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Overflying Justiciability? Drones and Avoidance Doctrines Before National Courts

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Abstract

In recent years much research has been dedicated to targeted killing, an issue often considered in relation to the deployment of new technologies such as unmanned aerial vehicles.

Quite surprisingly, however, not much attention has been devoted to access to justice for victims of drone strikes. This matter is rapidly gaining momentum as a considerable number of cases have been brought to court by victims of killing by drone in these last years, and many more such cases should be expected to ensue in the near future.

Against this background, this article will show that the great majority of domestic suits related to targeted killing have been dismissed on procedural grounds before ever reaching an adjudication on their merits, mainly as a result of domestic courts' reliance on non-justiciability theories (or avoidance doctrines). The article will thus unveil that, due to the particular nature and features of drone strikes, the application of avoidance doctrines to cases ensuing from unlawful killing by unmanned aerial vehicles has the effect of leaving victims' demands for justice absolutely frustrated, thus effectively placing them outside the protection of the law. So that application of traditional theories on justiciability to new lethal practices ensuing from previously unforeseeable technical evolutions makes it possible for States to "kill in large numbers and to the sound of trumpets", while segregating victims to "die in the silence of courts".

Being this the case, the article will look into the specificity of drone strikes from an opposite angle, trying to turn the peculiarities of this weapon platform into a chance to pursue accountability and reparation throughout multiple proceedings in alternative jurisdictions.

1 Introduction

It is well-known that leaving abuses unpunished invites repetition,[1] especially when impunity for the gravest of conducts is widespread and granted both *de jure* and *de facto*.

The practice of targeted killing[2] seems to be a showcase for this assessment: on 29 January 2017, at around 2:30 a.m., a United States commando raid, preceded by drone strikes, stormed the village of Yakla, in Yemen.[3] Among the victims of the strike was 8-years-old Nawar al-Aulaqui, sister of Abdulrahman Aulaqui—killed in a US led drone strike on 14 October 2011 when he was only 16 years old[4]—and daughter of Anwar al-Aulaqui—also killed in a drone strike carried out in the morning of 30 September 2011.[5]

Aside from the tragedy inherent to the reported deaths and to the fact that two generations of a family have been literally vanquished by three subsequent drone strikes in regions far removed from well-recognized

Drones and the Right to Life, UN Doc. A/68/382, 13 September 2013, para. 95. In higher detail on this matter *see* Gervasoni (2017).

49 HRC, General Comment No. 29 (2001), UN Doc. CCPR/C/21/Rev.1/Add.13, paras. 14–15.

50 *See* the separate opinions of judge Cancado Trindade in: *The case of Pueblo Bello Massacre* (Series C No. 14), IACtHR judgment of 31 January 2006, para. 64; *Cases of Massacres of Ituango v. Colombia* (Series C No. 148), IACtHR, judgment of 1 July 2006, para. 47; *La Cantuta v. Peru* (Series C No. 162), IACtHR Judgment of 29 November 2006, paras. 49–62.

51 Article 3 Hague Convention respecting the Laws and Custom of War on Land (adopted on 18 October 1907, entered into force on 26 January 1910).

52 It is worth noticing that the *travaux preparatoires* of the 1907 Hague Convention IV show that Article 3 was never meant to be restricted to inter-state relationships. On direct individual entitlement to reparation *see* ICJ, *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, I.C.J. Reports 2004, p. 136, paras 145, 152–3 and ICJ, *Armed Activities on the Territory of the Congo Case (Democratic Republic of the Congo v. Uganda)*, ICJ Report 2005, p. 82, para. 259. By the same token, Zegveld (2003), pp. 497–526; Kalshoven (1991), pp. 827, 830; Mazzeschi (2003), pp. 339–347.

53 Article 91 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977.

54 Kalshoven and Zegveld (2011), p. 147. By the same token *see* also Bassiouni (2006), p. 217; Bassiouni (2002); Sassoli (1988).

55 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (hereinafter Geneva Convention I); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (hereinafter Geneva Convention II); Convention (III) relative to the Treatment of Prisoners of War (hereinafter Geneva Convention III); Convention (IV) relative to the Protection of Civilian Persons in Time of War (hereinafter Geneva Convention IV), adopted on 12 August 1949, entered into force on 21 October 1950.

56 Ronzitti (2007).

57 Henckaerts and Doswald-Beck (2005), Rule 150. Affirmative, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary- General, 25 January 2005.

58 AP I, Articles 11, 85 and 87, para. 3; Geneva Conventions I–IV, Articles 1, 50, 51, 130, and 147. By the same token, Henckaerts and Doswald-Beck (2005), Rule 158. To this end *see also* Gervasoni (2017).

59 Alston (2011), p. 311.

60 To this end *see* in higher detail Provost (2002), pp. 47–56; Tomuschat (2002a), pp. 178–179.

61 Evans (2012), pp. 37–38.

62 Alston Report cit., para. 93. For a similar conclusion *see* also Ben Emmerson, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (hereinafter Emmerson Report), UN Doc. A/HRC/25/59, 10 March 2014, para. 32.

63 Alston Report cit., para. 52.

64 Supreme Court of Israel, *The Public Committee Against Torture in Israel v. Israel*, Judgment of 13 December 2006.

65 Notably, in a previous judgment concerning the legitimacy of a policy of targeted killing the Supreme Court of Israel itself had declared the matter non-justiciable arguing that "The choice of means of warfare, used by the Respondents to pre-empt [sic] murderous terrorist attacks, is not the kind of issue the Court would see fit to intervene in". To this end *see* Supreme Court of Israel, *Barakeh v. Prime Minister and Minister of Defence*, judgment of 29 January 2002. For a thorough commentary to the judgment *see* Ben-Naftali and Michaeli (2003), p. 369.

66 Supreme Court of Israel, *The Public Committee Against Torture in Israel v. Israel* cit., para. 54.

67 Ibid., paras. 18–22. The Court made clear, in particular, that when there is a gap in IHL such a lacuna should be filled by reference to human rights law.

68 Evans (2012), pp. 42–43.

69 Trindade (2011), p. 195. *See* accordingly *Barrios Altos v. Peru,* IACtHR, judgment of 14 March 2001, and *Almonacid Arellano v. Chile*, IACtHR, judgment of 26 September 2006.

70 Weill (2014), p. 69.

theatres of hostilities, what is particularly salient in this chain of killings is that two lawsuits had respectively sought to prevent the very beginning of this sequence and to assert accountability following the perpetration of the first of these killings. Indeed, on 30 August 2010, Nasser Al-Aulaqi, Anwar Al-Aulaqi's father, brought a lawsuit challenging the government's decision to target his son for killing.[6] On 18 July 2012, after Anwar Al-Aulaqi had actually been deprived of his life and the second of these drone strike had killed Abdulrahman Al-Aulaqi, the victims' relatives again filed a lawsuit before US courts, this time seeking for redress.[7] In both these instances the US judiciary avoided to take a stance upon the merits of the complaints considering the matter as non-justiciable and thus impeding any form of reparation.

Whereas in recent years drone strikes and targeted killing have been the subject of considerable attention, the same cannot be said about the right of access to justice for those who have fallen victims of such practices. While the underlying assumption of this Chapter is that targeted killing may be either lawful or unlawful depending on a series of factors,[8] its scope is to focus on access to justice and reparation for persons who have already been so selected and/or so deprived of their lives.

This Chapter will thus show that the great majority of domestic lawsuits related to targeted killing have been dismissed on procedural grounds before ever reaching an adjudication on their merits, mainly as a result of domestic courts' reliance on non-justiciability doctrines. After providing a brief overview of these procedural-related hindrances to redress and accountability, the analysis will turn to international law, arguing that the duty to grant victims of gross human rights violations full reparation is hardly reconcilable with non-justiciability theories, whose application may give rise to a separate and additional violation of victims' fundamental rights. In so doing, the Chapter will show that the main problem hindering an effective application of international law standards in terms of access to justice and effective remedies lies within the very rationale often placed at the foundation of avoidance doctrines: when anchoring these theories to constitutional principles of separation of powers, indeed, domestic courts actually create a contrast—which would seem *prima facie* irreconcilable—between constitutionalism and international obligations. Hence, the need to explore alternative solutions, with a view of going beyond the formal condemnation of denial of justice and overcoming its effects all together through the identification of alternative pathways to justice, which may prove to be effective for the enhancement of victims' rights.

2 Avoidance Doctrines

Aside from the peculiarities characterizing any of their specific variations, "avoidance doctrines" may be described in general as judicially-made doctrines "allowing courts to refrain from exercising their established jurisdiction", thus shielding certain actions of the executive from the scrutiny of the judicial apparatus.[9] By reference to avoidance doctrines, courts have argued in the past that any determination in the realm of military affairs is not susceptible of intelligent judicial appraisal due to the nature of the information they are based on.[10] In turn, this approach implies that, in highly sensitive areas falling within the realm of "external affairs", an absolute deference is made to the executive's will and discretion.[11]

2.1 Origin and Peculiarities of Non-justiciability Theories

As it appears, avoidance doctrines lead to a redefinition of the very area of what is and what is not for judges to know and decide upon. Henceforth, by framing, accepting or rejecting them, "courts design their own role in applying" the law.[12]

Whereas the contours of these doctrines remain "murky and unsettled",[13] non-justiciability theories share some common traits.[14] The act of state doctrine is a justiciability principle according to which the judiciary

This requirement is mirrored in Principle 16 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation, which extends such an obligation to cases of "gross violations of international human rights law", clarifying that "in these cases, States should […] cooperate with one another and assist international judicial organs competent in the investigation and prosecution […] States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction".[120] In particular, it could be argued that extrajudicial executions, in both times of peace and armed conflict, fall within those crimes that impose or at least permit the exercise of universal jurisdiction.[121] Importantly, this might go to fashioning both criminal and civil jurisdiction,[122] especially considering the role that victims are granted in the criminal process in multiple (for the majority, civil law systems) legislations.[123] In line with this assessment, UN Special Procedures have already recommended States to abide by the *aut dedere aut judicare* principle.[124]

It should be noticed, nonetheless, that universal civil and criminal jurisdiction lacks mechanisms which may render effective decisions taken in this area on third States' soil[125] and may be hard to pursue since hindrances similar to those characterizing typical avoidance doctrines might be coupled with further obstacles to prosecution and reparation relating to standing and further jurisdictional concerns.

6 Conclusions: Targeted Killings and Avoidance Doctrines as Intertwined Façades

International law places on States a duty to grant a judicial review of the decision to target and kill a pre-identified person as well as of the lawfulness of any such a killing once the victim has been deprived of his life, granting full reparation whenever a violation of IHL or human rights law occurs.[126] Being the right to an effective remedy a basic pillar of the rule of law itself, moreover, it is exactly under emergency scenarios that the protections it grants become all the more crucial: since the link between the principle of legality and the right to an effective remedy is inextricable, in fact, judicial guarantees cannot be either suspended nor derogated from.[127] Under this light, "accountability for violations of international human rights law is not a matter of choice or policy; it is a duty under domestic and international law".[128]

However, one particularly controversial feature of drone strikes relates to the insurmountable hindrances that impede access to justice and reparation to victims and their families.[129] Indeed, since their first systematic deployment in the international arena, the use of armed drones has largely resulted in an "accountability vacuum".[130] As noted by the former UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, "there is no evidence in relation to targeted killings to indicate that they provide anything other than a façade of legality to dignify official lawlessness".[131] Interestingly enough, the same expression had previously been used to suggest that behind the "façade of legality" they offer, avoidance doctrines are actually the incarnation of "judicial timidity" related to courts' unwillingness to get involved in the "mysterious realm of international politics".[132]

This coincidence is quite peculiar insofar as two practices which—on the face of it—would seem to be only remotely related, in practice significantly reinforce each other: while one endangers the fundamental rights of persons selected as targets of lethal strikes, the other waters down the procedural guarantees aimed at avoiding an arbitrary use of lethal force. It thus appears that, when jointly considered, drone strikes and targeted killing have the devastating effect of placing a person outside the protection of the law, leaving his fate to the will of the executive power alone. So that the current state of affairs seem to perfectly embody Voltaire's avowal that "all murderers are punished unless they kill in large numbers and to the sound of

access to justice and to grant them effective remedies, including full reparation.[40] Henceforth, the obligation to grant an effective remedy entails, on the one hand, a duty to grant access to justice and, on the other, a parallel (and additional) duty to grant reparation to those individuals whose fundamental rights have been violated.[41]

With specific reference to right to life violations, human rights monitoring bodies have clarified time and again that States are bound to provide victims with "full reparation", which involves "restitution, rehabilitation and measures of satisfaction […] as well as bringing to justice the perpetrators of human rights violations".[42] A breach of this obligation is in and by itself sufficient to give rise to an additional and autonomous violation of the fundamental rights violated in the first place.[43] As a matter of fact, the right to an effective remedy has acquired such a crucial importance to be considered "one of the basic pillars […] of the rule of law (*État de Droit, Estado de Derecho*) itself in a democratic society".[44] *Quae cum ita sint*, the right to an effective remedy has attained customary law status.[45]

The case law of human rights courts and bodies is moreover replete of references to investigation and prosecution as remedies for gross human rights violations which confirm this stance.[46] Mirrored as it is in a plurality of binding as well as non-binding instruments, and reflected in customary international law,[47] that of accountability has become a very foundational principle of human rights law itself, so that, as for the right to an effective remedy in general, also "a failure to investigate and, where applicable, punish those responsible for violations of the right to life in itself constitutes a violation of that right".[48]

Notably, the right to an effective remedy also applies in times of emergency. In this regard the Human Rights Committee (HRC) has clarified that Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) "constitutes a treaty obligation inherent in the Covenant as a whole", therefore concluding that under any circumstance "the State party must […] provide a remedy that is effective" and insisting that "it is inherent in the protection of rights explicitly recognized as non-derogable in [A]rticle 4, paragraph 2, that they must be secured by procedural guarantees, including often, judicial guarantees".[49] In fact, on the basis of similar considerations, it has been suggested that the right to an effective remedy has now obtained the status of a *jus cogens* norm—at least when the remedy is sought in pursuance of non-derogable fundamental rights.[50]

A similar conclusion may be reached with regard to IHL. According to Article 3 of the 1907 Hague Convention IV,[51] States are responsible for acts performed by their armed forces and are under an obligation to pay compensation to those affected by the violations of the laws and customs of war they perpetrate.[52]

The same wording characterizes Article 91 of Additional Protocol (AP) I.[53] Even though AP II—governing certain hostilities not of an international character—does not feature any provision corresponding to Article 91 AP I, victims' entitlement to compensation should be ensured by the circumstance that conventional provisions related to reparation have now attained customary status and should therefore be deemed applicable to the whole of IHL.[54] Moreover, being AP II internal armed conflicts a sub-species of the more general non-international armed conflicts defined under Article 3 common to the 1949 Geneva Conventions,[55] it may be concluded that what applies to internal armed conflicts pursuant to Article 3 also applies to conflicts that would fall within the scope of application of AP II. Since States perpetrating violations of the laws of war are generally also committing violations of their own legal order, victims should in addition be able to sue the responsible State within its own legal system.[56] In line with these considerations, the International Committee of the Red Cross (ICRC) has found that States bear a duty of reparation in both international and non international armed conflicts.[57] In addition, IHL itself provides for

decisionist theory thus places this branch over and above legal prescriptivism and makes it immune from any accountability, on the one hand, while providing it with the ability to single-handedly shape the legal system, on the other.[81] Under this representation, avoidance doctrines define justiciability proper, i.e. they identify what falls within the purview of the judiciary itself.

Decisions mirroring this rationale fall within a well-traced line of rulings justifying the validity of non-justiciability by reference to "its capacity to reflect the proper *distribution of functions between the judicial and the political branches of the Government* on matters bearing upon foreign affairs".[82] As is apparent by the very wording of this argument, the motivation provided by courts when dismissing nowadays claims brought by victims of drone strikes closely resembles past phenomenology of avoidance doctrines. Accordingly, the validity of avoidance doctrines would be harnessed to that "cornerstone of modern constitutionalism"[83] that is separation of powers. Under this light, domestic courts have often taken the stance that decisions in areas of foreign policy and control of the armed forces maintain a primarily political nature[84] allegedly falling outside "the legal forms and jurisdiction typifying the abilities of a judge".[85]

In terms of effectiveness of international law—which, in the case at hand, directly translates into the effective safeguard of victims' rights—, this is probably the most problematic characterization of avoidance doctrines, since insinuating the existence of a clash between the right of access to justice and reparation and the very foundation of the forum State's constitutional system has the potential to make entirely hollow the protection of individual rights.

Indeed, it is well known that, from the intrinsically "external perspective" of international law, domestic legal concerns—even of a constitutional nature—cannot be adduced as justifications for internationally wrongful acts. Thus, as far as avoidance doctrines and targeted killing go, the joint operability of international human rights law and IHL requires States to harmonize their internal legal systems with conventional provisions and to provide victims with effective local remedies, whose absence would amount in and by itself to a violation of a State's international obligations.[86] It is indeed from this "outsider's view of [S]tate conduct"[87] that the UN Special Rapporteur on EJK has averred in relation to drone strikes that "efforts should be strengthened to bring perpetrators of unlawful killings, be they military contractors, intelligence agents, high - or low - ranking Government officials, to justice".[88] Still by this perspective, the UN Human Rights Committee has expressed its concern about the "lack of accountability for the loss of life resulting from [the US practice of targeted killing]", further recommending the State to "conduct independent, impartial, prompt and effective investigations of allegations of violations of the right to life and bring to justice those responsible [and] [p]rovide victims or their families with an effective remedy where there has been a violation".[89]

However, when a well-entrenched jurisprudential doctrine envisages the existence of a full-out contrast between the principle of division of power and international law obligations, how likely is it that a court could give precedence to the latter over the former?

It has been argued that the problem at the origin of this seemingly irreconcilable clash between the constitutional principle of division of powers and international law lays in the fact that the latter remains "willfully blinded by [its] external perspective to constitutional peculiarities" and it therefore ignores relationships among national actors "which go to fashioning law and the rule of law in a national setting".[90] As a consequence, the dualism between international and national law could not easily be overcome by giving precedence to one body of law over the other.[91] This conundrum is well mirrored in practice by the ongoing contrast between the US and the UN Special Rapporteur on EJK who has stressed that:

officials] to such cases.[30]

Notably, the Court's reasoning thus runs counter to the rationale underlying its own judgment in the *Al-Aulaqi v. Obama* case, pursuant to which the political question doctrine barred any possible consideration of the lawsuit in its merits *because*, as the Court itself had clarified, the role of the judiciary is to conduct *post hoc* determinations.

Jointly read, these two judgments leave no judicial venue whatsoever to either prevent an extrajudicial killing to take place *ex ante* (*Al-Aulaqi v. Obama* case) or to seek for a remedy *post facto* (*Al-Aulaqi and others v. Panetta and Others* case) whenever the executive alleges that the killing is an act of war.

This impression finds full confirmation in yet another decision of the US District Court for the District of Columbia on a drone strike case: the lawsuit lodged by Faisal Bin Ali Jaber seeking a declaration of unlawfulness of targeted killing policies and reparation for the killing of his nephew and his brother in law has indeed been dismissed on grounds of the political question doctrine. Moving along the lines of its previous Al-Aulaqi case-law, the Court averred that the use of military force abroad squarely falls within the exclusive powers of the executive,[31] thus in fact unveiling a far-reaching withdrawal of the judiciary from any assessment over possible abuses perpetrated by the executive branch, and even clarifying that:

> to the extent that these hypothetical war crimes do result from a deliberate policy decision of the [e]xecutive, the courts' inability to review that decision underlies our entire constitutional system.[32]

The English judiciary has come to dismiss drone-related complaints on similar grounds. In the case of *Noor Khan v. Secretary of State*—concerning the clarification of the UK's involvement in US led drone strikes and the ensuing demand for injunctive relief against the Secretary of State's decision to cooperate with the US, as such a cooperation would make the UK ancillary to murder—both the High Court of Justice and the Court of Appeals dismissed the case declaring the matter non-justiciable pursuant to the foreign act of state doctrine.[33] Both Courts, in particular, argued that holding a defendant responsible for murder due to his involvement in a third State's conduct would "involve, and would be regarded 'around the world' […] as 'an exorbitant arrogation of adjudicative power' in relation to the legality and acceptability of the acts of another sovereign power".[34] Thus they stressed that answering an hypothetical question on whether a UK national who kills a person in a drone strike in a third country's territory is guilty of murder would be in reality tantamount to make an assessment of the principal actor-State's conducts which "would inevitably be understood […] by the US as a condemnation of the US".[35]

3 Access to Justice and Reparation in International Law

Under international law, victims of human rights violations and breaches of International Humanitarian Law (IHL) shall "have their right to access to justice and redress mechanisms fully respected".[36] Correspondingly, States are bound to grant them an "effective remedy" against violations.[37]

Indeed, the very function of Article 8 of the Universal Declaration of Human Rights (UDHR) is to ensure that every potential abuse be justiciable at the domestic level.[38] This obligation, its spirit and function, is now also endorsed in several international instruments of a binding nature.[39] The right at hand is moreover reinforced by the joint operability of the general obligation to ensure respect to fundamental rights, as well as conventional clauses endorsing substantive human rights which, read together, impose on States a duty to investigate alleged breaches, to provide victims of human rights and IHL violations with equal and effective

in the recalled *Noor Khan* case.[103] The conclusion thus reached, nonetheless, seems to amount in and by itself to a breach of the right of access to court and reparation: no violation of third State immunity from foreign civil jurisdiction would indeed be integrated by a mere analysis *incidenter tantum* of such a State's behavior. In line with this argument, international judicial and quasi-judicial bodies have already had occasion to deliver judgments over the responsibility of a State for its complicity in a third party's human rights violations, even when they did not have jurisdiction over the latter.[104] The soundness of this reasoning finds further confirmation in the very judgment delivered by UK Supreme Court in the case of *Belhaj v. Straw*,[105] which has rejected the idea that courts may be prevented from judging upon the UK's responsibility only because doing so would entail consideration of third States' conducts.

A further venue to seek redress may be found in the judiciary of those States on whose territories drone strikes take place. Indeed, "disclosure of these killings is critical to ensure accountability, justice and reparation for victims or their families",[106] a result that may be at least in part achieved through such legal action. Thus, for instance, the Peshawar High Court in Pakistan has found that more than 1449 Pakistani civilians were killed between 2008 and 2012 and directed the Pakistani Government to do whatever was in its power to prevent future drone strikes on its soil.[107] Again, following a complaint filed by Karim Khan, in 2014 the Islamabad High Court ordered the local police to initiate a criminal investigation into the involvement of the CIA personnel stationed in Pakistan in relation to their involvement in the drone strikes perpetrated on Pakistani soil. Also in this connection, however, a *vacuum* in accountability and redress still remains. Not only because, as already noticed by commentators, drone strikes continue to take place regardless of the recalled decisions,[108] but also because of the practical difficulties of apprehending, judging and sanctioning those responsible, and seizing their goods for reparation.

A final way that may prove useful in overcoming the obstacles posed by avoidance doctrines would be to resort to universal titles of jurisdiction in States other than those directly involved in or by targeted strikes.[109] Even though such a pursuit would seem to be hardly workable in terms of suits directed at third States due to well-known principles of sovereign immunity,[110] the same cannot be said for either criminal prosecution or actions in tort damages directed against those personally responsible of the grave violation of international law complained of.[111] In this regard, it should be pointed out that both IHL and international human rights law apply to States other than those directly involved in armed conflict[112] or directly responsible for violations of international law.[113] Moreover, fundamental principles of IHL and some human rights law norms, including those related to the right of access to justice and reparation, have arguably obtained the status of customary international law, with the consequence that their reach and the obligations deriving from them go well beyond the States directly interested by the relevant conducts,[114] creating obligations *erga omnes* which every State has a legal interest to protect.[115] When such violations occur, every State has a right to demand the cessation of the wrongful act and reparation for the persons affected.[116]

Furthermore, the general duty to respect and ensure respect, both in IHL and human rights law, entails that all States should take all the appropriate measures to safeguard compliance with conventional obligations, even when their breach derives from another State's conduct. Indeed, the 1949 Geneva Conventions establish that every State party is under an obligation to ensure that the Conventions are complied with, bearing a positive obligation to prevent and bring violations to an end.[117] It further specifies that States "shall be under the obligation to search for persons alleged to have committed, or have ordered to be committed, […] grave breaches and shall bring such persons, regardless of their nationality before its own court",[118] thus bringing them to justice pursuant to universal titles of jurisdiction.[119]

trumpets", consecrated by the deafening silence of courts that, envisaging areas of non-justiciability, provide their governments with "effective shields against judicial review"[133] and thus leave victims in situations of "virtual defencelessness",[134] regardless of their right of access to justice and to an effective remedy. In other words, States kill to the sound of trumpets, while victims die in the silence of courts.

Against this background, victims do have the chance of resorting to alternative judicial venues, pursuing justice and reparation in *fora* other than those of the States responsible for drone strikes. It should however be kept well in mind that at this stage no solution seems to be immune of significant hurdles, so that the chances of victims of targeted killing being restored in their violated rights remain "very meagre".[135] Nonetheless, a continuous engagement before national judiciaries aimed at enforcing international law obligations both in those States that are directly responsible for drone strikes and in other States that may have competence to decide upon a drone-related controversy (or at least upon certain aspects of it) pursuant to different titles of jurisdiction, remains the most effective way to pursue justice and accountability for victims of unlawful drone strikes. This perspective, as some of the latest judicial outcomes show, invites for (an albeit cautious) optimism for future litigation.

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71 It is significant to point out, in this regard, that also States where avoidance doctrines have developed and thrived remain of the opinion that all States are under the obligation "to conduct exhaustive and impartial investigation into all suspected cases of extrajudicial, summary or arbitrary executions, to identify and bring to justice those responsible, […] and to adopt all necessary measures, including legal and judicial measures, to put an end to impunity and to prevent the further occurrence of such execution". *See*, to this end, Alston (2011), p. 314, referring to the US practice of calling upon other States to conduct investigations and prosecutions into right to life violations.
72 Accordingly Emmerson Report cit., paras. 33–36.
73 On a functional approach to the obligation to investigate *see* in higher detail Gervasoni (2017).
74 AP I, Article 43, para.2.
75 Claus Kreß, Aerial Drone Deployment on 4 October 2010 in Mir Ali/Pakistan, (Case No. 3 BJs 7/12-4) Decision to Terminate Proceedings, Germany, Federal Prosecutor General, 23 July 2013, 157 ILR 122, at 758. For a comment on this decision *see* Daskal (2015).
76 Alston Report cit., para. 71. For a detailed discussion of the different approaches of the German Federal Prosecutor General and that of the UN Special Rapporteur on EJK, leaning towards the latter's assessment, see Heinsch and Poulopoulou (2017), pp. 77–78. Accordingly *see* also Vogel (2011), pp. 134–135.
77 To this end *see* IMT Charter, Article 7 and Control Council Law No. 10, Art. II(4)(a); Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 7(2); Statute of the International Criminal Tribunal for Rwanda, Article 6(2); Statute of the International Criminal Court, Article 27. In national proceedings *see* Eichmann, 36 ILR at 308-311 (Isr. S. Ct.); Pinochet [1999] 2 All E.R. at 111–115.
78 *See* to this end Wittes (2009), p. 112; Vermeule (2009), pp. 1132 and 1097.
79 Demiray (2010).
80 Delacroix (2005); for a critique to the decisionist approach *see* in higher detail Dyzenhaus (2011). On the decisionist theory *see* Schmitt (2007), arguing that in abnormal situations a need to take decisions in unrolled situations justifies the executive to do so without any supervision.
81 For an analysis of differences and similarities between epistemic authority and decisionism *see* Rosen (2014).
82 Emphasis added. *Banco National de Cuba v. Sabbatino*, 376 US 398,423,427 (1963). By the same token, *United States v. Verdugo-Urquidez*, 110 S.Ct 1056, 29 ILM (1990) 441, at 449–450.
83 Haljan (2013), pp. 31–35.
84 Ibid., pp. 47–48.
85 Ibid., p. 60.
86 UN Basic Principles on the Right to a Remedy and Reparation cit., Principle 2(c). To this end *see* also International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter ARSIWA), Article 32, as to the "irrelevance of internal law" and HRC, General Comment No. 31 cit., para. 13 as to the shared position of international human rights bodies in this regard. By the same token *see*, *inter alia*, the separate opinion of judge Cancado Trindade in *Massacre of Pueblo Bello* case cit., para. 23.
87 Haljan (2013), p. 14.
88 Christof Heyns, Follow-up to Country Recommendations—United States of America, UN Doc. A/HRC/20/22/Add.3, 30 March 2012, para. 88.
89 HRC, Concluding Observations on the Fourth Periodic Report of the United States of America, UN Doc. CCPR/C/USA/CO/4, 23 April 2014, para. 9.
90 Haljan (2013), pp. 27–31.
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93 Emphasis added. Human Rights Council, Report of the Working Group on the Universal Periodic Review—Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, UN Doc. A/HRC/16/11/Add.1, 8 March 2011, para. 14.
94 *See* accordingly Benvenisti (1993), pp. 173–175.
95 Trindade (2011), pp. 84 and 86: "The judicial power ought to apply the treaty norms in the domestic legal order effectively, and to ensure that they are respected. This means that the national legislature and the judiciary have a duty to provide and apply effective local remedies against violations not only of the rights constitutionally foreseen but also of

would be prevented from conducting inquiries into third States' actions.[15] Thus, the Foreign Act of State Doctrine, in the UK, postulates that determinations potentially damaging the public interest in the fields of international relations due to the connection of their underlying questions with third States' conducts are non-justiciable.[16] Correspondingly, according to the Crown Act of State Doctrine, the judiciary of the UK shall then refrain from adjudicating on claims in tort brought against the Crown itself due to activities that may be attributed to the State acting *jure imperii.* [17] Similarly, in the US the political question[18] doctrine requires courts to refrain from any interference with "issues of political delicacy in the field of foreign affairs"[19] as well as with third countries' determinations.[20]

The comparison between two studies on the impact of avoidance doctrines on judicial review of fundamental rights violations conducted on the span of some 15 years[21] points to the conclusion that national courts have shifted from a widespread application of non-justiciability clauses to a partial abandonment of such an approach.[22] However in cases of targeted killing this evolution does not emerge as of yet. Indeed, the most recent decisions on targeted killing cases in US jurisprudence closely resemble judgments dating back to almost 30 years.[23]

2.2 Avoidance Doctrines Applied to Targeted Killing Cases

The already recalled Al-Aulaqi proceedings—the first targeted killing related complaint ever brought before the US judiciary—was dismissed by reason of lack of standing and political question doctrine.[24] After stating that the events of the case had taken place in the context of an ongoing armed conflict[25] and that, in theory, extrajudicial killings would be a legitimate basis for a claim in torts, the District Court for the District of Columbia stressed the (allegedly) extraordinary nature of the suit; it then underlined that the executive had not waived sovereign immunity and applied the political question doctrine tracing its rationale all the way back to the constitutional principle of separation of powers. In particular, the Court maintained that national security, military matters and foreign relations are "quintessential sources of political questions", concluding that, "[i]f the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President's decision to launch an attack on a foreign target" since this "would be anathema to […] separation of powers" principles.[26]

Surprisingly enough, the Court thus concluded that where a judicial decision would matter the most—i.e., in a literal "life-or-death" situation—then the judiciary has no powers whatsoever. Perhaps even more astonishingly, while recognizing "the somewhat unsettling nature of its conclusion" the Court maintained that "there are circumstances in which the Executive's unilateral decision to kill a US citizen overseas is 'constitutionally committed to the political branches' and judicially unreviewable",[27] thus averring that the decision whether or not to deprive a person of his life is political in nature.[28]

If the recalled judgment excluded any possibility of judicial review over governmental policies for preventative purposes, the following decision of the District Court for the District of Columbia made clear that the judiciary is also barred from conducting *post-hoc* assessments of the lawfulness of a targeted killing, as this question too would fall within the realm of non-justiciable matters.[29] Nominally avoiding to apply the political question doctrine since the power granted to the executive by the Constitution does not provide it with *carte blanche* to do whatever it deems appropriate, the Court nevertheless averred that:

> US law does not provide any available remedy for such a claim since a number of special factors hinder its justiciability – including separation of powers, national security, and the risk of interfering with military decisions – [and] preclude the extension of [claims in tort against individual federal

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the rights enshrined in human rights treaties which bind the State at issue".

96 Scott (2015), p. 3, who argues that such an erosion had already started following the joint appeals in *Serdar Mohammed v. Ministry of Defence* and *Rahmatullah v. Ministry of Defence.*

97 *Belhaj & Rahmatullah (No 1) v. Straw and Others* [2017] UKSC 3, January 2016. On this judgment in higher detail *see* Simonsen (2017); Gibson (2017), p. 113.

98 To this end *see, inter alia*, Gibson (2017), pp. 105–106.

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102 Moynihan (2016), p. 8.

103 In higher detail on this case *see* Gibson (2017), pp. 103–104.

104 *El-Masri v. the former Yugoslav Republic of Macedonia* (App No. 39639/09), ECtHR, Grand Chamber, judgment of 13 December 2011, para. 211; *Al Nashiri v. Poland* (App No. 28761/11), ECtHR, judgment of 24 July 2014, para. 516; *Husayn (Abu Zubaydah) v. Poland* (App No. 7511/13), ECtHR, judgment of 24 July 2014, para. 511. HRC, *Alzery v. Sweden*, Views of 25 October 2006, para. 11.6. For a critical comment of the recalled decisions *see* Scheinin (2014) and Nollkaemper (2012).

105 *Belhaj & Rahmatullah*, case cit.

106 Akbar (2017), pp. 95–96.

107 Peshawar High Court, *Foundation for Fundamental Rights vs. Federation of Pakistan and Four Others*, May 11, 2013.

108 Akbar (2017), pp. 95–96.

109 Keith Hall (2003), p. 111, considering universal jurisdiction "one way of making the right recognized in Article 8 of the Universal Declaration to an effective remedy in national courts". On the principle of universal jurisdiction *see* also, *inter alia*, Wolfrum (1994).

110 ICJ, *Jurisdictional Immunities of the State (Germany v. Italy)*, Judgment of 3 February 2012, I.C.J. Reports 2012, p. 99.

111 Whereas currently senior sitting officials continue to enjoy qualified immunity (ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, I.C.J. Reports 2002, p. 3, paras. 54–55), the same does not apply to former high officials, including heads of State.

112 Chetail (2003).

113 ICJ, *Wall Opinion*, case cit. para. 106.

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115 ICJ, *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)*, Judgment of 24 July 1964, I.C.J. Reports 1970, p. 3, para 33.

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118 Geneva Convention IV, Article 146. To this end *see* also the Rome Statute of the International Criminal Court, Preamble, paras. 4–6: "the most serious crimes of concern to the international community as a whole must not go unpunished […] it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". Notably, even though neither the IV 1949 Geneva Conventions nor their 1977 Additional Protocols expressly provide for universal jurisdiction for violations of IHL in non-international armed conflicts, substantial State practice demonstrates that national courts can exercise universal jurisdiction over persons allegedly responsible for such violations. To this end *see* Keith Hall (2003), pp. 121–122.

119 The Princeton Principles on Universal Jurisdiction, Princeton University, 2001, Principle 1.

120 UN Basic Principles on the Right to a Remedy and Reparation cit., Principles 4 and 5. To this end *see* also Tomuschat (2002a, b), pp. 315, 325, and 326; Bassiouni and Wise (1995), pp. 21–25 and 51–55, arguing that this principle is paralleled by the evolution of a customary rule to prosecute the most serious human rights violations.

121 UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions,

1989, Principle 18; UN Commission on Human Rights, Resolution 2000/31 of 20 April 2000, para. 4. Accordingly *see* also Keith Hall (2003), p. 118; Ratner et al. (2009), pp. 72 and 87.

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128 Christof Heyns, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions—Armed Drones and the Right to Life, UN Doc. A/68/382, 13 September 2013, para. 97.

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131 Alston (2011), p. 293.

132 Benvenisti (1993), p. 173.

133 Ibid., p. 161.

134 Trindade (2011), p. 194.

135 Ronzitti (2007). Notably, the rare national judgments in the matter of targeted killings which did not make application of avoidance doctrines remain today largely unimplemented in practice. To this end *see* B'Tselem (2010), pp. 19–20.

> the nearly universal sense I was given during my visit […] is that systematic accounting of, and prosecutions for, wrongful deaths are unlikely. In short, war crimes prosecutions in particular are politically radioactive.[92]

This difficulty in reconciling constitutionalism and international law is at the core of the controversy insofar as avoidance doctrines and targeted killing are concerned, with a clear and unavoidable detrimental effect over efficiency in the promotion and protection of fundamental rights as some States' judiciaries are extremely reluctant to accept that they not only have the right but also the duty, under international law, to grant access to justice to victims of drone strikes. Some of them are equally resistant to accept that international law has a role to play in their considerations, rejecting any argument grounded on international human rights law and actually behaving as if international obligations in this realm did not bear any value. In this regard, the US attitude in its latest Universal Periodic Review has been particularly revealing, clarifying that "[t]he US supports recommendations calling for prohibition and vigorous investigation and prosecution of any serious violations of international law, *as consistent with existing US law, policy and practice*", while explicitly rejecting "portions of these recommendations concerning reparation, redress, remedies, or compensation".[93]

5 Alternative Pathways to Justice

Since avoidance doctrines, if anchored to separation of power logics, are effectively used to "block international norms that did not receive the express approval of the country's legislature",[94] the problem with them is not only the need to underline their incompatibility with international law, but also to find a way to overcome their devastating effect in practice.

Henceforth, it should be noted first and foremost that what is represented by some as an irreconcilable conflict between constitutionalism and international obligations may very well not be a real conflict after all. A proper interpretation of domestic legal provisions in light of international law shows that both legal systems could actually be fully respected.[95] Something of the sort has been recently done by the UK Supreme Court which, following suit in the erosion of the non-justiciability prerogative already triggered by previous judgments,[96] has reached a decision in stark contrast with the *Noor Khan* jurisprudence, averring that "in deciding whether an issue is non-justiciable, English law will have regard to the extent to which the fundamental rights of liberty, access to justice and freedom from torture are engaged by the issues raised", and finding "no basis for accepting a yet further doctrine whereby United Kingdom courts might be precluded from investigating acts of a foreign state".[97]

The recalled judgment offers a further inspiration: while some of the States responsible for drone strikes may not be willing to grant an effective remedy to victims, the very nature of drone operations often requires the involvement of third States which may be called into question—and whose officials' responsibility may be entangled—due to their role in the targeting process.[98] As a consequence, it may prove extremely effective to turn to countries which assist in these killings by means of intelligence or logistic support, in order to hold them and their organs responsible for the role they played in adding and assisting targeting States.[99] As a matter of fact, knowingly providing a facility essential to a wrongful conduct, permitting the use of a State's territory to use force against a third State,[100] or aiding in the commission of human rights violations[101] are prototypical conducts triggering a State's responsibility due to complicity. Accordingly, locating a target for a drone strike would squarely fall within the scope of the material conduct of aid and assistance.[102] This line of argument has been pursued and rejected, as we have seen, before the UK judiciary

2 In general, on targeted killing *see* Melzer (2008); Philip Alston, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions—Study on Targeted Killings (hereinafter "Alston Report"), UN Doc. A/HRC/14/24/Add.6, 28 May 2010; and Gervasoni (2016).
3 Ghobari and Stewart (2017). According to unofficial investigations, civilian deaths included ten children in addition to an 80 year-old tribal leader, a villager who had already survived a drone strike on his wedding day back in 2013 and a pregnant woman, together with her new-born child. To this end *see* Reprieve, Game Changer, available at: https://www.reprieve.org.uk/wp-content/uploads/2017/10/2017_10_31_PRIV-Yemen-Report-UK-Version-FINAL-FOR-USE.pdf.
4 Greenwald (2011).
5 Griffin (2011) and Rushe and McGreal (2011).
6 *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, Dist. Court, Dist. of Columbia 2010.
7 *Al-Aulaqi and Others v. Panetta and Others*, Complaint, 18 July 2012.
8 To this end *see* Gervasoni (2016).
9 Weill (2014), p. 69.
10 *Korematsu v. U.S.*, 65 S. Ct. 193, 245, 1944, Justice Jackson's Opinion.
11 Benvenisti (1993), p. 161.
12 Weill (2014), p. 69.
13 *Bancoult v. McNamara*, 726 F.2d 774, 803 n. 8, D.C. Cir. 1984. Accordingly, in relation to the UK doctrines of Crown act of State and Foreign act of State *see* Scott (2015), p. 1.
14 Significantly, even though throughout this Chapter reference is primarily made to systems of common law, the judiciary of civil law countries are no stranger to similar applications. To this end see, by way of example, the Markovic *case* before the Italian Court of Cassation (Cass. Civ. SS.UU. 5 June 2002, No. 8157).
15 Weill (2014), pp. 70–71.
16 *Campaign for Nuclear Disarmament v. Prime Minister of the United Kingdom* [2002] EWHC 2777. In higher detail on the relationship between the Crown act of State and Foreign act of State doctrines see *Mohammed v. Secretary of State for Defence* [2015] EWCA Civ 843, [375]. On the Foreign act of State doctrine in particular *see* Nicholson (2015).
17 Mann (1986), p. 187; Hartley and Griffith (1981), pp. 312–316. For an analysis of the doctrine and its evolutions following the most recent UK judgments in the joined appeals in *Serdar Mohammed v. Ministry of Defence* and *Rahmatullah v. Ministry of Defence see* Scott (2015), arguing that "both the non-reviewability of the prerogative generally and the specific immunity of the Crown in its own courts have been significantly eroded".
18 On this matter see extensively Amoroso (2015, 2011).
19 Henkin (1976), p. 597.
20 *Underhill v. Hernandez*, 168 U.S. 250 (1897), 252.
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22 Benvenisti and Downs (2009), p. 60.
23 *See* respectively *Saltany v. Reagan*, 886 F.2d 438, DC dr. 1989, and *Industrie Panificadora, SA. et al. v. United States*, 763 F. Supp. 1154, DDC, 1991, 4T4 957 F.2d 886, DC Or. 1992, Cert denied, 113 S.CL 304; *Panama SA. v. United States*, 967 F.2d 965, 4th Or. 1992, Cert denied, 113 US 411. Coming to a similar conclusion on the broader issue of access to justice for victims of counterterrorism measures in general *see* Brown (2011), p. 248.
24 *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, Dist. Court, Dist. of Columbia 2010.
25 *Hamdan v. Rumsfeld*, 548 U.S. 557, 2006.
26 *Al-Aulaqi v. Obama* cit., pp. 65–66 and 70–72.
27 Ibid., p. 78.
28 For a thorough analysis of this judgment *see* Heller (2011).
29 *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, Dist. Court, Dist. of Columbia, 2014.
30 Ibid., pp. 28–32.
31 *Ali Jaber v. United States*, 155 F. Supp. 3d 70, 73, D.D.C., 2016.
32 Ibid. For a commentary of this decision *see* Wittes (2011).
33 High Court of Justice, *Noor Khan v. Secretary of State* [2012] EWHC 3728 (Admin) and Court of Appeal, *Noor Khan v. Secretary of State* [2014] EWCA Civ 24.
34 High Court of Justice, *Noor Khan v. Secretary of State* cit., paras. 53–55.

a duty to investigate at the very least alleged grave breaches—thereby including willful killing—and sanction those individually responsible for them[58]; an obligation which would be "illusory" if a State responsible for a targeted killing were to avoid doing so.[59]

Indeed, also those authors who support a restrictive reading of Article 91 AP I actually stress that some grave violations of IHL are coextensive with gross human rights law violations, in which case the right to a remedy would anyway find application pursuant to the latter regime.[60] Accordingly, the UN Basic Principles on Reparation indistinctively refer to gross human rights violations and serious violations of IHL. In so doing, they endorse, and at the same time reinforce, the "normative connection" between the two legal regimes[61] reflecting their common rationale.

Also the practice of UN Special Procedures confirms the existence of a normative connection between the two regimes, endorsing the view that "the State's duty to investigate and prosecute human rights abuses also applies in the context of armed conflict and occupation"[62] and further stressing that "[t]he legal obligation to effectively punish violations is as vital to the rule of law in war as in peace".[63]

A case in point is the renowned judgment on targeted killing delivered by the Israeli Supreme Court in 2006.[64] The Court first of all discarded in very clear terms the idea that avoidance doctrines could prevent an adjudication on the merits of the questions before it[65] because determining otherwise would prevent the examination of a practice that might jeopardize "the most basic right of a human being – the right to life".[66]

Resorting to an integrated approach to human rights and humanitarian law, then, the Court came to the conclusion that each and any targeted killing shall be the subject of an independent investigation, insisting that targeting operations must take place within the limits of the law,[67] thus stressing the importance of judicial scrutiny over "the power" of the executive.

All of the above supports the conclusion that "reparations are a legally inseparable corollary to human rights violations"[68] and grave breaches of IHL. Since reparation may only be awarded if access to justice is granted, it follows that the latter is a necessary prerequisite of the former. So that practices hindering or impeding at all justiciability in this area are to be considered incompatible with international law and, as a consequence, should be deemed devoid of any juridical effect.[69]

4 Countering Avoidance Doctrines' Rationale

If access to court and reparation are recognized as constitutional rights in most democratic States[70] as well as fundamental rights protected as such by international law, and if it is so clear that under the latter the right of access to court cannot be derogated from, then how is it even possible to envisage the operability of avoidance doctrines in this area?.[71]

The reasoning of the previously recalled decisions on drone strikes suits are characterized by a series of arguments which tend to justify the alleged non-justiciability of the matter by reference to the intricacies of any assessment over the lawfulness of typical "battlefield determinations", often adopted and implemented on third States' territory and concerning the conduct of State officials involved in acts of hostilities and therefore often assumed to enjoy combat immunity for their actions. Whereas the rationale leading to this outcome may vary, in each and any of the recalled cases courts have denied judicial review of conducts that had either potentially jeopardized or actually deprived persons of their lives, considering the political ramifications of the acts called into question somewhat prevalent over their legal nature.

4.1 Contextual Discomfort, Territorial Jurisdiction and Combat Immunity

This line of considerations seems however unpersuasive. Assuming that a judge is particularly ill-suited to assess the legality of battlefield determinations is tantamount to offer the military a *carte blanche* which would imply an absolute derogation from the right to an effective remedy in times of war, even when the most heinous crimes of war are committed. Such an interpretation is thus in stark contrast with the international law principles and obligations recalled before.

Also the geographical location of the strikes seems to be irrelevant insofar as justiciability is concerned, especially if one considers the peculiarities of armed drones: the very nature of this weapon platform ensures the existence of recordings of the operations, of the operators and of the chain of command of every single strike since all this information rests with the very State that performs such an operation.[72] Thus, from an international law perspective, the fact that a certain strike has been performed on a third State territory would be irrelevant for an assessment of justiciability before the targeting State's judiciary, as this latter would have the capacity, and therefore the function, and therefore the jurisdiction to conduct a prompt and thorough investigation[73] and, similarly, to grant access to remedies and reparation to victims of unlawful strikes.

Another peculiar feature that is often considered to hamper justiciability of complaints lodged by victims of drone strikes relates to *status* determination under IHL for both those targeting and those who are targeted. It is indeed well known that under the laws of war combatants are entitled to directly take part to hostilities and they therefore enjoy a qualified immunity from prosecution if they comply with the rules and principles of IHL.[74] Insofar as drone strikes are concerned, this issue has acquired particular relevance when the German Attorney General has decided to decline prosecution for a drone strike that had killed a German citizen in Pakistan in 2010 as he found that CIA employees, while *de jure* civilians, could functionally fall within the definition of combatants and their actions would therefore be covered by combatant immunity.[75] Contrary to this view, the UN Special Rapporteur on Extra-judicial Killings (SR on EJK) had however already indicated that the personnel of intelligence agencies do not enjoy the same immunity that international law grants to members of the armed forces and, as a consequence, CIA personnel taking part in drone strikes should be prosecuted pursuant to applicable national laws for the crime of murder whenever they engage in lethal drone strikes.[76]

Given the highly contentious nature of the matter at hand, it would seem appropriate to leave these determinations to the judiciary rather than to the prosecution alone. It should also be stressed that, in case of grave breaches of IHL, as is the willful killing of a civilian, combat immunity does not shield either civilians or combatants[77] and, since the qualification of a victim should be reached at the merits phase, *status* determination should be ascertained in a court of law, rather than being used as a procedural tool hindering justiciability.

4.2 Internal Versus External Perspective (or Constitutionalism Versus International Law)

A more sophisticated argument suggests that there is no direct contrast between avoidance doctrines and the right of access to justice and reparation because the former, rather than impeding access to court, merely defines the area of what can become a matter of contention before a judge. According to those who support this conclusion, a deficit in accountability is both unavoidable and required by reason of judiciary deference to the executive, at the very least in (non-better-defined) "emergency situations".[78] Such a "decisionist" characterization of law, viewed as an integration of decisions and norms,[79] envisages the existence of grey areas where the executive enjoys a widespread discretion to trace the divide between the area of legality and that of politics, re-framing by reference to its own practice the scope of application of legal norms.[80] The

35 Court of Appeal, *Noor Khan v. Secretary of State* cit., paras. 36–38.
36 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. UN Doc. A/RES/60/147, adopted by the UN General Assembly with Resolution 60/147 of 16 December 2005, Preamble.
37 *See*, *ex multis*, Amnesty International, The UN Human Rights Committee's Proposed General Comment on the Right to Life—Preliminary Observations, 2005, p. 10.
38 *See* accordingly Verdoot (1963), pp. 116–119.
39 Article 2, para. 3 of the International Covenant on Civil and Political Rights. On the scope of application of Article 2, para. 3 *see* in particular Human Rights Committee, General Comment No 31, 29 March 2004, UN Doc CCPR/C/21/Rev.1/Add.13, para. 16. At a regional level, Article 13 of the European Convention on Human Rights, Article 25 of the American Convention on Human Rights and Article 27 of the Protocol to the African Charter for the Establishment of the African Court on Human and Peoples' Rights.
40 UN Basic Principles on the Right to a Remedy and Reparation cit., Principle 3 (b), (c) and (d). On reparation *see* Principle 18.
41 Ibid., Principle 3 (b), (c) and (d) and Principle 11. In international jurisprudence *see* confirmation of this standing, *inter alia*, in *Gülec v. Turkey* (App No. 21593/93), ECtHR, judgment of 27 July 1998; *Kurt v. Turkey* (App No. 24276/94), ECtHR, judgment of 25 May 1998); *Velásquez Rodriguez v Honduras* (Series C No. 4), IACtHR, judgment of 29 July 1988; *Paniagua Morales v. Guatemala* (Series C No. 37), IACtHR, judgment of 8 March 1998; *Blake v. Guatemala* (Series C No. 36), IACtHR, judgment of 24 January 1998.
42 Human Rights Committee, General Comment No 31 cit., para. 16. By the same token *see, inter alia, Velasquez Rodrıguez v. Honduras* case cit., paras. 166–167 and *Velasquez Rodrıguez v. Honduras* IACtHR, judgment (reparations) of 21 July 1989, para. 26. Insofar as the ECtHR is concerned, *Aksoy v. Turkey* (App no 21987/93), ECtHR, judgment of 18 December 1996, para. 98, stating that the notion of an effective remedy entails in addition to compensation a thorough investigation capable of leading to the identification and punishment of those responsible and requires the involvement of those whose rights have been violated in the investigatory proceedings. As for the African system, *see inter alia*, African Commission on Human and Peoples Rights, Resolution on the Human Rights Situation in Tunisi*a*, March 1992. In higher detail on the right to reparation *see* Nowak (2000), pp. 203–204; Shelton (2005), pp. 195, 197, 200.
43 UN Doc. CCPR/C/31/Rev.1/Add.13, para. 8. In higher detail *see* Clapham (2006), pp. 328–332.
44 *Case of Castillo Paéz v. Peru* (Series C No. 34), IACtHR, judgment of 3 November 1997, para. 82. *See* to the same end *Loayza Tamayo v. Peru* (Series C No. 42), IACtHR, judgment (reparations) of 27 November 1998, para. 169; and *Blake v. Guatemala* case cit., para. 63. Accordingly Shelton (2005), p. 140. It has been noted that, significantly, the case law of the ECtHR and the IACtHR on the right to an effective remedy is converging in this regard. To this end *see* Trindade (2011), p. 59.
45 Shelton (2005), p. 238.
46 To this end *see*, *ex multis*, Human Rights Committee, *Sathasivam v. Sri Lanka*, Views of 8 July 2008, para. 6.4; *Branko Tomašić and Others v. Croatia* (App. No. 46598/06), ECtHR judgment of 15 January 2009, para. 62; *Myrna Mack-Chang v. Guatemala*, (Series C No. 101) IACtHR, judgment of 25 November 2003, paras. 156-157; *Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela*, (Series C No. 150) IACtHR, judgment of 5 July 2006, para. 66. On this topic *see* in higher detail Gervasoni (2017). As to the extensive jurisprudence elaborated by the ECtHR in relation to the right to an effective remedy and the ensuing right to reparation *see* in detail European Commission for Democracy through Law (Venice Commission), Report on the Democratic Oversight of the Security Services, 11 June 2007 available at http://www.venice.coe.int/docs/2007/CDL-AD(2007)016-e.asp.
47 Human Rights Committee, General Comment No. 6, 30 April 1982, U.N. Doc. HRI\GEN\1\Rev.1; *see* also, *ex multis*, *Kaya v. Turkey* (App. No. 22535/1993), ECtHR, judgment of 10 October 2000; *McCann and Others v. The United Kingdom* (App. No. 18984/91), ECtHR, judgment of 27 September 1995, para. 140; 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc. A/RES/40/34; 1997 Revised Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Joint Principles), UN Doc. E/CN.4/Sub.2/1997/20/Rev.1; 2005 Updated Principles on Action to Combat Impunity, UN Doc. E/CN.4/2005/102/Add.1. *See,* accordingly, Alston (2011), p. 313.
48 Christof Heyns, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions—Armed

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