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When the ‘war on terror’ undermines the sovereignty of fragile, failing and failed states

Mélanie Dubuy
Associate Professor in Public International Law
Université de Lorraine

Abstract:

The fight against terrorism in the post-11 September 2001 period has called into question the classic models of conflict between states, as framed conventionally and customarily by public international law. In the context of this ‘war’ on terror, the sovereignty of the most fragile, failed or failing states has been undermined by powerful states that have been the victim of terrorist attacks. The failure of a state to properly ensure the exercise of authority throughout its territory and to provide security and basic services to its population within its borders leads to a relativisation of the respect for its equal sovereignty in interstate relations, a principle that is nevertheless enshrined as absolute and cardinal in international public law. The use of armed drones and targeted killings against terrorist group leaders is characteristic of the weakened respect for the sovereign equality of states on whose territory these groups are established.

Index of notions

failed state - global war on terror - intervention by invitation – self-defence - sovereign equality -targeted killings - terrorist groups -

The fight against terrorism in the post-11 September 2001 period has challenged the classic models of interstate conflict constructed by international law therefore bringing a change of paradigm (Chinkin & Kaldor, 2017, 3). The relationship of violence can now bring a state into conflict with a non-state group whose attacks are of such intensity they may be equivalent to a state act of armed aggression and trigger a self-defence response¹ (Stahn, 2003; Trapp 2015). In the fight against terrorism, especially after 2001, States have been divided as regard to the possibility of invoking self-defence against a terrorist threat of armed attack. With the “Bush doctrine” and even after (O’Meara, 284 and 335; Kattan, 2018; Wood, 2020), the United States were defending the possibility of invoking preventive self-defence ie against a threat that was certain but not imminent, defending a new conception of imminence that would not be deemed in a chronological way but in a contextual one encompassing the gravity of the threat, the capability of the terrorist groups. Such right has been largely rejected by states (Henderson, 2018, 285-296 ; Gray, 2018, 248-261; Corten, 2021, 403-435: Kolb 2021, 385 ff). States generally reject preventive self-defence against a non-imminent attack. But a state like France, for example, accepts the principle of anticipatory self-defence against an imminent threat² (Schmitt, 2019). If States have also been divided as regard to the possibility of invoking the right of self-defence against terrorist groups, i.e. non state actors in contrast with the classical conception of the right of self-defence in a state-to-state reaction, many states are of the view that terrorist groups can perpetrate armed attack triggering a riposte in self-defence from the victim state (Arrocha Olabuenaga, 2019; Henderson, 2018, 210, 320; Gray, 2021, 238-240). For instance, France has been invoking the right of self-defence directly against a terrorist group whose action are not attributable to a state in exceptional circumstances, when this group had the characteristics of “quasi state” as it was the case in

¹ The exercise of self-defence is embedded in article 51 of the Charter of the United Nations and customary law that belong to the rules of the jus ad bellum, for a general overview, see Kolb 2021, 375 ff.; Corten 2021, 401 ff.

² There are different kinds of self-defence. The academic debate is divided between “restrictionists” that explain that self-defence is only acceptable in positive international law if an armed attack is consumed and “expansionists” that accept the idea that self-defence can be activated against a threat of armed attack. Henderson speaks about “preventative self-defence as an umbrella term” to encompass all kinds of self-defence that are not reactive ie that “prevent the physical manifestation of an armed attack from occurring” (Henderson, 2018, p. 275). The difficulty is that there are confusions as regard to the use of the appropriate formula. This can lead to misinterpretation especially when a State is invoking pre-emptive self-defence and is in fact practising a preventive one. “Anticipatory” self-defence corresponds to the use of the right of self-defence against a threat of armed attack that is imminent, that is about to occur while “preventive” self-defence corresponds to a riposte in self-defence against a future threat of armed attack but without certainty as regard to the occurrence of the attack (we don’t know when and where the attack will occur). For further precisions, Deeks, 2017, p. 662, defining anticipatory, pre-emptive and preventive self-defence and describing the use of force on a temporal continuum from one side of the spectrum that is anticipatory which “requires a state to be virtually certain about the time, place, author and fact of the future attack” and preventive self-defence “that requires no such certainty about those factors”.

2015 with the intervention in Syria against ISIS (Haque 2021). A terrorist group even aim to compete with the state and claim to be able to assemble its constituent elements. This was the case with Islamic State (IS), which asserted its territorial claims and was structured like a state, with ministries and powers resembling sovereign state prerogatives (levying taxes, minting currency) but was not a state in the legal sense of international law because notably of the ineffectiveness of its territorial control and the fact that the scope of application of the governmental powers was uncertain and not stable (Longobardo, 2017, speaking of “a group of insurgents with a territorial basis”). The model of state the IS was aiming for was not a democratic state but a Caliphate without frontiers. This goal of statehood from a terrorist group was innovative as it was not Al Qaeda’s one in 2001 which aim was practicing a global djihadism.

After the 9/11 attacks, the use of the expression ‘war on terror’ (on the relevance of the concept, see O’Connell 2005 ; O’Connell 2012)³ became widespread. Originally intended as an attention-grabbing symbolic slogan, the term is no longer seen as controversial today and is readily used by heads of state (Hollande, 2015)⁴. The term ‘war’, however, has not been used in international law since it was replaced by the term ‘armed conflict’ in the 20th century in the contexts of *jus ad bellum* and *jus in bello*.

The *belli gerandi potestas* has always been a manifestation of sovereign power (Dubuy, 2012) and was historically a state’s means of asserting its sovereign power. However, in the context of the ‘war’ against terrorism, this classic mode of expressing sovereignty, the power to wage war, can negatively impact sovereignty. The sovereignty of states presenting signs of increased fragility has been severely tested in their efforts to drive out these terrorist groups and thwart their attacks.

The question of state fragility was originally assessed exclusively from an economic and humanitarian perspective but is now also understood from a security point of view (Cahin, 2020; Cahin, 2013; Mouton, 2012), with fragile states being presented in security strategies as a destabilising factor especially since the 9/11 attacks. This has been particularly the case with US security strategies⁵ (USA, 2017, 39)⁶, *United States Strategy to Prevent Conflict and*

³ The global ‘war on terror’ was led by the Bush and Obama administrations. Barack Obama no longer spoke of a ‘global war on terror’ but of ‘a war against Al-Qaida and its affiliates’ (Obama, 2009).

⁴ ‘What happened yesterday in Paris and Saint-Denis near the Stade de France is an act of war and when faced with war, the country must take the appropriate decisions’. Unless otherwise indicated, all quotations from French sources have been translated into English.

⁵ e.g. *National Security Strategy* 2002, 2015 and NSS, 2017 under Trump.

Promote Stability 2020 (USA, 2020, 4)⁷, *Interim National Security Guidance* (USA, 2021; Quirk, 2021), *National security strategy* (USA, 2022, 19), where a failed state is considered dangerous due to its political instability and porous borders (Puccetti, 2021)⁸. Failed states have therefore been classified as states of concern in the preservation of international peace and security on several grounds (Lax, 2012 42). First, the fact that a state's institutions have collapsed and that corruption is rife in its territory means that terrorist groups can move in without fear of capture or reprisal. Second, a failed state territory allows terrorist groups to establish a base with access to the resources they need for their activities (organised crime, maritime piracy, arms trafficking, organisation of recruitment, etc.). Third, terrorist groups can hide behind the shield of state sovereignty, because neighbouring states will not want to cross the host state's borders (Dunlap, 2004, 460).

This concept of the failed, failing and fragile state was developed by political science commentators (Helman & Ratner, 1992 ; Verhoeven, 2009 ; Woodward, 2017 ; Englehart, 2017, 36 ff.) and then elaborated much later by international law commentators (Thürer, 1999 ; Pustorino, 2010). The failed state, a concept very much in vogue in the 1990s and 2000s, has been defined as the opposite of a state that fully exercises its control and authority. This dysfunction was first described by Rosa Brooks: 'Successful states control defined territories and populations [...] Failed states, their dark mirror image, lose control over the means of violence, and cannot create peace or stability for their populations or control their territories' (Brooks, 2005, 1160). The failed or failing (to varying degrees, therefore) state is thus defined negatively (Rotberg, 2002 ; Underhill, 2014, 19) in relation to an ideal type, the Weberian model, which is based on the idea of the state's monopoly of legitimate violence within its territory (Weber, 1919⁹; Chan, 2013, 399; Newman, 2009, 427). This description corresponds to the constitutive elements of the state in public international law, i.e. the full exercise of sovereign powers over a defined territory and a population, a coercive political organisation that exercises legitimate violence and provides public services (Crawford, 2011). The

⁶ 'The United States will also assist fragile states to prevent threats to the U.S. homeland. Transnational threat organizations, such as jihadist terrorists and organized crime, often operate freely from fragile states and undermine sovereign governments. Failing states can destabilize entire regions'.

⁷ 'We will give priority to strengthening states where state weaknesses or failure would magnify threats to the American homeland. For instance, engagement in Afghanistan seeks to prevent the re-emergence of terrorist safe havens'.

⁸ For a presentation of arguments for and against the thesis that failed or very fragile states are highly dangerous from a security point of view (Pasagic 2020). On the porous borders between Afghanistan and Pakistan in particular (Underhill, 2014) 54 ff.

⁹ 'A state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory'.

definition thus also includes¹⁰ a modern state's responsibilities to meet its population's needs (Saeed, 2020, 770). A failed state is one that cannot provide economic growth for its population, the distribution of services or security within its territory¹¹. It is characterised by an extreme stage of failure in the exercise of its duties, while the fragile state is characterised by a partial failure. Today, the labels 'failed' and 'failing' are generally replaced by the less stigmatising terms 'situations of fragility' (France, 2018)¹², 'states of fragility' (OECD, 2022), or 'state fragility' (USIP, 2018a), with levels ranging from minor to severe.

For more than fifteen years now, official reports have been classifying states according to their fragility (World Bank, 2023; OECD, 2022), European Union (EU, 2015), think tanks such as the Fund for Peace. The classification framework is based on economic, social and political criteria, both endogenous (e.g. increase in civil wars or coups d'état) and exogenous (e.g. natural disasters and pandemics). It also takes into account multifactorial economic (e.g. unemployment), environmental (epidemics), political (corruption), security (organised crime) and societal (vertical and horizontal inequalities) factors (Fund for peace, 2022)¹³. In an empirical analysis, which is not that of public international law, fragile states only partially correspond to the Westphalian state model (Newman, 2009).

The fight against terrorist groups may put into danger the cardinal protection of state sovereignty by international law that is compelled to take into account and react to the state incapacity or difficulty to exercise effectively its sovereignty inside its borders. The aim of this chapter is to show that in the context of the fight against terrorism, a state's inability to carry out its functions within its borders (internal aspect) raises questions about the cardinal principle in international law of respect for sovereignty in its external aspect, that is in its relations with other states, which are subject to international law and must therefore respect the principles of non-interference in the internal affairs of a state and of non-violation of its territorial integrity (article 2§4 of the Charter of the United Nations, Kolb, 2019 ; Corten 2021). In public international law, external and internal sovereignty are 'two necessary sides of the same coin' (Besson, 2011, §29). State fragility, decline or failure, depending on the

¹⁰ Weber focused on the monopoly of legitimate violence, but this view has been judged inadequate (Englehart, 2017, 39).

¹¹ Definitions vary. Some strategic reports use the lack of effective government control as the defining criterion of a failed state, some use the absence of a central government, and some use the inability of a state to meet certain obligations (Woolaver, 2014, 601; Bingham, 2014).

¹² Speaking of 'countries in a situation of fragility', in particular p. 7, and p.16.

¹³ It uses the following criteria: cohesion indicators (security apparatus, organised crime, etc.), economic indicators (economic decline, brain drain, etc.), political indicators (public services, state legitimacy), social indicators (demographic pressure, external interventions).

degree of weakening, is a pathology caused by a deficiency in the exercise of state authority (I). A weakening of state authority leads to a weakening of respect for that state's sovereignty, and a powerful victim state will be resolved to intervene by armed force on a weakened host state's territory to drive out the terrorist group in question (II).

State failure: a deficiency in the effective exercise of state sovereignty

In the Weberian conception, the state holds the monopoly on legitimate physical violence within its territory (A). If it fails to ensure the material security of its population, a breakdown of trust ensues among that population (B).

A. The state's loss of monopoly on legitimate force

A state loses control of the monopoly of armed force within its territory if it is challenged by a terrorist group settled on its territory. Its primary mission is nevertheless to provide security for its citizens. This is a quality of the state first noted by Rotberg: 'The state's prime function is to provide that political good of security – to prevent cross-border invasions and infiltrations, and any loss of territory; to eliminate domestic threats to or attacks upon the national order and social structure; to prevent crime and any related dangers to domestic human security; and to enable citizens to resolve their disputes with the state and with their fellow inhabitants without recourse to arms or other forms of physical coercion' (Rotberg, 2003, 3). State failure thus manifests first in the loss of the exercise of authority over parts of its territory. This was the case, for example, when IS took control of several cities in Syria (Raqqa – capital of the IS jihadists' self-proclaimed caliphate, Palmyra, etc.) and Iraq (the provinces of Anbar, Ninewah, Salah Al-Din, Diyala). When a state loses its authority, it is unable to engage in the fight against a terrorist group. A concept has emerged to describe this incapacity called the '*unwilling or unable state*' (Starski, 2015; Martin, 2019; Gray, 2018, 247 ff. and the numerous references note 274 ff.), which corresponds, respectively, to the hypothesis of a state that either does not have the political will to expel terrorist groups or is unable to because it lacks the political and military means to ensure security within its borders, allowing the terrorist group to easily take over parts of its territory and set up training camps (Mahmoudi, 2022). In this context, a state that has terrorist camps (sanctuaries)

established on its territory is obliged to not only refrain from assisting such groups but also to exercise due diligence to ensure its territory is not used to harm other states (Trapp, 2020). Explicitly adopted notably by the United States (USA, 2016, 10)¹⁴, Australia, the United Kingdom, Turkey, Canada (Henderson, 2018, 332) but rejected by a large number of states (Ministère de l'Europe et des Affaires étrangères et européennes, 2018; Schmitt, 2019; Arrocha-Olabuenga, 2019, speaking of “scarce practice”), this doctrine consists in considering that a failing state or a state with defined fragilities that does not respect these obligations will expose its territorial integrity to a limited violation, in other words the victim state’s armed action will not be carried out directly against the host state but will be confined to the terrorist camps (Henderson, 2018, 322).

When a state is no longer able to perform its primary functions, its legitimacy suffers a clear *capitis deminutio*.

B. The loss of state legitimacy as a consequence of its inability to provide political goods and services

A failing state is characterised by its inability to properly provide societal governance through service delivery and through ensuring the welfare of its population (Giorgetti, 2010a), 473)¹⁵, which leads to a loss of legitimacy as far as its population is concerned¹⁶. As Rotberg observed, ‘nation-states fail because they are convulsed by internal violence and can no longer deliver positive political goods to their inhabitants. Their governments lose legitimacy, and the very nature of the particular nation-state itself becomes illegitimate in the eyes and in the hearts of a growing plurality of its citizens’ (Rotberg, 2003, 1). The failing state’s inability to coerce and impose its authority over its entire territory is also coupled with an inability to manage and provide services (Rotberg, 2020, §1)¹⁷. For example, its infrastructure and transport systems completely deteriorate, inflation soars, food insecurity is endemic, and civil servants’ pay is stopped so the continuity of services is no longer ensured. In addition, wealth is not distributed equitably, citizens lose faith in the judicial system, and there is a lack of

¹⁴ According to this doctrine, the United States considers that the negligence of a state that is unable or lacking the political will to drive out terrorist groups leaves the field open for victim states to act militarily on the basis of the right to self-defence without having to seek the host state’s agreement.

¹⁵ ‘State failure can be seen as a condition in which State is unable to provide political goods to its citizens and to the international community’.

¹⁶ Legitimacy is another element in the definition of a failed state (Englehart, 2017, 40).

¹⁷ ‘Failed states are those political entities in international politics that supply deficient qualities and quantities of political goods and, simultaneously, no longer exercise a monopoly of violence within their territories’.

democratic debate and respect for the rule of law by the state (McLaughlin, 2021, 183)¹⁸. The population then loses confidence in the state (Stewart & Brown, 2010, 6; Ezrow & Frantz, 2013, 20; Piazza, 2008, 470¹⁹). The state's provision of resources covers a number of elements, including political participation, health and social protection, education, economic management, the rule of law and human security (Rotberg, 2003, 3-4). Failure affects the whole structure of the state. According to political scientists Patrick and Rice, a failed state is unable to fulfil four types of responsibilities. It fails to create an environment for equitable and sustainable economic growth, to construct legitimate, transparent, accountable political institutions, to protect its population from violent conflict and control its territory and to meet the population's basic human needs (Patrick & Rice, 2008, 3). As Giorgetti noted, this implies a graduation in the exercise of sovereign capacity according to the degree of state failure (Giorgetti, 2010 a, 474). In the context of state incapacity, various actors (terrorist groups, warlords) will take advantage of the power vacuum to offer security and services to the population (food and medicine) that the state no longer provides (USIP, 2018b).

When a state loses control of its territory and the confidence of its people because it has failed to offer them security by engaging in the fight, its total or partial failure leads to a form of breach of the social contract (USIP, 2018a²⁰; on the reference to the social contract in relation to state failure, see Carment, Samy, & Prest, 2008; Holsti, 1996; Englehart, 2017, 39 ff.; on the state failing to fulfil its part of the social contract, see Giorgetti, 2010a, 475, Giorgetti, 2010 b, 47 ff.) between the state and its people and additionally between the state and other states, who will be tempted, in the name of conducting an effective 'war' against terrorism, to take liberties with the cardinal principle of respect for the sovereignty of a state that causes concern from a security standpoint. Victim states will subrogate themselves to the rights of the host state, acting in its stead and unilaterally assessing whether the state is in difficulty and unable to combat the terrorist groups established on its territory.

The sovereignty of the failing state therefore becomes porous to the exercise of other sovereignties, and states waging a 'war' on terrorism feel vested with the mission to intervene militarily.

¹⁸ 'The "international law essence" of State failure is defined by the *loss of capacity* of the State in question, to: a) Represent, enforce, and apply the prerequisites and obligations of *sovereignty*, (including – most importantly – the capacity to mediate conflict and "deal with" disaffection internally), b) In *compliance* with that State's international obligations'.

¹⁹ 'In states experiencing significant state failure, challenges to executive authority abound and confidence in the state's ability to assert unrivalled authority is eroded (Zartman, 1995)'.

²⁰ 'Fragility is the absence or breakdown of a social contract between people and their government.'

The consequences of state failure and the weakening of respect for its sovereignty from other states

There is a presumption in international law of the continuity of the state. The question of effective government is therefore assessed less rigorously during the life of a state than when an entity obtains the status of a state. The state is thus considered not as a ‘conceptual variable’ (Englehart, 2017, 36, referring to the writings of J. P. Nettl), as it is in political science, but as a constant in international law. The Somalian state did not cease to be a member state of the United Nations when it was in severe difficulty. States and international organisations have always affirmed respect for the territorial integrity and sovereign equality of states in difficulty. According to Crawford, government failure is not state failure in international law (Crawford, 2006, p. 59). As he noted: ‘there is a distinction between the creation of a new State on the one hand and the subsistence or extinction of an established State on the other. In the former situation, the criterion of effective government may be applied more strictly’ (Crawford, 2006, 59). In the context of the fight against terrorism, there is thus a tension between respect for the sovereignty of a failing or very fragile host state and the preservation of the victim state (Proulx, 2012, 245) (the security/sovereignty dilemma). While the idea of a relative, conditional, contingent sovereignty (Krasner, 2004) and of non-absolute sovereignty are now gradually creeping in, public international law continues to not differentiate between states and does not establish any hierarchy between them. Failed states are sometimes regarded by other states as de facto ‘unequal’ (A). This is particularly the case in the context of the practice of targeted killings using armed drones within the territory of a host state (B).

A. A de facto ‘inequality’?

International law has established a monolithic approach to internal (state is the supreme authority for its population on its territory, see Carrillo-Salcedo, 1991, 60), external (states in their international relations with other states are not the subject of any superior power, see Besson, 2011, §26 ff) sovereignty²¹. The concept displays two further aspects : the negative side (i.e. respect for the principle of non-intervention by other states, the negation of submission of a state to another one) and the positive one (the right to exercise the fullness of

²¹ Lax (2012) identified three elements to describe state sovereignty: legal and political sovereignty; the principle of non-intervention; and territorial integrity with fixed and inviolable borders.

state powers, Carrillo-Salcedo, 1991, 60). When an entity becomes a state, other states must respect it in their mutual relations under the cardinal principle in international law of sovereign equality (article 2§1, Charter of the United Nations), and this sovereign equality must be respected externally even if a state fails to exercise its powers internally (Giorgetti, 2010b, 53; Lax, 2012, 49²²). International law is thus not much concerned once a state is created and is ultimately not interested in the fate of that state thereafter (Kreijen, 2004, 102)²³. Jackson (1992, 26 ff.) referred to states that fail to fully exercise positive sovereignty (i.e. fulfilment of the state's obligations to its population as well as to other states by providing order and security within its territory) as 'quasi-states'. He noted that in cases where a de facto state is able to perform its duties effectively, a failed or failing state certainly exercises de jure sovereignty, because it is protected from external intervention, but not a de facto sovereignty, because it is unable to provide services and security for its population. An idea developed in the field of international relations that has begun to make inroads into public international law is that a failure to exercise internal sovereignty may call into question the obligation of respect for sovereignty in its external dimension (Newman, 2009, 424).

In the context of the fight against terrorism, a number of authors (Fenstein, 2004; Stahn, 2003; Wedgwood, 1999, 565; Reinold, 2011, 285; Dunlap, 2004, 475)²⁴ and indeed some states²⁵ have put forward the idea that a right to use armed force to expel terrorist groups from their training camps should be granted to victim states. Any state allowing terrorist groups to flourish on its territory should forfeit the protection of its territory in the name of another state's legitimate self-defence. Finstein stated, in the aftermath of 9/11, that the failing state was at fault: 'A State, which does not prevent the use of its territory for terrorist activities directed against and injurious to another State, cannot justifiably complain if the target State uses force in order to quell the danger that threatens it' (Feinstein, 2004, 78).

Some states have questioned this obligation to respect the sovereignty of failed states that are no longer able to impose their authority over parts of their territory. In the manner of

²² 'Once sovereign status is obtained and internationally recognized, international law provides no means by which to alter this status, even where a State no longer has the effective capacity to govern or exert authority over its population or is perpetuating outrageous human rights abuses against its own citizenry'.

²³ 'The statehood of quasi states is positively judicial instead of being empirical'.

²⁴ In favour of such a right, Dunlap wrote, 'States that are the targets of terrorist attacks should be able to use preemptive military force against terrorist groups in failed states, where the collapse of security institutions makes fighting terrorists impossible'.

²⁵ This is above all the United States's position (Gray, 2018, 226; Reinold, 2011, 251). '[The USA] upheld the claim that a state is responsible for the actions of private actors operating on its territory even if does not exercise effective or overall control over them, and that self-defense may therefore be exercised against the non-state actor and its state sponsor alike' (Chan, 2013, 423 ff).

negotiorum gestio, the victim state acts in place of the weak state that is unable to drive out the terrorist group because it considers it too weak and because it believes it represents a threat to the victim state's security. Several arguments have been put forward in the literature to justify an armed intervention on a host state's territory without its consent, which would amount to a violation of its sovereignty under international law. One such argument is that when a state does not exercise authority over parts of its territory (ungoverned spaces - on the concept, see references Dubuy 2020, note 5), there is no risk of infringing its sovereignty (Hakimi, 2015, 26). Another is that if a host state is unable to exercise authority over its territory, it loses all legitimacy, and armed intervention by a victim state is therefore legitimate (see Starski's extensive review, 2015, 494 ff)²⁶.

The problem here, however, is that a state that fails to expel terrorist groups because it has lost control of parts of its territory cannot be held responsible for the loss of authority that results in an increase in terrorist acts. Momentary incapacity should certainly not be confused with a lack of political will. Some states have nevertheless tended not to differentiate between the two, lumping together states lacking the means to drive out terrorist groups (unable) and those lacking the political will to do so (unwilling). The use of armed force by a victim state on the territory of an 'unable' host state seems to reflect a variable geometry conception of sovereignty. As Ohlin judiciously pointed out, this conception contrasts sharply with the classical view of international law, which holds that strong states are no more sovereign than weak states. A state is either sovereign, or it is not. It can never be half or three-quarters sovereign. However, with this conception of the failing state in which sovereignty is contextualised (according to the degree of state control), sovereignty may be insufficiently strong to be effective against a terrorist group but strong enough to protect it against interference from other states, as Ohlin noted: 'when a state is unable, the state's sovereignty is diminished in proportion to its level of control. This assumes that sovereignty has gradation which is very controversial' (Ohlin, 2021, 122-123).

²⁶ The arguments P. Starki identified include: the notion of 'estoppel', in other words a state that is unable to control its territory should not expect respect for its sovereignty and will not be able to claim a breach of its right to respect for sovereignty; if a state fails in its duty to expel terrorists from its territory, it forfeits respect for its sovereignty and for the principle of non-interference; failed states remain states but lose their external sovereignty and consequently the possibility of invoking art. 51 of the Charter of the United Nations. In ungoverned spaces, because terrorist groups are positioned outside the fold of sovereignty, the state therefore loses its protection. Another explanation is that de facto sovereignty is non-existent, so de jure sovereignty does not have to be respected.

The use of armed drones to execute terrorist leaders has been a popular strategy in some countries, particularly the United States (under all presidencies since 2001, O'Connell 2022 ; for the statistics, Sterman, 2022).

B. The case of targeted killings using armed drones

Under international law, respect for state sovereignty requires that a victim state obtain authorisation from the host state to carry out an armed intervention, that is it requires a consented intervention clearly given by the official authorities in power. The use of drone strikes for targeted killings in counter terrorism is not different because of the use of armed force on the territory of a host state in a cross-border operation. Those killings are intentional, premeditated and deliberate uses of lethal force against specific individuals (definition and references Casey Maslen 2012 note 11; for a general presentation see Henderson, 2018, 233 ff.). Targeted killings have raised a number of thorny questions as regard to their legality in international law by causing tremendous damages among civilian population (*jus ad bellum*, humanitarian law, human rights law; Casey Maslen, 2012). This is a new way of practising war, an individualized and a dematerialized one (Mignot-Mahdavi, 2020).

Victim states may invoke the argument of legitimate self-defence for the use of armed force as the United Kingdom engaged for instance in a targeted killing operation in Syria against two of its citizens in 2015 on the basis of anticipatory self-defence (Birsdall, 2022), but in the event that the requirement for armed aggression is not met, the state wishing to take action must seek and obtain the host state's agreement within the context of a consented intervention (Candelmo, 2019, 96; *Contra* for a different position see Paust, 2010, 237-280). As Candelmo argued, 'an operation of force.... Would inevitably violate or, in any case, impact on the territory inside the borders of a sovereign State. Such an operation needs to be accepted by the State itself, and consent by the territorial State to the drone strike must be verified in order to establish its lawfulness'. However, some states have put forward the fight against terrorism argument to justify their less than scrupulous respect for the sovereign will of a failing host state (Ali & Khan, 2017, 193-194, quoting A. Dworkin and "the armed conflict framework"). With the killing of Al Qaeda leader Al Zawahiri, in Afghanistan in August 2022, the legal basis invoked to justify this "over the horizon counter-terrorism operation" by the United States was not clear at all. According to Martin, there was no evidence of imminent threat triggering self-defence and "it was unclear that necessity required a use of force without consultation with the government of Afghanistan" (Martin, 2022 , printed version p. 7; Dunlap 2022). Martin then explains that according to the "unable and unwilling doctrine" for

which the requirement of consent would not operate, in the case that it would be accepted, it was not even clear that the Taliban government of Afghanistan was in this situation. There must be a reasonable and objective determination of this inability or lack of will the burden of which must be on the defending state.

Anderson described this double standard as follows: ‘States are not all the same when it comes to terrorism, in other words. No rational US leader is going to take the solemn international law admonition of the “sovereign equality of states” too seriously in these matters—and the United States has never regarded a refusal to do so as contrary to international law but instead as something built into international law as a qualification on the reach of the “sovereign equality” of states’ (Anderson, 2011, 10). The United States’s practice of using armed drones in targeted assassinations has shown that, in the name of the fight against terrorism, they have cheapened or at the very least undermined the sovereignty of states with defined fragilities, such as Pakistan, Yemen and Somalia (*Contra* for a different position, Woolaver, 2014, 617)²⁷.

Hence, even if they did take steps to seek the consent or at least the approval of the authorities in power in Afghanistan²⁸, Yemen (Emmerson, 2014, §28; Deeks 2014), Somalia (USA, 2019, p. 6; Sauvage, Schmitt, & Latif Dahir, 2022)²⁹, and Pakistan (Dawn, 2012), the United States generally seemed satisfied with a controversial or implicit agreement, for example, whereas international law requires a clearly expressed agreement³⁰. Uncertainty regarding the official nature of the authorities giving their consent to an intervention presents another difficulty, because these failed or failing states and those with defined fragilities are characterised by political instability (Giorgetti, 2010a, 179).

This factor has long posed a problem with regard to Somalia. Uncertainty in terms of consent also characterised Yemen in 2015, when the incumbent president, Hadi, fled to Saudi Arabia

²⁷ According to the Fund for Peace (2022), Yemen is the most fragile state, Somalia the second, Afghanistan the eighth and Pakistan the thirtieth out of 179 states analysed. The OECD has categorised Somalia and Yemen as ‘contexts of extreme fragility’ (OECD, 2022).

²⁸ The Afghan authorities called the assassination of Al-Zawahiri in August 2022, after the United States had withdrawn its troops and was no longer engaged alongside Afghanistan in a conflict on its territory, a violation of the principles of international law and the Doha agreement. The Secretary of State of the United States Anthony Blinken replied that hosting the Al Qaida leader and fighters contradicted the Taliban’s engagement as regard to the Doha agreement (Martin, 2022; Cristiani 2022).

²⁹ On the drone strikes at the request of Somali’s president (Jones, 2022).

³⁰ Consent was not always clear in the case of Yemen. The United States only actually indicated that it had the consent of the Yemeni authorities in 2016 (Moorehead, 2017).

for six months (Moorhead, 2017; Lederman, 2016)³¹. In Pakistan, an implicit or even secret agreement, which was eventually uncovered by WikiLeaks³², was obtained (O’Connell, 2015, 69 ff.) between 2007 and 2011 from the Pakistani secret services department, not an authority officially authorised to decide on an armed intervention. In 2013, Pakistan’s prime minister expressly refused to give his consent to intervention (Sharif, 2013) and had all drone launch bases shut down (Brookman-Byrne, 2017, 19; Fair, Kaltenthaler, & Miller, 2014; Welsh, 2015, 41). He reiterated his refusal in 2016, denouncing it as a violation of Pakistan’s sovereignty (Dawn, 2016; Bowcott, 2013; Woods, 2012; Abbas Khan & Ali, 2017). Pakistan’s parliament had also refused its consent to the US drone strikes. The Peshawar High Court recognised a violation of Pakistan’s sovereignty in 2013. The targeted assassinations using drones nevertheless continued (see statistics for 2004-2018, The bureau of investigative journalism, 2018) even after this explicit refusal (Sixta Rinehart, 2016, 46-47; Ullah, 2022, 103-104). In 2018, Pakistan’s foreign minister again denounced a violation of sovereignty following drone strikes against members of the Taliban-affiliated Haqqani group, designated as a terrorist entity by the United States (Massoud, 2018). These states, even though they were in a weakened position, thus did not accept this violation of their sovereignty and officially condemned it.

In the fight against terrorism then, it seems that equality is no longer viewed in the same way today. It appears to have been maintained formally but not in reality (Anderson, 2011, 8 ff.) Anderson identified this difference in treatment between a healthy state, capable of meeting the requirements of the rule of law, and failing states that are struggling: ‘this is not to say that the United States could or would use drones anywhere it wished. Places that have the rule of law and the ability to respond to terrorists on their territory are different from weakly governed or ungoverned places. There won’t be drones over Paris or London—this canard is popular among campaigners and the media but ought to be put to rest. But the vast, weakly governed spaces, where states are often threatened by Islamist insurgency, such as Mali or Yemen, are a different case altogether’ (Anderson, 2013). This is the manifestation of what Simpson referred to in relation to outlaw states as the hegemonic approach to international

³¹ This difficulty of obtaining valid consent from the appropriate authority was acknowledged by the United States (Schwedler, 2015).

³² There was a secret agreement between the CIA and Pakistan’s intelligence services to launch drone strikes in Waziristan (Brookman-Byrne, 2020, 75). Brookman-Byrne argued that neither the international law of accountability nor the law of the use of armed force requires that consent be given publicly.

law (Simpson, 2005, 325; Brookman-Byrne 2020, 100³³; Martin, 2022). With regard to states that do not respect international law, such as Saddam Hussein's Iraq, he indicated that the regime for the use of armed force increased as the respect for state sovereignty decreased. This variable geometry respect for sovereignty can be seen in the case of fragile states. This was a prevalent conception of sovereignty in the 19th century.

Many internationalists in the late 19th and early 20th centuries³⁴ classified states according to their level of development. They considered that a state's use of armed force was possible when it could not remain impassive in the face of destabilising states that would lose their statehood because of a lack of effective government. Baty, for example, was very uncompromising on the subject of states experiencing internal difficulties: 'If there is no single government in control or struggling to maintain its control, it is unreasonable to expect foreign countries to stand by and watch with folded hands the development of anarchy. There is neither precedent nor authority directing them to do so, and common sense may well forbid it'. This is a very dangerous path to go down, but it could prove tempting in the context of the fight against terrorism. However, it would contribute to further weakening the legitimacy of an extremely fragile host state vis-à-vis its population (in this sense, Ahmad, 2014, 24-25). A weakened respect for the sovereignty of a failing host state leaves it with little chance of reclaiming its sovereignty. Somalia has attempted to do just this by refusing to allow states to enter its territorial waters to capture pirates who have taken refuge there. The UN Security Council actually took this refusal on board in March 2022 when it did not renew the most recent authorisation (S/2608/2021) allowing states to intervene in Somalia's maritime sovereignty.

Problems in states that are failed, failing or have defined fragilities are often referred to using medical vocabulary, which mobilises the image of a state that is viewed as sick to some degree and as not properly functioning. The vocabulary of pathologisation is advancing in the study of state fragilities evolution. As Manjikian pointed out, 'Just as sick people have less autonomy than those who are well, sick states have less sovereignty than healthy ones' (Manjikian, 2008, 335). In the name of the imperative of this 'war on terror', a failing host state's vulnerability is likely to increase if its autonomy in decision-making decreases. There is a huge temptation for powerful victim states to put such host states under a trusteeship by dispossessing them. Trusteeship would consist, in this instance, of acting in place of the host

³³ 'intervention by invitation is a doctrine with the clear capacity to act as a legal tool of neo-colonial policing and militarism, engendering modern practices of liquid warfare and entrenching hegemony'.

³⁴ Lorimer, Hall, Baty are cited by Woolaver, 2014, 599.

state judged unable or unwilling to take on its share of the responsibility. The idea of this contextualised sovereignty would have catastrophic consequences for the principle of sovereign equality. Although it is sometimes weakened, international law values the sovereign equality of states and would therefore resist this development and reject such a return to the past.

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