes little or no damage should escape judicial consideration, sanctioning

an aggression without casualties or any noticeable harm would inevitably result in a political act (Creegan, 2012, pp. 62-3). That is why, the reasoning goes on, we have a purely political organ, such as the UN Security Council, which is entrusted with a gatekeeping role for possible prosecutions for aggression by the International Criminal Court (Creegan, 2012, p. 67). In fact, proceedings cannot be started if the Security Council has not referred the case or has not approved a resolution labelling it as an act of aggression.

The rationale behind this is that it is generally believed that some uses of force are acceptable, insofar as they are grounded on humanitarian reasons, need to intercept a deadly attack, self-defence, self-determination, etc. Therefore, it seems that it is the intention of the framers of current international law on aggression to treat it as a political crime, subject to political evaluations.

Once we establish the impossibility to criminalize non-State actors for aggression, which, as we have seen, is currently meant to be a political crime of States, it is necessary to analyse what are the alternative legal frameworks under which violent non-State actors could be dealt with. Therefore, I will now focus on the possible acceptance of uses of force in self-defence or as law enforcement against non-State actors. Erin Creegan, for instance, grounds the possible carve-out for extraterritorial uses of force to fight violent non-State actors on the impossibility to apply the above-mentioned Montevideo criteria on States that are unable to prevent such actors from operating inside their territory, thereby implying a loss of the sovereign right to non-interference (Creegan, 2012, p. 74).

In particular, in the next section I move on to examine the possible use of self-defence, as codified in Article 51 of the UN Charter, in order to justify use of force abroad against non-State actors that act transnationally and carry out attacks of various types from the territory of a host State against another victim State.

2.3.3 A CASE FOR INTERNAL AGGRESSION?

The concept of aggression as codified in the previously-mentioned legal sources seems designed to condemn inter-State use of force, by totally neglecting acts of violence taking place within the borders of States. However, sometimes in the past, people have hinted at the possibility of having an “internal aggression”. One of the first appearances of the idea in official documents is probably in the Memorandum for the US Secretary of Defence concerning the “*Concept and Plans for the Implementation, if Necessary, of Article IV, 1, of the Manila Pact*”. Point two of the document states:

There are three basic forms in which aggression in South-east Asia can occur:

- a) Overt armed attack from outside of the area.*
 - b) Overt armed attack from within the area of each of the sovereign States.*
 - c) Aggression other than armed, i.e., political warfare, or subversion.*
- (US Department of Defense, 1955)*

Letter (b) and (c) clearly represent a significant stretching of the concept of aggression, for the purposes of the 1954 Manila Pact, which designed to counter communism in South-east Asia. In the first case, the memorandum refers to the action of the Viet Cong in South Vietnam. Aggressions of this kind will be treated more in-depth in section 4.3 of this work, where the legal concepts of aggression and armed attack will be applied to rebel and guerrilla groups. In letter (c), instead, the document refers to an even subtler form of aggression, largely unrecognized in today’s international law on use of force, which is “political warfare or subversion”. Those categories may be linked to economic pressures, which the international community has never uniformly deemed as a use of force, let alone an act of aggression. Yet, this kind of pressures by means short of violence are frequently heard. For instance, the Dalai Lama has referred to “demographic aggression” when speaking of the Chinese policy of pushing non-Tibetan Chinese into the region, in order to undermine the local culture (Fox News, 2008). In any case, if aggression is to be meant as a crime against State sovereignty, then, regardless of the existence of the above-mentioned facts and of the “demographic aggression” category, we may not consider Tibet as a victim, due to its lack of statehood.

Different is the case of the threatened demographic aggression by the Turkish President Recep Tayyip Erdogan, who, in March, has encouraged Turks in Europe to make children in order to become “*the future of Europe*” (Goldman, 2017). According to the Pew Research Center: “*The Muslim share of the population throughout Europe grew about 1 percentage point a decade, from 4 percent in 1990 to 6 percent in 2010. This pattern is expected to continue through 2030, when Muslims are projected to make up 8 percent of Europe’s population*” (Goldman, 2017). Evidently, this is a remote but real threat, although not identifiable as aggression. If, on the one hand, in this case, both the victim and the perpetrator would be States, on the other hand, there would be no margin to find an armed attack. It is also true that one may subscribe to the “concentric circles” view, which sees armed attack as a subset of aggression, and, therefore, admit the possibility that aggression may materialize outside the boundaries of armed attack, including a wider set of actions other than forcible ones. As hinted before, in fact, the General Assembly has successively picked up its definition and tried to expand it as to encompass also non-violent annexation.

In sum, internal aggression may arise in a violent form when, for instance, the attempt of a group to obtain self-determination is bloody, but the victim, in this case, lacks statehood, which, as far as current international law is concerned, is a crucial condition in order to find an aggression. There may also be inter-State forms of internal aggression, insofar as non-violent means are used to threaten sovereignty and political independence. However, in order to accept that, one should forfeit the identification of the concepts of aggression and armed attack, thus allowing the former to have a broader scope. Perhaps, this is the most acceptable evolution of international law. That is to say, allowing for new forms of aggression to take place, beyond physical armed attack. Under this rationale, a clear and hostile plan of “demographic aggression” from one State to another would be qualifiable as actual aggression, as long as it threatens the sovereignty or political integrity of the victim State. Moreover, if, on the one hand, demographic aggressions taking place within the borders of single States may be better addressed under the principle of self-determination, on the other hand, one should also allow for the possibility of non-State actors carrying out such assaults, as it will be argued below.

After having outlined the potential shape of aggression, as a legal category of use of force in international law, I now move on to examine its applicability to new and controversial forms

of violence, such as, for instance, terrorist attacks, cyber-attacks or automatic weapons. I will face the question from the other side of aggression, which is self-defence, so as to take into account also the possibilities that States have in order to react to such phenomena.

3 SELF-DEFENCE AGAINST NON-STATE ACTORS

As exposed in the previous section, aggression is at the same time a wrongful act of the State giving rise to international responsibility, a crime of leaders who have pushed for or collaborated to such a solution and, usually, an armed attack that enables the victim to respond in an appropriate way. Precisely this last aspect will be the crucial focus of this section, which will analyse the possibility of States to react in self-defence, especially against new forms of aggression.

Under the Charter system, indeed, there are only two legal options to legitimately resort to force: either in self-defence under Article 51 or upon authorization from the Security Council acting under Chapter VI. The former is meant as a temporary measure that the victim State may enact pending the seizure of the matter by the Security Council.

In the wake of 9/11, State practice, coupled with the opinion of some legal experts, seemed to be challenging the existing interpretation, so as to expand the scope of self-defence, in order to include also the possibility to react to new threats, such as international terrorism or new weapons of mass destruction. As foreseen by Article 31, paragraph 3 b, of the Vienna Convention on the Law of Treaties, “*any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation*” shall be taken into account. That is why, I will examine whether the substance of self-defence has actually been altered by customary law and/or whether new laws are desirable to address the threat of violent non-State actors, even if in the 2005 World Summit States choose to reaffirm that “*the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security*” (UN General Assembly, 2005).

If we consider non-State actors as just those actors whose actions cannot be attributed to any State under any possible interpretation of attribution, then ways to use force against them may include the above-mentioned self-defence under the Charter system. One could argue that there are other the possible safe harbours, such as counter-measures, necessity or distress, but

their use to shield operations of use of force abroad against non-State actors seems to be largely inappropriate (Lubell, 2010). Obviously, any possibility of attribution of non-State actors to a State would amount to aggression under the UN GA definition and, as such, may fall under the classical laws of inter-State war.

Finally, it must be stressed that this chapter will focus on a *ius ad bellum* issue about the legality of recourse to force. However, this will be of no prejudice to the *ius in bello* obligations that will continue to bind the parties to the conflict, regardless of the legality of the conflict itself (Alston, 2006, p. 15). The rationale behind this is that, even if a war is started illegally, by no means this has to compromise the application of the safeguards of international humanitarian law meant to protect civilians, property or cultural heritage.

3.1 SELF-DEFENCE IN THE UN CHARTER

The current normative framework of use of force is mainly linked to the Charter of the United Nations, whose provisions are the starting point to review the legality of forcible measures. Therefore, I will start from them in order to assess the limits within which States may use force in self-defence when reacting to violent non-State actors. The main provision is Article 2, paragraph 4, whose implications as a general prohibition on the use of force have been discussed above.

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations. (Article 2(4) Charter of the United Nations)

Alternative readings of Article 2, paragraph 4, of the UN Charter have been proposed so as to exclude from this general prohibition all the forcible measures that do not represent a violation of territorial integrity or political independence. That is to say, any intervention that does not entail a loss of territory for another State (D'Amato, 1987).

The position was maintained also by Israel when defending its 1976 raid on the Ugandan airport of Entebbe, whose aim was rescuing Israeli nationals held as hostages by Palestinian hijackers (UN Doc. S/PV.1939, 1976). In that controversial case, the hijackers were killed, together with some Ugandan soldiers and an Israeli one. The Security Council did not manage to come out with a resolution, but no clear will to allow for such derogations to Article 2(4) emerged (Lubell, 2010, p. 27). The International Court of Justice, too, seemed to lean in favour of an overarching ban on use of force in the *Corfu Channel Case*, regarding UK activities in Albanian seas (*Corfu Channel Case (UK v. Albania)*, 1949).

However, the second part of the text (“*or in any other manner inconsistent with the Purposes of the United Nations*”) and the *travaux préparatoires* clarify that the provision is

meant to protect international peace and security – which is the main purpose of the United Nations according to Article 1 of the Charter –, hence not confining the prohibition on just those acts that may threaten the sovereignty or integrity of States (Dinstein, 2011, p. 87). Furthermore, Article 2(4) has to be read in conjunction with the preceding paragraph 3, which prescribes the duty to settle disputes peacefully (Dinstein, 2011, p. 87).

The stance on Article 2(4) as representing an absolute ban on use of force is confirmed by the approach of the International Court of Justice in the *Nicaragua* case, where it refers to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the UN (GA Res. 2625/1970) to demonstrate the inclusion of “less grave forms” of use of force within the aforementioned prohibition. Indeed, in the words of the Declaration:

"Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.

States have a duty to refrain from acts of reprisal involving the use of force.

Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of that right to self-determination and freedom and independence.

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force."

(Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 1970)

Therefore, if Article 2(4) represents a prohibition on any use of force whatsoever, the only possibility to resort to it is to fall under any of the exception provided for in the other Charter Provisions, i.e. Article 51 (Self-defence) and Article 39 *et seq.* (Collective security).

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence 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. (Art. 51 Charter of the United Nations)

Several elements may emerge from a textual analysis of the Article. First, self-defence was meant as a temporary measure, covering the time span between the materialization of an armed attack and the reaction by the Security Council. The wording “*until the Security Council has taken measures necessary to maintain international peace and security*” suggest that a State is entitled to act in self-defence as long as there is the necessity for the Security Council to adopt a resolution in order to re-establish peace and security (Ruys, 2010, pp. 77-8). According to Ronzitti, the general failure of the UN security system as originally conceived, i.e. with the Security Council directly and exclusively in charge of collective security, has paved the way to an extensive recourse to self-defence by individual States and regional defensive alliances (Ronzitti, 2006, p. 344).

Second, self-defence is linked to the procedural obligation of reporting to the Security Council, which is a proof of a State's good faith and willingness to couch its use of force in the legal framework of the Charter (Ruys, 2010, pp. 70-3). Third, self-defence is linked to the occurrence of an armed attack. This point has been subject to much controversy, since many

questions may arise from this general formulation: which types of uses of force do qualify as an armed attack? Which is the threshold of violence or damages in order to label a hostile act as an armed attack? Which actors may perpetrate it? May States act as to prevent or anticipate a foreseeable attack? Can a series of hostile acts qualify as such? What is their necessary frequency? The answers to all these questions clearly revolve around a precise definition of “armed attack”, which will, in turn, affect the modes and the cases in which States are able to exercise their right to self-defence. It is interesting to note that, according to the *travaux préparatoires*, the UK delegation opposed to the use of the word “aggression”, deemed to be too vague (US Diplomatic Papers, 1945, pp. 675-7). Indeed, previous draft versions of the UN Charter used the word “aggression”, instead of “armed attack”, in Art. 51, in line with the position of several States, which equated the two concepts and conceived self-defence as a “repression of aggression” (Ruys, 2010, p. 129).

3.2 ARMED ATTACK REQUIREMENT OF SELF-DEFENCE

In order to label a hostile act as an armed attack, and therefore be able to appeal to self-defence under Article 51, three aspects should be taken into account: *ratione materiae*, i.e. what actions have been made, *ratione temporis*, i.e. when they have been carried out, and *ratione personae*, i.e. by whom they have been perpetrated. In this work, I will examine all the three, but I will focus especially on the last one, in order to establish whether violent non-State actors using or threatening use of force against States may be considered equivalent to States for the purposes of Article 51, in light of developments in customary law and the legal doctrine. Whenever reactions do not qualify as self-defence, they can be deemed to be reprisals. The main difference between the two is the intention behind: while the former is a reaction justified by the need to defend the rights to territorial integrity and political independence, the latter is a mere retaliation with a punitive intent.

3.2.1 MAGNITUDE (*RATIONE MATERIAE*)

How do we distinguish between an armed attack and a “minor border incident” or an incident “short of war”? According to Cassese, we could label an armed attack any “*massive armed aggression against the territorial integrity and political independence of a State that imperils its life or government*” (Cassese, 2005, p. 354). In *Nicaragua*, the International Court of Justice affirms that the difference between an armed attack and less grave forms of use of force must be found in their “*scale and effects*” (Case concerning Military and Paramilitary Activities in and against Nicaragua, 1986, p. 103).

Therefore, the main controversies are to be found in those acts that can be classified as “less grave uses of force” or “minor border incidents”. Commentators have had different approaches to them. Some of them, such as Kunz, have denied the existence of such a

distinction, due to the wording of Article 51, which does not qualify armed attack (Ruys, 2010, p. 144). Dinstein, instead, concedes a narrow range of actions that may qualify as negligible uses of force, such as breaking a diplomatic bag or detaining a ship (Ruys, 2010, p. 144). Finally, Hargrove strongly criticizes the International Court of Justice for its contention in *Nicaragua* that:

While an armed attack would give rise to an entitlement to collective self-defence, a use of force of a lesser degree of gravity cannot, as the Court has already observed, produce any entitlement to take collective counter-measures involving the use of force. The acts of which Nicaragua is accused, even assuming them to have been established and imputable to that State, could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts (Case concerning Military and Paramilitary Activities in and against Nicaragua, 1986, p. 127)

In the above-mentioned paragraph 249, the Court has suggested that minor uses of force may give rise to “*proportionate counter-measures*”, which seem to differ from self-defence in the explicit exclusion of the “collective” element, i.e. no third State may assist the victim in its response. Yet, Hargrove fears this may turn into a slippery slope enabling States to easily circumvent the prohibition on use of force (Ruys, 2010, p. 145).

As it will be exposed below, in the past, Israel has justified some of its forcible actions in Syria, Jordan and Egypt as self-defence in reaction to a series of attacks coming from their territories. Yet, those actions have usually been labelled by the Security Council as disproportionate, illegally pre-emptive or reprisals, thus falling outside the scope of self-defence (Lubell, 2010, p. 51). The debate on whether an accumulation of minor border incidents or violent events can constitute in itself an armed attack is divisive, since both its acceptance or its rejection would pose legal challenges. In the former case, one could argue that a State might be able to invoke self-defence whenever confronted with an attack and an evidence that future ones will follow, but this would amount to relaxing the imminence requirement and giving way to a slippery slope in anticipatory actions (Lubell, 2010, p. 54). On the other hand, the total rejection of the “accumulation of events” approach may prove myopic in the categorization of

hostile acts and hamper the ability of states to prevent them. The ICJ, on its part, has always followed a conservative approach, so as to preserve the effectiveness of the prohibition on use of force. Its judgments have been oriented to the setting of a high threshold of magnitude for violent events and to the rejection of the “accumulation of events” scenario as a valid legal basis for extraterritorial forcible responses (Alston, 2006, p. 13).

The magnitude, however, is not the only criterion to take in consideration when determining whether an armed attack has taken place. Other variables include the time of occurrence and the actors involved.

3.2.2 TIME OF OCCURRENCE (*RATIONE TEMPORIS*)

The discussion around self-defence covers also the possibility to use force in a pre-emptive or anticipatory way. That is to say, whether it is possible to react to a future attack that is either foreseeable (in case of a pre-emptive action) or about to be carried out (in case of an anticipatory action). Legal scholars have generally tended to exclude the former possibility, while opening to the anticipatory or interceptive actions, so as to preserve the ability of States to react to an attack that is going to materialize for sure. Indeed, if it can be classified as an interceptive use of force, the response would satisfy the necessity requirement as formulated in the *Caroline* case, i.e. answering to a need that is “*instant, overwhelming and leaving no choice of means, and no moment for deliberation*” (*Caroline* case, 1837). A pre-emptive action, on the other hand, would follow the doctrine of “preventive war”, elaborated by the Bush administration in the 2002 National Security Strategy, with the aim of enlarging the scope of self-defence through the extension of the notion of imminence of the armed attack, so as to encompass new security threats, such as terrorist groups and States that possess and are ready to use weapons of mass destruction (Ronzitti, 2006, p. 347).

However, under the current framework of Article 51, both anticipatory and pre-emptive actions seem to be ruled out, according to the *travaux préparatoires* at the San Francisco Conference, where a leader of the US delegation expressed the opposition of its government to

the extension of the right of self-defence to attacks that have not materialized yet (Lubell, 2010, p. 56). Here, the technological developments in the domain of warfare pose a legal and ethical question about the need to revise such an absolute prohibition on anticipatory acts.

Indeed, there has been a development of the attitude of States, at least at a customary law level, so as to tolerate in some cases anticipatory actions, such as the one by Israel in 1967 (see below) (Lubell, 2010, p. 57). This customary law changes could be reconciled with the UN Charter in different ways: either by recognizing self-defence as an “inherent” right, therefore including also the possibility to react by anticipating attacks, or by insisting more on the notion of “interceptive” self-defence, as a way to stress the need for the armed attack to be about to occur (Lubell, 2010, p. 58). In 2004, the High-Level Panel appointed by the UN Secretary-General produced a *Report on Threats, Challenges and Changes*, where we find a positive stance towards the latter version, in line with a widespread opinion in the international community, which is concerned about the danger represented by new weapons (Ronzitti, 2006, p. 347).

In a parliamentary debate of the House of Lords in 2004, the UK Attorney General Lord Goldsmith argued that “*it has been the consistent position of successive United Kingdom Governments over many years that the right of self-defence under international law includes the right to use force where an armed attack is imminent*” (Lord Goldsmith, 2004). Its argument is that Article 51 simply embodies a pre-existing customary norm of self-defence, which is the one expressed in the *Caroline case*, where anticipatory uses of force are admitted in cases of imminent armed attacks (Lord Goldsmith, 2004). This is an interpretation shared mainly by common law countries and by Israel, as opposed to the continental school of thought, which tends to privilege a narrow understanding (Ronzitti, 2006, p. 345). In any case, no guidance on the matter is provided by the *travaux préparatoires* of Article 51 and not even by the ICJ, which has generally refrained from examining anticipatory self-defence in the several cases regarding use of force and self-defence that it has judged, although in *Nicaragua* it stated that there is a correspondence between the Charter provisions and international customary law (Ronzitti, 2006, p. 345).

The High-Level Panel’s *Report on Threats, Challenges and Changes*, which denied the possibility of intervening in self-defence on the basis of a security threat but, at the same time,

endorsed forcible reactions to imminent attacks, thereby embracing the above-mentioned idea of interceptive self-defence (Ronzitti, 2006, pp. 345-6).

Perhaps, it could be argued that two different regimes exist for anticipatory self-defence, to be chosen according to whether the threat comes from a State or a non-State actor. Indeed, while inter-State violence is clearly regulated by the UN Charter and, hence, falls within the reach of the prohibition represented by Article 51, the use of force against a non-State actor may refer to the above-mentioned formulation of necessity within the *Caroline* case in order to have a legal justification (Lubell, 2010, p. 59).

In the case of non-State actors, one could argue that the scope of self-defence could be expanded up to pre-emptive uses of force. The reason for that would be the possibility for those actors to enter in possession of modern chemical, biological or atomic weapons, which, due to their potential of mass destruction, may represent a grave danger to the territorial integrity of any State (Lubell, 2010, pp. 60-1). This is an instrumental reasoning, which, for the time being, seems to have no legal basis. Therefore, by merely following usefulness, also a restrictive interpretation excluding pre-emption would found an opposite justification, since if we allow for pre-emptive strikes, then there would be risks of slippery slopes. The more space is left to unilateral actions, the less stable the international system. This is even truer in cases of existing disputes, such as between the two nuclear powers of India and Pakistan (McGoldrick, 2004, p. 76). For sure, it is possible to affirm that pre-emptive self-defence against States as articulated by the Bush administration (i.e., opening to self-defence against rogue States, terrorists and States owning weapons of mass destruction) has been expressly rejected by the High-Level Panel's *Report on Threats, Challenges and Changes* (Ronzitti, 2006, p. 346). In addition to that, in the case *DRC v. Uganda*, also the ICJ ruled out the applicability of self-defence in a pre-emptive way, since, it argued, this would fall under the competence of the Security Council (Ronzitti, 2006, p. 346). That is why, in paragraph 148 of the sentence, it points out that any perceived security threat must be dealt with through "*recourse to the Security Council*", rather than individual self-defence (Case Concerning Armed Activities on the Territory of the Congo (*DRC v. Uganda*), 2005).

3.2.3 RATIONE PERSONAE

Typically, Article 51 has been based on an inter-State reading, which is the classical understanding of the Charter. In the post-WWII era, the drafters of the Charter did not pay attention to the possible threat coming from cross-border violence by irregular armed groups. Indeed, one of the versions of Article 51 bore a reference to “*attacks by one State against another*”, which was removed without any particular discussion or concern on the potential implications about the issue of non-State actors (Ruys, 2010, p. 369). During the period of decolonization, the main focus of the international community was on the diffusion of proxy warfare, more commonly referred to as “indirect aggression”, which consists of actively supporting irregular armed bands (e.g., by providing weapons, shelter, etc.), so as to favour their attacks against third States (Ruys, 2010, pp. 370-1). To be precise, any kind of support, either active or passive (e.g., mere toleration), is a clear breach of the prohibition of use of force as of Article 2 paragraph 4 of the UN Charter and especially of paragraph 9 of the first principle of the 1970 UN GA Declaration on Friendly Relations:

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force (Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 1970).

Nevertheless, as it has been set out by the ICJ in the Nicaragua case, only a support of a sufficiently high intensity and a substantial involvement will be enough to give rise to self-defence under Article 51 of the Charter.

The recent intensification of uses of force by non-State actors, however, has rendered it necessary to increase the concern with respect to the decolonization era and to enact with more urgency forceful responses in foreign territories where they operate or hide. Unfortunately, this is normally possible whenever there is an attribution link (see 3.2.3.a) that enables the

defendant to identify the non-State actor its host State, thereby giving rise to a legitimate use of force in the territory of the latter. Otherwise, without the possibility of attribution, the only way to conduct an extraterritorial forcible response is to widen the definition of “armed attack” so as to admit that non-State actors may perpetrate it. Indeed, one must note that, although the above-mentioned UN GA Definition of Aggression requires attribution in Article 3(g) and in spite of the extensive use the ICJ has made of it in determining legitimate self-defence, “aggression” remains a separate standard with respect to “armed attack” (Trapp, 2015, pp. 3-4). Therefore, the verification of aggression according to Article 3(g) of the UN GA Definition, i.e. the existence of an attribution link, is a sufficient but not necessary requirement to ascertain an armed attack, since nothing in the wording of Article 51 restricts the ability of non-State actors to perform such an action.

In its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice seems to argue in favour of State involvement as a *conditio sine qua non* of armed attack. In paragraph 139 it states: “*Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State*” (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004). Therefore, the Court seems to limit the applicability of Article 51 of the UN Charter only to cases where the actions of the non-State actors involved can be attributed to a State.

Judge Higgins has issued a separate opinion for this case, in order to criticize the majority position of the Court about the scope of Article 51. Indeed, she objected that the restrictive interpretation applied in the judgment does not find any support in the wording of the Article, which does not explicitly limit self-defence to armed attacks by States or to aggression – that, as explained above, is a crime of States (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Separate Opinion Judge Higgins, 2004).

In another separate opinion, Judge Koojimans signals that the reluctance of the court to examine the question of self-defence against non-State actors beyond the possibility to ascribe their actions to a State is inappropriate. Indeed, he highlights that the wording of Article 51 does not explicitly prevent self-defence against a non-State actor whose actions are not attributable to a State. In his words:

If armed attacks are carried out by irregular bands from such territory against a neighbouring State, they are still armed attacks even if they cannot be attributed to the territorial State. It would be unreasonable to deny the attacked State the right to self-defence, merely because there is no attacker State, and the Charter does not so require. (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Separate Opinion Judge Koojimans, 2004)

The position of Judge Koojimans may be confirmed by a comparative reading of all the articles of the UN Charter related to use of force would single out the peculiarity of Article 51, which is the only one avoiding a specific reference to States. Therefore, a textual reading might open the way to the possibility for a non-State actor to perform armed attacks and, as a result, for the victim State to react.

Another critical voice is the one of Judge Higgins, whose separate opinion stressed that the restrictive interpretation of armed attacks as acts originating only from States is a legacy of the *Nicaragua* judgment, which she sees as essentially flawed. Indeed, she finds as profoundly unfair the differential treatment granted to Palestine according to whether it is considered a State or an occupied territory, since no armed attack would be recognized in the latter case and, consequentially, no right to react would be granted to Israel. In spite of her divergent interpretation, she confirms her favourable vote, primarily because self-defence under Article 51 is meant to involve armed reactions and not the construction of a wall (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Separate Opinion Judge Higgins, 2004).

Finally, Judge Buergenthal notes that nothing in the wording of Article 51 prevents armed attacks from originating from non-State actors and stresses the articulation of the right to self-defence as codified in the wake of 9/11 through the UN SC Resolutions 1368 (2001) and 1373 (2001), i.e. as a possible instrument to fight terrorism coming from non-State actors that cannot be attributed to States. He also notes that the Court rejects the Israeli arguments of imperative military necessity and national security without providing real reasons. On the other hand, Buergenthal also recalls the prohibition for occupying powers to settle occupied territories as of Article 49 paragraph 6 of the Fourth Geneva Convention and underlines the

disproportionality of the construction of the wall as a self-defence measure, in light of the serious suffering of the Palestinian population (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Separate Opinion Buerghenthal, 2004).

In the *Armed Activities* case, instead, the ICJ seems to open the way to the possibility to act in self-defence against non-State actors whose conduct cannot be attributed to a State, provided that the reaction is narrowly focused on those violent groups. In fact, it condemns the Ugandan reaction against the Democratic Republic of Congo only because it was directed against areas other from the ones that were used by the rebels to launch their attacks, but not because of the reaction in absolute terms (Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005).

To be precise, the ICJ refused to address the question of self-defence *per se* and, consequently, declined to define any necessary condition for hostile acts by un-attributable non-State actors to qualify as an armed attack, but it adhered to the *Nicaragua* judgment as for the attribution criterion, which shall rest upon effective control. According to it, there was “*no need to respond to the contention of the Parties as for whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces*” (Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005). Once again, Judge Kooijmans, together with Judge Simma, issued a separate opinion and insisted that, even in this case of non-State actors not attributable to a State but engaged in cross-border use of force sufficiently extensive to qualify as armed attack, then Article 51 could still justify a reaction (Ronzitti, 2006, p. 349).

Successively, with the growth of terrorism, in 1984 the US adopted the so-called “Shultz doctrine” (from the name of Reagan’s Secretary of State), which saw all those States unwilling to fight terrorist groups within their borders as collaborators in the armed attack and, thus, potential targets of a self-defence reaction (Ruys, 2010, p. 422). In 1986, Secretary Shultz made a statement that sounded like if it was interpretative of the UN Charter:

It is absurd to argue that international law prohibits us from capturing terrorists in international waters or airspace, from attacking them on the soil of other nations even for the purpose of rescuing hostages or from using force against states that support, train

and harbor terrorists or guerrillas. International law requires no such result, a nation attacked by terrorists is permitted to use force to prevent or pre-empt future attacks, to seize terrorists or to rescue its citizens when no other means is available (Gwertzman, 1986).

In the following part, I am going to examine whether this doctrine can be deemed to hold in current international customary law, with particular reference to the question of attribution of actions by non-State actors to more or less complicit States.

3.2.3.A ATTRIBUTION AND RELATIONS WITH THE HOST STATES

State practice seems to uphold the claim that Article 51 may give rise to self-defence even against non-State actors whose actions are neither directly nor indirectly attributable to a State. There are several examples of extraterritorial uses of force in self-defence directed against non-State actors. While the most recent and controversial ones will be examined in Chapter 4 of the present work, the phenomenon dates back to the nineteenth century, where the first case concerning such extraterritorial activities against non-State actors can be found, i.e. the *Caroline* case of 1837. In that occasion, British forces in Canada were clamping down on Canadian rebels, who, however, were receiving supplies from people in the US. In order to prevent this, British soldiers seized a ship, the *Caroline*, and destroyed it, by killing also two US citizens. The actions of the rebels were not attributable to the US under any possible understanding, as the latter was not providing support or instructions to the former.

Another landmark case on the matter is the *Nicaragua* one, where the Court abstains from giving a definition of “armed attack”, but insists on the need to bridge Articles 2(4) and 51 of the UN Charter, by specifying which uses of force are the gravest and, hence, constitute an act of aggression (Case concerning Military and Paramilitary Activities in and against Nicaragua, 1986, p. 101). The difference, according to the Court, is one of “*scale and effects*”, which are the key criteria to distinguish between an armed attack and a minor border incident, regardless of the actors who are involved in the use of force (Ruys, 2010, p. 140). But most importantly, in this specific case, the Court gives some hints on a possible test for attribution of the acts of non-State actors to third supporting States, for the purposes of giving rise to self-

defence (paras. 131, 195, 229, 230). Indeed, it had to examine whether the use of force by the US against Nicaragua could be couched in collective self-defence, in response to alleged Nicaraguan armed attacks against El Salvador, Honduras and Costa Rica (Case concerning Military and Paramilitary Activities in and against Nicaragua, 1986, pp. 72-3). While some cross-border intervention by Nicaragua had actually taken place in Honduras and Costa Rica, the Court had not sufficient elements to discern whether their magnitude was enough to get the label of “armed attack”. Yet, the most interesting insight was offered by the possibility to determine an indirect aggression of Nicaragua against El Salvador – and the consequential intervention by the US in collective self-defence –, because of the support of the former to the armed opposition in the latter, in light of Article 3(g) of the UN GA Definition of Aggression, whose status here has been famously upgraded to the one of international customary law. In paragraph 195, indeed, the Court affirms that:

[...] it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (inter alia) an actual armed attack conducted by regular forces, "or its substantial involvement therein". This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law (Case concerning Military and Paramilitary Activities in and against Nicaragua, 1986, p. 103)

In this paragraph, the Court has concentrated a reasoning with several far-reaching implications. First of all, the Court has determined that the Definition of Aggression by the UN General Assembly was becoming part of international customary law, with the natural consequence that any non-State actor whose acts were attributable to a State was then under the legal capacity to perform an armed attack under Article 51. In particular, the Court maintains that, if an action perpetrated by regular armed forces could be deemed as an armed attack by virtue of its characteristics, then the same label would still hold even if it was done by

irregular armed forces attributable to a State. Precisely because of this, the Court includes also a possible test that might be used to assess attribution. That is to say, by adopting a literal reading of resolution 3314 of the General Assembly, the irregular armed bands must be “*sent by*” another State, acting “*on behalf*” of it or under the “*substantial involvement*” of this potential aggressor State (Case concerning Military and Paramilitary Activities in and against Nicaragua, 1986, p. 103). However, the Court fell short of acknowledging an aggression by the US, since the very strict standard it proposed for the attribution test does not admit it in case of mere support to the non-State actor, in terms of “*financing, organizing, training, supplying, [...] equipping, [...] selection of its military or paramilitary targets, and the planning of the whole of its operation*” (Case concerning Military and Paramilitary Activities in and against Nicaragua, 1986, pp. 64, 104). By analyzing the specificity of facts, it further explains that:

The Court was not however satisfied that assistance has reached the Salvadorian armed opposition, on a scale of any significance, since the early months of 1981, or that the Government of Nicaragua was responsible for any flow of arms at either period. Even assuming that the supply of arms to the opposition in El Salvador could be treated as imputable to the Government of Nicaragua, to justify invocation of the right of collective self-defence in customary international law, it would have to be equated with an armed attack by Nicaragua on El Salvador. As stated above, the Court is unable to consider that, in customary international law, the provision of arms to the opposition in another State constitutes an armed attack on that State. Even at a time when the arms flow was at its peak, and again assuming the participation of the Nicaraguan Government that would not constitute such armed attack (Case concerning Military and Paramilitary Activities in and against Nicaragua, 1986, p. 119)

In the controversial contention of the Court at that time, this act could amount to an internationally wrongful act by the State providing assistance and be dealt with accordingly, or it could be treated as a treat or breach to the peace under Chapter VII of the UN Charter by the Security Council (Case concerning Military and Paramilitary Activities in and against Nicaragua, 1986, p. 104). In paragraph 115, however, the Court states that its focus is on

whether the US has “*directed or enforced the perpetration of the acts contrary to human rights and humanitarian law*”, thereby totally avoiding any *ius ad bellum* issue regarding self-defence by Nicaragua.

A possible supporting element of the ICJ’s interpretation of Article 3(g) may be found in the preparatory works of UN GA resolution 3314, where some States were reluctant to include the words “assistance” and “support” in the definition of aggression when setting out the threshold of State involvement in an action by a non-State actor in order to establish an attribution link between the two (Ruys, 2010, p. 389). This clearly supports the restrictive interpretation proposed by the ICJ. The prudence adopted in the above-mentioned resolution contrasts with the broader reach of the definition of “indirect use of force” in the 1970 Friendly Relations Declaration, where “organizing”, “acquiescing within its territory” and “assisting” were sufficient to establish a link (Ruys, 2010, p. 389). The different approach may be justified in light of the significance of aggression, which, being a subset of armed attacks, is among the graver forms of use of force giving rise to self-defence under Article 51 of the UN Charter.

It might also be the case that a State is unable to cope with a terrorist group operating from within its territory. Since it is its duty to actively fight terrorism under international law, the failure or inability to act enables the offended State to react in self-defence – provided that all other requirements are met – in the host State’s territory, in derogation of the principle of territorial integrity (Schmitt, 2002, p. 33). This is pretty much the application of the above-mentioned Shultz doctrine, but grounded on the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations (see quotation above) and on Security Council Resolutions n. 1368 and 1373 of 2001, which all proscribe toleration of terrorist organizations on one’s own territory and oblige to an active effort to eradicate terrorism (Lubell, 2010, p. 39).

In a bold attempt to set out a comprehensive framework for use of force in self-defence against non-State actors, Daniel Bethlehem proposes sixteen principles that may bridge the concerns arising from doctrinal debates and the practical necessities of States in ensuring security. Starting its reasoning from resolutions 1368 and 1373 of the UN Security Council, Bethlehem affirms a right of States to self-defence against “*imminent or actual armed attacks by non-State actors*” (Bethlehem, 2012, p. 775). According to principles 2 and 3, the forcible

reaction in self-defence must be a last resort and must comply with both necessity and proportionality (“*to the threat that is faced*”) (Bethlehem, 2012, p. 775). In principles 4 and 5, Bethlehem admits self-defence against “*discrete attacks*” and “*series of attacks*” that may be reconducted to a common design, so that, when assessing necessity and proportionality, the whole set of hostile actions can be taken into account (Bethlehem, 2012, p. 775). As for the legitimate targets of the reaction, principles 6 and 7 include also those who provide for “*material support essential to those attacks*” or are involved in planning (Bethlehem, 2012, p. 775). Principle 8 states that imminence of an attack shall be examined according to the related threats, its actual probability, its damaging potential and the possibility to contextualize it within a set of coordinated actions (Bethlehem, 2012, pp. 775-6). Principles from 9 to 13 uphold the view that it is a duty of all States to ensure that no armed group may use its territory as a basis to perpetrate armed activities against other States and, whenever this occurs, this victim State may undertake extraterritorial forcible reactions against the non-State actor in all the following cases:

- The territorial State where the armed group is based gives its consent to uses of force in its territory by the victim State, either explicitly or implicitly;
- There is a resolution by the UN Security Council authorizing use of force under Chapter VII of the UN Charter;
- The territorial State is willingly harbouring the armed group or it is reluctant to intervene against it, in compliance with its above-mentioned duty to contrast such phenomena;
- The territorial State is unable to abide by its duty to fight the non-State actor within its territory and the request for its consent “*would be likely to materially undermine the effectiveness of the action in self-defence*” (Bethlehem, 2012, p. 776).

In the remaining principles, he states that those principles shall be applied “*without prejudice*” to the UN Charter, the Security Council resolutions, the right to self-defence and the circumstances precluding wrongfulness (Bethlehem, 2012, p. 776).

In response to Bethlehem, O'Connell argues that the international legal system is already endowed with norms to face threats coming from non-State actors and that scholars had better address issues of noncompliance with these norms, rather than trying to enlarge them so as to include current deviant behaviours (O'Connell, 2013). As she notes, after the major revision they underwent from 2003 to 2005 due to 9/11 and the Iraq war, the international rules governing use of force received a renewed endorsement at the 2005 World Summit, where the international community found them exhaustive and suitable to current challenges to international peace and security (O'Connell, 2013, p. 381). She goes on objecting especially on the apparently absent threshold of magnitude in order for an armed attack to trigger Article 51, which, in her opinion, is limited to significant attacks, on the possibility to consider planning or threatening as direct participation in hostilities and on the dangerous admissibility of implicit consent by third States (O'Connell, 2013, pp. 382-3). Furthermore, O'Connell denies that there is anything such as a right to extraterritorial forcible operations in States that are unwilling or unable to cope with violent non-State actors in their territories, as an evaluation of this kind would have to be carried out by the Security Council (O'Connell, 2013, p. 384). As a result, she concludes that any extension or weakening of current international law norms on use of force would pave the way to a slippery slope and justify actions that are currently illegal, such as the US practice to resort to extrajudicial killings in arbitrary ways (O'Connell, 2013, pp. 385-6). The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Philip Alston is, indeed, of the advice that non-State actors are seldom able to perform an armed attack of the magnitude required to trigger self-defence under Article 51 of the UN Charter, but when they manage to do it, a resolution by the UN Security Council is still needed to react (Alston, 2006, p. 13).

Yet, on the other hand, it is equally true that States are subject to a due diligence rule, descending from the UN GA Declaration on Friendly Relations and, among others, from the UN SC Resolution 1373/2001 (Ruys, 2010, p. 375). Therefore, they should use any possible mean to prevent irregular armed groups from using their territories to prepare or launch attacks against other States. It must be stressed that the due diligence duty applies to all sort of obligations imposed on States by international law and that it gives rise to a wrongful act only in case of total inaction, but not in case of failure to prevent the attack or the consequent damages (Ruys, 2010, pp. 375-6). This was the case of Congo, which, as the ICJ ascertained in *DRC v. Uganda*,

did not have sufficient means and penetration in the territory from which rebels were operating against Uganda (Ruys, 2010, p. 376).

3.2.3.B ARMED CONFLICT WITH NON-STATE GROUPS

Before going on, it is useful to spend some words on the *ius in bello* issues that arise when non-State actors are at stake, in order to ease the discussion below on their impact on international law. First, whenever it is established that an armed conflict is going on, it is necessary to distinguish what kind of conflict it is, in order to apply the relevant rules. International humanitarian law distinguishes between international and non-international armed conflict.

A significant difference arises for targeted killing operations, whose selection of targets has to meet different standards based on whether they are carried out in a situation of international or non-international armed conflict (Alston, 2006, p. 19). In the former, any combatant may be a lawful target and may be killed according to the procedural requirements of humanitarian law. In the latter, lawful targets are identified in the grey area of “civilians directly participating in hostilities”, for which no commonly agreed definition has been found yet (Alston, 2006, p. 19). Usually, there must be a direct material contribution to violent actions in order for a civilian to qualify as “directly participating”, so that non-combat, financial or verbal/ideological support are deemed to be below that threshold and, hence, acceptable (Alston, 2006, p. 19).

Much of the uncertainty surrounding the notion, and especially the time span of direct participation, has been dissipated thanks to the Interpretive Guidance on the Notion of Direct Participation in Hostilities by the International Committee of the Red Cross.

First, the ICRC introduces the notion of “continuous combat function”, which allows for a permanent status of direct participation in hostilities, strictly linked to the “*lasting integration into an organized armed group acting as the armed forces of a non-state party to an armed conflict*” (International Committee of the Red Cross, 2009, pp. 33-4). Yet, this special category gives rise to some controversies, especially regarding the need to distinguish continuous

combatants from sporadic fighters, general supporters providing for all the kinds of help not identifiable as direct participation and political representatives of armed groups (Alston, 2006, p. 21). Transparency is also needed as far as the criteria of each State for defining direct participation are disclosed. For instance, the US has reportedly and worryingly been including drug traffickers linked to Afghan insurgents among civilians directly participating in hostilities, instead of dealing with them through the appropriate law enforcement legal framework (Alston, 2006, p. 21).

Furthermore, the ICRC has clarified the temporal scope of direct participation for those civilians that engage in sporadic hostile actions. The interpretive guidance states that civilian immunity is lost from the beginning of “*preparatory measures aiming to carry out a specific hostile act*” until the effective cessation of that act (International Committee of the Red Cross, 2009, p. 66).

The guidance expands also on the notion of hostile act, which must meet a “threshold of harm” to people or property in order to qualify as such (International Committee of the Red Cross, 2009, p. 50). Other requirements for qualification are the direct one-step causation of harm, descending from the hostile act, and the so-called “belligerent nexus”, i.e. the basic prerequisite that the harm in question is in favour of a party to the conflict and detrimental to the other – with the exception of acts of individual self-defence, exercise of authority or civil unrest (International Committee of the Red Cross, 2009, pp. 58, 64).

As for international armed conflict, Common Article 2, paragraph 1, of the Geneva Conventions provides for a definition that shall be used as a legal test to verify its subsistence: “*Any difference arising between two States and leading to the intervention of armed forces*” (Common Article 2(1), Geneva Conventions). The test does not take into account the magnitude or the time-related aspects of hostilities. However, the formulation clearly excludes any international armed conflict between a State and a non-State actor.

In order to better orient the classification of a conflict, it is useful to draw a definition of what constitutes a non-State armed group from common article 3 of the Geneva Conventions and the current jurisprudence. Indeed, in order to qualify as such, armed groups have to have an internal structure that enables them to respect international humanitarian law and, at the same time, allows the State to identify them as unitary enemies (Alston, 2006, p. 17). Whenever

a non-State armed group is singled out according to the aforementioned description and it embarks in a confrontation against the armed forces of a State, then a non-international armed conflict can be said to take place, provided that violence is protracted and sufficiently intense (Alston, 2006, p. 17). Moreover, non-international armed conflicts can be of a transnational nature, as, for instance, the US deems the one it is carrying on against Al-Qaeda. This claim will be examined in detail in section 4.1.1, devoted to the US and the legal framing of its counter-terrorism operations.

Yet, on the opposite end, the High Court of Israel stated that “*the normative system which applies to the armed conflict between Israel and the terrorist organizations in the area is complex. In its center stands the international law regarding international armed conflict*” (The Public Committee Against Torture et al. v. The Government of Israel, et al., 2006).

In any case, the use of force against enemies in a situation of armed conflict, although much less restricted than in time of peace, is still subject to some basic limitations, i.e. military necessity and the principle of humanity. That is to say, any use of force, even if directed against enemies as part of an armed conflict, must be proportionate to the sought legitimate military objectives, so as to minimize the risks for the civilian population. As for the principle of humanity, it is about armed adversary alive, it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force.

3.3 NECESSITY AND PROPORTIONALITY

Besides the ascertaining of the occurrence of an armed attack, there are two more substantive criteria to be fulfilled when acting in self-defence. Namely, necessity and proportionality. They are couched in customary law and in the judgments of the International Court of Justice. In the words of the Court, indeed, “*the submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law*” (Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996). The currently-accepted definition of necessity has been given after the 1837 *Caroline* incident, in an exchange between the US Secretary of State Webster and the British government, whereby the former asks the latter to prove a “*necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation*”. As for proportionality, Secretary Webster states that the forcible response entails “*nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity and kept clearly within it*” (Webster, 1983). It is important to stress that Article 51 plainly excludes that necessity of self-defence may persist after the Security Council is seized of the matter. Although, one could argue that the right to self-defence might continue to exist as a general principle of international law, hence regardless of UN SC intervention. Beyond necessity and proportionality, reactions would fall under the category of unlawful reprisals.

3.3.1 NECESSITY

Each of the two conditions is made up of several sub-conditions that help in determining whether the reaction is fully justified in terms of self-defence. Necessity, indeed, is tested against the requirements of last resort, immediacy and targeting.

3.3.1.A LAST RESORT

In order to enhance the legitimacy of an action taken in self-defence it is preferable to show that all other possible means offered by the Charter and by the diplomatic channels – whenever available, either with the non-State actor or the territorial State harbouring it – have been exhausted. It must be remarked that last resort is a preferential requirement, since it usually contributes to the final evaluation among several other factors, without precluding any final result (Ruys, 2010). Only in few cases, it seemed to play a relevant role. An example is the Israeli raid against the Osiraq nuclear reactor in 1981, which was carried out, according to Israel, after diplomatic efforts to block the production of nuclear armaments (Ruys, 2010, pp. 96-7). Clearly, this is a use of force which could have been justified only under the dubious doctrine of pre-emptive self-defence (see par. 3.2.2), i.e. exercised when an armed attack is foreseen but has not actually materialized. That is why, with the resolution 487/1981 the Security Council declared the raids illegal, also due to the complaints of many States that highlighted the failure of Israel to submit the issue to the Security Council or to the International Atomic Energy Agency (UN Doc. S/PV. 2282, 1981). Moreover, if we consider the *Caroline* test requirement of a necessity “*leaving no choice of means*” (Caroline case, 1837), clearly Israel did have a choice and merely declaring to have explored diplomatic solutions before does not seem to demonstrate the contrary. In sum, the relevance of last resort as an evaluative element is especially relevant to the gravity and imminence of the threat faced by the respondent. As professor Ago puts it in the addendum to the eighth report on State responsibility, the last resort condition “*would be particularly important if the idea of preventive self-defence were admitted. It would obviously be of lesser importance if only self-defence following the attack was regarded as lawful*” (Ago, 1980). It is relevant to consider that also the possibility to obtain the cooperation of the territorial State whose territory is being used by the non-State actor as a base for its actions must be considered before any use of force (Lubell, 2010, p. 46).

3.3.1.B IMMEDIACY

Another useful element to discern between a legitimate self-defence action and a reprisal is the time span between the materialization of the armed attack and the forcible response. The *Caroline* formulation, according to which there should be “*no moment for deliberation*”, is perhaps too strict in its literal sense, since any attack may naturally require some degree of preparation (Lubell, 2010, p. 44). It goes without saying that an interpretation following the *effet utile* of this requirement would necessarily take into account that it is meant to avoid arbitrary forcible measures justified in light of past hostilities that either have ceased or are remote in time. For instance, in paragraph 237 of the *Nicaragua* judgment, the International Court of Justice finds the United States in breach of the immediacy requirement, since several months had elapsed between the major offensive of the *contras* against El Salvador and the intervention of the US against Nicaragua, which started when the Salvadorian government was actually out of danger (Case concerning Military and Paramilitary Activities in and against Nicaragua, 1986). A particular case in this regard is represented by the need to react to a series of attacks. That is to say, when a State has already received one or more attacks and has motivated expectations that more will follow, it is entitled to act in self-defence to prevent these future attacks from happening. In this case, “*the requirement of immediacy of the self-defensive action would have to be looked at in the light of those [successive] acts as a whole*” (Ago, 1980). The most blatant example of this is the broad consensus found after 9/11 on the need to respond to terrorist attacks by resorting to war, even if they were over (Ruys, 2010, pp. 104-5). More specifically, the US attack on Afghanistan is an example of how the last resort and the necessity requirements may come to clash with each other. In that occasion, the time elapsed between 9/11 and the US intervention in Afghanistan is actually due to the attempt to win the cooperation of the Taliban government (Murphy, 2002). Obviously, the duty/possibility to seek alternative solutions to the use of force is available only in response to armed attacks that are over (Lubell, 2010, p. 45).

3.3.1.C TARGETING

The targeting requirement entails that the objects of a legitimate action of self-defence must be the source of the armed attack, always in compliance with international humanitarian law. That is why, the bombing of Beirut airport or the blockade carried out by Israel as part of an alleged reaction against Hezbollah was mostly condemned by the international community (Ruys, 2010, p. 109).

In 2006, in fact, Hezbollah attacked Israel by firing rockets, killing eight Israeli soldiers and abducting two of them. In response to that, Israel set up a large-scale military operation in the Lebanese territory, claiming to be acting only against Hezbollah:

There is no doubt that Hizbullah, a terrorist organization operating inside Lebanon, initiated and perpetrated today's action; Israel will act against it in a manner required by its actions (Israeli Ministry of Foreign Affairs, 2006).

Nevertheless, in the same statement, Israel still assigned some responsibility to the Lebanese government, since the attack originated from its soil (Israeli Ministry of Foreign Affairs, 2006). In spite of the ambiguity with which Israel pointed out the targets of its military operation in Lebanon, most of the Security Council members and the UN Secretary-General recognized its right to self-defence (Trapp, 2015, p. 10). However, the extent of destruction, the death toll and the scope of that intervention was so large to be labelled as disproportionate by the same Security Council (Trapp, 2015, p. 10). The most interesting element of the international reaction is that, by officially assessing the intervention under the mere aspects of targeting and proportionality, it automatically confirmed the possibility to defend against attacks by non-State actors that are not attributable to a State (Trapp, 2015, p. 10).

The example of Israel and Lebanon is useful to show the difference between carrying out an operation against another State or simply in its territory. For the purpose of a legal categorization, it would be useful to distinguish among three prototypical relations between the violent non-State actor and the territorial State from which it operates:

1. The acts of the non-State actor can be attributed to the host State.

2. There is no link between the non-State actor and the host State, but the latter bears some responsibility for the attacks of the former.
3. The territorial State has no connection with the non-State actor, nor it bears any responsibility for its violent actions.

The relevant difference here is between the first and the second scenario, since the former involves an act of indirect aggression under the UN General Assembly's definition, whereas the latter is a wrongful act under international law, which would not be sufficient to invoke self-defence against the State (Lubell, 2010, p. 40). Yet, in this eventuality, as we have seen, the victim State may carry out a self-defence reaction against the terrorist organization in the territory of the host State, even without its consent. Moreover, as the 1976 Entebbe case demonstrates, the resistance of the host State to the victim State's reaction makes the former an accomplice of the terrorist organization and, hence, a lawful self-defence target (Mullerson, 2002, p. 174). In the Entebbe raid, the resistance opposed by Ugandan forces to Israeli ones made Uganda a legitimate target of the Israeli reaction to the terrorist attack.

3.3.2 PROPORTIONALITY

Besides necessity, whose three components have been taken into account in the previous paragraphs, a legitimate self-defence intervention must comply also with proportionality, which is usually hard to assess. Broadly speaking, there can be two different approaches to it. On the one hand, under a quantitative approach, the magnitude of the response should be more or less equal to the armed attack in terms of casualties and damage (Ruys, 2010, p. 111). On the other hand, a functional approach would privilege the effectiveness of the defensive action over the strict equivalence of the two actions, so that the defendant is allowed to use force as much as it is needed to eradicate the threat or at least to discourage a new attempt of offensive. In the words of professor Ago: “*The action [...] may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the “defensive” action, and not the forms, substance and strength of the action itself*” (Ago, 1980).

Currently, there is no way to determine which of the two approaches shall be preferred. Indeed, the proceedings of the UNGA Committee on the Question of Defining Aggression are an evidence of the mixed opinions of States on the matter, so that the position of USSR and others against the inclusion of references to proportionality won the day (UN Doc. A/AC.134/SR.67–78). Therefore, a careful evaluation should necessarily be carried out on a case-by-case basis and strike a balance between the two concepts of proportionality.

For instance, the temporary occupation of a foreign territory may be permissible whenever it proves to be the only way to stop an ongoing or repeated armed attack, for as long as it necessary to cease it, whereas annexation of that land shall always be unlawful (Cassese, 2005). In light of this, to a closer look, the Israeli reaction to the kidnapping of two of its soldiers by Hezbollah could be brought under the umbrella of self-defence, due to the gradual escalation it followed. Indeed, initially, Israel replied with aerial strikes and artillery fire focusing on Hezbollah's bases or some linked infrastructures in southern Lebanon, with the aim of hindering the displacement of its kidnapped soldiers in the north. Hezbollah reacted by launching missiles in northern Israel, so that the campaign of the latter against the former seemed proportional considering the whole chain of events (Ruys, 2010, p. 118). Yet, the blockade on Lebanon and the attacks on Lebanese civilian houses and military bases remains unjustified and illegal (Ruys, 2010, p. 118).

When it comes to self-defence against non-State actors, however, the proportionality requirement has been particularly loosened in recent times. For instance, the counter-terrorism Operation "Enduring Freedom" led by the US in Afghanistan has been prolonged for an extended period after the 9/11 attacks to which it was supposed to react. Although it has been supported by the Security Council and the internationally-recognized government of Afghanistan, the more it went on, the less legitimacy it could enjoy under Article 51 (Grey, 2008).

Some commentators, such as Kunz, have argued that when there are an armed attack and a later reaction in self-defence, a war is actually starting. Hence, the laws of war shall apply (Lubell, 2010, p. 65). Yet, the *jus in bello* conception of self-defence is different from the one under *ius ad bellum*, since the latter involves balancing force mostly in the regards of civilians (Lubell, 2010, p. 64). Dinstein, instead, points out the need to distinguish between whether a

State is reacting against a proper armed attack or against an incident short of war and then apply the most appropriate conception of proportionality accordingly (Dinstein, 2011, pp. 222-3). That is to say, while remaining in the domain of *ius in bellum*, it could be appropriate to apply a quantitative approach in the event of single incidents and a functional approach in case of actual wars.

A further complication arises when faced with non-State actors, since under a functional approach an assessment of the actual danger represented by them is needed in order to establish what are the limits of the reaction by the defendant. However, there is a major difficulty in evaluating such a dangerous potential for non-State actors, whose structures and operations are usually covert and obscure. Furthermore, those structures are likely to be transnational, so that a functional approach would pose challenges regarding the possibility of reacting across all borders as long as it is needed to eradicate the threat (Lubell, 2010, p. 66). Indeed, the absence of references as to the geographical scope of self-defence potentially opens to the possibility of reactions crossing multiple borders, provided that they are carried out in full compliance with proportionality and necessity, both of which have to be evaluated for each territory involved (Lubell, 2010, p. 67). That is to say, every State whose territory is used to perform a counter-attack in self-defence must be unable or unwilling to cope with the violent non-State actor operating inside its borders. Moreover, the whole set of extraterritorial cross-border reactions must be part of a reaction to the same armed attack, without extending into pre-emptive actions against future possible attacks (Lubell, 2010, p. 67).

To sum up, self-defence is a right provided by Article 51 of the UN Charter, which ties it to the legal concept of “armed attacks”. As a result, I have dissected it and pointed out its key elements, in order to assess whether and how new forms of aggression have moulded it or influenced its application. Typically, the three main requirements needed in order to label a violent act as an armed attack, thereby being entitled to react in self-defence, are a sufficient magnitude, a recent time of occurrence and the involvement of a State actor. Obviously, all the three have been challenged with the advent of asymmetric war and general developments of warfare, such as pre-emptive strikes. As for magnitude, the prevalent interpretation has been conservative, so that most of ICJ judgments on the matter prefer to set a high threshold and reject the “accumulation of events” theory, compounding the scale of multiple but close events.

As far as the time of occurrence is involved, current thinking in international law seems to reject the legality of pre-emptive strikes, i.e. strikes carried out in a preventive way on the basis of a foreseeable future attack. On the other hand, one could argue that interceptive self-defence is still admissible, insofar as an attack has already been launched and the victim State reacts before it is hit and casualties are made. Any other suspect or information about possible future armed attacks should be addressed through the UN SC. Finally, the last requirement about the legal personality of the attacker is perhaps the one that came under stress the most. Indeed, if one sticks with the prevalent opinion that stubbornly accepts only States as perpetrators of armed attacks, then, for instance, terrorist groups would need to be identified with a State in order to be eligible as targets of self-defence. This would be possible only through attribution of their acts to a State. In other words, they must be “*sent by*”, acting “*on behalf*” or under the “*substantial involvement*” of that State, which would be charged with indirect aggression. Yet, the strictness of this attribution test risks leaving most of hostile acts carried out by non-State actors unpunished. Therefore, international law is evolving towards a looser interpretation allowing for targeted extraterritorial uses of force in self-defence against non-State actors whenever their host State is neither consenting to it nor able/willing to eradicate such threat.

4 NEW FORMS OF AGGRESSION

In this chapter, I going to take into account several new forms of aggression, which include terrorist groups, cyber-attacks, rebel/guerrilla groups, private military and security companies (PMSCs), drones and lethal autonomous weapons systems (LAWS). Each of them carries implications and has had some impact on the provisions of international law related to the use of force. They will be examined both from a *ius in bello* and a *ius ad bellum* perspective, by summarizing several relevant contributions from the doctrinal debate and trying to make some inferences or to draw some similarities.

4.1 TERRORIST GROUPS

The most evident among the new forms of aggression is for sure the one coming from terrorist groups, which have posed a challenge to the international legal order since 9/11, whose huge implications and legal impacts I examine below. I will especially focus on the role of the United States, as the standard bearer of the war on terror and as the main source of the impulses that have been aiming at modifying relevant international law provisions on the use of force. Then, I am going to expose some academic contributions that try to push forward the legal debate on terrorism and to provide for new legal instruments to fight it.

4.1.1 THE US AND THE WAR ON TERROR

Since 9/11, political rhetoric has been referring to anti-terrorism operations as part of a global “war on terror”. This difference is not just rhetorical, as it also marks a break with the past in trying to shift the legal background of those operations from the normal law enforcement to the war scenario. The implications may seem trivial, but they are far-reaching. Indeed, while law enforcement operations are subject to international human rights law, war actions are subject to international law of armed conflict and humanitarian law. These are two radically different legal frameworks, in that they allow for different actions and behaviours. For instance, the most relevant difference is that killing under human rights law is legal only insofar as it can fall under the derogations to the right to life, whereas under international humanitarian law it is allowed – and also common – among combatants. Under the label of a “war on terror”, therefore, the range of lawful counter-terrorism actions is significantly expanded. Yet, this idea raises many concerns and controversies both over its potential reach – since there is no agreed definition of “terrorism” – and over its actual existence. Thus, any forcible action meant to be part of this particular war should be reviewed according to the above-mentioned standards of aggression and self-defence, i.e. whether terrorist groups can be

said to perpetrate an aggression and/or states can be said to act in self-defence when engaging in counter-terrorism operations.

4.1.1.A 9/11 AND FOLLOWING US ACTIONS

After the attacks of 9/11, the UN Security Council issued two resolutions, n. 1368 and 1373, which seem to classify Al-Qaeda's actions as an armed attack and, as a result, to leave to States the possibility to react in self-defence against terrorism (Grey, 2008, p. 193). In particular, resolution 1368, before the attribution of Al-Qaeda's acts to Afghanistan, condemns them as a "threat to international peace and security" and recognizes "the inherent right of individual or collective self-defence in accordance with the Charter" (UN SC res. 1368/2001). The claim was upheld by NATO Press Release 124 of 12 September 2001, which was meant to show the commitment of the Organization to react in collective self-defence. It clearly stated that the terrorist attack

shall be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all (NATO Press Release 124, 2001).

For the first time in history, indeed, NATO activated article 5, thereby considering the terrorist attacks of 9/11 as a full armed attack under Article 51 of the UN Charter, so as to trigger a collective self-defence reaction (Ronzitti, 2006, p. 348).

John Bellinger, legal adviser to the Secretary of State, gave a more extensive description of the US point of view when he delivered a speech at LSE in 2006:

It should be clear that U.S. and allied operations in Afghanistan during this period constituted a use of military force as part of an action in legitimate self-defense, as opposed to a massive law enforcement operation. We were in a legal state of armed conflict with al Qaida and the Taliban, which was governed by the law of war. (Bellinger, 2006)

He went on to expose the reasoning that led to attributing Al-Qaeda's acts to Afghanistan:

We were justified in using military force in self-defense against the Taliban because it had allowed al Qaida to use Afghanistan as an area from which to plot attacks and train in the use of weapons and it was unwilling to prevent al Qaida from continuing to do so. We knew from intelligence that Osama Bin Laden, his senior lieutenants, and numerous other members of al Qaida were in various al Qaida camps in Afghanistan. We gave the Taliban an opportunity to surrender those it was harboring, and when it refused, we took military action against its members. (Bellinger, 2006)

Therefore, the attribution was carried out on the basis of the Taliban's neglect or tolerance of Al-Qaeda's activities. In any case, he goes on, self-defence was against both the Taliban and Al-Qaeda, which he claimed to be a legitimate target according to the following justification:

We were also clearly justified in using military force in self-defense against al Qaida. Al Qaida is not a nation state, but it planned and executed violent attacks with an international reach, magnitude, and sophistication that could previously be achieved only by nation states. Its leaders explicitly declared war against the United States, and al Qaida members attacked our embassies, our military vessels, our financial center, our military headquarters, and our capital city, killing more than 3000 people in the process. Al Qaida also had a military command structure and worldwide affiliates. (Bellinger, 2006)

Even though he insisted on the possibility for States to engage in armed conflict with non-State actors, under any common legal understanding of the concept, he admitted that the "war on terror" was and remained a rhetoric device to indicate the whole set of counter-terrorism measures taken by States.

In a letter addressed to the President of the Security Council, dated 7 October 2001, the Permanent Representative of the US to the United Nations John Negroponte articulates the stance of its government towards Afghanistan. He contends that the decision of the Taliban

regime to harbour Al-Qaeda and its refusal to cooperate upon invitation by the international community makes it a legitimate target (Negroponte, 2001). Therefore, “*in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States*” (Negroponte, 2001). As we have seen, the “actions” he mentions are explicitly directed against both Al-Qaeda and the Taliban.

However, before extending the target of its self-defence reaction to the Taliban, the US had only such a right against Al-Qaeda, the actual perpetrator of the armed attack. In compliance with the above-mentioned requirement of last resort, the US asked for the cooperation of the Taliban government, whose reply has been largely unsatisfactory (Lubell, 2010, p. 47). Therefore, in so doing, the US managed to satisfy the necessity requirement in order to react to Al-Qaeda. Yet, one could argue that in order for the Taliban to qualify as legitimate targets of self-defence as well, the US would have had to show either the attribution of Al-Qaeda’s activities to them or their attempt to undermine or hinder US lawful action against Al-Qaeda (Lubell, 2010, p. 47).

In the debates of the Security Council, France underlined that it was only due to the gravity and magnitude of the terrorist attack that it could qualify as an armed attack (Cassese, 2005, p. 1351). Other States, such as the UK, Russia and the EU members aligned with that position and upheld the American claim that the refusal of the Taliban to cooperate made it a legitimate target as well (Cassese, 2005, p. 1352). Nevertheless, it must be noted that such an alignment came about also in occasion of the 1993 American missile launch against Iraq, when the US claimed to be acting in self-defence in reaction to the attempt by the Iraqi government to assassinate President Bush, which was probably an example of overstretched interpretation (Cassese, 2005, p. 1353).

The UN resolutions allow for uses of force in a pre-emptive fashion against those who plan attacks (Bethlehem, 2012).

Another possible source of concern is about the actual applicability of the concept of “non-State armed group” to Al-Qaeda, especially if we take the definition emerging from the international humanitarian law and exposed in section 3.2.3.b. In fact, it may be difficult to categorize the terrorist group as such, due to the lack of a very basic requirement, i.e. a precise

and unitary internal organization. Rather, Al-Qaeda appears to have a very loose structure, with an affiliation that sometimes is purely limited to mere ideological affinity (Alston, 2006, p. 18).

The many stringent criteria that have to be fulfilled in order to give rise to the applicability of the international humanitarian law of non-international armed conflict have to be conceived as a guarantee against possible slippery slopes. Indeed, looser criteria may enable States to shift away from the law enforcement framework any time they are faced with similar internal or transnational threats, such as organized crime (Alston, 2006, pp. 18-9).

International law of armed conflict and the existence of an armed conflict, in general, have been used by the US military apparatus in order to deny any response to the allegations moved by the Special Rapporteur Philip Alston in his inquiry on the violations of the right to life during the targeted killing of six men travelling in a car in Yemen by means of a US Predator drone aircraft and on the disproportionate use of force by the US military personnel in Fallujah in 2003 (Alston, 2004, pp. 15-6).

4.1.1.B APRIL 2017 EVENTS

With the beginning of the Trump presidency in 2017, the United States has inaugurated a new season of confrontational foreign policy, involving an apparent hardening of stance towards terrorist activities and rogue States. From a legal point of view, the new administration is seemingly downplaying the role of the UN Security Council, which has been largely bypassed, and is leaning towards an extensive use of pre-emptive strikes and retaliation, both currently deemed illegal under international law.

On the 6th of April, the US has carried out a military attack on an airbase of the Syrian government, by launching 59 Tomahawk cruise missiles as a response to the chemical attacks that had occurred in the city centre of Khan Sheikhoun on April 4 and that were supposedly attributed to the same Syrian government (Starr & Diamond, 2017). Besides any ethical consideration about the appropriateness of a forcible reaction to chemical attacks and any speculation as for the real responsibilities behind those attacks, a legal debate has already grown in opposition to the US reaction, taking for granted the illegality of chemical weapons.

First of all, the US administration has shown evident procedural failures, in that it has sent the letter justifying its unilateral action to the Congress, but not to the UN Security Council, as the UN Charter and a consolidated international practice require. Second, the letter does not provide a sound legal basis for the reaction, which is characterized as a duty of the single State whenever the international community fails in responding collectively (Ronzitti, 2017).

Although it has received the nearly unanimous approval of the international community – with the major exceptions of Russia and Iran – the US strike seems to fit more in the category of retaliation. This is evident in the news release by the US Department of Defense, which speaks about a “*retaliation for the regime of Bashar Assad using nerve agents to attack his own people*” (Garamone, 2017). In fact, such a limited intervention could not be characterized as a humanitarian intervention, due to its limited scale (Ronzitti, 2017). Moreover, even if falling within that category, its legal base would still be dubious, as the humanitarian intervention is not generally accepted as a legal justification. Finally, it cannot be deemed as Responsibility to Protect, which tends to be more accepted as a justification in the opinion of the international community, but requires an even broader commitment to prevent, react and rebuild, far from the one shown by the United States to date.

Another possible strand for legal justification is conceiving the strike as a countermeasure against the breach of the 1993 Chemical Weapons Convention, to which Syria acceded in 2013, and of the UN Security Council resolution 2118/2013, disposing of the destruction of the Syrian arsenal (Ronzitti, 2017). In the words of the US Secretary of State Rex Tillerson: “*it’s important that some action be taken on behalf of the international community to make clear that the use of chemical weapons continues to be a violation of international norms*” (Tillerson, 2017). Unfortunately, no countermeasure can involve the use of force. Furthermore, the US has not characterized its action as such in the UN SC debate following the strike. The news release by the UN Department of Defense also reiterates that “*this is a violation of the Chemical Weapons Convention*” and that “*Syria also ignored United Nations Security Council resolutions*” (Garamone, 2017). Yet, another account is offered by the statement of the Pentagon Spokesman Captain Jeff Davis, who defines the attack as “*a proportional response to Assad’s heinous act*” and specifies that it was “*intended to deter the regime from using chemical*

weapons again” (US Department of Defense, 2017). Therefore, he configures it as a sort of pre-emptive action against possible future uses of chemical weapons. A somewhat different kind of pre-emption was envisaged by the Secretary of State Tillerson, who stated that “*if there are weapons of this nature [i.e., chemical] available in Syria, the ability to secure those weapons and not have them fall into the hands of those who would bring those weapons to our shores to harm American citizens*”. This follows in the footsteps of the argument taken into account before, regarding the possibility of adopting pre-emptive measure when coping with potential risks coming from non-State actors (see 3.2.2). However, as examined above, pre-emption is still largely deemed to be forbidden under international law.

4.1.2 TERRORISM AS CRIME AGAINST HUMANITY

As the High-level Panel on Threats, Challenges and Change reported in 2004 in the famous document “*A More Secure World: Our Shared Responsibility*”, although there are currently 19 international agreements to fight terrorism, no uniform definition of terrorism arises from them (High-level Panel on Threats, Challenges and Change, 2004, p. 51) (United Nations, 2017). As a result, the United Nations and all the related international institutions are unable to provide for a reaction to terrorism, due to the lack of a single coherent legal framework. Two issues are usually said to cripple the process towards a shared definition: the use of force by States against civilians and the possible interference with the right of resistance of peoples under foreign occupation, which can never be considered as a condition to lift human rights guarantees (High-level Panel on Threats, Challenges and Change, 2004, p. 51). That is why, the Panel focuses its proposed definition on the use of force against civilians and non-combatants, which is deemed to be the essence of the crime:

Any action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such act, by its nature or context, is to intimidate a

population, or to compel a Government or an international organization to do or to abstain from doing any act (High-level Panel on Threats, Challenges and Change, 2004, p. 52)

A way to deal collectively with terrorism could be to consider it as a crime against humanity in itself. Quadarella explores this possibility by referring to the Rome Statute of the International Criminal Court. Indeed, in her argument, terrorism may be considered as an international crime on the basis of current international customary law, although its codification as such was avoided because of political reasons, connected to the consequences it would have had on the Israeli-Palestinian dispute (Quadarella, 2006).

In any case, some terrorist acts – especially those committed by Al-Qaeda – can be deemed and prosecuted as crimes against humanity through analogy according to letter (k) of Article 7 paragraph 1 of the Rome Statute of the International Criminal Court, which refers to inhumane acts in general (Quadarella, 2006). Moreover, those criminal terrorist actions fulfil the requirement of being gross and systematic violations, thus of a sufficient gravity in order to enter within the scope of the Rome Convention. Finally, in accordance with the considerations exposed above in paragraph 3.2.3.a, Quadarella argues that the link with the Taliban was sufficient for the purpose of establishing a link of attribution with the State of Afghanistan, thereby inserting the violations in the usual legal framework of international crimes of States (Quadarella, 2006). It is interesting to notice that the only occasion in which Article 5 of the North Atlantic Treaty has been triggered, and, hence, that collective self-defence against terrorism took place, was in response to the events of 9/11 (NATO, 2017).

4.1.3 SIMILARITIES BETWEEN PIRACY AND TERRORISM

Piracy is one of the cases in which States are authorized and even under a duty to conduct extraterritorial law enforcement operations in the high seas, whenever necessary to repress it. The relevant provisions can be found in the 1982 UN Convention on the Law of the

Sea, which in Article 100 imposes on all the parties a duty of cooperation in the repression of piracy, defined in the following article as:

[...] Any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (UNCLOS, 1982)

The ability of States to use force against piracy outside their borders descends from Article 105 UNCLOS, which states that:

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board (UNCLOS, 1982)

It must be noted that this provision allows for use of force extraterritorially, but not in derogation to the territorial sovereignty of other States, as it is the case for self-defence. Nevertheless, as the threat of piracy kept on growing over the years in the Horn of Africa and especially within Somali territorial waters, an expansion of this authorization became necessary by means of UN Security Council resolution 1846/2008. The resolution “*calls upon States and regional organizations that have the capacity to do so, to take part actively in the fight against piracy and armed robbery at sea off the coast of Somalia*”, thereby posing a geographical restriction. Yet, although limited to Somali territorial waters, it represents a legal exception allowing for forcible measures in a foreign territory against a non-State actor. The rationale behind this derogation is similar to the one I have outlined for the justification of an extraterritorial forcible operation against a non-State actor. That is to say, the Security Council expressly “*takes into account*” that the Transitional Federal Government in Somalia is unable to deal with pirates and ensure security in its territorial waters and that it has requested

international assistance (UN SC res. 1846/2008). Hence, there is both an element of consent and inability of the host State to cope with the violent non-State actor.

Another doctrine within UNCLOS that can be used to fight piracy is the one of hot pursuit. It can be found in Article 111 of the 1982 UN Convention on the Law of the Sea, codified in the following words:

The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted (UNCLOS, 1982).

Therefore, the right to hot pursuit allows a State to continue chasing individuals that have infringed on its domestic law even outside its borders. The doctrine is clearly relevant in a context of piracy, although it has been invoked also for non-State actors acting on land. The main problem with this doctrine, however, is represented by paragraph 3 of the above-mentioned Article 111, which states that this right “*ceases as soon as the ship pursued enters the territorial sea of another State, unless accompanied by treaty concessions or agreements allowing such incursions*” (UNCLOS, 1982). Thus, it is impossible to use it to justify extraterritorial uses of force, which, as the article sets out, are evidently out of the scope of the provision. Moreover, the application of hot pursuit on land finds no justification whatsoever in State practice. In fact, since the UN Charter is in force, the hot pursuit for an extraterritorial intervention has been invoked only once by South Africa, but the UN Security Council has condemned and rejected the approach with Resolution 568/1985 (Ruys, 2010, pp. 378-9).

Precisely because there is a clear legal framework to fight piracy, whereas there is none to fight terrorism, it has been argued that, in light of the similarities between the two transnational phenomena, they may be brought under the same legal norms, as *hostis humani generis* (i.e., enemies of the human race) (Burgess, 2006). Piracy, indeed, is deemed to be a

crime of international relevance, thus of universal jurisdiction – and historically the first of this kind. Therefore, pirates cannot be sheltered by States or enjoy any protection whatsoever due to citizenship or sovereign rights (Burgess, 2006, p. 299). The crime of piracy could be used as a legal precedent for terrorism, in order to overcome today's fragmented approach, which, through various conventions, punishes only single acts of terrorism, such as aerial hijacking or hostage-taking. The creation of an international crime of terrorism would have a double advantage of both harmonizing and regulating the global reaction against those groups (Burgess, 2006, p. 299).

According to current international law, pirates can be captured wherever they are found. Equating terrorists to pirates would allow any State to perform extraterritorial law enforcement actions without infringing on the sovereignty of other States, which would never be able to shelter such actors. The capture of terrorists would be allowed whenever they are found and their extradition would be irresistible, on the basis of the principle *aut dedere aut judicare* (Burgess, 2006, p. 334). Moreover, the creation of a crime of terrorism similar to the crime of piracy would allow the prosecution of terrorists just because of their belonging to a terrorist group, without the need for them to be materially involved in an attack (Burgess, 2006, p. 334).

Along with the traditional line of thought that “the enemy of my enemy is my friend”, piracy has also been sponsored by States as a tool to hurt other States, pretty much as it happens today with terrorism. Notoriously, in the XVI century, Queen Elizabeth I considered them a useful support to the Royal Navy, insofar as they were representing an advantage over the Spanish (e.g., by provoking them, eroding their resources or providing the English with trained seamen) (Burgess, 2006, p. 302). Later on, in periods of peace, the British empire revoked the licences for privateers, which, as a result, turned against all sorts of ships, thereby becoming the first transnational actors to organized in a “war against the world” (Burgess, 2006, pp. 307-8). The reaction of the international community was through the 1856 Declaration of Paris, which *de facto* created a third subject of international law in-between people and States, i.e. *hostis humani generis*, enjoying neither citizenship nor sovereignty. In particular, Burgess finds several similarities between piracy and terrorism (Burgess, 2006, p. 315). That is to say: they are carried out by organizations of volunteers; they aim at attracting attention through violent acts

that arouse fear; they operate transnationally and without being subject to any jurisdiction; they operate against States and, therefore, they are enemies of all States (Burgess, 2006, p. 310).

In the twentieth century, piracy underwent a mutation, so that many acts acquired a political meaning of rebellion or revolution. That is why, both the 1958 Convention on the High Seas and the 1982 Convention on the Law of the Sea provide for a political exception in order to escape the categorization of piracy and *hostis humani generis*, so as to exclude all acts that may be seen as inter-State or civil war (Burgess, 2006, pp. 318-20). We might wonder whether terrorist groups whose aim resembles the one of rebels (i.e., regime change) could fall within such an exception. The answer, according to Burgess, lies in the crucial methodological difference between terrorists struggling for a regime change and rebel groups fighting for self-determination, since the former employ force against targets other than the established government and usually have other aims beyond the mere overthrowing (Burgess, 2006, p. 321). Therefore, terrorism, in his account, should be defined as a crime of universal jurisdiction like piracy, as they could be deemed to share the same *actus reus*, i.e. killing, ravaging and pillaging, but also of the same *mens rea*, which consists in perpetrating those criminal acts for aims that have to be deemed private and not political, due to the theoretical reasons exposed above (Burgess, 2006, p. 322). Burgess goes on in what is perhaps his most controversial point, in an attempt to overcome the most serious hurdle to the assimilation of the two phenomena: piracy and terrorism have a fundamental divergence as far as the *locus* is concerned. Piracy, indeed, is, by definition, carried out in the high seas. The theory by Burgess aims at stretching such a territorial limitation through the concept of “descent from the sea”, thereby seeing terrorism as an attack coming from outside the territory of the State, or from an area outside its jurisdiction, e.g. the skies (that is also why, there is the expression “aerial piracy”) (Burgess, 2006, p. 322).

Although this theory could be deemed as an innovative one and, possibly, used to steer future legal developments in the fight against terrorism, it is not immune from criticism. First of all, by coming back to the definition of piracy provided by Article 101 of the UN Convention on the Law of the Sea, one could argue that, even though it employs violence on random targets, the final end of terrorism is not exactly “private”, as the text requires. In fact, if the *prima facie* end is the killing of innocent people and/or the destruction of property, the final

aim is distinct and certainly political. For instance, one could hardly say that Al-Qaeda's violent actions are for private and not political ends, for this would entail that its only motivation would be either enrichment or pointless devastation. Furthermore, the idea of "descent from the sea" might result too far-fetched to encompass all terrorist actions happening on land. In any case, the definition of Article 101 UNCLOS literally speaks of actions that take place in "ships" or "aircraft", so that most of the terrorist attacks are undoubtedly left out. As a result, the only way to reap the benefits of an international criminalization of terrorism seems to be the crafting of a commonly agreed definition, yet to be found, and its inclusion in the Rome Statute of the International Criminal Court.

The criminalization of terrorism would provide for a useful alternative to fight it other than armed conflict and the "war on terror" framework. Therefore, as long as terrorism is concerned, current efforts of dealing with it through self-defence and armed conflicts have inevitably produced a relaxation of standards for intervention abroad against those groups. However, an even more effective approach would aim at the criminalization of terrorism, either by inserting it in the Rome Statute or, more simply, by considering it a crime against humanity through analogy, according to letter (k) of Article 7 paragraph 1 of the Rome Statute of the International Criminal Court, as Quadarella's above-mentioned argument goes.

I will now move on to another form of aggression that is increasingly common and will inevitably have an impact on current international law, i.e. cyber-attacks.

4.2 CYBER-ATTACKS

4.2.1 CYBER-ATTACKS AS ARMED ATTACKS

The definition of armed attack has been significantly expanded in recent times. Already in 1971, India labelled as such an influx of migrants from East Pakistan, which, in so doing, was about to compromise the Indian economy and social system (Ronzitti, 2006, p. 350). Nowadays, the stretching of the meaning of armed attack may go even beyond, in order to encompass new cybersecurity threats, such as Computer Network Attacks (CNAs), especially if they provoke real destruction or disasters (Ronzitti, 2006, pp. 350-1).

CNAs represent a *sui generis* threat to the legal order because of four peculiar features that it shows, i.e. the fact that they involve a new category of targets – computer networks – while, at the same time, excluding the use of *kinetic* force, the *physical* crossing of borders and *physical* damages (Schmitt, 1999, p. 888). Essentially, CNAs can be defined as “*operations to disrupt, deny, degrade, or destroy information resident in computers and computer networks, or the computers and networks themselves*” (Joint Chiefs of Staff, 1998). The crucial distinction, however, has to be made with respect to the ends of such a cyber-attack. Indeed, by means of the CNA, the offending party gains an advantage over the victim. Whenever this advantage is confined to domains other than the military one, then the issue might be dealt under the international legal regime for wrongful acts. But when that advantage is directed at easing or in some way connected to a conventional physical armed attack, then it is worth considering the problem in light of the above-mentioned provisions of the UN Charter related to uses of force and self-defence. Yet, the key requirement to include CNAs under the scope of such UN Charter provisions is that they should be included under the category of wrongful uses of force. In particular, it is necessary to assess whether “force” in the object and purpose of the Charter is just the armed one or if it covers also other forms of coercion (Schmitt, 1999, p. 904).

A textual analysis of the Charter would take into account the qualification of “force” as “armed”, contained in the Preamble among the purposes: “*to ensure, by the acceptance of*

principles and the institution of methods, that armed force shall not be used, save in the common interest". That is why, in spite of the general reference to "force" in Article 2(4), the whole Charter may be read according to the initial specification (Schmitt, 1999, pp. 903-4). Also when considering the *travaux préparatoires*, the rejection of an amendment proposed by Brazil and aiming at including economic coercion in the prohibition of Article 2(4) might be considered as revealing the leaning of framers towards a more restrictive interpretation of the concept of "force" (Schmitt, 1999, p. 905). In general, as long as one focuses on a literal or contextual interpretation of limitations on the use of force in international agreements, there is a clear will of contracting parties to distinguish between "use of force", classically associated with armed force, and force meant as pressure through residual means (Schmitt, 1999). What is more interesting, however, is that a teleological interpretation able to shift the focus from the policy instruments to the consequences may encompass also some kinds of CNAs within the prohibited uses of force. Indeed, some CNAs are able to cause serious physical injury, destruction or even death (e.g., when hitting hospitals, supplies, safety systems, etc.). Therefore, by virtue of their effects, those CNAs might be considered as armed force and brought within the reach of the general prohibition of use of force, just as it happens with, for instance, chemical weapons (Schmitt, 1999, pp. 912-3). In those cases, the assimilation with armed force gives also rise to the possibility for the Security Council to act under Chapter VII and, more importantly, for individual States to react in unilateral self-defence under Article 51 of the Charter (Schmitt, 1999).

Other CNAs, instead, might be labelled as mere uses of force, i.e. between armed force and coercion by other means (e.g., economic or political). More than that, it would be appropriate to establish a presumption tending to categorize CNAs as uses of non-armed force by default, especially in light of the legal consequences. In such a case, indeed, they would fall within the prohibition set forth in Article 2(4), but they could give rise to action by the UN SC and to unilateral self-defence only in particular cases. As for the former, it is up to the SC to rule on the matter, by considering the CNA in question as a threat or breach to the peace under Article 39 of the Charter. As for the latter, there must be a series of conditions that enable the victim State to justify its armed reaction as interceptive self-defence (see 3.2.2). In particular, the CNA must be an irrevocable step of an operation leading to an armed attack, which the

defender cannot avoid in any way other than reacting through Article 51 in that specific window of opportunity (Schmitt, 1999, pp. 932-3).

In the future, it is highly likely that cyber warfare will represent a higher share of forcible actions. That is why, the Kampala agreement on the definition of the crime of aggression may have been a mistake in at least two ways. First, it has crystallized an outdated definition (the GA's one of 1974) into treaty law, thereby possibly impeding further customary developments (Kocibelli, 2017). Second, it has focused too much on defining aggression according to the way it is performed, rather than according to its consequences, so that cyber-attacks are actually struggling to get into it (Kocibelli, 2017).

Significantly, last June, the British Defence Secretary Sir Michael Fallon stated that cyber-attacks directed at British systems “*could invite a response from any domain - air, land, sea or cyberspace*” and that the UK has already used cyber warfare in Syria and Iraq against the Islamic State, with outstanding results (Farmer, 2017). This is the first time that a State expresses so clearly its legal opinion on the matter, by supporting a major breakthrough in the international law on use of force.

Yet, what is perhaps the hardest challenge, is the attribution link between the hackers that carry out the cyber-attack (provided that they are identified) and the State that has recruited them. As the previous speculation shows, the International Criminal Court is not able to prosecute individuals acting alone or on behalf of non-State actors yet, even if they perform an actual aggression on the sovereignty of another State or cause considerable physical damage.

4.2.2 CYBER-ATTACKS AS WAR CRIMES

For sure, from a humanitarian law point of view, it is highly likely that CNAs violate the principle of distinction, which is the cornerstone principle of the laws of armed conflict establishing that any person not directly participating in the fight (i.e., civilians or people *hors de combat*) must be spared from deadly force. Only a certain amount of collateral damage is allowed, provided that it is within precise limits of proportionality and reasonableness. Besides

civilian immunity and proportional and reasonable collateral damage, the laws of war impose also restrictions on physical targets and procedural obligations avoiding perfidy.

Therefore, if we take into consideration the potential magnitude of CNAs and the way they should be used in order to provoke disruption, then we may wonder whether they can fall within the crimes of war. For instance, if a power plant is shut down and an entire city is deprived of electricity just to hit, let us say, a military base whose systems are too sophisticated to be targeted directly, then the action might result in highly disproportionate collateral damages or, worse, in the death of civilians (Lin, 2017).

Furthermore, another possible way in which a CNA may be punished as a crime of war is the selection of an illegal target under international humanitarian law, e.g. any object not directly involved in combat (in practice, hardly anything apart from military facilities) (Lin, 2017).

Finally, in order to obtain access to a computer network from outside, it is highly likely that deception proves necessary. That is why, by disguising agents, telling misleading information or enacting similar strategies, a State might be liable of perfidy, which can configure a war crime (Lin, 2017).

As a result, cyber-attacks may constitute both armed attacks and war crimes. However, with respect to other forms of aggression, they can be perpetrated by individuals, without being part of any organization whatsoever. In general, cyber-attacks challenge the traditional structure of international law, focused on territory and territoriality. Indeed, it is really hard to attribute the action of individual cybercriminals to a State or even an organization. More than that, even establishing the geographical location from where the attack was launched requires complex and difficult operations, not always guaranteeing a positive result. In Ophardt's words:

In general, while tracing an attack is possible, most traces terminate at the ISP (Internet Service Provider). An ISP subscriber may be the responsible party, or the ISP may be yet another conduit through which the attack has been routed. Regardless, further tracing will require ISP cooperation. [...] The number and diversity of culpable individuals involved in international cyber aggression require an appropriately tailored and flexible definition of aggression (Ophardt, 2010).

Here, again, we may find it easier and more desirable to criminalize cyber-attacks by means of an *ad hoc* crime, contemplating a responsibility that is both individual and differentiated according to the various possible degrees.

Another challenge, as mentioned above, is to the notion of territoriality. In particular, due to the fact that cyber-attacks usually flow across multiple territories. This is best captured by the functioning of Distributed Denial-of-Service (DDoS) attacks carried out through botnets:

Botnets are not limited geographically; the malware that creates them moves freely across national borders. A DDoS attack using a botnet will cause assets scattered across the globe to attack a target through the Internet. Internet traffic was specifically designed to travel over the fastest route possible. This route is not necessarily the same as the most geographically direct route. (Ophardt, 2010)

Thus, the extension and re-shaping of self-defence in reaction to terrorism, i.e. the Shultz doctrine and following developments, seems to be totally ineffective here. In fact, we would hardly be able to speak of a “host State” tolerating or unable to deal with the threat if that threat is travelling across multiple borders, perhaps ultimately controlled by just an individual, maybe even with an uncertain geographical position.

Once again, an *ad hoc* crime of cyber aggression would have to allow for individual responsibility, thereby dropping any obligation to link the action to a State. Moreover, the concept of territory would have to be replaced with the one of cyberspace, therefore renouncing to establish territorial connections of attacks according to their physical routing (i.e., the physical “path” they follow), which, as we have seen, is meaningless.

4.3 REBEL GROUPS AND GUERRILLA

Another peculiar (although not properly new) form of aggression is the one perpetrated by rebel or guerrilla groups. The current international legal framework unequivocally enshrines the principle of self-determination of peoples and, consequently, safeguards all the actors that take up arms in its name. This can be inferred from Articles 1, 55 and 56 of the UN Charter, but also from common Article 1 of the two 1966 Covenants on Human Rights and the 1970 General Assembly Declaration on Friendly Relations, which lists self-determination among the basic principles of international law (Francioni, 1988). During the drafting of the latter, many developing or socialist countries objected that paragraphs 8 and 9 could hamper the right to self-determination of peoples oppressed by foreign occupation and colonial rule (Ruys, 2010, p. 390). That is why, they insisted for an exception so as to consider legitimate both the use of armed force justified by self-determination and the provision of any kind of assistance and support to those rebel groups from third countries (Ruys, 2010, p. 390). The principles have eventually found room in paragraph 5, although in a very vague formulation:

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter (UN GA res. 2625 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 1970)

In particular, the final reference to the “*accordance with the purposes and principles of the Charter*” leaves doubts as to whether and when are non-State actors entitled to lawfully receive support for their self-determination fight.

Also the UN GA definition of aggression, in Article 7, carefully excludes peoples struggling in the name of self-determination from the scope of aggression. In the words of the article:

Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination: nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration. (UN GA res. 3314)

The practice of the UN Security Council and General Assembly follows the same pattern of denunciation of oppressive regimes, such as South Africa under apartheid or Southern Rhodesia, with praises to States supporting liberation movements from outside (Ruys, 2010, p. 404).

However, the most sweeping consequences are to be found in the particular treatment reserved by international humanitarian law to groups fighting for self-determination. As it has been outlined above, the domain of international humanitarian law, we can distinguish between international and non-international armed conflicts, which have two different legal regimes. Under the rules of non-international armed conflict, non-State actors can be subject to obligations towards civilians and people “*hors de combat*”, but the former do not enjoy the same status, since the international community has been careful in granting them fewer rights. An example is the “prisoner of war” status, which prevents States from trying war prisoners taken among enemy combatants, but does not apply to non-State actors in non-international armed conflicts. This means that States have reserved for themselves the right to put under trial members of rebel groups, or similar armed groups, which otherwise would have enjoyed immunity from prosecution under international humanitarian law. The rationale behind this is

not difficult to grasp, since soldiers fighting for an enemy State, unlike rebels who are *de facto* perpetrating treason, are not committing any crime. Therefore, rebel or internal opposition groups are kept in an unfavourable position. However, as stated before, there is an explicit exception expressed in Article 1, paragraph 4, of the 1977 Additional Protocol to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts, which states that “*armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of self-determination*” can enjoy, under certain conditions, the same privileges of belligerents in international armed conflicts.

As for *ius ad bellum* against rebel groups, State practice and the jurisprudence are not unanimous on the possibility and the criteria to lawfully react under Article 51 of the UN Charter. For instance, the Colombian action against the training camps of the Revolutionary Armed Forces of Colombia (FARC) in Ecuadorian territory was condemned by the Organization of American States as in breach of the rights of sovereignty and non-intervention, although Colombia had framed it in terms of self-defence, in light of a possible complicity of Ecuador (Trapp, 2015, pp. 10-1). Yet, this is largely insufficient to claim that a hypothetical Ecuadorian support or harbouring of FARC could possibly be legal and justifiable under the national liberation exception.

As for the jurisprudence, the ICJ has had the opportunity to express itself on Uganda’s attempt to fight the Lord’s Resistance Army in the Democratic Republic of Congo (DRC), from which it conducted its operations. Clearly, the operation was against the necessity requirement, since the UN was airlifting troops of the DRC in the zones where the rebels were operating, so as to cope with them (BBC News, 2005). In any case, the Court was mainly interested in attribution of armed bands to DRC, but when it came out with a negative answer, it renounced to investigate whether self-defence could still be a valid justification for Uganda’s reaction and whether the LRA could benefit from the safe harbour of self-determination (which appears not to be the case, actually).

Nowadays, it is clear that any “national liberation exception” legitimizing guerrilla groups in their struggles for self-defence is meant to be confined to people under colonial rule (Ruys, 2010, p. 421). Hence, such an exception entitling to special protection and the possibility

to receive support from third States appears now as outdated and even dangerous, in light of the new terrorist phenomena.

4.4 USE OF FORCE BY PRIVATE CONTRACTORS

Another case of non-State actor involved in the use of force and posing challenges to current international law is given by Private Military and Security Contractors (PMSC). These actors are usually hired by States in order to accompany their regular armed forces and their presence is increasing over time. Indeed, Blackwater personnel has been allegedly used in Libya by the United Arab Emirates, the US Department of Defence has recently stipulated contracts for a value of about €500 million to support the US Africa Command in the hunt for Joseph Kony of the rebel group Lord Resistance Army, while China and Russia are increasingly interested in legalizing and collaborating with PMSC (Orizio, 2017). However, their legal status, rights and duties under international law are still unclear.

From an international humanitarian law viewpoint, several scholars have argued that they could fall under different categories, according to the functions they perform and the type of ties they develop with belligerent parties. Their position should be assessed according to Article 43 of the 1977 Additional Protocol I to the Geneva Conventions (not ratified by 27 States yet) on members of armed forces and Article 4A(2) on the de facto combatant status (Sossai, 2011, p. 198). This status is assigned to any militia “belonging to a party to the conflict” (i.e., that is controlled or dependant on that party), having a precise hierarchical organization, fixed distinctive signs recognizable at distance, carrying arms openly and conducting operations according to the laws and customs of war (Sossai, 2011, p. 199). As for PMSC, difficulties arise for the organizational requirement and the two regarding recognisability with respect to civilians. In fact, for instance, the US Department of Defense usually does not allow PMSC to wear military uniforms or similar ones (Sossai, 2011, p. 199). Article 43, instead, articulates a more advanced list of requirements, so as to take into account the historical development of conflicts. In particular, the requirements set out are three: acting on behalf of a party to a conflict, being organized and being under a command responsible to that party for the conduct of its subordinates (Sossai, 2011, p. 200). Here the crucial doctrinal distinction is on whether the

last requirement shall be satisfied *de facto* or by means of effective integration of PMSC into armed forces under domestic law. The ICRC interpretative guidance on the notion of direct participation in hostilities allows for the former possibility, by arguing that *de facto* integration is possible whenever PMSC are engaged in a continuous combat function (International Committee of the Red Cross, 2009, p. 39). Otherwise, like civilian employees accompanying armed forces, they stay civilians, with the possibility of losing their immunity so long as they participate directly in hostilities (see 3.2.3.b) (International Committee of the Red Cross, 2009, p. 39).

The phenomenon of private contractors has an obvious impact also on the protection of the right to life, which, as part of the body of international human rights law, applies as *lex generalis* in situations of armed conflict, with respect to the *lex specialis* of international humanitarian law. This protection is granted through the principle of distinction, which prevents civilians from being attacked by combatants, so long as they do not directly take part in hostilities. Yet, as exposed above, PMSC can rarely be included among combatants, since this would require their *de facto* or legal integration into armed forces. This has two major legal consequences: they are not entitled to attack but in case of self-defence and they normally enjoy civilian immunity. Most States employing PMSC in war scenarios consider their forcible acts as self-defence, since the main reason for their use is protection, rather than hostile action (Den Dekker & Myjer, 2011, p. 181). Clearly, self-defence can be used as a legitimate ground for intervening in hostilities without being considered as directly participating, but only if that violence is aimed at protecting oneself or other people or some property essential to someone's survival. In the wording of Article 31 paragraph 1 letter c of the Rome Statute of the International Criminal Court, criminal responsibility may be excluded if:

The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected (Rome Statute of the International Criminal Court, 1998)

In this case, self-defence remains subject to the above-mentioned principles of necessity and proportionality.

Other grounds on which PMSC may use violence could be military necessity or duress, but the former is thought to be a circumstance precluding wrongfulness of States, while the second is subject to severe restrictions, as it is meant to be excluding liability only in rare cases where the actor involuntarily finds him/herself in a situation from which s/he has no other way to escape but to infringe the law. Therefore, it is unlikely that duress may provide for a remedy whenever self-defence fails to do so, even more in light of the larger freedom enjoyed by PMSC in refusing assignments by their employers (Den Dekker & Myjer, 2011, p. 184).

Recently, human rights courts have tended to focus on due diligence obligations of States to ensure the respect of human rights in occupied areas, in light of Article 43 of The Hague Regulations (Den Dekker & Myjer, 2011, p. 185). Similarly, States should protect all the people under their jurisdiction or control, including private contractors, who, being civilians under humanitarian law, should have their right to life granted (Den Dekker & Myjer, 2011, p. 186). Yet, devoting resources and military personnel to the continuous protection of private contractors would greatly reduce their usefulness. Therefore, a better solution to comply with this due diligence obligation could be to consider weapons equipped to contractors as a fulfilment of the State's duty to protect them, provided that this is lawfully implemented under the domestic law of the territorial State where operations take place (Den Dekker & Myjer, 2011, pp. 186-7). Finally, it would be appropriate for the hiring State to verify whether and to what extent the contract with the PMSC may involve direct participation in hostilities, so as to avoid endangering contractors (Den Dekker & Myjer, 2011, p. 191).

Generally speaking, the lack of protection of private contractors is part of a historical bias that was also valid in the past for mercenaries, who were left outside the legal framework. Moreover, the exercise of forms of governmental authority by private entities can usually be assimilated to State conduct – on the basis of the actual capacity of that entity in the moment of the exercise – or even deemed to be illegal (Den Dekker & Myjer, 2011, p. 190).

From the *ius in bello* issues of PMSC we may derive their impact on *ius ad bellum*, that is, we may ask ourselves how does the use of PMSC fit into the provisions concerning

aggression and self-defence. By analogy with what has been exposed above regarding rights, duties and crimes of private contractors under international humanitarian law, we may address the question of attribution, which is the main issue when it comes to *ius ad bellum*. One could argue that, similarly to what happens to self-defence in *ius in bello* (i.e., lawfully reacting to, let us say, a shot by a private contractor), a victim State is entitled to a forcible response whenever the private contractor at stake is *de facto* or legally integrated into the regular armed forces of the offending State. Another possible circumstance, dictated by logic, is whenever they perpetrate an armed attack (i.e., directly participate in hostilities) and they have a contractual link or otherwise receive money or instruction from a State, to which they will obviously be attributed.

4.5 DRONES AND AUTONOMOUS WEAPONS

4.5.1 EXTRATERRITORIAL LAW ENFORCEMENT OPERATIONS

Sometimes States deal with violent non-State actors by engaging in extraterritorial operations outside the framework of armed conflict, which has been adopted within the context of the so-called “war on terror” after 9/11 and extensively analysed above. These operations are usually carried out by means of drones and take the form of targeted killings, which are defined by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Philip Alston as “*the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator*” (Alston, 2006, p. 3).

Unlike the cases described above, targeted killings, as law enforcement operations, happen under the legal framework of international human rights law, since, due to the negligible magnitude of the phenomenon, no armed conflict or attack can be said to exist. Thus, neither *ius in bello* nor *ius ad bellum* come into the picture, but rather human rights law becomes relevant.

What distinguishes targeted killings from other types of killings or law enforcement operations is that there is a “degree of pre-meditation” in the use of lethal force against a specific individual, so that the aim of the operation is to execute from the beginning. That is why, I am going to examine the possible impacts on the right to life, so as to assess the legality of the usual use of drones by States.

4.5.1.A IMPACTS ON THE RIGHT TO LIFE

Under human rights law, i.e. outside a situation of war, people enjoy the right to life, which is protected under Article 6, paragraph 1, of the 1966 International Covenant on Civil and Political Rights, under regional human rights systems in Africa, Europe and America, and even under international customary law (Lubell, 2010, p. 170). Not surprisingly, the right to life

is the one which is compromised the most by the practice of extrajudicial killings. A crucial point to stress, in this case, is that the right to life is not absolute, but rather can be subject to derogation.

First and foremost, the right to life can be derogated in a situation of conflict, when international humanitarian law, as *lex specialis*, replaces international human rights law, which is to be considered as *lex generalis*. As exposed above, international law allows killing among combatants or people directly taking part in hostilities. Indeed, the Israeli government tried to justify its targeted killings of Palestinian terrorists precisely through self-defence and international humanitarian law (Alston, 2006, p. 6). This approach, as I have previously argued, allows much more freedom in killing and, perhaps, wider powers granted by domestic law in situations of armed conflict, but it is linked to many pre-conditions that are likely to be disregarded, e.g. the actual existence of an armed conflict. The applicability of humanitarian law may prove decisive in order to assess the legality of targeted killings, since the Special Rapporteur on Extrajudicial Executions Philip Alston believes that the practice may be legal only in this context (Alston, 2006, p. 5).

The other alternative in which killing may be permissible is under the general conditions for derogation provided by human rights law. That is to say, when the restriction of a right – in this case, the right to life – is necessary, proportional and provided by law. This is the typical case of a death penalty. Unfortunately, however, extrajudicial killings do not seem to fit into this framework.

First, they do not seem to be in accordance with the law, as no trial is held before the execution and there are serious doubts as to whether they comply with US domestic law and Executive Order 12333 on assassinations, which dates back to 1981 and disposes that: “*No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination*” (McDonald, 2002) (Murphy, 2003) (Parks, 1989).

Second, the necessity requirement would be missed, since a targeted killing is rarely the only solution available. In order for this to be the case, the target must be about to carry out a deadly attack, it must be impossible to stop him/her by means of capture and detention and there must be no other best place or time to hit him/her (Lubell, 2010, p. 176).

As for proportionality, it should be assessed on case-by-case bases. In any event, law enforcement operations shall always follow a functional model of proportionality. That is to say, they should involve means and actions that are directly proportional to their aim. Having said that, proportionality remains always difficult to evaluate, as it involves balancing a killing with the potential damage caused by inaction.

The High Court of Israel has pronounced on the matter by supporting a case-by-case approach and, as a general rule, favouring the legality of targeted killings whenever the victim has taken part directly in the hostilities, there are no other ways to neutralize the threat, collateral damages to civilians meet proportionality and there is an *ex post facto* investigation to verify that the foregoing requirements are respected (Alston, 2006, p. 6).

In sum, the taking of life under international human rights law is possible only if perpetrated in defence of life and if non-lethal measures are available. There have been several proposals to allow for limited exceptions in the taking of the life of terrorists, justified in light of efficiency with respect to war, or in the execution of dictators upon authorization by the Security Council to safeguard human rights (Slaughter, 2003). Yet, although their intent may seem worthy of praise, the actual effect is likely to be only deleterious to human rights law, since they would potentially open the way to dangerous slippery slopes, by relieving governments from the obligation to demonstrate the guiltiness of targets and the exhaustion of all non-lethal remedies, thereby compromising accountability (Alston, 2004).

As I have pointed out above, however, the law enforcement framework is increasingly seen by States as obstructing their capacity to ensure security and fight terrorism. In the words of John Bellinger:

Some critics say that the right model is the law enforcement model. But would reliance on law enforcement personnel and traditional law enforcement cooperation alone really have stopped al Qaida from planning and executing its attacks around the world and in the United States, especially given the lack of a functioning government in Afghanistan? If we relied on a law enforcement model alone, we could not have used force against the Taliban and al Qaida in Afghanistan. And if we were justified in using force, as we

believe we were, it would not have been workable to detain only those members of the Taliban and al Qaida immediately suspected of a crime (Bellinger, 2006).

Therefore, I move on to consider the drone policy of the major international users of such weapons and their impact on the international law on use of force.

4.5.2 DRONE POLICIES

As described above, drones have been used mainly in the context of extraterritorial law enforcement operations, in particular, extra-judicial killings carried out as part of a global fight against terrorism. However, the above-mentioned rhetoric of the “war on terror” has come to dominate those efforts aimed at contrasting terrorist groups and drones and targeted killings have been one of the most extensively used weapons to fight terrorism. Their deployment has been usually couched in terms of self-defence, which, by officially giving rise to an armed conflict, would let targeted killings be carried out in a framework of international humanitarian law, with significantly fewer procedural restrictions. Below, I review the American and Russian drone policies, in order to show the looseness of the rules governing the phenomenon and the relaxation of due diligence duties in the name of counter-terrorism.

4.5.2.A US

Under President Bush, targeted killings by means of drones were largely resting on the legal framework of the “war on terror”, which, as analysed before, is more a rhetorical rather than a legal concept. According to this view, strikes were seen as part of an ongoing armed conflict, so that killing would not be subject to the restrictions of international human rights law, but rather to the verification of the combatant status or the loss of civilian immunity under international humanitarian law. Indeed, the authorization procedure was really opaque, since there was a massive delegation of authority to the C.I.A. senior officials, who were able to authorize strikes on behalf of President Bush (Johnston & Sanger, 2002). However, the most

worrisome aspect was related to the targeting decisions, which were mainly based on surveillance and study of the so-called “patterns of life” (Alston, 2006, p. 8).

President Obama, instead, articulated a new drone policy in the 2013 Presidential Policy Guidance, based on secrecy, the selection of targets only on “outside areas of active hostilities” and the “near certainty” of leaving civilians unharmed (Stohl, 2017). Still, targeting decisions were not completely based on clear and fair procedures, accountability remained poor and no delimitation of the armed conflict supposedly going on between the US and the terrorist groups was provided (Alston, 2006, p. 8). Yet, greater due diligence efforts were evident from a stronger commitment to transparency – in 2016 the Obama administration started an annual release of statistics on civilian casualties in US drone operations – and a partial shift of responsibility away from the C.I.A. and towards the Department of Defense (Stohl, 2017).

This last development has been reportedly rolled back under the Trump presidency (Stohl, 2017). Moreover, a general relaxation of standards seems to be going on the classification of “temporary areas of active hostilities”, civilian risks and threat thresholds for targets – who should represent a “continuing and imminent threat” (Stohl, 2017). As for the first, lower-rank officials would be delegated authority to authorize life-or-death drone strikes in all the undeclared battlefields that, for six months, are labelled as “temporary areas of active hostilities” (Ackerman, 2017). As for the second, instead, the safety requirement of “near certainty” of no injury to civilians would be replaced by a looser “reasonable certainty” (Ackerman, 2017). However, this enhanced flexibility in targeted killings may end up undermining the efforts in the creation of a shared legal framework for such operations and, above all, may compromise the US ability to establish alliances or, more generally, conduct its foreign policy without risky incidents. If President Obama authorized a drone strike every 5.4 days, now president Trump authorizes a strike every 1.8 days (Ackerman, 2017).

4.5.2.B RUSSIA

Russia made an extensive use of targeted killings, mostly (but not exclusively) against insurgents in Chechnya, within an alleged context of counter-terrorism operations, which, however, raise concerns over their large scope, since the breadth of the Russian criterion to

identify terrorists allows large parts of the population to become potential targets of killings (Alston, 2006, p. 8).

The broad definition of terrorism adopted by the Russian Parliament in 2006 is particularly worrying, due to the nearly unlimited discretion that Russian forces enjoy in killing terrorists both at home and abroad (with the authorization of the President). According to the text of the law, terrorist phenomena may be also: “*practices of influencing the decisions of government, local self-government or international organizations by terrorizing the population or through other forms of illegal violent action*” (Alston, 2006, p. 9).

4.5.3 LETHAL AUTONOMOUS WEAPONS SYSTEMS (LAWS)

The most recent issue in international law is the one of lethal autonomous weapons systems (hereinafter LAWS), which are usually referred to as “killer robots”. From a legal point of view, it is necessary to establish whether those systems, in taking autonomous decisions on killings, may violate human rights or humanitarian law. For the purpose of the present work, i.e. taking into account the extent to which the use of LAWS may give rise to aggression, I will rely on the literature on the responsibility framework under *ius in bello* (international humanitarian law). By similarity, I will try to derive criteria for the *ius ad bellum* part, i.e. aggression. The main concerns are about their ability to distinguish between lawful and unlawful targets and, if they are able to do so, about whether they respect human dignity, which is about treating people as subjects and not objects (or, as Kant would say, as ends and not means). Those issues are even more pressing if one considers that the lack of human control on LAWS makes it very hard to establish responsibility in case of violations. Human Rights Watch speaks of an “accountability gap” (Human Rights Watch, 2016).

Before addressing that accountability gap, it is necessary to establish whether LAWS are illegal in themselves. Some argue that the automated decision-making that leads to killing determines always a violation human dignity. Yet, since there are far worse horrors in war, it may be more appropriate to argue that it is the extreme precision of LAWS that could

determine an excessive damage dealing and a consequential breach of the laws of war. For instance, sometimes wounding an enemy is sufficient to incapacitate it, but a lethal automated weapon system would not have enough judging capacity to avoid the killing (Lin, 2015).

Thus, instead of focusing on the illegality of LAWS in themselves, one could analyse the way in which they are used. The shift seems necessary since there are only four categories of weapons illegal *per se* (i.e., the indiscriminate ones, the ones specifically prohibited by law, the ones causing unnecessary suffering and those causing environmental harm), but LAWS does not seem to fit in any of them (Switzerland, 2016). Or, better, they may not be illegal in themselves, as long as they respect the principle of distinction between combatants and non-combatants (Switzerland, 2016).

Therefore, it is necessary to point out the requirements for a lawful use of LAWS. Besides distinction between combatants and non-combatants, LAWS should be able to evaluate the proportionality of collateral damages and to avoid it whenever possible (Switzerland, 2016). According to the Swiss proposal submitted for the 2016 informal meeting of experts on LAWS, those systems should also respect a particular category of non-combatants, i.e. people *hors de combat*. That is to say, combatants who get wounded and/or wish to surrender. Thus, LAWS should enable their targets to surrender before the attack is carried out (Switzerland, 2016).

Perhaps, according to the Swiss position, the most critical point refers to all those situations in which humanitarian law requires combatants to express value judgments, e.g. the presumption of civilian status in case of doubt, the prohibition of perfidy in betraying confidence, or the imperative necessity of war as an exception to destroy civilian property (Switzerland, 2016). Hence, Switzerland concludes that no LAWS is currently able to comply with humanitarian law without some degree of human supervision. In particular, in a programming phase, the rules of engagement of the autonomous weapon may be restricted proportionally to its ability to comply with the laws of war. Afterwards, compliance could be checked through real-time human supervision.

It seems that an important task is to select and discern the most appropriate legal categories that have to be applied on LAWS. In particular, we should not try to hold such systems accountable according to human standards of moral respect if they do not have the ability to engage in moral reflection, just as we do with dogs used in combat or guided missiles

(Lin, 2015). As a result, one could argue that moral standards and legal responsibility may be applied on those who deploy LAWS. On the one hand, those who design and craft are usually granted immunity for the damages provoked by their products, so that an accidental killing cannot be treated as a legal accident (Human Rights Watch, 2016). Moreover, manufacturers would simply charge higher prices, so as to take account of liability risks, thereby passing on taxpayers the burden of compensation (Hammond, 2015, p. 666). On the other hand, there is still the possibility to hold operators and commanders accountable for the LAWS they deploy. The US Department of State has already accepted that those who authorize the use of or operate LAWS can face individual liability if they know or should have known that the system is likely to violate international law or the rules of engagement (Hammond, 2015, p. 664).

Yet, States' liability may be preferable, since States, as purchasers and official users, are better equipped to ensure compliance of those weapons with international law and to provide for compensation in case of breach (Hammond, 2015, pp. 655-6). From a normative point of view, States could face liability whenever they choose to purchase and deploy LAWS in a way that is reasonably likely to result in a violation of international law. The legal reasoning would be similar to the one for attribution of responsibility to commanders and operators, but there would be an additional element of *effet utile*, since State responsibility would foster States to require higher quality and safety standards for the purchase, but also to set stricter guidelines for the usage of such systems. Therefore, the State, as main actor behind the whole process of adoption of LAWS, from the production to the use, is the fittest to bear liability, since its decisions are able to shape the risks that will be implicitly accepted and run in case of use (Hammond, 2015, p. 670). Finally, in this case, liability is preferable to responsibility, because the asymmetrical distribution of risks and benefits imposed on another population by the State using LAWS goes beyond mere negligence. That is to say, the latter is reaping all the strategic benefits deriving from the efficiency of LAWS but the population residing in the territory of deployment is bearing all the safety risks of the usage, without having any possibility to "opt out", have a say or control them in any way (Hammond, 2015, pp. 670-1).

If all the reasoning above is applicable to liability for war crimes, then it is not absurd to assign it also for the crime of aggression, if perpetrated and initiated by means of LAWS. One possible objection to that is aggression, as we have seen, has more far-reaching consequences

with respect to war crimes. That is to say, it involves individual criminal liability, State responsibility, individual or collective self-defence reactions and also a possible intervention by the Security Council under Chapter 7 of the UN Charter. Is it wise to allow the possibility for autonomous weapons to trigger such potentially huge chain reactions? *Prima facie*, it may seem too far-fetched, but one should not forget that, for a crime of aggression to be ascertained, there are high thresholds regarding magnitude, timing and attribution to States that need to be met. As it may arguably happen with war crimes, a State deploying LAWS in another territory, without considering the possibility of verification of an armed attack (defined according to the above-mentioned criteria) so grave as to configure as an act of aggression, should be held accountable and liable. Once again, liability descends from the breadth and the asymmetric nature of the risks that a State, willingly or for its negligence, imposes on another State, thereby potentially threatening its sovereignty or political independence, as the criteria of aggression require.

Clearly, this could apply as long as there is no customary law or treaty regulating the LAWS, as it is today. Indeed, the regulation of those weapons by the international community is highly desirable, since the current state of affairs includes several reflections by scholars in the legal literature, the outcomes of the yearly meetings of experts on LAWS hosted by the UN and the (discordant) opinions that States have expressed on those occasions. As a result, regardless of the willingness to ban formulate an absolute ban on LAWS or to discipline their production or usage at an international level, it is crucial that a joint effort is made, so as to overcome the obstacles that generate the accountability gap.

In the end, new technologies can – and indeed do – represent a threat to the current legal framework on use of force, insofar as they can be used to perpetrate an act of aggression. I have examined the impact that the increasing use of drones and lethal autonomous weapons systems is having on international law. The former is usually sought as an alternative to classical forms of use of force, precisely in order to avoid giving rise to an armed conflict, by opting for a more surgical law enforcement operation known as “targeted killings”. This practice, although not constituting an armed attack, is exposing human rights law (i.e., the framework applying as *lex generalis* when no conflict is underway) to dangerous slippery slopes, especially as far as the right to life and the procedural safeguards for its derogation are involved. In fact,

targeted killings rarely comply with the stringent requirements in terms of absolute necessity, proportionality and explicit codification by law prescribed by the relevant provisions. Moreover, they often deprive the suspects of the right to demonstrate their innocence.

As for LAWS, the main threat they are expected to pose to current international law of armed conflict is due to the disconnection of the classical accountability chain, because of the absence of human control. Indeed, whether they are used to carry out an act of aggression or for less significant forcible actions, the accountability gap would still represent a loophole in order not to give execution to either *ius ad bellum* or *ius in bello* provisions if left unresolved. In this work, I report and support a proposal according to which responsibility would fall on the States commissioning the production of LAWS and deciding on their deployment.

5 CONCLUSION: NEW RULES NEEDED?

In this work, I have first analysed the anatomy of the crime of aggression, as it is codified and conceived today. Its historical roots are to be found in the first attempts to outlaw use of force in an aggressive way, which may be identified more or less with the Kellogg-Briand pact of 1928, whose official purpose was precisely the “*renunciation of war as an instrument of national policy*”. After World War II and with the setting up of the UN, this renunciation was codified into the UN Charter. In particular, in Art. 2 par. 4 on the prohibition of use of force, whose overarching nature makes it one of the pillars of today’s international legal order. The UN Charter has also introduced a series of provision contouring, complementing and extending the illegality of aggression. In particular, I am referring to Article 39, which enables the UN Security Council to intervene in domestic affairs, even in a forcible way, in reaction to threats to the peace, breaches of the peace and acts of aggression. This last one has never been invoked as a legal basis to act, although the UN General Assembly has managed in 1974 to provide a definition of aggression, mainly meant to support the Security Council in its peace enforcement action. This landmark document will provide for the first codification of aggression after many disagreements, due to the possible political impacts on the Cold War and the Israeli-Palestinian conflict. Not by chance, the main blocks confronting with one another during the negotiations were the West, the neutral countries and the USSR. In the end, aggression was characterized mainly as a political crime of States against other States, whereby one of them threatens the “*sovereignty, territorial integrity or political independence*” of another. The definition included also an open-ended list of possible examples. The inclusion among them of the sending of armed bands on behalf of a State represented a major innovation in international law, due to the introduction of the concept of indirect aggression. Finally, what makes it particularly relevant, is the fact that it has been copied and transplanted into the Rome Statute of the International Criminal Court, by means of the 2010 Kampala Amendment, which made justiciable the crime of aggression.

Aggression, in fact, is not only a wrongful international act but also a crime of leaders, which is the case since the Nuremberg trials, when the International Military Tribunal condemned Nazi officials. This is the first time that non-State actors were convicted for an

international crime. The practice went on with the International Criminal Tribunal for former Yugoslavia, where paramilitary formations were prosecuted. Nowadays, the crime of aggression is justiciable thanks to the 2010 Kampala Amendment to the Rome Statute of the International Criminal Court. The tribunal is now able to prosecute leaders for the crime of aggression, as a separate and autonomous crime. Nevertheless, there are still doubts about the appropriateness of the definition as it has been enshrined by the above-mentioned amendment, as it potentially leaves out relevant actors, such as terrorist groups. Currently, it is impossible to hold terrorist leaders accountable for the acts of their group, due to the fact that it lacks statehood and aggression is a crime of States. I have also taken into account the possibility of having an “internal aggression”, i.e. within the boundaries of a State, or by means other than the military ones. Yet, this may prove to be too far-fetched for the time being, since, once again, non-State actors are involved.

Another provision sanctioning aggression in the UN Charter is Article 51, which provides for self-defence against armed attacks, of which aggression is gravest possible form. Thus, self-defence is the flip side of aggression. That is one of the reasons why States have always been cautious in defining the latter. However, since the focus is on armed attacks, I have devoted Chapter 3 to the anatomy of the concept of armed attack, its components and its requirements. An armed attack, indeed, has to meet a certain threshold of magnitude and the reaction to it must be within a certain time span. But the most critical issue is the one regarding the agent entitled to perform an armed attack, since the current sources of law are still reluctant to recognize the possibility for non-State actors to perpetrate such an act and become the target of self-defence. Therefore, I have analysed all the cases in which the action of non-State actors may be attributed to a State, which becomes legally responsible under international law. Whenever the possibility to act in self-defence is established, this shall always comply with the criteria of necessity and proportionality that I have examined in section 3.3.

In Chapter 4, instead, I have singled out all the possible new forms of aggression that may have an impact on moulding international law provisions, by evolving their interpretations or suggesting some modifications. First, I have taken into account terrorist groups, as actors that are increasingly shaping and extending the concepts of aggression and self-defence since 9/11. In particular, the Shultz doctrine enunciated in 1984 seems to be increasingly accepted by the

international community, so that States unable or unwilling to cope with terrorist groups based on their territories may be legitimate targets of self-defence reactions. The US-made rhetoric of the “war on terror” is contributing to extending powers and discretion both at domestic and international level when it comes to carrying out attacks. An example is offered by the considerable overstretching of presidential powers in the US and of its freedom of action in the international scenario, especially in terms of strikes (often classifying as retaliatory in legal terms). I have also reviewed some legal reasoning trying to propose ways to fight terrorism by considering it a crime against humanity, through analogy according to letter (k) of Article 7 paragraph 1 of the Rome Statute (i.e., within inhumane acts in general), or something similar to an act of piracy, thus identifying terrorists as *hostis humani generis*. Yet, international law is still struggling to get out of its State-centric roots. In 2014, the prosecutor of the International Criminal Court was still facing difficulties in charging ISIS leaders with the crime of aggression against Syria and Iraq, because non-State actors, as stated above, are still left out of the definition under article 8 *bis*(1) and 25(3 *bis*) of the Rome Statute (Scheffer, 2017, p. 1482). That is why, a possible solution proposed by Scheffer is that terrorist leaders belonging to terrorist groups operating and committing international crimes in the territory of a State party to the Rome Statute shall be eligible for prosecution (Scheffer, 2017, p. 1482).

Another issue is represented by cyber-attacks. I have shown that in some cases they may be considered as armed attacks, due to the extent of the physical destruction they may bring about. The US Department of Defence has already classified cyber-attacks as potential acts of war and correspondingly activated a US Cyber Command to face such hostilities (Scheffer, 2017, p. 1484). Moreover, I have reported also views that cyber-attacks could also constitute war crimes for the peculiar features they show in terms of potential disproportionate/unreasonable collateral damages, non-compliance with the principle of distinction or perfidy. Scheffer reports as an example the North Korean hacking into Sony Entertainment in December 2014 against the release of the movie *The Interview*, in a blatant attempt to compromise American freedom of speech. In such a case, if the US were parties to the Rome Statute (and allowing for an extensive interpretation of the crime), the prosecutor could have investigated North Korean leadership for aggression (Scheffer, 2017, p. 1484).

Then, I have examined rebel groups, by focusing in particular on the safe harbour that they might enjoy under the right to self-determination. Indeed, some of these groups could justify their actions in light of this right, so as to escape criminalization for their act of aggression and even be able to receive support from third States, which would be able to escape prosecution for indirect aggression, as well. The main orientation, however, would consider the so-called “national liberation exception” as a safe harbour mainly conceived to benefit the peoples struggling against colonial rule and foreign occupation, both of which are rarely observable today.

Subsequently, I have moved on to private contractors, whose deployment by States is growing more and more. Their role largely depends on whether they are *de facto* or legally integrated into a country’s regular armed forces. If this is the case, then few issues would arise as for the possibility to attribute their actions to a State and as for their combatant status under humanitarian law. Otherwise, a tougher examination of their links with attribution would still not be difficult, due to the likely presence of contracts and payments, but their *ius in bello* status would not automatically be that of combatants. More accurately, they could be considered as civilians directly participating in hostilities and, hence, they might be possible targets of use of force only as long as they are actually taking active and direct part in the combat. Therefore, for sure, the use of private military and security companies represents more a challenge for *ius in bello* than for *ius ad bellum*.

Finally, I have considered the impact of drones and lethal autonomous weapons systems, both of which are highly criticized today. The former is a key weapon in the global war on terror, as it is largely used in targeted killings carried out as part of counter-terrorism operations. This practice obviously gives rise to many concerns, especially for its potentially arbitrary violation of the right to life, especially due to the lack of a due process. Yet, in many occasions, targeted killings are justified as self-defence and, thus, couched in terms of self-defence and in a scenario of armed conflict. In fact, the looseness of rules and procedural obligations surrounding extra-judicial executions makes it one of the areas that perhaps deserves the most a tough legal scrutiny.

Another similar issue is the one lethal autonomous weapons systems (LAWS), which, differently from drones, lack human control. According to some commentators and States, this

is sufficient to label LAWS as illegal in themselves. Nevertheless, as I have reported above, the automated decision-making that leads to killing can hardly be included among the worst horrors that can happen in a war. At best, LAWS could be liable of disproportionality, as their automated decision-making would prevent them from judging when wounding an enemy is sufficient to incapacitate it. In any case, the most urgent issue behind LAWS is the accountability gap arising from the lack of a human brain taking decisions. I have argued that the most promising solution found in literature could be the adoption of State liability for acts and crimes committed by LAWS, because States are consciously accepting and imposing on third non-consenting parties a bunch of risks deriving from the use of such weapons and because States are the ones able to supervise the whole process of adoption of LAWS, from the industrial design to the deployment.

To sum up, a series of new forms of aggression, actors and weapons are posing a significant challenge to the current international legal system. There are several possible ways to advance it in order to make it deal effectively with those new forms of aggression and I have examined some of them for each specific case above. In general, however, Mullerson argues that neither sticking to the current UN Charter interpretation nor reinventing new rules from scratch would be appropriate solutions (Mullerson, 2002, p. 171). Thus, a balanced approach would start from the provisions of the UN Charter, without modifying them, and arrive at a new interpretation, according to current needs and issues (Mullerson, 2002, p. 171).

Scheffer, instead, argues that it is necessary to rethink the crime of aggression and amend again the Rome Statute. First, Article 8 *bis*(1) would have to be amended so as to exclude any reference to the “*political or military action of a State*” as the object of control of leaders in order for them to be eligible for prosecution, because this clause would possibly exclude cyber-attacks. Alternatively, an explicit reference to cyber-attacks may be included. Then, as it has been argued above, a reference to non-State actors should be included (“...*of a State or a non-State actor*”), in order to encompass also terrorist or armed groups able to perpetrate aggression. Furthermore, individuals that are members of a non-State entity committing aggression on the territory of a State party should fall within the jurisdiction of the Court. This could be achieved by adding supplementary wording establishing a carve-out in Article 15 *bis*(5), which prohibits

the Court from exercising its jurisdiction on the nationals or the territory of States that are not parties to the convention.

In the end, the new forms of aggression have for sure contributed to the unleashing of several fragmented tendencies, each trying to extend the scope of key provisions of international law concerning the use of force, such as Article 51 of the UN Charter. Certainly, advancements have been made, especially as far as the struggle against terrorism is concerned. Yet, concerted changes are desirable, in order to allow for too much discretion, such as the unbridled use of drones in extra-judicial executions, but also the existence of aggressive phenomena that cannot be sanctioned or are hardly punishable under current international law, such as cyber-crimes. An amendment such as the above-mentioned one of the Rome Statute would be useful in order to fight them and to effectively undermine terrorist groups and violent non-State actors in general. Therefore, the two main lines of change that emerge from my analysis are about the UN Charter, in particular with reference to self-defence, and the Rome Statute of the International Criminal Court, as far as the formulation and the enforceability of the crime of aggression is concerned.

According to the analysis I have carried out above, international law has certainly made some progress in order to accommodate new forms of aggression and react to them. Most of this progress, however, have been extremely slow and have not been codified – at least not in a proper way. It is sufficient to mention the 2010 Kampala amendment of the Rome Statute, which represents a late and largely disappointing attempt to provide for a workable definition of the crime of aggression. In fact, by copying the 1974 definition by the General Assembly, the negotiating parties demonstrated a lack of ability to grasp the changes that had made their way in the international scenario and correspondingly update the wording. Therefore, the current scenario of scarce and ill-conceived codification leaves much room for unilateral actions and/or statements of single States. The evolutionary impacts of such behaviours are still largely left to the interpretation and the reasoning of legal scholars, who have divergent views, as it naturally happens in academic debates. The reason behind this is that aggression is the flip side of self-defence, which, in turn, is key for legitimate unilateral recourse to the use of force. Hence, by defining aggression, one is precluding or allowing possibilities for acting in self-defence. Yet, by leaving its contours blurred as it is today and allowing for too much interpretation, the

international community risks creating more instability than expected, or, even worse, to ignore dangerous loopholes in human rights or humanitarian law.

A solution may lie in proactively steering those developments. This would mean codifying into hard law a more complete definition of aggression and new rules for both self-defence and the prosecution of the crime of aggression. Any effort in this sense must take into account new weapons, technologies and warfare. Thus, it should regulate the use of cyber warfare, private contractors, drones and LAWS, both under a *ius ad bellum* and a *ius in bello* point of view. As I have suggested above, the two main paths to make advancements in this domain may be through the UN system (in particular, the UN General Assembly and the International Law Commission) and the International Criminal Court, whose statute should be revised in a bolder way.

REFERENCES

Ackerman, S., 2017. *Pentagon wants to declare more parts of world as temporary battlefields* - *The Guardian*. [Online]
Available at: <https://www.theguardian.com/us-news/2017/mar/13/pentagon-military-commanders-temporary-battlefields-white-house>

[Accessed 31 July 2017].

Ackerman, S., 2017. *'They're going to kill me next': Yemen family fears drone strikes under Trump* - *The Guardian*. [Online]
Available at: <https://www.theguardian.com/world/2017/mar/30/yemen-drone-strikes-trump-escalate>

[Accessed 31 July 2017].

Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (1996)
International Court of Justice.

Ago, R., 1980. *Addendum to the eighth report on State responsibility*. s.l.:International Law Commission - United Nations.

Akande, D. & Tzanakopoulos, A., 2017. *The Crime of Aggression in the ICC and State Responsibility* - *Harvard International Law Journal*. [Online]
Available at: <http://www.harvardilj.org/2017/04/the-crime-of-aggression-in-the-icc-and-state-responsibility/>

[Accessed 28 August 2017].

Al-Adsani v. UK (2001) European Court of Human Rights.

Alston, P., 2004. *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, s.l.: ECOSOC - Commission on Human Rights.

Alston, P., 2006. *Extrajudicial, summary or arbitrary executions, Report of the Special Rapporteur*, s.l.: UN.

Anderson, M., 2011. Reconceptualizing Aggression. *Duke Law Journal*, 60(411).

Anonymous v. Israel (2008) Supreme Court of Israel.

BBC Ethics Guide, n.d. *The 'ticking bomb' problem*. [Online] Available at: http://www.bbc.co.uk/ethics/torture/ethics/tickingbomb_1.shtml [Accessed 22 April 2017].

BBC News, 2005. *DR Congo troops to Uganda border*. [Online] Available at: <http://news.bbc.co.uk/2/hi/africa/4309272.stm> [Accessed 22 March 2017].

Bellinger, J., 2006. *Legal Issues in the War on Terrorism*. London, London School of Economics.

Bellinger, J., 2006. *LSE Website Archive*. [Online] Available at: http://www.lse.ac.uk/website-archive/publicEvents/pdf/20061031_JohnBellinger.pdf [Accessed 18 March 2017].

Bethlehem, D., 2012. Self-defense against an Imminent or Actual Armed Attack by Nonstate Actors. *AJIL*, 106(770).

Bowett, D., 1958. *Self-defence in International Law*. Manchester: Manchester University Press.

Bowett, D., 1972. Reprisals Involving Recourse to Armed Force. *AJIL*, 1(66).

Bowett, D. W., 1961. *Self-defence in International Law*. Manchester: Manchester University Press.

Bruha, T., 2017. The General Assembly's Definition of the Act of Aggression. In: C. Kress & S. Barriga, eds. *The Crime of Aggression: a Commentary - Volume 1*. Cambridge: Cambridge University Press, pp. 142-177.

Burgess, D. R., 2006. Hostis Humani Generi: Piracy, Terrorism and a New International Law. *University of Miami International and Comparative Law Review*, 13(293).

Caroline case (1837).

Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda) (2005) ICJ.

Case concerning Military and Paramilitary Activities in and against Nicaragua (1986) ICJ.

- Cassese, A., 2005. Article 51. Dans: J. Cot & A. Pellet, éd. *La Charte des Nation Unies*. Paris: Economica, pp. 1229-1361.
- Cassese, A., 2005. *International Law*. 2005 ed. Oxford: OUP.
- Clapham, A., 2006. *Human Rights Obligations of Non-State Actors*. Oxford: Oxford University Press.
- Clapham, A., 2006. *Human Rights Obligations of Non-State Actors*. Oxford: OUP.
- Corfu Channel Case (UK v. Albania)* (1949) ICJ.
- Creegan, E., 2012. Justified Uses of Force and the Crime of Aggression. *J. Int'l Crim. Just.*, 10(59).
- D'Amato, A., 1987. *International Law: Process and Prospect*. s.l.:s.n.
- Daugirdas, K. & Mortenson, J. D., 2016. United States Expands Air Strikes Against al-Shabaab; State Department Legal Adviser Discusses Legal Justification for Counterterrorism Operations Abroad. *American Journal of International Law*, 110(3), pp. 554-595.
- Den Dekker, G. & Myjer, E. P., 2011. The Right to Life and Self-defence of Private Military and Security Contractors in Armed Conflict. In: N. Ronzitti & F. Francioni, eds. *War by Contract: Human Rights, Humanitarian Law, and Private Contractors*. Oxford: Oxford University Press, pp. 171-193.
- Dinstein, Y., 2003. Ius Ad Bellum Aspects of the "War on Terrorism". In: W. Heere, ed. *Terrorism and the Military: International Legal Implications*. The Hague: Asser.
- Dinstein, Y., 2011. *War, Aggression and Self-Defence*. V ed. Cambridge: Cambridge University Press.
- Dinstein, Y., 2015. Aggression. In: *Max Planck Encyclopedia of Public International Law*. Oxford: OUP.
- Domukovsky and ors v. Georgia* (1995) HR Committee.
- Domukovsky and others v. Georgia* (1995) UN Human Rights Committee.
- Farmer, B., 2017. *Britain prepared to use air strikes or send in troops as retaliation against future cyber attack - The Telegraph*. [Online] Available at: <http://www.telegraph.co.uk/news/2017/06/27/cyber-attack-could-lead-military-retaliation-says-fallon/>
[Accessed 30 July 2017].

Feder, N., 1987. Reading the U.N. Charter Connotatively: Toward a New Definition of Armed Attack. *New York University Journal of International Law and Politics*, 19(395).

Fox News, 2008. *Fox News*. [Online] Available at: <http://www.foxnews.com/story/2008/03/29/dalai-lama-demographic-aggression-making-tibetans-minority-in-homeland.html> [Accessed 10 July 2017].

Francioni, F., 1988. Maritime Terrorism and International Law: The Rome Convention of 1988. *German Yearbook on International Law*, 31(263).

Franck, T., 2001. Editorial Comments: Terrorism and the Right of Self-Defense. *95 American Journal of International Law*, p. 839.

Franck, T., 2002. *Recourse to Force: State Action Against Threats and Armed Attacks*. Cambridge: Cambridge University Press.

Garamone, J., 2017. *Trump Orders Missile Attack in Retaliation for Syrian Chemical Strikes*. [Online] Available at: <https://www.defense.gov/News/Article/Article/1144601/trump-orders-missile-attack-in-retaliation-for-syrian-chemical-strikes/> [Accessed 19 April 2017].

Gillard, E.-C., 2017. *Humanitarian Action and Non-state Armed Groups: The International Legal Framework*. [Online] Available at: <https://www.chathamhouse.org/publication/humanitarian-action-and-non-state-armed-groups-international-legal-framework> [Accessed 2017 2 12].

Gill, T., 2003. The Eleventh of September and the Right of Self-Defense. In: W. Heere, ed. *Terrorism and the Military: International Legal Implications*. The Hague: Asser, pp. 23-37.

Goldman, R., 2017. 'You Are the Future of Europe,' Erdogan Tells Turks - *NY Times*. [Online] Available at: <https://www.nytimes.com/2017/03/17/world/europe/erdogan-turkey-future-of-europe.html> [Accessed 15 July 2017].

Gonzales, A. R., 2005. Memorandum, dated 25 January 2002, from Alberto R Gonzales, Counsel to the President, to President Bush. In: K. Dratel & J. Greensberg, eds. *The Torture Papers: The Road to Abu Ghraib*. s.l.:s.n.

Greenwood, C., 1995. *Scope of Application of Humanitarian Law in Armed Conflicts*. Oxford: OUP.

Greenwood, C., 2003. International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida and Iraq. *San Diego International Law Journal* 4, pp. 7-37.

Grey, C., 2008. *International Law and the Use of Force*. Third Edition ed. Oxford: OUP.

Gwertzman, B., 1986. *NY Times*. [Online] Available at: <http://www.nytimes.com/1986/01/16/world/shultz-supports-armed-reprisals.html> [Accessed 17 July 2017].

Hamdan v. Rumsfeld (2006) US Supreme Court.

Hammond, D. N., 2015. Autonomous Weapons and the Problem of State Accountability. *Chicago Journal of International Law*, 15(2), p. 652.

Higgins, R., 1994. *Problems and Process: International Law and How We Use It*. Oxford: Clarendon Press.

High-level Panel on Threats, Challenges and Change, 2004. *A More Secure World: Our Shared Responsibility*, s.l.: United Nations.

Human Rights Watch, 2016. *Statement by Human Rights Watch to the Convention on Conventional Weapons Experts Meeting*. [Online] Available at: <https://www.hrw.org/news/2016/04/13/statement-human-rights-watch-convention-conventional-weapons-experts-meeting-lethal> [Accessed 22 July 2017].

International Committee of the Red Cross, 2003. *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, s.l.: s.n.

International Committee of the Red Cross, 2008. *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, s.l.: s.n.

International Committee of the Red Cross, 2009. *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*. Geneva: s.n.

International Law Commission, 1996. *Commentary to the 1996 Draft Code of Crimes against the Peace and Security of Mankind*. s.l.:s.n.

International Law Commission, 2001. *Commentary to the Draft Articles on Responsibility of States for Internationally Wrongful Acts*. s.l.:s.n.

Israeli Ministry of Foreign Affairs, 2006. *Special Cabinet Communique-Hizbullah attack*. [Online]

Available at: <http://www.mfa.gov.il/mfa/pressroom/2006/pages/special%20cabinet%20communique%20-%20hizbullah%20attack%2012-jul-2006.aspx>

[Accessed 19 March 2017].

Jinks, D., 2003. September 11 and the Laws of War. *Yale Journal of International Law*, 28(1).

Johnston, D. & Sanger, D. E., 2002. *THREATS AND RESPONSES: HUNT FOR SUSPECTS; Fatal Strike in Yemen Was Based on Rules Set Out by Bush*. [Online] Available at: <http://www.nytimes.com/2002/11/06/world/threats-responses-hunt-for-suspects-fatal-strike-yemen-was-based-rules-set-bush.html>

[Accessed 21 April 2017].

Joint Chiefs of Staff, 1998. *Joint Doctrine for Information Operations GL-5*, s.l.: s.n.

Juan Carlos Abella v. Argentina (1997) IACHR.

Klabbers, J., 2003. Rebel with a Cause? Terrorists and Humanitarian Law. *EJIL*, 14(299).

Kocibelli, A., 2017. *Michigan Journal of International Law*. [Online] Available at: <http://www.mjionline.org/aggression-from-cyber-attacks-to-isis-why-international-law-struggles-to-adapt/>

[Accessed 22 July 2017].

Kretzmer, D., 2005. Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?. *EJIL*, 16(171).

Kretzmer, M., n.d. Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?. *EJIL*, 16(171).

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (2004) ICJ.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Separate Opinion Buergenthal (2004) International Court of Justice.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Separate Opinion Judge Higgins (2004) International Court of Justice.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Separate Opinion Judge Koojimans (2004) International Court of Justice.

Lietzau, W., 2002. Combating Terrorism: Law Enforcement or War?. In: M. Schmitt & G. Beruto, eds. *Terrorism and International Law: Challenges and Responses*. s.l.:International Institute of Humanitarian Law.

Lin, P., 2015. *Do Killer Robots Violate Human Rights? - The Atlantic*. [Online] Available at: <https://www.theatlantic.com/technology/archive/2015/04/do-killer-robots-violate-human-rights/390033/> [Accessed 22 July 2017].

Lord Goldsmith, 2004. [Online] Available at: <https://www.publications.parliament.uk/pa/ld200304/ldhansrd/vo040421/text/40421-07.htm> [Accessed 30 March 2017].

Lubell, N., 2010. *Extraterritorial Use of Force Against Non-State Actors*. Oxford: Oxford University Press.

Mancini, M., 2012. A Brand New Definition for the Crime of Aggression: The Kampala Outcome. *Nordic Journal of International Law*, Issue 80, pp. 227-248.

McDonald, A., 2002. Terrorism, Counter-terrorism and the Jus in Bello. In: G. Beruto & M. Schmitt, eds. *Terrorism and International Law*. s.l.:International Institute of Humanitarian Law.

McDougall, C., 2017. The Crimes against Peace Precedent. In: C. Kress & S. Barriga, eds. *The Crime of Aggression: a Commentary - Vol. 1*. Cambridge: Cambridge University Press, pp. 49-112.

McGoldrick, D., 2004. *From '9-11' to the 'Iraq War 2003'*. Oxford: Hart.

McGoldrick, D., 2004. *From 9/11 to the Iraq War 2003: International Law in an Age of Complexity*. Oxford: Hart.

Mohamedou, M., 2005. Non-Linearity of Engagement: Transnational Armed Groups, International Law, and the Conflict between Al Qaeda and the United States. In: *Program on Humanitarian Policy and Conflict Research, Harvard University*. s.l.:s.n.

Moir, L., 2008. *The Law of Internal Armed Conflict*. Cambridge: CUP.

Mullerson, R., 2002. Jus Ad Bellum: Plus Ça Change (Le Monde) Plus C'est La Même Chose (Le Droit)?. *Journal of Conflict and Security Law*, 7(149), pp. 149-190.

Murphy, S. D., 2002. Contemporary Practice of the United States Relating to International Law. Legal Regulation of Use of Force: Terrorist Attacks on World Trade Center and Pentagon.. *AJIL*, Volume 237, pp. 243-6.

Murphy, S. D., 2003. International Law, the United States and the Non-military War against Terrorism. *EJIL*, 14(347).

Myer, E. & White, N., 2002. The Twin Towers Attack: An Unlimited Right to Self-Defence?. *Journal of Conflict and Security Law*, 7(5).

NATO Press Release 124, 2001. *Statement by the North Atlantic Council*. [Online] Available at: <http://www.nato.int/docu/pr/2001/p01-124e.htm> [Accessed 18 March 2017].

NATO, 2001. *NATO Press Release 124*. s.l.:s.n.

NATO, 2017. *NATO*. [Online] Available at: http://www.nato.int/cps/cn/natohq/topics_110496.htm [Accessed 31 May 2017].

Negroponte, J. D., 2001. *Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council*. s.l.:UN SC Doc. S/2001/946.

OAS, 2001. *Statement of the Organization of American States "Support for the Measures of Individual and Collective Self-Defense Established in Resolution Rc.24/Res.1/01"*. s.l.:s.n.

Ocalan v. Turkey (2005) ECHR.

O'Connell, M. E., 2013. Dangerous Departures. *AJIL*, 107(2), pp. 380-6.

O'Connell, M. E. & Niyazmatov, M., 2012. What is Aggression?. *J. Int'l Crim. Just.*, 10(189).

Oil Platforms (Iran v. USA) (1993) ICJ.

Ophardt, J. A., 2010. Cyber Warfare and the Crime of Aggression: the Need for Individual Accountability on Tomorrow's Battlefield. *Duke Law and Technology Review*, Issue 3.

Orizio, P., 2017. *Futuro roseo per i contractors delle PMSC - Analisi Difesa*. [Online] Available at: <http://www.analisdifesa.it/2017/04/futuro-roseo-per-i-contractors-delle-pmsc/> [Consultato il giorno 7 June 2017].

Parks, H. W., 1989. *Memorandum of Law: Executive Order 12333 and Assassination*, Washington D.C.: Department of the Army.

Pellet, A., 2001. "No, This is not War!": The Attack on the World Trade Center: Legal Responses. *European Journal of International Law*.

Pictet, J., 1958. *Commentary on the Geneva Convention of 12 August 1949 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*. Geneva: International Committee of the Red Cross.

Prosecutor v. Dusko Tadic - Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (1995) International Criminal Tribunal for former Yugoslavia.

Prosecutor v. Furundzija (1998) International Criminal Tribunal for Yugoslavia.

Prosecutor v. Haradinaj and ors (2008) ICTY.

Prosecutor v. Thomas Lubanga Dyilo (2012) ICC.

Quadarella, L., 2006. *Il nuovo terrorismo internazionale come crimine contro l'umanità*. s.l.:Editoriale Scientifica.

R. v. Jones and Others (2006) UK House of Lords.

Roberts, A., 2003. The Laws of War in the War on Terror. *Israel Yearbook on Human Rights*, Issue 32, p. 193–245.

Ronzitti, N., 2006. The Expanding Law of Self-Defence. *Journal of Conflict & Security Law*, 11(3), pp. 343-359.

Ronzitti, N., 2017. *L'intervento Usa e la legalità internazionale*. [Online] Available at: <http://www.affarinternazionali.it/articolo.asp?ID=3897> [Accessed 15 April 2017].

Ruggie, J., 2008. *Protect, Respect and Remedy. Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises*, s.l.: UN.

Ruggie, J., 2011. *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*. s.l.: Human Rights Council.

Ruys, T., 2010. *"Armed attack" and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*. Cambridge: Cambridge University Press.

Ruys, T., 2016. The impact of the Kampala definition of aggression on the law on the use of force. *Journal on the Use of Force and International Law*, 12, pp. 187-193.

Sassoli, M., 2004. Use and Abuse of the Laws of War in the "War on Terrorism". *Law and Inequality: A Journal of Theory and Practice*, Issue 22.

Sassoli, M., 2006. Transnational Armed Groups and International Humanitarian Law. *Program on Humanitarian Policy and Conflict Research, Harvard University, Occasional Paper Series*, Issue 6.

Schachter, O., 1988-9. The Extraterritorial Use of Force Against Terrorist Bases. *Houtson Journal of International Law*, Issue 11, pp. 309-11.

Scheffer, D., 2017. Amending the Crime of Aggression under the Rome Statute. In: C. Kress & S. Barriga, eds. *The Crime of Aggression: a Commentary - Volume 2*. Cambridge: Cambridge University Press, pp. 1480-1499.

Schmitt, M., 1999. Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework. *Columbia Journal of Transnational Law*, 37(885).

Schmitt, M., 2002. *Counter-Terrorism and the Use of Force in International Law*. s.l.: The George C. Marshall European Center for Security Studies.

Schondorf, R., 2004. Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?. *New York University Journal of International Law and Politics*, 37(1).

Slaughter, A. M., 2003. Mercy Killings: why the United Nations should issue death warrants against dangerous dictators. *Foreign Policy*, Issue 136, p. 72.

Sossai, M., 2011. Status of Private Military and Security Company Personnel in the Law of International Armed Conflict. In: F. Francioni & N. Ronzitti, eds. *War by Contract: Human Rights, Humanitarian Law, and Private Contractors*. Oxford: Oxford University Press.

Special Working Group on the Crime of Aggression, 2009. *Report of the Special Working Group on the Crime of Aggression*, s.l.: s.n.

Starr, B. & Diamond, J., 2017. *Trump launches military strike against Syria*. [Online] Available at: <http://edition.cnn.com/2017/04/06/politics/donald-trump-syria-military/index.html> [Accessed 15 April 2017].

Stoche v. Germany (1991) ECHR.

Stohl, R., 2017. *Trump Drone Policy Taking Shape*. [Online] Available at: <https://www.thecipherbrief.com/article/exclusive/middle-east/trump-drone-policy-taking-shape-1091> [Accessed 21 April 2017].

Switzerland, 2016. *Towards a “compliance-based” approach to LAWS, Informal Working Paper submitted by Switzerland for the informal meeting of experts on LAWS*. Geneva: Switzerland.

Tams, C., 2009. The Use of Force Against Terrorists. *20 European Journal of International Law*, pp. 378-81.

The Public Committee Against Torture et al. v. The Government of Israel, et al. (2006) Israel High Court of Justice.

Tillerson, R., 2017. *Remarks With National Security Advisor H.R. McMaster*. [Online] Available at: <https://www.state.gov/secretary/remarks/2017/04/269543.htm> [Accessed 19 April 2017].

Trapp, K., 2015. Can Non-State Actors Mount an Armed Attack?. In: W. Marc, ed. *The Oxford Handbook of the Use of Force in International Law*. Oxford: OUP.

UN General Assembly, 2005. *World Summit Outcome Document*. New York: UN.

United Nations, 2017. *United Nations Action to Counter Terrorism*. [Online] Available at: <http://www.un.org/en/counterterrorism/legal-instruments.shtml> [Accessed 23 Maggio 2017].

US Department of Defense, 1955. *Pentagon Papers, Memorandum of the Joint Chiefs of Staff for the Secretary of Defense*. Washington D.C.: s.n.

US Department of Defense, 2017. *Statement from Pentagon Spokesman Capt. Jeff Davis on U.S. strike in Syria*. [Online] Available at: <https://www.defense.gov/News/News-Releases/News-Release-View/Article/1144598/statement-from-pentagon-spokesman-capt-jeff-davis-on-us-strike-in-syria/>

[Accessed 19 April 2017].

US Diplomatic Papers, 1945. *Foreign Relations of the United States, Diplomatic Papers*. s.l.:s.n.

US Government, 1928-9. Note of the Government of the United States, 23 June 1928. In: J. T. Shotwell, ed. *War as an Instrument of National Policy and its Renunciation in the Pact of Paris*. New York: Harcourt, p. 297.

Watkin, K., 2004. Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict. *AJIL*, 98(1).

Webster, D., 1983. Letter to Henry Stephen Fox. In: K. E. Shewmaker, ed. *The Papers of Daniel Webster*. s.l.:Dartmouth College Press, p. 62.

World Economic Forum, 2017. *Why cyberattacks could be war crimes - World Economic Forum*. [Online] Available at: <https://www.weforum.org/agenda/2017/07/why-cyberattacks-could-be-war-crimes>

[Accessed 19 July 2017].

SOURCES OF LAW

African Charter on Human and Peoples' Rights (26 June 1981) OAU Doc CAB/LEG/67/3 rev.5; 1520 UNTS 217; 21 ILM 58 (1982), entered into force 21 October 1986

American Convention on Human Rights (22 November 1969) 1144 UNTS 123, entered into force 18 July 1978

Charter of the United Nations (26 June 1945) 59 Stat 1031; TS 993; 3 Bevans 1153, entered into force 24 October 1945

Chemical Weapons Convention 1993

Control Council Law No. 10

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85, entered into force 26 June 1987

Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 222; 312 ETS 5, entered into force 3 September 1953

Covenant of the League of Nations (signed 28 June 1919, entered into force 10 January 1920)

Covenants on Human Rights 1966

Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA res. 2625 (1970)

Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the UN

Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its 53rd session (2001)

Draft Code of Offences against the Peace and Security of Mankind 1954

General Treaty for Renunciation of War as an Instrument of National Policy (signed 27 August 1928, entered into force 25 July 1929)

Geneva Convention relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287, entered into force 21 October 1950

Geneva Convention relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135, entered into force 21 October 1950

Geneva Protocol on the Pacific Settlement of Disputes 1924

International Convention for the Protection of All Persons from Enforced Disappearance, GA Res 61/177; UN Doc A/RES/61/177 (2006), adopted 20 December 2006

International Convention for the Suppression of Terrorist Bombing, GA Res 164, UN GAOR, 52nd session, Supp no 49 at 389; UN Doc A/52/49 (1998), entered into force 23 May 2001

International Convention for the Suppression of the Financing of Terrorism (9 December 1999) GA Res 109, UN GAOR, 54th session, Supp no 49; UN Doc A/54/49 (vol I) (1999); S Treaty Doc no 106–49 (2000); 39 ILM 270 (2000), entered into force 10 April 2002

International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, entered into force 23 March 1976

International Covenant on Civil and Political Rights 1966

International Military Tribunal of Nuremberg, Judgment of 1 October 1946

London Charter 1945

Montevideo Convention on Rights and Duties of States 1933

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977) 1125 UNTS 3, entered into force 7 December 1978

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977), 1125 UNTS 609, entered into force 7 December 1978

Regulations Annexed to The Hague Convention (IV) Respecting the Laws and Customs of War on Land, 1907

Rome Statute of the International Criminal Court, UN Doc 2187 UNTS 90, entered into force 1 July 2002

Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (15 December 1989) UN Doc A/RES/44/128, entered into force 11 July 1991

UN Convention on the Law of the Sea 1982

UN Doc. A/AC.134/SR.52–66

UN Doc. A/AC.134/SR.67–78

UN Doc. S/PV.1939

UN GA Declaration on Friendly Relations among States 1970

UN General Assembly res. 3314 (1974)

UN SC Resolution 2118/2013

UN Security Council res. 1368 (2001)

UN Security Council res. 1373 (2001)

UN Security Council res. 487 (1981)

Universal Declaration of Human Rights, Resolution 217 A(III); UN Doc A/810 91, UN General Assembly, 1948

Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS entered into force on 24 April 1964

Vienna Convention on the Law of Treaties 1969

ABSTRACT

The research question of the present work revolves around whether new forms of aggression appearing along with advanced and/or asymmetric warfare have had an impact on international law and what it has been. In particular, five forms of violence have been taken into account: terrorism, cyber-attacks, rebel groups, the use private contractors and drones/lethal autonomous weapons systems. All of them are having a growing role in contemporary conflicts and are contributing to re-shaping the use of force at the international level.

As a first passage, the concept of aggression has been eviscerated, by considering its historical evolution and the role it has today in international law as both a crime of States and of individuals. Indeed, in the classical international society (i.e., before World War II) aggression was a lawful and legitimate instrument of international policy for any State, but then it has undergone a gradual transformation. Logically, freedom of aggression presents a fundamental challenge to the sovereign equality of States, on which the international community rests. Therefore, since the nineteenth century, States have progressively resorted to pacts of non-aggression, obliging the parties to engage in preventive talks or to try to settle their dispute through peaceful means. The most relevant examples, however, will be found in the early twentieth century: these are the 1919 Covenant of the League of Nations (contained in the Treaty of Versailles) and the 1925 Locarno Treaty of Mutual Guarantee. Soon after, the 1928 General Treaty for Renunciation of War as an Instrument of National Policy, also known as Kellogg-Briand Pact, will mark a definitive turning point by outlawing aggression, although in a limited way. That is to say, among the signatories, uses of force were admissible only in reaction to violations of either international law or the treaty provisions, or in case of self-defence. Many loopholes were left, starting from the lack of a precise definition of self-defence and the lack of coverage for all the uses of force short of war.

The turn will be completed after World War II, when the international community, by means of the 1945 Charter of the United Nations and subsequent practice, decided to set out a general prohibition on use of force (Art. 2 par. 4 UN Charter), with the inclusion of threats. This prohibition is meant to have an *erga omnes* effect, since it rules out aggression against “any

State” (not just the UN members) and indirectly insists also on those non-members thanks to Art. 2 par. 6, under which members have to “*ensure that States which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security*”. Obviously, there are possibilities of derogation, which are expressly mentioned in the Charter. The first is the resort to force following a resolution of the Security Council under Chapter VII of the Charter, which allows the body to intervene in internal matters of States (in light of Art. 2 par. 7) in case of threat to the peace, breach of the peace and act of aggression (Art. 39). By reading the Charter according to the subsequent international practice, the resolutions of the Security Council are able to authorize uses of force by single States willing and able to contribute to the maintenance of international peace and security. The second exception to the general prohibition of use of force remains self-defence, which has been codified in Article 51 of the Charter as a lawful forcible response to “*armed attacks*”. It is worth mentioning at this point that a minority view in the international community sees the concepts of “use of force”, “aggression” and “armed attack” as concentric circles, progressively narrowing down to graver forms of violence. Yet, the prevalent opinion seems to treat them as functional equivalents.

Having sketched the current legal framework on aggression and use of force, it is necessary to focus on the definition of the former, which, nowadays, can be considered both a crime of States and a crime of leaders. As for the first aspect, the UN General Assembly has dedicated itself to the matter in 1974 through resolution 3314, which has established that, in practice, aggression coincides with the “*first use of armed force*”, in absence of a contrary determination by the Security Council. In theory, aggression is defined as “*the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations*” (the only difference with Art. 2 par. 4 being the absence of any reference to threats of force). More than that, Article 3 of the resolution includes a non-exhaustive list of examples of aggression, with letter g explicitly mentioning indirect aggression, described as “*the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries*”. Finally, the resolution states that “*a war of aggression is a crime against international peace. Aggression gives rise to international responsibility*”.

At the same time, starting from the 1945 London Charter setting up the International Military Tribunal of Nuremberg, a progressive trend towards the criminalization of leaders was initiated. According to the London Charter, anyone holding a political, civil or military position in Germany (or its allies) could be found guilty of committing crimes against peace by the international tribunal, if s/he had a role in “*planning, preparing, initiating, and waging wars of aggression*”. Yet, at that time, the international community was still deprived of an agreed definition of aggression and a permanent international body prosecuting such an individual crime. With the 1998 Rome Statute, some States took part in the creation of the International Criminal Court, which has jurisdiction, *inter alia*, on the crime of aggression (see Art. 5 par. 1 of the Rome Statute). Unfortunately, the task of finding a common definition of the crime was delayed and entrusted to a successive conference, which took place in 2010 in Kampala. The outcome, which reflects the political complexity of the matter, may be described as mere cut and paste of the 1974 definition by the General Assembly into the Rome Statute, thereby overcoming the deadlock in the least ambitious way. Perhaps, the most serious issue among the neglected ones is the one of violent non-State actors, which, as a result, are still excluded from the jurisdiction of the Court, unless they are recognized as States and paradoxically granted the relative privileges (suffice it to think about terrorist groups).

As mentioned above, aggression is a sensitive topic, since it has a political relevance. This is due to the fact that it practically constitutes the flip side of self-defence, being the former certainly included in (if not coincident with) the concept of armed attack. Therefore, the reasoning needs to include some considerations on self-defence as it is conceived and regulated today. Starting from a textual analysis of Art. 51 of the UN Charter, States are entitled to resort to individual self-defence whenever they face an armed attack, as long as the Security Council is not acting on the issue and it is notified of all the initiatives of the defendant. The possibility to label a hostile act as an armed attack should be assessed according to the concrete forcible action it entails (*ratione materiae*), the time when it is carried out with respect to the response (*ratione temporis*) and the actors who perpetrate it (*ratione personae*). Indeed, uses of force not reaching a certain threshold of scale and effects are to be considered, according to the jurisprudence of the International Court of Justice and the legal doctrine, “minor border incidents” or incidents “short of war”, which could only elicit proportionate counter-measures.

Legal scholars, however, remain divided as to whether an accumulation of such incidents may give rise to an armed attack, if considered as a whole, but the ICJ firmly refuses such particular reasonings. The second crucial variable in the determination of the lawfulness of self-defence is the contiguity in time of the attack and the consequent response, so that the reaction configures itself as an urgent necessity. In this regard, the prevailing legal opinion tends to reject preventive self-defence, with the exception for interceptive actions (i.e., those aimed at stopping an attack that has already been launched). The final requisite of armed attacks is about the actors perpetrating them. In the famous *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ seems to argue in favour of State involvement as a *conditio sine qua non* of armed attack. Yet, the Court was not unanimous in its position: Judge Higgins, Koojijmans and Buerghenthal doubted about the restrictive interpretation of Article 51 and questioned it on the basis of a textual reading, also in light of resolutions 1368 (2001) and 1373 (2001) of the UN Security Council and of a comparison with the other provisions of the UN Charter related to the use of force, all explicitly referring to States. A year later, however, in the case *DRC v. Uganda* the ICJ seems to open the way to the possibility to act in self-defence against non-State actors whose conduct cannot be attributed to a State, provided that the reaction is narrowly focused on those violent groups. To be precise, the ICJ refused to address the question of self-defence *per se* and, consequently, declined to define any necessary condition for hostile acts by un-attributable non-State actors to qualify as armed attack, but it adhered to the *Nicaragua* judgment as for the attribution criterion, which shall rest upon effective control.

Attribution, in fact, is still the main hurdle when coping with new forms of aggression. With the growth of terrorism, a breakthrough was offered by the attempt led by the US to overcome attribution through the development of a custom on the basis of the so-called “Shultz doctrine” of 1984. The argument went as follows: all States unwilling or unable to fight terrorist groups within their territory after they have perpetrated an armed attack against another State are potential targets of self-defence reactions, or at least cannot oppose a foreign intervention against that armed group. The question of attribution lies at the heart of the issue, since, if we exclude the capacity of non-State actors to carry out an armed attack or an aggression by themselves, then the two ways left to react are either attribution of their conduct to their host

State or finding an alternative legal justification for intervention in that host State (such as the Schultz doctrine). The former, however, is very difficult. Since the ICJ set out strict criteria in the Nicaragua case, no relaxation has ever materialized in international law, so that substantial involvement or effective control are still needed and mere assistance is insufficient. Therefore, at least as long as terrorism is concerned, international law is evolving in the direction of the Schultz doctrine, as Security Council resolutions n. 1368 and 1373 (2001) testify. In other words, by reneging on their duty to fight terrorism, States expose themselves to the possibility of foreign intervention in their territories. It goes without saying that this intervention shall always thoroughly stick to the standards of necessity and proportionality, which also imply it should be targeted, immediate and a last resort.

The work goes on by separately examining several new forms of aggression: terrorist groups, cyber-attacks, rebel/guerrilla groups, private military and security companies (PMSCs), drones and lethal autonomous weapons systems (LAWS). Terrorism, perhaps, is the most evident challenge to current international law on use of force, within the broad domain of asymmetric warfare. Its relevance is due to 9/11 and the consequent rhetoric of the “war on terror”. For the first time, indeed, the international community has used the language of war and self-defence to address a threat coming from a non-State actor, following the impulse of the US. The proximate consequence has been to shift from the human rights law framework to the one of armed conflict and humanitarian law. This implies a significant relaxation of procedural standards when carrying out counter-terrorism operations. Thus, this work has presented alternative approaches that have been put forward by legal scholars. One of them, for instance, proposes to rely on the International Criminal Court to fight terrorism, by considering it a crime against humanity (through analogy according to letter (k) of Article 7 paragraph 1 of the Rome Statute) and prosecuting terrorists accordingly. An alternative although less convincing approach associates terrorists with pirates, hence treating them as *hostis humani generis* in order to fight them.

Another form of aggression that has been considered is the one of cyber-attacks. International law is gradually trying to accommodate them. Indeed, some cyber-attacks can be considered as use of armed force due to their consequences. This happens whenever they are able to cause serious physical injury, destruction or even death (e.g., when hitting hospitals,

supplies, safety systems, etc.). As a result, the Security Council could act under Chapter VII and States could react under Article 51. Otherwise, cyber-attacks not qualifying as armed attacks, would still be equivalent to uses of force and, thus, to an internationally wrongful act according to Art. 2 par. 4 of the UN Charter. Also this form of aggression, however, has to deal with the question of attribution, which is particularly difficult in this case. Because of their destructive potential, cyber-attacks might fall within war crimes, as well as crimes against peace, but there cannot be any progress unless the International Criminal Court is allowed to prosecute individuals acting alone or on behalf of non-State actors.

The third form of aggression analysed is the one of rebel or guerrilla groups. Their case is particular due to the possible clash with the principle of self-determination, which may allow third States to lawfully support or direct them without committing either an internationally wrongful act or a crime of aggression. However, a closer and more careful look into the so-called “national liberation exception” would result into the conclusion that only peoples under colonial rule or foreign domination may be entitled today to such a preferential treatment. In order to have a complete view on the matter, the work has also explored the possibility of an “internal aggression”, which may easily be rejected due to the inter-State nature of the crime of aggression that emerges from the wording of the definition given by the General Assembly and in Kampala.

A fourth form of aggression may be singled out if one considers the growing employment of Private Military and Security Contractors (PMSC) by States. The main juridical question here revolves around the legal status of contractors. Their position should be assessed according to Article 43 of the 1977 Additional Protocol I to the Geneva Conventions (not ratified by 27 States yet) on members of armed forces and Article 4A(2) on the *de facto* combatant status. The critical variable is the one of effective integration into the regular armed forces of a State, which could be *de facto* or under domestic law. In the first case, however, private contractors would be considered as civilian employees accompanying armed forces but directly participating in hostilities, by virtue of their continuous combat function, according to the interpretative guidance on the notion of direct participation in hostilities by the International Committee of the Red Cross. This entails that they lose their immunity as long as

they participate directly in hostilities. There is no difference, however, as far as the attribution of their conduct is concerned, since their link with their employing State is self-evident.

The last form of aggression considered here is related to some new and highly-criticized weapons, i.e. drones and Lethal Autonomous Weapons Systems (LAWS). Both are usually employed for targeted killings in the context of counter-terrorism operations and usually do not give rise to uses of force that meet the magnitude threshold of armed attacks, but they still pose some legal challenges. This work briefly reports the doctrinal debate on the intrinsic unlawfulness of this practice under international human rights law, since it violates the right to life, without complying with the procedural safeguards established for its derogation. Yet, unfortunately, the general trend in the international community is towards a relaxation of procedural standards and its justification by referring to the framework of armed conflict. As for LAWS, their use triggers a legal issue regarding attribution, since these so-called “killer robots” involve an automated use of lethal force. The issue is mainly about who is responsible for their violations of the laws of armed conflict or, especially, humanitarian law, but the outcome of the reasoning can be applied also for possible aggressions perpetrated through them. A balanced approach to bridge this accountability gap, on the basis of effectiveness and common sense, would still attribute the actions of LAWS to the States that have deliberately purchased and decided to deploy them, thereby being potentially able to control or to willingly accept any risk.

To conclude, a series of new forms of aggression, actors and weapons are posing a significant challenge to the current international legal system. According to the analysis I have carried out above, international law has certainly made some progresses in order to react to them. Most of these progresses, however, have been extremely slow and have not been codified – at least not in a proper way. It is sufficient to mention the 2010 Kampala amendment of the Rome Statute, which represents a late and largely disappointing attempt to provide for a workable definition of the crime of aggression. Therefore, the current scenario of scarce and ill-conceived codification leaves much room for unilateral actions and/or statements of single States. The evolutionary impacts of such behaviours are still largely left to the interpretation and the reasoning of legal scholars, who have divergent views. A solution may lie in proactively steering those developments. This would mean codifying into hard law a more complete

definition of aggression and new rules for both self-defence and the prosecution of the crime of aggression. Any effort in this sense must take into account new weapons, technologies and warfare. The two main paths to make advancements in this domain may be through the UN system (in particular, the UN General Assembly and the International Law Commission) and the International Criminal Court, whose statute should be revised in a bolder way, so as to make it encompass also non-State actors and individuals acting alone (e.g., terrorists or cyber criminals). A balanced approach would start from the provisions of the UN Charter, without modifying them, and arrive at a new shared interpretation, according to current needs and issues.