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**Promotion and protection of all human rights, civil,
Political, economic, social and cultural rights,
including the right to development**

Use of armed drones for targeted killings

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions^{*}, ^{**}

Summary

The present report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Agnès Callamard, is submitted to the Human Rights Council pursuant to Council resolution 35/15. In it, the Special Rapporteur addresses the issue of targeted killings using armed drones, particularly in light of the proliferation in the use of drones and their expanding capability over the past five years, and makes recommendations designed to regulate their use and enhance accountability.

* The present report was submitted after the deadline in order to reflect the most recent developments.
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I. Introduction

1. Armed drones, whether deployed by State or non-State actors, can nowadays strike deep into national territory, targeting individuals and public infrastructure. While some “incidents”, such as the drone strike in January 2020 against Iranian Major General Qasem Soleimani (see annex) or that against Saudi Arabian oil facilities,¹ generate strong political reactions, the vast majority of targeted killings by drones² are subjected to little public scrutiny, at both the national and international levels. Yet, drone technologies and drone attacks pose fundamental challenges to international legal standards, the prohibition against arbitrary killings, the lawful limitations on permissible use of force and the very institutions established to safeguard peace and security.

2. This is not to suggest that armed drones are mainly, or solely, responsible for a weakening in compliance with applicable international law. Deliberate attacks on civilians and civilian objects such as schools, hospitals and ambulances in Afghanistan, Libya, the Syrian Arab Republic and Yemen, as well as in the Occupied Palestinian Territory, to name but a few places, demonstrate the tragic disregard for the most essential humanitarian principles.³ Yet, while the deliberations of investigative bodies, commissions of inquiry, the General Assembly and the Security Council have led to some condemnation of these breaches of international humanitarian law and the resulting mass violations, by comparison, and despite their significant civilian casualties, the consequences of targeted killings by armed drones have been relatively neglected by States and institutions.

3. A reasonable argument can be made that to single out drones is misguided, given that many targeted killings are carried out by conventional means – e.g., by special operations forces. Indeed, these also raise serious concerns. The present report thus contains findings applicable to all forms of targeted killings, no matter the method employed. Nonetheless, understanding the particularities of armed drone technologies is crucial if we are to keep pace with current and expected developments affecting the right to life.

4. Two previous Special Rapporteurs have focused on the use of drones to carry out targeted killings, setting out the applicable legal obligations under three legal regimes. They lamented the lack of clarity among States about their obligations, the absence of accountability and States’ broad and permissive interpretations of the rules.⁴ In 2013, the then Special Rapporteur on extrajudicial, summary or arbitrary executions warned that the expansive use of armed drones by the first States to acquire them, if not challenged, can do structural damage to the cornerstones of international security and set precedents that undermine the protection of life across the globe in the longer term.⁵

5. Seven years later, the world has entered what has been called the “second drone age”,⁶ a time in which a vast array of State and non-State actors are deploying ever-more advanced

¹ On 14 September 2019, drones flown alongside cruise missiles hit oil processing facilities at Abqaiq and Khurais in eastern Saudi Arabia, which provide 6 per cent of world oil supply. The Houthi movement in Yemen claimed responsibility. Some States deemed the Islamic Republic of Iran responsible. The drones were possibly UAV-Xs. The United Nations panel that inspected them found they were powered by German and Chinese engines.

² Targeted killings are the intentional, premeditated and deliberate use of lethal force, by States or armed non-State actors, in times of peace and in international and non-international armed conflicts, through drones, sniper fire, shooting at close range, missiles, car bombs, poison etc. Although in most circumstances targeted killings violate the right to life, in the exceptional circumstance of armed conflict they may be legal (A/HRC/14/24/Add.6, paras. 7–10).

³ When the vast majority of war casualties are civilians, it is clear that the principles of distinction, proportionality, necessity and precaution are being disregarded on a large scale. See S/2019/373. It has been estimated that 85 per cent of war casualties are civilians.

⁴ A/HRC/26/36 and A/68/382 and Corr.1.

⁵ A/68/382 and Corr.1, para. 16.

⁶ <https://theintercept.com/2019/05/14/turkey-second-drone-age/?comments=1>.

drone technologies,⁷ making their use a major international security issue.⁸ For the first time, in January 2020, a State armed drone targeted a high-level official of a foreign state on the territory of a third one – a significant development and an escalation.

6. It is against this backdrop that the present report seeks to update previous findings.⁹ It interrogates the reasons for drones' proliferation and the legal implications of their promises; questions the legal bases upon which their use is founded and legitimized; and identifies the mechanisms and institutions (or lack thereof) to regulate drones' use and respond to targeted killings. The report shows that drones are a lightning rod for key questions about protection of the right to life in conflicts, asymmetrical warfare, counter-terrorism operations, and so-called peace situations. With their lot of unlawful deaths and arbitrary killings, they are also revealing of the severe failures of national and international institutions mandated to protect human rights, democracy, peace and security.

II. Growing use of armed drones

A. Proliferation by actor, place and country

7. As of 2020, at least 102 countries had acquired an active military drone inventory, and around 40 possess, or are in the process of procuring, armed drones. 35 States are believed to possess the largest and deadliest class.¹⁰ Since 2015, Egypt, Iraq, Iran (Islamic Republic of), Israel, Nigeria, Pakistan, Saudi Arabia, Turkey, the United Arab Emirates, the United Kingdom of Great Britain and Northern Ireland and the United States of America¹¹ have allegedly operated drones, including for the purpose of use of force, such as targeted killings.

8. Since 2015, armed drones have been used against domestic targets on national territories, within and outside non-international armed conflicts. Turkey has reportedly used drones domestically against the Kurdistan Workers' Party (PKK)¹² and in 2016 Nigeria confirmed carrying out an attack against a Boko Haram logistics base.¹³ In 2015, Pakistan allegedly used its armed drones, for the very first time, in an operation to kill three "high-profile terrorists".¹⁴ Iraq similarly purchased drones to carry out strikes against the Islamic State in Iraq and the Levant (ISIL) in Anbar Province in 2016.¹⁵

9. At least 20 armed non-State actors have reportedly obtained armed and unarmed drone systems,¹⁶ including the Libyan National Army, Harakat Tahrir al-Sham, the Palestinian Islamic Jihad, Venezuelan military defectors, PKK, Maute Group, Jalisco New Generation

⁷ www.newamerica.org/international-security/reports/world-drones/who-has-what-countries-with-armed-drones/.

⁸ www.mitpressjournals.org/doi/full/10.1162/ISEC_a_00257#fn31. Military drones are grouped into three categories based on their size and capabilities: class I (small drones); class II (medium-sized drones weighing between 150 kg and 600 kg); and class III (the largest and most lethal drones).

⁹ For their invaluable contributions, the Special Rapporteur thanks Bach Avezdjanov, Carolyn Horn, James Rogers and Sarah Katharina Stein.

¹⁰ www.newamerica.org/international-security/reports/world-drones/who-has-what-countries-with-armed-drones/.

¹¹ Officially, France carried out its first drone strike in December 2019 for kinetic tactical support reasons (www.france24.com/en/20191224-france-says-it-carried-out-first-armed-drone-strike-in-mali). The Russian Federation allegedly conducted strikes in the Syrian Arab Republic while undertaking combat trials of the Orion (<https://nationalinterest.org/blog/buzz/russia%E2%80%99s-predator-drone-flew-strikes-syria-93366>).

¹² www.theguardian.com/news/2019/nov/18/killer-drones-how-many-uav-predator-reaper. See also a video by the Government of Turkey of a 2018 strike: www.youtube.com/watch?v=gQRNI6NDmAQ.

¹³ <https://twitter.com/NigAirForce/status/958004984343343106>. See also videos by the Government of Nigeria of strikes: www.youtube.com/channel/UC2Jf80aJw_wGhA5AzP_9iLg/search?query=drone.

¹⁴ www.defensenews.com/air/2015/09/08/pakistan-surprises-many-with-first-use-of-armed-drone/.

¹⁵ www.popularmechanics.com/military/a21197/the-iraqi-army-is-flying-chinese-made-killer-drones/.

¹⁶ www.newamerica.org/international-security/reports/world-drones/non-state-actors-with-drone-capabilities; https://ploughshares.ca/pl_publications/the-use-of-drones-by-nonstate-actors/; <http://saharareporters.com/2018/11/30/%E2%80%98boko-haram-using-drones-mercenaries-against-nigerian-troops%E2%80%99>.

Cartel, the Houthis and ISIL.¹⁷ Armed groups have used commercially available “off-the-shelf” systems and drones sold by States and developed their own drones.¹⁸ Non-State actors have also deployed drones in multiples of 10. For example, in 2017, in Mosul, Iraq, within a 24-hour period “there were no less than 82 drones of all shapes and sizes” striking at Iraqi, Kurdish, United States and French forces.¹⁹ The Haftar Armed Forces have carried out over 600 drone strikes against opposition targets,²⁰ which has allegedly resulted in massive civilian casualties, including, in August 2019, against migrants in a detention centre.²¹

10. Exports of commercial drone technologies have contributed to the proliferation of drones and reduced their cost. It is expected that more and more countries will develop or acquire armed drones and that, within the next 10 years, over 40 per cent of drones will be armed, with some 90 per cent of these falling in the class III category.²²

B. Expanded capability, function and form

11. The “second drone age” is also characterized by a progressive transformation in the technology itself. Currently, drones remain vulnerable to detection and technical challenges. They tend to be deployed in “low-cost, low-risk conflict engagement and with an objective to minimize the number of boots on the ground”.²³ However, drones are becoming stealthier, speedier, smaller, more lethal and more easily operable by teams located thousands of kilometres away, and are therefore becoming better able to carry out targeted killings both near and far.

12. For instance, class III military drone systems can remain airborne for over 20 hours, fly more than 1,000 km at over 300 km/hour and carry heavy payloads and a sophisticated suite of hardware and software, which means they can pick up huge amounts of data, even private conversations transmitted through mobile telephones and computers.²⁴ Smaller drones with a 100 km-range can travel at 150/225 km/hour and carry a 30 kg warhead with air burst fragmentation explosive capacity. While some drones are piloted from within the theatre of conflict,²⁵ others are operated using near-real-time satellite connection: a team located near the zone of conflict guides the drone through take-off and landing, while sensor operators located thousands of miles away control the drone in flight and instruct strikes.²⁶

C. Problematic logic of drone-proliferation

13. The allure of drone technologies explains their proliferation:

(a) Efficiency. Drones are relatively cheap to produce, easy to deploy and offer economy of effort, meaning that opting for a targeted killing is less financially onerous than alternatives such as locating and detaining/arresting the target;

(b) Adaptability. Drones are truly all-terrain vehicles, deployable in a variety of settings for a range of purposes²⁷ by various actors, and they are amenable to ongoing technological innovations;

¹⁷ www.newamerica.org/international-security/reports/world-drones/non-state-actors-with-drone-capabilities.

¹⁸ www.conflictarm.com/dispatches/evolution-of-uavs-employed-by-houthi-forces-in-yemen/.

¹⁹ thebulletin.org/2019/10/the-dark-side-of-our-drone-future/.

²⁰ www.iiss.org/blogs/analysis/2019/11/mide-uavs-in-libyas-civil-war; S/2019/914.

²¹ <https://news.un.org/en/story/2020/01/1056052>.

²² Cited in www.sdu.dk/cws/-/media/cws/files/cws_military_drones_in_europe_report.pdf, p. 52.

²³ *Ibid.*, p. 48.

²⁴ These include the Reaper, the unarmed Global Hawk, the Heron and the armed Wing Loong II.

²⁵ <http://drones.cnas.org/reports/a-perspective-on-france/>.

²⁶ Arthur Holland Michel and James Rogers, “Drone warfare: distant targets and remote killings”, in *The Palgrave Encyclopedia of Global Security Studies*, Scott Romaniuk, Manish Thapa and Peter Marton, eds. (Palgrave Macmillan, 2020).

²⁷ This includes loitering or “persistent overwatch”, allowing a drone to be held in one geographical location for 14 hours or so and carry out strikes if deemed necessary.

(c) Deniability. As drones can be operated at long range and clandestinely, their use is both easy to deny and more difficult to attribute. Furthermore, drones often look alike, having a similar design, range and lethal capability. The very same make and model may be deployed by States and non-State actors operating in the same geographical area;

(d) Effectiveness. Drones offer an unprecedentedly asymmetrical advantage in favour of their deployer, promising limited damage to nothing but the intended target and posing little-to-no risk of direct damage to the initiator;²⁸

(e) Acceptability. Drone technologies are perceived as largely “bloodless, painless and odourless”²⁹ and thus as the guarantors of a (more) virtuous war by providing “the technical capability and ethical imperative to threaten and, if necessary, actualize violence from a distance with virtually no casualties”;³⁰

(f) Political gain. As a number of drone strikes have demonstrated, a country’s ability to take out big-name targets without suffering any casualties is a political gain for the Government in power, even though it may not see military victory in the longer term.

14. These characteristics, however, individually and collectively, raise troubling moral and human rights questions and, just as importantly, spin dangerous myths.

D. Myth of the surgical strike

15. Military officials and others have argued that drones enable the most surgical of strikes; that drones’ persistent overwatch capabilities offer clear military advantages; that drones’ greater endurance results in detailed situational intelligence; and that heightened accuracy comes with far fewer collateral casualties. But these assertions are not all supported by evidence. Far more casualties are attributable to drone strikes than has been acknowledged.³¹

16. The intelligence-gathering and complex coordination required across teams, agencies and countries, the diffusion of commands over visuals and other factors increase the risk of inaccuracy in use, if not in actual misuse, of drone technology. In practice, the potential for human error and therefore of imparting imperfect instructions to a drone is far higher than is usually acknowledged.³²

17. In so-called personality³³ or signature strikes,³⁴ a major problem exists at the moment of identifying targets. While personality strikes may be based on intelligence gathered by various State agencies regarding specific individuals, signature strikes, immensely problematic, are based on defining characteristics associated with terrorists (e.g., making bombs or carrying weapons) and on metadata such as gender and age.³⁵ Both kinds of strikes rely on often complex networks of informers and analysts and on information that is commonly convoluted and speculative. Mistakes are inevitable.

18. Furthermore, even when a drone (eventually) strikes its intended target, accurately and “successfully”, the evidence shows that frequently many more people die, sometimes because of multiple strikes. Those casualties may well amount to violations of international

²⁸ Arthur Holland Michel and James Rogers, “Drone warfare: distant targets and remote killings”.

²⁹ www.mitpressjournals.org/doi/full/10.1162/ISEC_a_00257#fn28.

³⁰ James Der Derian, *Virtuous War: Mapping the Military-Industrial-Media-Entertainment-Network*, 2nd ed. (Routledge, 2009), pp. 241–244.

³¹ Counting civilian deaths or collateral casualties can suggest that the intended targets were deprived of their lives legitimately. This is not the case, as highlighted below. Nevertheless, the focus here is on the killings of those who were not the targets of drone strikes.

³² Interviews with Lawrence Lewis and James Rogers, March 2020.

³³ It has been alleged that low-level foot soldiers who possess no leadership roles are also targeted.

Interview with Camilla Molyneux and Aditi Gupta, March 2020.

³⁴ Kevin Jon Heller, “‘One hell of a killing machine’: signature strikes and international law”, *Journal of International Criminal Justice*, vol. 11, No. 1 (March 2013), pp. 89–119. The author found that a significant number of United States signature strikes violated international humanitarian law.

³⁵ <https://wilpf.org.uk/wp-content/uploads/2014/12/sex-and-drone-strikes.pdf>.

humanitarian and/or human rights law.³⁶ Civilian deaths and drones' operations also alienate local populations, further reducing their willingness to provide intelligence and generating grievances that can feed further conflict.³⁷

19. Instances of civilian casualties from drone strikes include the following:

(a) Analysis of classified data on United States drone strikes in Afghanistan in 2010–2011 reveals that drone strikes were 10 times more likely to cause civilian casualties than conventional air attacks;³⁸

(b) Research conducted on Yemeni drone strikes from 2009 to 2014 shows that more than 80 per cent of all civilian deaths were caused by drones.³⁹ The data also underscore the human cost of incorrect intelligence. For example, 17 men in Yemen were targeted multiple times; the strikes killed 273 other people and accounted for almost half of all confirmed civilian casualties and 100 per cent of all recorded child deaths;⁴⁰

(c) In Pakistan in 2015, missed strikes targeting 24 men killed 874 other people, including 142 children, accounting for the 35 per cent of all confirmed civilian casualties involving Pakistani drone strikes;⁴¹

(d) Since 2017, civilian casualties have increased in central Yemen, southern Somalia and the Syrian Arab Republic,⁴² including Mosul (allegedly 200 civilians), Aleppo (a mosque)⁴³ and Raqqa (a school). Strikes have allegedly gone wrong in Afghanistan,⁴⁴ while in Somalia they have reportedly contributed to an increase in casualties.⁴⁵

20. Civilian harm caused by armed drone strikes extends far beyond killings, as many more people have been wounded by such strikes.⁴⁶ While the consequences of both armed and non-combat drones remain to be systematically studied, evidence shows that populations living under “drones' persistent stare and noise experience generalized threat and daily terror”.⁴⁷ The strain caused by the constant anticipation of a drone attack⁴⁸ causes significant psychological harm, including post-traumatic stress disorder,⁴⁹ cripples daily activities⁵⁰ and creates largely unaccounted for socioeconomic burdens, particularly on women.⁵¹

21. In armed conflicts, civilian casualties have been reduced through stronger coordination, improved data analysis, better training of drones' operators and systematic evaluation of strikes.⁵² The 2018 protection of civilians strategy and concept of the North

³⁶ <https://civiliansinconflict.org/wp-content/uploads/2020/02/PDF-Report-for-Website.pdf>.

³⁷ Interviews with Camilla Molyneux and Aditi Gupta, April 2020.

³⁸ Interview with Lawrence Lewis, March 2020, who noted that the United States had taken steps to address risk factors in training and in their employment. He asked: “What kinds of issues will we see, and how long will they last, for other militaries now acquiring unmanned capabilities?”

³⁹ www.cna.org/cna_files/pdf/COP-2014-U-008746-Final.pdf, p. 32.

⁴⁰ https://reprieve.org/wp-content/uploads/2014_11_24_PUB-You-Never-Die-Twice-Multiple-Kills-in-the-US-Drone-Program-1.pdf.

⁴¹ *Ibid.*

⁴² <https://airwars.org/news-and-investigations/shadow-american-war-syria/>.

⁴³ <https://airwars.org/news-and-investigations/unilateral-strike/>.

⁴⁴ www.amnesty.org/en/latest/news/2019/09/afghanistan-shocking-disregard-for-civilians-as-us-drone-strike-adds-to-death-toll/.

⁴⁵ www.amnesty.org/en/latest/news/2019/09/us-military-shows-appalling-disregard-for-civilians-killed-in-somalia-air-strike/.

⁴⁶ <http://www.christopherjferguson.com/Drones.pdf>.

⁴⁷ Ioannis Kalpouzos, “Armed drone”, in *International Law's Objects*, Jessie Hohmann and Daniel Joyce, eds. (Oxford University Press, 2018).

⁴⁸ www.cdn.law.stanford.edu/wp-content/uploads/2015/07/Stanford-NYU-Living-Under-Drones.pdf; www.christopherjferguson.com/Drones.pdf.

⁴⁹ www.christopherjferguson.com/Drones.pdf.

⁵⁰ www.files.ethz.ch/isn/196761/Drone%20Chic%20Briefing%20April%202016.pdf; www.theatlantic.com/international/archive/2013/04/living-in-terror-under-a-drone-filled-sky-in-yemen/275373.

⁵¹ Caroline Kennedy-Pipe, Gordon Clubb and Simon Mabon, eds., *Terrorism and Political Violence* (Sage Publications, 2016).

⁵² <https://aoav.org.uk/2020/protecting-medical-care-in-conflict-a-solvable-problem/>.

Atlantic Treaty Organization, for example, established civil-military coordination teams responsible for recording and investigating allegations. Efforts to mitigate civilian harm integrate civilian protection at all points in the planning and use of military force. Systematic review of incidents that have caused civilian deaths also help to avoid operational deficiencies.⁵³ The Special Rapporteur strongly encourages such measures, which should include robust investigations into possible violations of international law.⁵⁴

E. Absence of transparency and accountability

22. Echoing the findings of the previous Special Rapporteur,⁵⁵ the evidence continues to suggest that drone operations are also characterized by violations of the international obligation to investigate⁵⁶ and to punish, where applicable, those responsible for violations of international humanitarian or human rights law. There is little public disclosure,⁵⁷ as targeted killings by drones are wrapped in secrecy extending to the investigation of civilian deaths.

23. Without on-the-ground, post-strike assessments, authorities rely on pre- and post-strike drone-video feeds to detect civilian casualties, leaving potentially significant numbers of civilian casualties, including those misidentified as “enemies”, undiscovered. Studies have shown that, in Iraq and the Syrian Arab Republic, initial military estimates missed 57 per cent of casualties.⁵⁸ While civilians should play a central role in reporting and accountability mechanisms, regrettably there seems to be no reporting mechanism for families affected by drone strikes. Yet, civil society and the media have proven invaluable, including to military authorities, in providing accurate counts of civilian casualties, which is also essential for a fuller picture of the impact of operations.⁵⁹ Ultimately, however, the lack of transparency and accountability about the extent of armed drones’ operations and the consequent civilian casualties is the result of State policies and legal loopholes.⁶⁰

24. Drones sit at the intersection of several oversight regimes but, being intelligence assets, they somehow fall between them. With little or no risk to those directing or operating drones, including of legal accountability, “the typical decision-making barriers to the use of force become eroded ... because they do not attract ‘the public scrutiny that a troop deployment invites’”, as then United States President Barack Obama conceded in May 2013.⁶¹ In general, at the domestic level, there seem to be many loopholes to avoid scrutiny, especially because the matter can fall within the remit of many agencies and, at the same time, under the responsibility of none.⁶²

25. Few countries have subjected drones to parliamentary oversight. In general, a country’s lethal use of drones is not subject to prior approval by parliament,⁶³ even though, under a first strike doctrine, their use may trigger an international armed conflict.

⁵³ www.cna.org/cna_files/pdf/COP-2014-U-008746-Final.pdf.

⁵⁴ www.geneva-academy.ch/joomlatools-files/docman-files/Guidelines%20on%20Investigating%20Violations%20of%20IHL.pdf.

⁵⁵ A/68/382 and Corr.1.

⁵⁶ The African Commission requested the Niger to launch its own investigation into French and United States drone strikes on its soil.

⁵⁷ <https://civiliansinconflict.org/wp-content/uploads/2020/02/PDF-Report-for-Website.pdf>.

⁵⁸ Interview with Lawrence Lewis, March 2020.

⁵⁹ <https://civiliansinconflict.org/wp-content/uploads/2020/02/PDF-Report-for-Website.pdf>.

⁶⁰ See, for example, www.whitehouse.gov/presidential-actions/executive-order-revocation-reporting-requirement.

⁶¹ Michael C. Horowitz, Sarah E. Kreps and Matthew Fuhrmann, “Separating fact from fiction in the debate over drone proliferation”, *International Security*, vol. 41, No. 2 (Fall 2016); www.usnews.com/news/articles/2013/05/23/obama-administration-saw-drone-strikes-as-cure-all-for-terrorism.

⁶² www.opensocietyfoundations.org/publications/armed-drones-in-europe; Jameel Jaffer, *The Drone Memos: Targeted Killing, Secrecy, and the Law* (The New Press, 2015); interview with Aditi Gupta and Camilla Molyneux, March 2020.

⁶³ For an in-depth analysis of the situation in Europe, see www.opensocietyfoundations.org/publications/armed-drones-in-europe.

26. The use of drones for the purpose of killing extraterritorially raises questions of morality, jurisdiction and accountability. With regard to the former, the International Court of Justice⁶⁴ and the European Court of Human Rights,⁶⁵ among others, have established that human rights treaty obligations can apply in principle to the conduct of a State outside its territory.⁶⁶ The Human Rights Committee has established that a State party has an obligation to respect and to ensure the right to life of all persons whose right to life has been affected by its military or other activities in a direct and reasonably foreseeable manner.⁶⁷ That scenario applies to drone strikes and their targets, who should be considered to fall within the jurisdiction of the State operating the drone.

27. Judicial practice is not, however, yet in synch with these normative arguments. Thus far, courts have refused to oversee the use of drones to carry out targeted killings extraterritorially, arguing that such matters are political or relate to international relations between States and are therefore non-justiciable.⁶⁸ A blanket denial of justiciability over the extraterritorial use of lethal force cannot be reconciled with recognized principles of international law, treaties, conventions and protocols, and violates the rights to life and to a remedy.

28. There are notable and recent exceptions to this state of affairs, which may augur a stronger legal response to the use of drones in acts of force. A watershed ruling is that of Rhine-Westphalia Higher Administrative Court on the legal responsibilities of Germany as the host of United States drone operations originating at Ramstein air base. As at the time of writing the present report, the implication of the ruling in terms of precedent-setting is uncertain, but its findings are crucial:

(a) Germany has jurisdiction over a drone strike conducted by the United States by virtue of the assistance it provides and the central role it plays in United States strikes. In other words, Germany has a duty to protect the right to life of those targeted;

(b) There is no basis in international law for preventive self-defence;

(c) Germany should make greater efforts to ensure respect for international law in United States military operations involving German territory (Ramstein airbase);

(d) United States assurances regarding the legality of activities undertaken through Ramstein airbase are insufficient;

(e) The provision of assistance to unlawful United States strikes is a matter of law, not politics, and thus cannot be justified through foreign policy alone.

29. Protecting lives – the highest State responsibility – lies at the heart of a State's authority to use force. Given the gravity of the acts and their consequences, effective parliamentary and judicial mechanisms to oversee, review and/or approve a State's use of lethal force, domestically and extraterritorially, should be established and enabled to keep pace with technological and weapons developments. Triggers for that oversight, and its scope, must evolve accordingly, including specifically where the line between combat and non-combat operations is blurred.

⁶⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, at para. 109.

⁶⁵ *Al-Skeini and others v. the United Kingdom*, application No. 55721/07, Grand Chamber judgment of 7 July 2011, paras. 106–186; *Loizidou v. Turkey*, application No. 15318/89, judgment of 23 March 1995; *Ilaşcu v. Moldova and Russia*, application No. 48787/99, judgment of 8 July 2004, para. 392; *Al-Jedda v. the United Kingdom*, application No. 27021/08, Grand Chamber judgment of 7 July 2011.

⁶⁶ A/68/382 and Corr.1, para. 45.

⁶⁷ Human Rights Committee, general comment No. 36 (2018) on the right to life, para. 63.

⁶⁸ See, for example, *United Kingdom Court of Appeal, Noor Khan v. the Secretary of State for Foreign and Commonwealth Affairs*, judgment of 20 January 2014.

III. Targeted killings using drones and international law

30. As argued by a previous Special Rapporteur,⁶⁹ to be lawful, a drone strike must satisfy the legal requirements under all applicable international legal regimes: the law regulating inter-State use of force (*jus ad bellum*), international humanitarian law and international human rights law.

31. On its own, *jus ad bellum* is not sufficient to guide the use of force extraterritorially. While *jus ad bellum* is a question between States under the Charter of the United Nations, other obligations are owed to individuals. Accordingly, even the legality of a strike under Article 51 of the Charter does not preclude its wrongfulness under international humanitarian or human rights law. As the International Law Commission has stated: “As to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct.”⁷⁰

32. While previous Special Rapporteurs have applied this approach to situations of peace and non-international armed conflict, current events oblige the present Special Rapporteur to consider these legal questions in reference to international armed conflicts and to how the complementarity between international humanitarian law and international human rights law is made operational.

A. Protection against arbitrary killings

33. The right to protection from arbitrary deprivation of life is a rule of customary international law, a general principle of international law and a rule of *jus cogens*. It is recognized in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and regional conventions.⁷¹

34. The complementarity of international humanitarian and human rights law has been highlighted by States, international bodies and courts.⁷² The well-established principle that international human rights law continues to apply during war and public emergencies⁷³ has been confirmed in international jurisprudence⁷⁴ and human rights treaties, including their derogations.⁷⁵

35. That said, the legal assessment of targeted killings may result in different outcomes depending on the regime considered. As a general principle, under international human rights law, the intentional, premeditated killing of an individual is unlawful unless it is carried out as a means of last resort and is strictly necessary to protect against an imminent threat to life. For a deliberate killing to be lawful under international humanitarian law, however, the target must be a legitimate target (i.e., a combatant or a civilian directly participating in hostilities) and the killing must be guided by the principles of distinction, proportionality and precaution.

⁶⁹ A/68/382 and Corr.1.

⁷⁰ Draft articles on responsibility of States for internationally wrongful acts, *Yearbook of the International Law Commission 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, at p. 74.

⁷¹ A/68/382 and Corr.1, para. 30.

⁷² See, e.g., International Conference on Human Rights resolution XXIII, on human rights in armed conflicts (A/Conf.32/41); General Assembly resolution 2444 (XXIII) and Security Council resolutions 237 (1967), 1649 (2005) and 1882 (2009); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, p. 136; Inter-American Court of Human Rights, *Serrano-Cruz Sisters v. El Salvador*, Preliminary Objections, 23 November 2004; Marko Milanović, “Norm conflicts, international humanitarian law and human rights law”, in *International Humanitarian Law and International Human Rights Law*, Orna Ben-Naftali, ed. (Oxford University Press, 2011).

⁷³ www.justsecurity.org/34631/human-rights-armed-conflict-part/; www.justsecurity.org/34815/human-rights-armed-conflict-part-ii/; Adil Ahmad Haque, *Law and Morality at War* (Oxford University Press, 2017).

⁷⁴ See, for example, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226.

⁷⁵ Milanović, “Norm conflicts, international humanitarian law and human rights law”.

36. States parties engaged in acts of aggression, as defined in international law, resulting in deprivation of life, violate, ipso facto, article 6 of the International Covenant on Civil and Political Rights,⁷⁶ whether or not they also violate international humanitarian law. States parties that fail to take all reasonable measures to settle their international disputes by peaceful means may fall short of compliance with their positive obligation to ensure the right to life,⁷⁷ a link not established by or under international humanitarian law.

37. These differences have, for years, been the subject of debates largely dominated by arguments over the *lex specialis* doctrine, which proclaims that the body of law created for a particular situation should govern that situation, taking primacy over other legal regimes. The application of *lex specialis* to the relationship between international humanitarian law and international human rights law dates back to 1996.⁷⁸ It recognizes that the protection offered by international human rights law does not cease in times of war, except under derogations, but the definition of what is considered to be arbitrary corresponds, according to the International Court of Justice, to “the applicable *lex specialis*, namely, the law applicable in armed conflict”.⁷⁹ Under this approach, if the application of international humanitarian and human rights law lead to different outcomes, the lawfulness of a killing would be assessed according to humanitarian law standards and tests.⁸⁰

38. The doctrine’s conceptual clarity is illusory, however. First, the notion of a *lex specialis* that displaces or modifies more general bodies of law is not supported by the rules governing the relationship between different legal regimes in international or domestic law. Second, there is little State practice or *opinion juris* supporting the theory. Until 1996, there was no suggestion of a rigid classical division between the law of war and the law of peace, nor any kind of overarching principle whereby special law overrode general law.⁸¹ After 1996, the International Court of Justice itself changed direction. In its judgment on *Democratic Republic of the Congo v. Uganda*, it made no reference to *lex specialis*, determining instead that “both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration”.⁸²

39. Finally, *lex specialis* would be of limited use when applied to targeted killings carried out by drones operating in the territory of third States. The International Committee of the Red Cross (ICRC) holds that international humanitarian law does not permit the targeting of persons directly participating in hostilities who are located in non-belligerent States because otherwise the whole world would potentially be a battlefield.⁸³ That position has been endorsed by others.⁸⁴

40. The Special Rapporteur believes that situations resulting in differentiated assessments are few and far between. Care must be taken not to create fictional conflicts in order to address legal distortions established by some States. To the extent that uncertainty exists, however, certain steps can be taken to bring clarity.

41. The first priority is to determine whether, on the basis of a strict and objective reading of the elements constituting armed conflict, a situation amounts to an international or a non-

⁷⁶ Human Rights Committee, general comment No. 36, para. 64.

⁷⁷ *Ibid.*, para. 70.

⁷⁸ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226. See also Marko Milanović, “The lost origins of *lex specialis*”, in *Theoretical Boundaries of Armed Conflict and Human Rights*, Jen David Ohlin, ed. (Cambridge University Press, 2014).

⁷⁹ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 240, para. 25.

⁸⁰ This opinion was postulated by the Russian Federation in its written statement and comments of 19 June 1995 on the issue of the legality of the threat or use of nuclear weapons and by the United States in its written statement of 20 June 1995.

⁸¹ Milanović, “The lost origins of *lex specialis*”.

⁸² *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, p. 168, at p. 242, para. 216.

⁸³ A/HRC/25/59; A/68/389; www.icrc.org/eng/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm; [https://cms.webbeat.net/ContentSuite/upload/cav/doc/Main_conclusions_of_CAVV_advice_on_armed_drones\(1\).pdf](https://cms.webbeat.net/ContentSuite/upload/cav/doc/Main_conclusions_of_CAVV_advice_on_armed_drones(1).pdf).

⁸⁴ A/HRC/25/59; A/68/389; [https://cms.webbeat.net/ContentSuite/upload/cav/doc/Main_conclusions_of_CAVV_advice_on_armed_drones\(1\).pdf](https://cms.webbeat.net/ContentSuite/upload/cav/doc/Main_conclusions_of_CAVV_advice_on_armed_drones(1).pdf).

international armed conflict. Four scenarios relating to targeted killings using drones may be identified:

(a) The first scenario involves a drone strike in neither an international or non-international armed conflict. Such a strike must be assessed under international human rights law, taking into account the larger context, whether derogations have been activated (as highlighted in relevant jurisprudence)⁸⁵ and the specifics of the situation;

(b) Under the second scenario, the drone strike occurs in an international or non-international armed conflict in the midst of, or alongside, active and open hostilities involving exchange of fire, conventional air strikes and other military operations;

(c) Under the third scenario, although a country or region may be affected by an international or non-international armed conflict, the drone strikes far away from any battlefield, striking instead in areas where, or at a time when, there is no military activity, presence, control or engagement. This is a pertinent scenario:⁸⁶ many contemporary conflicts involve sporadic, unpredictable front lines that often leave large areas of a country or region entirely or almost free of exposure to active or ongoing exchange of enemy fire;

(d) Under the fourth scenario, the drone strike is a first strike that potentially triggers an international armed conflict. No other elements or acts constitutive of a conflict exist before, concurrently with or even after the strike.

42. In the first scenario, the applicable body of law is clear. By comparison, the outcomes of an assessment of the lawfulness of targeted killings in the last three scenarios⁸⁷ and, in particular the last two, may vary.

43. One approach is to apply the legal regime that is the most protective of victims,⁸⁸ or that which privileges individual rights over State rights.⁸⁹ In these instances, however, international humanitarian law would always be displaced in favour of international human rights law.

44. Under another approach – the systemic integration approach,⁹⁰ which is derived from article 31 (3) (c) of the Vienna Convention on the Law of Treaties and has been applied by the International Court of Justice⁹¹ – the different rules of international law would be used to assess the situation and/or support a purposive interpretation of Convention-based rights.⁹² This approach is in keeping with the derogation clauses of the International Covenant on Civil and Political Rights and regional instruments, applicable in the exceptional circumstances of emergency or war.⁹³ It is backed up by contemporary jurisprudence.⁹⁴ In the aforementioned scenarios, a systemic integration approach would not consider humanitarian

⁸⁵ European Court of Human Rights, *Al-Saadoon and Mufdhi v. the United Kingdom*, application No. 61498/08, judgment of 2 March 2010; *McCann and Others v. the United Kingdom*, application No. 18984/91, judgment of 27 September 1995.

⁸⁶ This is the position defended by the Special Rapporteur in a previous report on armed non-State actors.

⁸⁷ In the second scenario above, international human rights law continues to apply, but in the Special Rapporteur's views, as elaborated below, the immediate context and situation demand that the lawfulness of armed drone strikes be assessed for compliance with international humanitarian law principles, particularly those protecting civilians from deliberate or disproportionate attacks.

⁸⁸ Alonso Gurmendi Dunkelberg, "There and back again: the inter-American human rights system's approach to international humanitarian law" (8 March 2017); Inter-American Court of Human Rights, *Las Palmeras v. Colombia*, judgment of 6 December 2001.

⁸⁹ <http://opiniojuris.org/2020/01/13/the-soleimani-case-and-the-last-nail-in-the-lex-specialis-coffin/>.

⁹⁰ www.tandfonline.com/doi/abs/10.1080/18918131.2017.1353213?journalCode=rnh20.

⁹¹ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, *I.C.J. Reports 2003*, p. 161.

⁹² Milanović, "The lost origins of lex specialis".

⁹³ A/HRC/37/52. Derogations must be well calibrated, exceptional and temporary.

⁹⁴ See, for example, Inter-American Commission on Human Rights, *Juan Carlos Abella v. Argentina*, 1997; Inter-American Court of Human Rights, *Santo Domingo Massacre v. Colombia*, judgment of 30 November 2012, pp. 211–236; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *I.C.J. Reports 2005*, p. 168, at p. 242, para. 216.

law alone but would consider human rights treaties obligations, the territoriality and scope of contemporaneous military actions and State behaviour overall.⁹⁵

45. An example of the systemic integration approach is found in the judgment of the Supreme Court of Israel in *Public Committee against Torture in Israel v. Government of Israel*:

A civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. In our domestic law, that rule is called for by the principle of proportionality. Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed.

46. In that case, the Court called for a case-by-case analysis, recognizing that, while that may not always be realizable, it is a possibility that should always be considered.

47. The African Commission on Human and Peoples' Rights adds: "Where military necessity does not require parties to an armed conflict to use lethal force in achieving a legitimate military objective against otherwise lawful targets, but allows the target for example to be captured rather than killed, the respect for the right to life can be best ensured by pursuing this option".⁹⁶

48. In a slight variation, ICRC (controversially) emphasizes moral imperatives rather than just situational necessities when it states that to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force would defy basic notions of humanity.⁹⁷

49. Two reasonings may thus be adopted when assessing the legality of targeted killings under the above-mentioned ambiguous scenarios. Both are predicated on some degree of fluidity, required by the overall context and the specific situations:

(a) The first is that one body of law can provide interpretive reference to the other. The lawfulness of a targeted killing under humanitarian law should be assessed with reference to human rights principles, which means that whether the target was a combatant or a civilian engaged in hostilities may not be considered determinative;⁹⁸

(b) The second approach would be to assess the situation or action under both legal regimes and then determine if some of the additional constraints inherent to the human rights regime should be applied because the context allows or mandates it.

50. It is the Special Rapporteur's opinion that such contextual and situational analyses are inherent to all effective assessments of the use of force,⁹⁹ including in the scenarios presented above. For compliance with international human rights law, this means assessing necessity, proportionality and precaution through a situational analysis that takes into account the

⁹⁵ As highlighted by Dapo Akande in 2019, "there are occasions when subsequent practice can legitimately be used to interpret the Charter ... One can think of the interpretation of the concept of threat to the peace to include internal matters or humanitarian challenges. This has opened the door to the Council authorising force on numerous occasions now for the purpose of protection of civilians or in internal situations." (www.ejiltalk.org/the-diversity-of-rules-on-the-use-of-force-implications-for-the-evolution-of-the-law/).

⁹⁶ General comment No. 3 on the African Charter on Human and Peoples' Rights: the Right to Life (art. 4), para. 34.

⁹⁷ www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf; <https://harvardnsj.org/2013/06/are-we-reaching-a-tipping-point-how-contemporary-challenges-are-affecting-the-military-necessity-humanity-balance/>.

⁹⁸ This approach is not without its risks, such as the two bodies of law being used interchangeably, or humanitarian law concepts being used in a manner that compromises the integrity of the human rights regime as a whole. <https://harvardnsj.org/wp-content/uploads/sites/13/2014/01/Modirzadeh-Final.pdf>; William Schabas, "Lex specialis? Belt and suspenders? The parallel operation of human rights law and the law of armed conflict, and the conundrum of *jus ad bellum*", *Israel Law Review*, vol. 40, No. 2 (2007), pp. 592–613; Milanović, "Norm conflicts, international humanitarian law and human rights law".

⁹⁹ See, for example, www.ohchr.org/Documents/Issues/Executions/HumanRightsDispatch1.pdf.

location, circumstances, possibilities of armed resistance and planning involved.¹⁰⁰ It also means that the lethal use of force cannot be justified or allowed when it is not necessary, is likely to cause disproportionate harm or could reasonably have been avoided by feasible precautionary measures.¹⁰¹

B. Law of self-defence

51. In accordance with the Charter of the United Nations, all Member States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State (Art. 2 (4)). There are just three exceptions narrowly constructed so as fully protect the prohibition of the use of force:¹⁰² (a) authorization by the Security Council; (b) State consent to an attack on its own territory; and (c) self-defence against an armed attack.¹⁰³

52. International jurisprudence and State practices have largely suggested that self-defence could only be invoked against an existing threat. However, the notion that a narrowly construed pre-emptive act of self-defence taken to prevent an imminent attack is legal under Article 51 of the Charter has been somewhat accepted,¹⁰⁴ as long as the threat is “instant, overwhelming and leaving no choice of means, no moment of deliberation”.¹⁰⁵

53. Yet, in the context of the so-called “war on terror”, over the past two decades a small number of influential States have sought to expand that understanding despite the large body of opinions and State practices opposing it.¹⁰⁶ It is the view of the Special Rapporteur that these recent minority interpretations create troubling legal distortions.

54. First, they create a distortion of time. Under the expansionist interpretation, pre-emptive acts of self-defence may be invoked against perceived security threats,¹⁰⁷ including by non-State actors whose plans for attack may not yet be fully known.¹⁰⁸ Under this interpretation,¹⁰⁹ imminence becomes no longer just a temporal criterion.¹¹⁰ Rather, an attack can be deemed imminent if it is believed that a further delay in response would prevent the State under threat to defend itself.¹¹¹ Imminence is thus read into the principle of necessity.

55. Second, they create a distortion of geography. Under this interpretation, once a State has “lawfully resorted to force in self-defence against a particular actor in response to an actual or imminent armed attack by that group”, it is not necessary to reassess imminence in future attacks.¹¹² A State is authorized to use force against particular non-State groups with

¹⁰⁰ www.unodc.org/documents/justice-and-prison-reform/17-03483_ebook.pdf.

¹⁰¹ Nils Melzer, *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare* (European Parliament, 2013), p. 30.

¹⁰² www.washingtonpost.com/outlook/2019/10/22/turkey-is-violating-international-law-it-took-lessons-us/.

¹⁰³ The Charter did not, however, define an armed attack; the matter was interpreted according to *opinio juris* confirmed by corresponding State practice.

¹⁰⁴ A/59/565 and Corr.1, paras. 188–192; A/59/2005 and Corr.1, para. 124.

¹⁰⁵ R.Y. Jennings, “The *Caroline* and *McLeod* cases”, *American Journal of International Law*, vol. 32, No. 1 (January 1938).

¹⁰⁶ A/68/382 and Corr.1, para. 87.

¹⁰⁷ It was however condemned by the United Nations (A/59/565 and Corr.1).

¹⁰⁸ Daniel Bethlehem recommends that an assessment of imminence include the nature and immediacy of the threat, the probability of an attack, information on a pattern of continuing armed activity, the scale of the attack (e.g. likely injury) and the likelihood of other opportunities to undertake effective action in self-defence that would cause less serious collateral injury, loss or damage. If there is a reasonable and objective basis for concluding that an attack is imminent, time, place and manner will not preclude the right to self-defence. See <https://legal.un.org/counsel/Bethlehem%20-%20Self-Defense%20Article.pdf>.

¹⁰⁹ www.justsecurity.org/wp-content/uploads/2017/01/United-Kingdom-Attorney-General-Speech-modern-law-of-self-defence-ISS.pdf.

¹¹⁰ <https://legal.un.org/counsel/Bethlehem%20-%20Self-Defense%20Article.pdf>.

¹¹¹ www.chathamhouse.org/publications/papers/view/108106.

¹¹² https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.

whom the State has declared itself at war, anywhere, including on the territory of States hosting them, if the latter are unable or unwilling to deal with their threats.¹¹³

56. Sometimes labelled a “global non-international armed conflict”,¹¹⁴ this dimension of the expansionist doctrine has been vigorously rejected by ICRC and others, who argue that a case-by-case approach to the classification of various violent situations, including in relation to counter-terrorism, must be applied. Some situations may be classified as international armed conflicts, others non-international armed conflicts, others internationalized non-international armed conflicts, while various acts of terrorism may occur outside of any armed conflict.

57. This geographical distortion also fails to uphold the distinction between the legal regimes of *jus ad bellum* and *jus ad bello*: whether the right to self-defence is legitimately claimed against an (imminent) armed attack has no implications on a strike’s lawfulness under humanitarian law.

58. Thirdly, they distort the principle of sovereignty. The expansionist interpretation seeks to permit States to engage in non-consensual military operations in the territory of another State against armed groups that pose a direct and immediate threat of attack to them if the host State is unable or unwilling to neutralize the threat posed by them.

59. This doctrine contradicts the prevalent understanding of sovereignty, according to which self-defence against an armed group in the territory of another State can be justified only where the actions of the group are imputable to the host State.¹¹⁵ Absent that, the extraterritorial use of force is an unlawful violation of sovereignty¹¹⁶ and thus potentially an act of aggression, unless it takes place with the host State’s consent or the prior authorization of the Security Council.

C. What expansionist efforts signify

60. As far as drone strikes are concerned, resort to these legal distortions had been limited to countering the threats of non-State actors. The targeted killing of General Soleimani and of his companions on 3 January 2020 is the first known incident in which a State invoked self-defence as a justification for an attack against a State actor, in the territory of another State, thus implicating the prohibition of the use of force set out in Article 2 (4) of the Charter.

61. Some key findings arising from an analysis of the targeted killing of General Soleimani (see annex) include:

(a) In this instance, the use of force by the United States was directed not only at the Islamic Republic of Iran but also at Iraq. By killing General Soleimani on Iraqi soil, without first obtaining that State’s consent, the United States violated the territorial integrity of Iraq;¹¹⁷

(b) The justifications advanced by the United States (and then later by the Islamic Republic of Iran in defence of the actions taken on 8 January 2020) include no evidence that threats were imminent (United States); indeed, no reference to imminent threats were made (Islamic Republic of Iran). Both States focus instead on past incidents. To the extent that any evidence points to the United States and Iranian strikes having been acts of retaliation or reprisal, each would be unlawful under *jus ad bellum*;

Pdf. See also S/2019/804 and www.ejiltalk.org/a-collective-failure-to-prevent-turkeys-operation-peace-spring-and-natos-silence-on-international-law/.

¹¹³ www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf, pp. 9–11.

¹¹⁴ www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy.

¹¹⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, p. 168.

¹¹⁶ International Law Association, “Sydney Conference (2018): final report on aggression and the use of force”, p. 16.

¹¹⁷ *Ibid.*

(c) The justifications have also the effect of weakening the distinction between *jus ad bellum* and *jus in bello*. Were the blurring of these lines to be allowed, States could support the legality of their acts by cherry-picking justifications from different legal spheres. A clear distinction between *jus ad bellum* and *jus in bello* must be maintained to secure the safeguards of each and their complementary;

(d) The application of a “first shot” theory to the targeted killing of a State actor translates into the real possibility that all soldiers, anywhere in the world, could constitute a legitimate target.

62. The full implications of the targeted killing of a State actor using a drone for future conduct are unknown. What is known is that the legal distortions of the past 20 years, coupled with the technological prowess of the “second drone age”, have enabled a substantial increase in the use of force: low-intensity conflicts take place with few if any geographical or temporal boundaries.¹¹⁸ The targeted killing of a State actor in a third State has brought “the signature technique of the so-called ‘war on terror’ into the context of inter-State relations”¹¹⁹ and highlighted the real risks that the expansion of the “war on terror” doctrine¹²⁰ poses to international peace.¹²¹

63. The international community must now confront the very real prospect that States may opt strategically to eliminate high-ranking military officials in the absence of an obvious war and seek to justify such killings on the grounds that the target was a “terrorist” who posed a potential future threat.

64. In other words, the targeted killing of General Soleimani, coming in the wake of 20 years of distortions of international law and repeated massive violations of humanitarian law,¹²² is not just a slippery slope. It is a cliff.¹²³

IV. International scrutiny and oversight

65. Notwithstanding the legal gymnastics that a number of States must perform as they attempt to justify targeted killings using drones, many such killings qualify either as arbitrary under article 6 of the International Covenant on Civil and Political Rights or as violations of *jus ad bellum*. Some killings, along with their so-called “collateral” casualties, may also violate international humanitarian law. However, the lack of investigations into these incidents keeps them sealed off from truth and accountability.

66. At the international level, where should these matters be reviewed, in a consequential way and in a manner that encourages States to take the outcomes of such reviews seriously? Unfortunately, to date, international oversight mechanisms have not been able to address this situation with the gravity it deserves. In an extensive 2017 study, the United Nations Institute for Disarmament Research, for example, found that there was a pressing need to address the lack of transparency, oversight and accountability for the use of armed drones.¹²⁴

67. Given that finding and keeping in mind the importance of Article 51 of the Charter for global peace and security, the principal mission of the United Nations, it seems reasonable to suggest that States who invoke Article 51 to justify targeted killings by drones or other tools owe the international community a thorough justification, not a cursory report. Such

¹¹⁸ Christof Heyns and others, “The international law framework regulating the use of armed drones”, *International and Comparative Law Quarterly*, vol. 65, No. 4 (October 2016), pp. 791–827.

¹¹⁹ www.justsecurity.org/67937/soleimani-strike-marks-a-novel-shift-in-targeted-killing-dangerous-to-the-global-order/.

¹²⁰ See, for example, A/73/361.

¹²¹ The use of armed force by a State against the sovereignty, territorial integrity or political independence of another State may constitute an act of aggression. As of 2018, the International Criminal Court has had jurisdiction over the crime of aggression.

¹²² See, for example, www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=25520&LangID=E; A/HRC/43/57.

¹²³ To paraphrase Marko Milanović (interview, March 2020).

¹²⁴ www.unidir.org/files/publications/pdfs/increasing-transparency-oversight-and-accountability-of-armed-unmanned-aerial-vehicles-en-692.pdf.

justifications should include “evidence of the imminence of an external threat and the proportionality of measures to be taken in response. Excessively expansive and unchecked interpretations of Article 51 are a threat to the international rules-based order and an obstacle to the promotion of international peace and security.”¹²⁵

68. Yet, States have provided little by way of evidence for the imminence of the threats against which they have invoked claims of pre-emptive self-defence and targeted killings. The poor quality of the Article 51 submissions is compounded by the fact that States are not informed of their submissions as a matter of routine. An extensive study of Article 51 submissions by the Harvard Law School Program on International Law and Armed Conflict has shown that “Member States are apparently not made aware of such statements on the use of force as a matter of routine practice”.¹²⁶ This is cause for significant concern, for it also means that the silence with which States most often meet Article 51 submissions may not be deliberate or even conscious.¹²⁷

69. The Security Council itself has offered little response to Article 51 claims. Academic analysis shows that the Council’s “most common reaction by far” to self-defence submissions is no formal response at all. From 1945 to 2018, “the Security Council responded formally – at least in the sense of a provision in an act of the Council or in a presidential statement – to only about one-tenth of the identified self-defence communications”.¹²⁸ In those instances, the Council more often couched its reaction in political, rather than legal, terms, expressing concern but failing to offer a legal evaluation or recommend accountability and corrective action. Despite the many occasions on which the integrity of the Charter, the sovereignty of a third State and the right to life have been violated, in only one instance did the Council question the legality of an extraterritorial targeted killing.¹²⁹ The absence of formal engagement may result from the significant increase in the use of veto by permanent members of the Council, particularly over sensitive issues such as the use of force and targeted killings.

A. States and the sound of silence

70. Member States too fail to respond publicly to cases involving pre-emptive self-defence, including when drones are used. For instance, even in the face of the vast numbers of strikes on the Syrian Arab Republic by coalition forces between 2014 and 2017, while “several States have reacted ... some with ‘legal vocabulary’, others using rather evasive language ..., most States have remained silent.”¹³⁰

71. Does the silence of States and other international actors represent acquiescence, as some scholars have suggested?¹³¹ The short answer is no,¹³² but the reasons for saying so are

¹²⁵ Liechtenstein (S/PV.8699, p. 37).

¹²⁶ Dustin A. Lewis, Naz K. Modirzadeh and Gabriella Blum, *Quantum of Silence: Inaction and Jus ad Bellum* (Harvard Law School Program on International Law and Armed Conflict, 2019).

¹²⁷ Several mechanisms have been devised over time to ensure that that State and Security Council submissions on Article 51 (among others) are put together and shared. The preparation of many of the reports, however, is delayed by several years, making them of limited policy value, although this is not to reject the other contributions of such mechanisms.

¹²⁸ Lewis, Modirzadeh and Blum, *Quantum of Silence*.

¹²⁹ Security Council resolution 573 (1985).

¹³⁰ Paulina Starski, “Silence within the process of normative change and evolution of the prohibition on the use of force: normative volatility and legislative responsibility”, *Journal on the Use of Force and International Law*, vol. 4, No. 1 (2017), p. 48.

¹³¹ These views are presented and analysed in Lewis, Modirzadeh and Blum, *Quantum of Silence*, pp. 70–79.

¹³² As stated on 13 January 2020 by the Permanent Representative of Austria to the United Nations (www.bmeia.gv.at/oev-new-york/news/statements-and-speeches/alle-statements/2020/01/sc-open-debatemaintenance-of-international-peace-and-security-upholding-the-un-charter/):

We note with concern the increasing number of cases where armed force is applied unilaterally, invoking the inherent right of self-defence pursuant to Article 51 of the Charter. These cases and the fact that other UN Member States do not publicly express their legal views on each and every case may not be interpreted as a new State practice or *opinio juris*

worth elaborating upon. In essence, the question concerns the origin and character of the right to self-defence, which is a narrow exception to the *jus cogens* prohibition against use of force in international relations. Discerning the implications of State silence in this area is complex, not least because silence can convey vastly different meanings in different circumstances. It can signify tacit agreement or imply objection. It may convey an absence of any view at all, or simply a lack of interest. It may also indicate fear or reluctance.

72. The legal starting point is that a norm of *jus cogens* can be modified only by another *jus cogens* norm.¹³³ However, the notion that State silence can modify the content of a peremptory norm, including its auxiliary provisions (such as recognized exceptions to the norms), must be considered with the most extreme caution.¹³⁴ Claims that State silence may change the content either of the prohibition of the use of force or of the narrow self-defence exception to it, especially claims that purport to widen the grounds for resorting to force, are difficult to defend.

73. The 2018 positions of the International Law Commission do not provide sufficient guidance on these matters. Regarding the potential role of silence in treaty interpretation, the Commission formed the view that “silence on the part of one or more parties may constitute acceptance of the subsequent practice when the circumstances call for some reaction”.¹³⁵ Yet, the Commission tempered this general notion by emphasizing that “the relevance of silence or inaction for the establishment of an agreement regarding interpretation depends to a large extent on the circumstances of the specific case”.¹³⁶

74. Regarding acceptance as law (*opinio juris*) – a constituent element of customary international law with general practice, the Commission concluded that failure to react over time may be evidence of *opinio juris* provided that States were in a position to react and if the circumstances called for some reaction.¹³⁷

75. States’ reactions to the position of the Commission reveal a clear absence of consensus. Some have cautioned that their views may be expressed privately rather than publicly, and that their perceived non-reaction or silence may be the result of political and diplomatic considerations, not because they agree with the legal position behind the State act. It is worth noting that jurists have stressed that, when the belief of States is motivated by self-interest or coercion, it may lack “genuineness” and thus be devoid of legal effect.¹³⁸

76. Article 51 of the Charter requires Member States to immediately report to the Security Council measures taken purportedly in the exercise of the right of individual or collective self-defence. In the face of an “Article 51 submission” to the Council that invokes an overly broad self-defence claim, is the apparent silence of the Council, its members or other States capable of widening the treaty or customary international law grounds for resorting to force in self-defence?

77. Security Council resolutions and debates may be relevant with respect to the interpretation of the Charter and to the formation, or expression, of *opinio juris*.¹³⁹ Moreover,

that might lead to the erosion of Article 2 (4) of the Charter, which the International Law Commission has determined to be a peremptory norm (*jus cogens*).

¹³³ www.ejiltalk.org/the-diversity-of-rules-on-the-use-of-force-implications-for-the-evolution-of-the-law. Akande also points to occasions when subsequent practice can legitimately be used to interpret the Charter, such as in relation to the responsibility to protect.

¹³⁴ Lewis, Modirzadeh and Blum, *Quantum of Silence*, p. 79.

¹³⁵ *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, p. 15.

¹³⁶ *Ibid.*, p. 80.

¹³⁷ *Ibid.*, p. 120.

¹³⁸ Starski, “Silence within the process of normative change and evolution of the prohibition on the use of force”, p. 21.

¹³⁹ For example, the International Tribunal for the Former Yugoslavia has considered, in its decision of 2 October 1995 in *Prosecutor v. Tadić*, Security Council resolutions “of great relevance to the formation of *opinio juris*”. See also www.law.umich.edu/facultyhome/drwcasebook/Documents/Documents/ILA%20Report%20on%20Formation%20of%20Customary%20International%20Law.pdf and Jessica S. Burniske, Naz K. Modirzadeh and Dustin A. Lewis, *Armed Non-State Actors and International Human Rights Law: An Analysis of the Practice of the U.N. Security Council and U.N.*

through the combined effects of its condemnations and relevant practices and States' *opinio juris*, including as expressed in Council debates, certain practices pertaining to the Council may contribute to the emergence, crystallization or consolidation of a customary rule of general international law.¹⁴⁰ And, in certain circumstances, the silence of States has the potential to affect the formation, identification, modification and termination of certain doctrines.¹⁴¹ Such conditions, however, are far from being met in Article 51 communications.

78. The theoretically possible modalities for modifying international law are largely inadmissible with respect to broad claims for resorting to force couched in terms of exercising the right to self-defence. Furthermore, in part because States are not made aware contemporaneously and systematically of "Article 51 communications", their purported silence cannot be considered deliberate or even conscious, let alone evidence of a genuine belief.¹⁴² As a legal adviser to the Permanent Mission of Mexico to the United Nations in New York has explained, the lack of transparency in Security Council procedures is largely responsible for the silence of many Member States, which "thus cannot be considered as acquiescence regarding any novel interpretations of Art. 51 of the UN Charter on the use of force against terrorists in a third country ... Most UN Member States are left in the dark."¹⁴³

79. Nevertheless, despite a strong presumption that silence alone does not constitute acceptance of a position, for several reasons the prevailing situation of silence in the face of illegitimate self-defence claims is highly unsatisfactory:

(a) First, the silence of many seems to have the unfortunate effect of amplifying the voices of the few who seek to expand the grounds for resorting to force. Their disproportionate influence is certainly reflected in legal scholarship;

(b) Second, State silence is open to wide interpretation, misinterpretation and misunderstanding, particularly by the State initiating the action;

(c) Third, as members of the international community, especially in a period marked by attempts to generate normative volatility, weakening strict requirements on self-defence, States have a responsibility to secure legal stability by speaking up,¹⁴⁴

(d) Fourth, the gravity of the matters at stake – implicating as they do fundamental norms of the contemporary international legal system, the violation of which affects all States – should compel States to speak.

80. Silence, albeit through convoluted and indirect routes, can still ultimately influence norms and their development. Amid the legal complexities, silence can be dangerous, not least because it is ambiguous. Explicit agreement with an action is a signal, as is direct disagreement. But what signal is conveyed when nothing is said? Politics through silence and silence because of politics may be lethal. Silence amounts to turning a blind eye to unlawful killings.

81. Of course, States cannot decide whether to speak out if they do not realize that a response may be warranted. All States should be made aware – directly, reliably and systematically – of communications submitted to the Security Council regarding the use of force and targeted killings, and of the Council's and other States' responses (or lack thereof). Multilateral discussions on matters of grave international concern should be revived and stimulated.

General Assembly (Harvard Law School Program on International Law and Armed Conflict, June 2017).

¹⁴⁰ Lewis, Modirzadeh and Blum, *Quantum of Silence*, citing Olivier Corten, p. 47.

¹⁴¹ *Ibid.*, p. 80.

¹⁴² Starski, "Silence within the process of normative change and evolution of the prohibition on the use of force", p. 21.

¹⁴³ www.justsecurity.org/63415/an-insiders-view-of-the-life-cycle-of-self-defense-reports-by-u-n-member-states/.

¹⁴⁴ Starski, "Silence within the process of normative change and evolution of the prohibition on the use of force", p. 125.

82. To date, attacks and targeted killings using drones have not been the object of robust international debate and review. The Security Council is missing in action; the international community, willingly or not, stands largely silent. That is not acceptable.

V. Conclusion

83. When asked why he wanted to climb Mount Everest, a renowned mountaineer retorted “Because it’s there”. As public opinion has turned against the loss of soldiers’ lives in military actions abroad, the use of armed drones has increased exponentially. Drones have also emerged as a prestigious, effective and efficient weapon in this “second drone age”, with many States eager to join the “drone power club”.¹⁴⁵ But the mere existence of drones does not justify their indiscriminate deployment, as conventions against weapons of mass destruction, chemical weapons and other indiscriminate weapons exemplify.

84. What is especially troubling is the absence of a public discussion about the ethics, legality and effectiveness of the “decapitation” strategy¹⁴⁶ at the heart of targeted killings using drones, whether they indeed have the claimed effect, and about the measure of their success in terms of a long-term vision for the sustainable protection of human lives and global peace. Instead, war has been normalized as the legitimate and necessary companion to peace, not as its opposite. We must do all that we can to resist.

85. To tackle effectively the many challenges posed by armed drones and targeted killings, States, international decision-making bodies and other concerned actors, should:

- (a) Develop and commit to robust standards of transparency, oversight and accountability in the use of armed drones;
- (b) Undertake effective measures to control the proliferation of drones through export and multilateral arms control regimes and/or under international treaties;
- (c) Openly discuss the challenges that targeted killings using drones pose to international law;
- (d) Call out any use of force not in compliance with the Charter of the United Nations and reject the purported legal underpinnings of such use of force;
- (e) Investigate all allegations of unlawful deaths related to the use of drones, including through international bodies where States fail to do so.

VI. Recommendations

86. In addition to reaffirming the recommendations of her predecessor,¹⁴⁷ the Special Rapporteur makes the recommendations below.

87. Regarding the legal framework, international human rights law should continue to apply in armed conflicts in complementarity with international humanitarian law. Assessments of the lawfulness of strikes and killings should consider both bodies of law, adopt a systemic integration approach and conduct or undertake a contextual/situational analysis.

88. The Security Council should meet in formal session to review and debate all claims received under Article 51 of the Charter.

89. The Secretary-General should set up international commissions of inquiry or fact-finding missions to investigate targeted killings using drones.

¹⁴⁵ See also www.senat.fr/rap/r16-559/r16-5591.pdf.

¹⁴⁶ Strategy seeking to remove the leadership of an armed group or Government deemed hostile.

¹⁴⁷ A/68/382 and Corr.1.

90. **OHCHR should submit to the Human Rights Council an annual report tracking drone strikes and casualties.**
91. **Member States should:**
- (a) **Set up a discussion forum on Article 51 claims to exchange information about the operationalization and scope of and limits to the right to self-defence;¹⁴⁸**
 - (b) **Establish a transparent multilateral process for the development of robust standards on the use of drones;**
 - (c) **Failing (b), like-minded States should establish a group of experts to develop such standards (in the form of a time-bound forum), for States, academics and civil society to identify and strengthen legal norms and accountability mechanisms;**
 - (d) **Invite experts or institutions to publicly classify armed conflicts and situations that may have triggered or are evolving rapidly as an international or non-international armed conflict;**
 - (e) **Support initiatives prohibiting the use of veto by Security Council members when mass atrocities and self-defence claims must be reviewed, and support also the automatic convening of the General Assembly whenever a veto is cast in the Council¹⁴⁹ in relation to these matters;**
 - (f) **Support the Secretary-General's protection of civilians strategy by providing it with a clear mandate and adopting specific guidance on the use of explosive weapons in urban areas;**
 - (g) **Adopt a strong political declaration on strengthening the protection of civilians from humanitarian harm arising from the use of explosive weapons in populated areas.**
92. **States using armed drones should:**
- (a) **When invoking Article 51, provide a thorough justification, including evidence of an ongoing or imminent attack and information on the proportionality of the measures to be taken in response;**
 - (b) **Set up a dedicated civilian casualty mitigation and investigation team with commensurate resources to understand the impact of drone operations and accurately record civilian harm;**
 - (c) **Robustly investigate allegations of civilian harm, including with external sources, and release data and findings.**
93. **States assisting other States' drone programmes should:**
- (a) **Inform parliament of any assistance arrangements;**
 - (b) **Establish a robust oversight framework to ensure that they are not complicit in unlawful actions and that State officials are criminally liable (assurances are not, on their own, sufficient);**
 - (c) **In situations involving the use of force in countries with which the host State is not in conflict, adherence to international human rights law should guide the use of force.**
94. **States that export armed drones technologies should:**
- (a) **Enact stricter controls on the transfer of military and dual-use drone technologies and apply clear criteria to prevent irresponsible transfers;**

¹⁴⁸ A/AC.182/L.154.

¹⁴⁹ S/PV.8699, p. 37. Such a discussion would take place without prejudice to any possible outcome and irrespective of the substance of the draft resolution that was subject to a veto.

(b) **Include civilian protection and adherence to international humanitarian law in approvals and agreements for continued support, sale of and training on armed drones;**

(c) **Adopt a dedicated process of operational end-use monitoring to analyse the outcome of drone strikes and their impact on civilians.**

95. **Parliaments should:**

(a) **Review procedures for parliamentary scrutiny and oversight to identify and limit specific instances when the deployment of force may not be openly debated;**

(b) **Debate general policies on the use of force, including for purposes of targeted killing, particularly in instances when parliamentary approval has not been secured.**

96. **Armed groups that use armed drones should abide by international human rights and humanitarian law, including in respect of the prohibition of arbitrary killings under international law, investigate all allegations of violations and produce regular reports tracking drone strikes and casualties.**

Annex

I. The targeted killing of General Soleimani

1. This case study examines the targeted killing by US armed drone of Iran's General Qassem Soleimani in Iraq. It is based on legal and policy analyses of the facts as they are known to the Special Rapporteur.

The case in question

2. On 3 January 2020, a targeted drone strike in the vicinity of Baghdad International Airport killed Iranian General Qassem Soleimani, commander of the Quds Force unit of Iran's Islamic Revolutionary Guard Corps. Abu Mahdi al-Mohandes, deputy commander of Iraq's Popular Mobilization Forces (PMFs), four other members of the PMF (Muhammed Reza al-Jaberi, Hassan Abdu al-Hadi, Muhammad al-Shaybani, Haider Ali) and four members of Iran's Islamic Revolutionary Guard Corps (Hossein Pourjafari, Shahroud Mozafarinia, Hadi Taremi, Vahid Zamanian) were reportedly killed in the strike. It is unclear whether civilians were harmed or killed in the attack.¹

3. Arriving from Damascus reportedly on an official visit upon the invitation of the then Prime Minister of Iraq, General Soleimani landed at Bagdad airport around 1:00 am where he was met by Abu Mahdi al-Mohandes. Moments after leaving the airport, his convoy was hit by a drone strike, killing at least ten persons. Notice of the strike was only made public some hours later at 4:00 am. In the meantime, the airport went into lockdown with all flights suspended.²

4. Some hours after the strike, the US Department of Defense (DoD) claimed that the US military³ had taken this "decisive" action against General Soleimani at the direction of US President Trump.⁴

5. On the same night that Soleimani was killed, the US military in Yemen allegedly targeted the commander of the Yemen division of Iran's elite Quds Force, Abdul Reza Shahlai. The attempt failed, but killed instead Mohammad Mirza, a Quds Force operative.⁵

6. Five days later, on January 8, Iran launched numerous pin-point precision⁶ ballistic strikes, against two Coalition force bases in Iraq, including the Ain al-Assad airbase from which the US drone strike against General Soleimani was launched. The strikes injured over 100 US servicemen, including 34 troops with traumatic brain injury.⁷

¹ <https://airwars.org/civilian-casualties/?country=iraq,syria&belligerent=coalition>. The Special Rapporteur is unaware of any statement by the US administration identifying who else was killed and their role, if any, in ongoing or imminent attacks on the US.

² For a timeline of the event, see this video by Al Arabiya: <https://www.youtube.com/watch?v=7-egpOeaJU4>.

³ Reporting suggests the involvement of the US Central Intelligence Agency as well. <https://www.nbcnews.com/news/mideast/airport-informants-overhead-drones-how-u-s-killed-soleimani-n1113726>.

⁴ <https://www.defense.gov/Newsroom/Releases/Release/Article/2049534/statement-by-the-department-of-defense/>. The DoD claimed that this was a "defensive" action, that General Soleimani was "actively developing plans to attack American diplomats and service members in Iraq and throughout the region" and the "strike was aimed at deterring future attack plans."

⁵ See <https://theintercept.com/2020/01/10/us-strike-abdul-reza-shahlai-yemen/>; <https://www.washingtonpost.com/world/national-security/on-the-day-us-forces-killed-soleimani-they-launched-another-secret-operation-targeting-a-senior-iranian-official-in-yemen>.

⁶ <https://ukdefencejournal.org.uk/soleimani-helped-turn-iran-into-one-of-the-most-effective-proponents-of-remote-warfare-his-impact-lives-on/>.

⁷ <https://www.reuters.com/article/us-usa-pentagon-tbi-exclusive/exclusive-more-than-100-u-s-troops-diagnosed-with-brain-injuries-from-iran-attack-officials-idUSKBN2041ZK>.

7. Seventy-two hours after their attacks, the Iranian authorities also confirmed that an Iranian missile had struck down “by mistake” Ukraine International Airlines Flight 752 en route from Tehran to Kiev shortly after take-off. All 176 passengers and crew were killed, including 82 Iranians, 55 Canadian citizens and 30 Canadian permanent residents, 11 Ukrainians, 10 Swedes, 4 Afghans, and 3 British nationals.⁸ The authorities insisted that the strike was a “mistake” of missile operators who had confused the civilian aircraft for a US missile or a plane. A safety investigation, led by Iran, was initiated shortly after the strike, supported by accredited representatives and experts from the affected countries. The investigation has, however, experienced delays due to the Covid19 pandemic⁹.

8. In the months before the events of January 2020, Iran, what the US deemed “Iran-supported militias”, and the US had engaged in a series of attacks and counter-attacks. US “interests in the Middle East region”¹⁰ were allegedly targeted, to which the US had responded.¹¹ In addition, on 27 December, a rocket attack reportedly by Kata’ib Hezbollah, occurred in Kirkuck. On 29 December, a US strike against five facilities in Iraq and the Syrian Arab Republic controlled by Kata’ib Hezbollah killed allegedly 24 people and wounded 50.¹² Despite these incidents, it appeared both Iran and the US wished to avoid a “full-out conventional war.”¹³

9. These late 2019 attacks took place against a backdrop of very large popular demonstrations against the high levels of unemployment and corruption in Iraq, beginning in November and directed to the Government. The protests were met with lethal force by Iraq’s security forces and armed non-State groups, resulting in hundreds of deaths, thousands wounded and multiple disappearances of activists.¹⁴

II. The international legal framework applicable to a drone targeted killing

10. To be lawful, a targeted killing, including by way of a drone strike, must be legal under all applicable legal regimes. The relevant regimes are the *jus ad bellum*, the *jus in bello* and international human rights law:

(a) *Jus ad bellum* is laid out in the UN-Charter and encompasses the right to use force. However, as a general rule, Art. 2.4 UN Charter forbids the use of force (or the threat to use force) between UN members with the exception, laid out under Art. 51, that gives States an inherent right to self-defense against an armed attack, as derived from customary international law. Over the last few decades, some States and commentators have attempted to expand the notion of imminent attack by suggesting that imminence is no longer defined temporally.¹⁵

(b) The second legal regime applicable in the case of a targeted killing, including by drone, is *jus in bello* or international humanitarian law. The legality of a war (the question of *jus ad bellum*) is not the focus of *jus in bello*, which is concerned instead with the protection of persons from the implications of warfare. The applicability of international

⁸ <https://www.cbc.ca/news/world/iran-ukraine-air-crash-canadians-tehran-1.5418610>; Canadian passengers were named here: <https://www.theglobeandmail.com/canada/article-students-doctors-children-ukrainian-airliner-crash-victims-had/>. Some passengers were dual nationals.

⁹ The strike against Flight 752 is the object of another inquiry by the Special Rapporteur. It is not completed at the time of publishing this report.

¹⁰ <https://www.justsecurity.org/wp-content/uploads/2020/01/united-states-article-51-letter-soleimani.pdf>.

¹¹ <https://www.nytimes.com/2019/06/23/us/politics/trump-iran-cyber-shadow-war.html>;

¹² The NYT quoting an Hezbollah spokesperson: <https://www.nytimes.com/2019/12/29/world/middleeast/us-airstrikes-iran-iraq-syria.html>.

¹³ See, e.g., <https://www.nytimes.com/2019/06/23/us/politics/trump-iran-cyber-shadow-war.html>.

¹⁴ See communications from Special Rapporteurs to the Government of Iraq: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25020>.

¹⁵ See, e.g., David Bethlehem, Principles Relevant to the Scope of a State’s Right of Self-Defense against an Imminent or Actual Armed Attack by NonState Actors, 2012, <https://www.un.org/law/counsel/Bethlehem%20-%20Self-Defense%20Article.pdf>.

humanitarian law is thus based on the existence of an international or non-international armed conflict. To be lawful under humanitarian law, targeted killings must be limited to combatants and guided by military necessity and proportionality, which requires avoidance of excessive civilian harm.

(c) The third legal regime applicable to targeted killings by drones is international human rights law. Under Art. 6 ICCPR, States are prohibited from arbitrary deprivations of life. The prohibition is a *jus cogens* norm, recognized under customary international law,¹⁶ and its respect is applicable extra-territorially (GC36, para. 63). As is well recognized, international human rights law continues to apply in armed conflict situations.

11. For the drone strike and targeted killing of General Soleimani and his companions to be lawful under international law, it must satisfy the legal requirements under all the applicable international legal regimes. Some drone strikes, but not all, raise difficulties as to their legal assessment, given that IHL and IHRL can sometimes provide diverging answers to the crucial question of when it is legally permissible to kill another person. The strike against General Soleimani is one such situation, raising genuine uncertainty as to how to interpret its lawfulness.

III. Context and Implications: An international armed conflict?

12. General Soleimani, his companions in the Islamic Revolutionary Guard Corps, and those of Iraq's PMF¹⁷ all had a military status, according to the information publicly available. Had the strike occurred within the setting of an armed conflict, under international humanitarian law they could have constituted legitimate military targets as combatants. IHL does not prohibit the killing of belligerents, but it does prohibit killings of civilians and persons hors de combat, as well as indiscriminate attacks and those resulting in an excessive loss of civilians.¹⁸ Whether and how this legal regime applies to all those killed, i.e. not only to General Soleimani¹⁹ but also to all his Iraqi and Iranian companions²⁰, is thus crucial to the determination of the lawfulness of the strike.

13. International humanitarian law (IHL) applies solely during international armed conflicts (IAC) and non-international armed conflicts (NIAC). Both will be examined in turn.

¹⁶ A/HRC/35/23, para. 26.

¹⁷ PMF is technically an ally of the US in the fight against ISIL, but it is also an entity allegedly responsible for some of the attacks against the US in Iraq. In December 2019, the US apparently called on the Government of Iraq to take actions to control this militia, now part of State forces. But the PMF is not mentioned in US explanations for the strike against General Soleimani. It is not clear how to categorize them and the implications of their presence in the car.

¹⁸ According to the ICRC, the "law relating to the conduct of hostilities is primarily a law of prohibition: it does not authorize, but prohibits certain things." In other words, when "we say that IHL 'permits' certain conduct, we mean only that IHL does not prohibit that conduct. We do not mean that IHL authorizes or justifies that conduct, or provides a legal right to engage in that conduct that might override other legal constraints." <https://www.justsecurity.org/34815/human-rights-armed-conflict-part-ii/>.

¹⁹ General Soleimani had been appointed head of Iran's Quds Force in March 1998 and is credited to have transformed it into an elite force with operations said to extend across Afghanistan, Iraq, Lebanon, the Syrian Arab Republic and Yemen. The Quds Force is said to have worked closely with the Popular Mobilization Forces of Iraq in the fight against ISIL and allegedly provided close support to the Government and forces of the Syrian Arab Republic throughout the past years' conflict. For many human rights activists from Iran, Iraq and the Syrian Arab Republic General Soleimani was deemed responsible for organising, supporting, inciting official and non-official forces involved in human rights violations.

²⁰ Mr. al-Mohandes was a commander of the Popular Mobilization Force, and four others killed were members of that force. The PMF is the State umbrella of Iraqi militias. Thus, the US military strike killed members of Iraqi state forces as well. The implications of these killings are addressed in Section V below.

Non-International Armed Conflict?

14. The strike against General Soleimani was clearly a strike against the armed forces of another State, thus discarding the possibility that this was a non-international armed conflict, which is defined by internal armed hostilities. The Special Rapporteur emphasizes this point solely because of the unusual step taken by the US to label the IRGC a “terrorist organization”. This opens the possibility of the US presenting these killings as being a part of its NIAC against Al Qaeda and its affiliates (an anomalous assertion given Iran’s leading contribution to fight against ISIL).²¹ While the ramifications of this US designation are unclear, one cannot eliminate the reality that any action taken by a State against General Soleimani is an action against a State official. The lawfulness of that action must be determined within that context.

An International Armed Conflict?

15. Did the strike either initiate an IAC between the US and Iran or take place as part of an ongoing IAC? The determination and classification of armed conflicts “depend on verifiable facts in accordance with objective criteria.”²² However, that determination of the matter is not without ambiguity or debate. One prominent doctrine as to what triggers an IAC is the so-called “first shot” doctrine, according to which humanitarian law ought to apply from the first moment of use of force by one State against another state: literally, just a single shot by one state against another. The 2016 and 2017 ICRC commentaries on the Geneva Conventions are clear that an international armed conflict arises when one State makes recourse to the use of force against another, regardless of their reasons for doing so or the intensity of the confrontation.²³ In this perspective, it is not necessary for the conflict to extend over time or to provoke a certain number of victims.²⁴

16. However, others express a different view. For instance, the ILA Committee on The Use of Force draws distinction between an armed attack (invoking the rights under Art. 51 of the UN Charter) and an international armed conflict. In its view “an armed attack that is not part of intense armed fighting is not part of an armed conflict.”²⁵ The Venice Commission also supports the application of an intensity threshold, arguing that an armed conflict “refers to protracted armed violence between States”.²⁶ More typically, however, commentators and States suggest that it takes at least a minimum, albeit undefined, threshold, beyond an isolated strike, to constitute an IAC.²⁷

17. The Special Rapporteur believes that the determination of the existence of an international armed conflict, given its grave implications for the societies involved, should

²¹ Statement from the President on the Designation of the Islamic Revolutionary Guard Corps as a Foreign Terrorist Organization, Issued on April 8, 2019.

²² Sylvain Vite, Typology of Armed Conflicts, International Review of the Red Cross, Volume 91 Number 873 March 2009, <https://www.icrc.org/en/doc/assets/files/other/irrc-873-vite.pdf>.

²³ Convention (I), 2016 Commentary, Article 2, at 218. The Special Rapporteur reads the decision as suggesting that both IAC and NIAC requires intensity. The Chamber states so when interpreting the circumstances at hand: “These hostilities exceed the intensity requirements applicable to both international and internal armed conflicts.” PROSECUTOR v. DUSKO TADIC, Oct. 2, 1995, at 70.

²⁴ *Pictet* suggested the threshold be a single wounded person from the intervention of armed forces. Pictet, Commentary to Common Art. 2 Geneva Conventions (1952), p. 32.

²⁵ INTERNATIONAL LAW ASSOCIATION, THE HAGUE CONFERENCE (2010), USE OF FORCE, at 8 http://www.rulac.org/assets/downloads/ILA_report_armed_conflict_2010.pdf.

²⁶ Venice Commission, 66th Plenary Session (Venice, 17-18 March 2006), at 78.

²⁷ UK Declaration upon signature of the I Protocol of 1977 to the Geneva Conventions (IAC does not include acts of terrorism, “whether concerted or in isolation”); Italy’s domestic definition of armed conflict, Art. 165, Codice Militare di Guerra, versione emendata L. 27 febbraio 2002, n. 15: “uso militarmente organizzato e prolungato delle armi” (an organized and prolonged uses of weaponry); see generally Marko Milanovic and Vidan Hadzi-Vidanovic, “A Taxonomy of Armed Conflict”, in Christian Henderson and Nigel White (eds), Research Handbook on International Conflict and Security Law, 2013, pp.256–313, pre-print draft: <http://ssrn.com/abstract=1988915>.

not rely exclusively on the laws of war, but also consider and integrate analyses and case law in relation to human rights conventions and their derogations.²⁸

18. When applied to the targeted killing by drone of General Soleimani, the “first shot” theory presents a number of challenges:

19. Firstly, in the months preceding the strike, there were a number of incidents that each on their own may have qualified as “first strikes”. In other words, the January 3, 2020 strike may have taken place as part of an ongoing IAC. Alternatively, it itself may have triggered an IAC. There might have been dozens of IACs between Iran and the US, triggered over a six month period, or there may have been none, or, alternatively, a single on-going IAC that began either in June or in December 2019.

20. On 17 December 2019, the Geneva Academy determined that in June 2019 the US and Iran were engaged in an IAC of low intensity by virtue of Iran’s shooting down of a US military drone and the alleged counter cyber-attack by the US.²⁹ For this determination, the Academy relied on the “first strike” theory, noting that “IHL is indisputably applicable in an IAC regardless of the level of violence which might occur in the use of force between the parties to the conflict.”³⁰ They found in particular that Iran’s action of shooting down an unarmed military drone, assumed by the US to be an accident, was enough to trigger the application of IHL. Published less than 3 weeks before the Soleimani strike, this analysis concludes that given the absence of further hostilities after June 2019, it was reasonable to conclude at the time of publication that this IAC was over.³¹ The Geneva Academy did not review the aforementioned incidents of the end of December 2019 to consider whether they, together or singularly, could have triggered an IAC.

21. However, in the aftermath of the Soleimani strike, some legal researchers observed that the killings of 3 January 2020 did not start an IAC between Iran and the United States, as an IAC had begun much earlier with the attacks by Iran and its “proxies”³² on US forces in Iraq in November and December 2019.³³ Their analysis concludes that the strike against Soleimani -- referred to as an “enemy combatant” -- was thus part of an on-going IAC and, as such, his killing was legitimate with the loss of nine other lives “considered proportionate collateral damage of a precision drone strike to eliminate the mastermind behind the ongoing series of attacks against the United States.” Their analysis does not factor in the implications of fact that the strike and those before it took place on the territory of a third State – that of Iraq.

22. To the best of the Special Rapporteur’s knowledge, no other expert/s have publicly reviewed the relevant “incidents” of June 2019 onwards for the purpose of determining objectively and factually whether or not they amounted to an IAC; a telling fact on its own.

23. Secondly, the majority of scholars who have analysed the various incidents in 2019 or the drone strike against Soleimani have stopped short of concluding that these events triggered an IAC.³⁴ A range of scholarly sources and media outlets referred to the state of

²⁸ See e.g. European Court of Human Rights, *Denmark, Norway, Sweden and the Netherlands v. Greece*.

²⁹ Another source is M. Schmitt, “Top Expert Backgrounder: Aborted U.S. Strike, Cyber Operation Against Iran and International Law”, 24 June 2019, <https://www.justsecurity.org/64669/top-expertbackgrounder-on-aborted-u-s-strike-and-cyber-operation-against-iran-and-international-law/>.

³⁰ Citing J. Grignon, “The Beginning of Application of International Humanitarian Law, *International Review of the Red Cross*”, 2014, 152.

³¹ <https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20United%20States%20Of%20America%20And%20Islamic%20Republic%20Of%20Iran%20An%20International%20Armed%20Conflict%20Of%20Low%20Intensity.pdf>.

³² The US itself has not supplied evidence to determine whether Iran had “overall control” over KH or other groups sufficient to attribute KH actions to Iran. See ICTY, *Prosecutor v. Tadic*, Judgment (Appeals Chamber), 15 July 1999, para. 137.

³³ <https://gpil.jura.uni-bonn.de/2020/01/the-u-s-killing-of-iranian-general-qasem-soleimani-of-wrong-trees-and-red-herrings-and-why-the-killing-may-be-lawful-after-all/>.

³⁴ E.g. Deutscher Bundestag, Wissenschaftlicher Dienst, *Völkerrechtliche Aspekte des Konflikts zwischen Iran und den USA*, <https://www.bundestag.de/resource/blob/677272/>

US-Iran relations in the months and indeed over the years preceding the strike as amounting to “shadow wars”, a concept widely used in the aftermath of 9/11 to denote covert hybrid military and intelligence operations waged in countries against which the US and, in this case, Iran have no official or acknowledged armed conflicts. However, “shadow war” has no legal meaning under IHL. As the Congressional Research Service warned in a report prepared for members of the Congress and Committees on January 6, 2020, “The U.S.-Iran tensions have the potential to escalate into all-out conflict in the wake of Soleimani’s killing”³⁵. The report refers to “heightened tensions” in the six months preceding the strike against General Soleimani, including the December 2019 incidents with the strike itself described as an “escalation.” The report stops short of deeming these to be or to have triggered an IAC. Other analyses of the December 2019 incidents and the January 2020 targeted killings conclude along similar lines.³⁶

24. Third, in the months preceding the strike, neither the US nor Iran spoke of their being in armed conflict with the other, preferring instead to speak of, or warn against, escalation. Following the Soleimani strike, the US administration officially declared that the “United States is not currently engaged in any use of force against Iran,” and that following the strike and Iran’s response, “there have been no further uses of force between Iran and the United States”.³⁷ Iran’s foreign minister declared the strike an “act of terrorism,” and Iran promised revenge.³⁸ But no action or statement has been made suggesting that either State considered themselves to be at war, either before or after the strike against General Soleimani.

25. It is well established that a formal declaration of war is not necessary for an IAC to be in effect. It is equally established that an IAC may be triggered notwithstanding the positions to the contrary of the parties to the conflict.³⁹ Nevertheless, it is reasonable to expect, at the very least, some debates of the issue in the countries concerned and/or internationally. It is somewhat unreasonable to argue retroactively that an IAC between Iran and the United States had been waged for several days, weeks or months prior to the killing in question.

26. One would have also expected inter-governmental bodies and other UN Member States to warn against an IAC or the risks of an IAC, or to have been informed that incidents had reached the level of an IAC. There are indications that a number of governments and the Secretary-General were alarmed at the deterioration of the US-Iran relations, and by the risks of escalation, ever since the US decision to withdraw from the Joint Comprehensive Plan of Action. But to the Special Rapporteur’s knowledge there was no mention that an IAC had occurred or was underway.

27. This all means that to suggest that the targeted killing of General Soleimani took place in the context of a pre-existing IAC, amounts to suggesting a breakdown of the national and international institutions whose responsibility it is to scrutinize inter-governmental military relations and activities and ensure peace and security. This may well be the case. The Soleimani strike may raise not only complex legal and empirical questions regarding its lawfulness and the classification of conflicts, but also profound policy and political concerns about the functioning of a variety of bodies dedicated to democratic governance, peace and security.

ba6f4e61c1f5b534f3a2ef59db1e721e/WD-2-001-20-pdf-data.pdf; Anderson, Jan. 1, 2020, <https://www.lawfareblog.com/law-and-consequences-recent-airstrikes-iraq>; but see Marko Milanovic, January 8, 2020, <https://www.ejiltalk.org/iran-unlawfully-retaliates-against-the-united-states-violating-iraqi-sovereignty-in-the-process/>.

³⁵ <https://fas.org/sgp/crs/mideast/R45795.pdf> p. 2.

³⁶ See e.g. <https://www.lawfareblog.com/law-and-consequences-recent-airstrikes-iraq>. Similarly, the German scientific services of the Parliament concluded that the events between Iran and US prior to the drone strike did not amount to an armed attack: <https://www.bundestag.de/resource/blob/677272/ba6f4e61c1f5b534f3a2ef59db1e721e/WD-2-001-20-pdf-data.pdf>.

³⁷ US official position: https://www.whitehouse.gov/wp-content/uploads/2020/02/SAP_SJ-RES-68.pdf.

³⁸ <https://www.nytimes.com/2020/01/03/world/middleeast/iranian-general-qassem-soleimani-killed.html?referringSource=articleShare>.

³⁹ Article 2(1) common to the 1949 Geneva Conventions.

28. Fourthly, if the strike against General Soleimani was itself a “first strike” triggering an IAC - against whom was that international armed conflict initiated: Iran? Iraq? Both? Applying a “first strike” theory would mean that the car carrying General Soleimani and his companions would be considered a conflict zone, but that everywhere else in the immediate surrounds of the convoy – as far as the Iraqi government and people were aware – was a non-conflict zone. It is understood that IHL may be applied to an act rather than spatially. Nevertheless, when the “first strike” theory is operationalized, its result may be the existence of an IAC limited to the vehicle in which General Soleimani was travelling and inevitably the asphalt within its immediate proximity. But as limited as these are spatially, they nevertheless are located on Iraq’s sovereign territory.

29. Fifthly, the Special Rapporteur notes that there may be valid reasons to assert that the US strike against General Soleimani did trigger an IAC and thus should be bound by IHL.

30. The strike was against a high-level State official, making it qualitatively different from the other drone strikes analysed by Special Rapporteurs, which were launched against non-State actors. This is the primary reason the Soleimani strike is considered a watershed change in the conduct of extraterritorially targeted strikes and killings. It is hard to imagine that a similar strike against a Western military leader would not be considered as an act of war, potentially leading to intense action, political, military and otherwise, against the State launching the strike. Indeed, this seems precisely the type of strike that the “first shot” doctrine is designed to capture if one is to follow the doctrine. However, the reactions amongst governments in the aftermath of the strike provide evidence of the fear of a full-blown conflict between the two countries, and possibly further beyond.

31. The determination that the strike prompted an IAC would imply that the parties are bound by their obligations under the Geneva Convention. According to the Geneva Academy, the conclusion that the shooting down of a military drone triggers an IAC is “the only way to fulfil the goals of IHL ... Even if the armed forces of one state attack one military target in the territory of another state, it is crucial to apply this principle in order to protect civilians in that territory⁴⁰.” Under this approach, the strike against Soleimani, in continuing or triggering an IAC, imposed obligations upon the striking State to protect civilians, among other requirements. It is unclear whether the US intended to abide by IHL when striking General Soleimani, although one hopes that they sought to do so. Indeed, humanitarian law principles of distinction and proportionality are reflected in the 2016 Report on the legal and policy frameworks guiding the United States’ use of military force and the 2019 Presidential Policy Guidance.⁴¹ In contrast however, the US has continuously insisted that its human rights obligations do not apply extraterritorially, thereby potentially leaving a black hole with no legal standards, should IHL not apply.⁴²

32. Yet, while it may be principled and somehow pragmatic, in order to protect Iraqi civilians, to conclude that the Soleimani strike constituted an IAC, it presents several limitations.

33. The identity of States involved in specific incidents, their relations, and the domestic legal frameworks within which they operate, ought to be considered when conducting a technical assessment of the determination of an international or non-international armed conflict, but these factors cannot solely be determining⁴³. Such an approach in particular ignores the complementarity of IHL and IHRL in armed conflict situations, confirmed by

⁴⁰ Geneva Academy, December 2019, p.5.

⁴¹ U.S. Report on the legal and policy frameworks guiding the United States’ use of military force and related national security operations, p. 25.

⁴² <https://www.justsecurity.org/68030/targeted-killing-of-general-soleimani-why-the-laws-of-war-should-apply-and-why-it-matters/> Eliav Lieblich argues state practice regarding extra-territorial application of human rights would lead to the possible outcome, that neither IHL nor IHRL would apply.

⁴³ <https://www.icrc.org/en/doc/assets/files/other/irrc-873-vite.pdf>.

international jurisprudence⁴⁴ and the text of human rights treaties, including derogations⁴⁵. Further, by rejecting its human rights obligations extraterritorially, the US is an outlier, particularly as it relates to the obligation to abide by *jus cogen* norms, such as the prohibition against arbitrary killings.

34. A far more straightforward and, in the Special Rapporteur's view, reasonable and logical way of protecting potential targets as well as civilians in situations where the nature of the armed conflict is difficult to ascertain, would be to apply human rights law to their protections.

35. Such a position should certainly apply to extraterritorial targeted strikes in non-belligerent States: these strikes occur outside the territories of the States engaged in hostilities and thus cannot be considered part of an armed conflict subject to IHL. Arguing otherwise will potentially subject non-belligerent civilians and civilian objects to "proportional" harm simply because "an individual sought by another State is in their midst"⁴⁶. For this reason, the ICRC has argued, at least in the context of NIACs, that targeted strikes in non-belligerent States against personnel purportedly engaged in a conflict should be governed by IHRL, not IHL.⁴⁷ Just as the ICRC finds these non-belligerent circumstances determinative for targeted strikes in a NIAC, should they not be found determinative in an attack against a State official on the territory of a third State as well?⁴⁸

36. Finally, even if, for the sake of arguments, one was to conclude that this one strike against General Soleimani triggered an IAC, and that it must be assessed against IHL, one may interrogate whether IHL standards are the best "fit," for lack of a better word, to assess the act and the situation – a single strike, one or two cars targeted, 10 individuals killed, in a non-belligerent country, surrounded by people unaware of and unprepared for an international armed conflict. This is far from the battlefields that IHL was designed to regulate or the urban warfare which the international community is increasingly confronting.⁴⁹

37. As highlighted in her thematic report, the Special Rapporteur would recommend that other sources of law, besides IHL, be considered, in the first place IHRL, and that a systemic integration and purposive interpretation ought to be adopted. Such a method, in her view, will end up playing down the combatant status of the target(s), focusing instead on issues in relation to military necessity, proportionality and humanity.⁵⁰

38. By failing to consider systemic integration and purposive interpretation along with the specificities of the context, the application of a "first shot" theory to the targeted killing of a State actor translates into the real possibility that ALL soldiers, anywhere in the world, could constitute a legitimate target. This approach may well trigger "ultra-short international armed conflicts: but it would also "effectively evaporate the distinction between war and peace".⁵¹

39. A first strike approach by a drone strike against a State actor in a third, non-belligerent, State, raises more questions than it solves. In the context of the strike against General Soleimani, it is the opinion of the Special Rapporteur that international human rights law remains the applicable framework. The US and Iran had not been and have not been considered to be involved in an IAC before or after the strike and the strike occurred in a civilian setting in an area outside of active hostilities and in a non-belligerent State.

⁴⁴ See for instance ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996.

⁴⁵ Marco Milanovic, "Norm Conflicts, International Humanitarian Law and Human Rights Law », *Journal of Conflict & Security Law*, 2009.

⁴⁶ ICRC's 2011 Challenges of Modern Warfare, at 21–22.

⁴⁷ ICRC 2011 Challenges of Modern Warfare at 21–22.

⁴⁸ See also *Public Committee Against Torture v. Government*, 2006, para 4, applying IHRL principles to targeted strikes in a non-battlefield environment.

⁴⁹ <https://www.icrc.org/en/document/explosive-weapons-cities-civilian-devastation-and-suffering-must-stop>.

⁵⁰ Supreme Court of Israel, *Public Committee against Torture in Israel v. Government of Israel*, 2006.

⁵¹ <https://opiniojuris.org/2020/01/20/soleimani-and-targeted-killings-of-enemy-combatants-part-i-revisiting-the-first-shot-theory/>.

IV. The Lawfulness of the Strike under International Human Rights Law

40. The Human Rights Committee (HRC) in its General Comment No. 36 (GC36), clarifies that “[T]he guarantees against arbitrary deprivation of life contained in article 6 continue to apply in all circumstances, including in situations of armed conflict and other public emergencies.⁵² The right to life must be protected and no arbitrary deprivations of life is allowed.

41. The right to life must also be respected extraterritorially. The International Court of Justice,⁵³ the Human Rights Committee⁵⁴, the Inter-American Commission on Human Rights⁵⁵ and the European Court of Human Rights⁵⁶ have all confirmed that human rights treaty obligations apply in principle to the conduct of a State outside its territory.

42. With regard to the right to life, the HRC has emphasised the functional dimension of extraterritorial human rights obligations and jurisdiction⁵⁷, one that derives from a State’s (uniquely located) capacities to respect or protect human rights, including the right to life, of people over which they have some degree of control: a State “has an obligation to respect and to ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control”.⁵⁸ This is a position that the Special Rapporteur endorses and has applied in her thematic reports.⁵⁹

43. Using a drone to target an individual anywhere he or she may be, including at home, is “indeed the ultimate exercise of physical power and control over the individual who was shot and killed.”⁶⁰ To argue otherwise is an anachronism when the physical presence of a State official was necessary to assert control. A targeted drone killing requires monitoring, tracking, surveillance and a specific decision to kill a particular person – all exercises of power over that person.⁶¹ As the reach of a State’s power expands, so too do its responsibilities.

44. States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 of the Covenant⁶² while States parties that fail to take all reasonable measures to settle their international disputes by peaceful means might fall short of complying with their positive obligation to ensure the right to life.⁶³

45. The Special Rapporteur recognizes that context and situation matter in determining whether a State killing is arbitrary. Reacting to threats is not an exact science, and governments understandably should want to err on the side of caution, proportionality and protection. Indeed, Article 6, ICCPR, “imposes a positive obligation on the State to protect life, including by taking effective preventive measures against a real and immediate risk to life from a terrorist attack.”⁶⁴ The “existence and nature of a public emergency which

⁵² Human Rights Committee, General Comment No. 36, para. 67. See also *Legality of the Threat or Use of Nuclear Weapons*, 1996, ICJ Rep, para 25; *Legal Consequences of the Construction of a Wall in the Occupied Territory* 2004, ICJ Rep 136 para. 106; see also UNSC Resolution 2249 (2015).

⁵³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para. 109.

⁵⁴ General comment No. 31 (2004).

⁵⁵ *Coard and others v. United States*, 1999, para. 37.

⁵⁶ For instance, *Al-Skeini and others v. the United Kingdom*, application No. 55721/07.

⁵⁷ M. Milanovic, “The Murder of Jamal Khashoggi” at 36, 2019 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3360647Milanovic.

⁵⁸ Human Rights Committee, General Comment No. 36, para. 63.

⁵⁹ A/HRC41/36; A/HRC/38/44; A/74/318.

⁶⁰ *Al Saadoon v Secretary of State for Defense*, [2015], para 117.

⁶¹ Nils Meltzer, *Targeted Killing in International Law* (Oxford, United Kingdom, Oxford University Press, 2008).

⁶² Human Rights Committee, General Comment No. 36, para 64.

⁶³ Human Rights Committee, General Comment No. 36, para 70.

⁶⁴ House of Lords, House of Commons, Joint Committee on Human Rights, *The Government’s Policy on the Use of Drones for Targeted Killing*, Second Report of Session 2015–16, at 8. <https://publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/574.pdf>.

threatens the life of the nation may ... be relevant to a determination of whether a particular act or omission leading to deprivation of life is arbitrary and to a determination of the scope of the positive measures that States parties must undertake.”⁶⁵

46. A situation such as the killing of General Soleimani demands contextual and situational analysis, the reference to other sources of law and purposive interpretation. The European Court for Human Rights (ECtHR) has introduced flexibility in its assessment of necessity and proportionality on the basis of the context. It recognizes that the standard of absolute necessity may be simply impossible “where the authorities had to act under tremendous time pressure and where their control of the situation was minimal ... The Court is acutely conscious of the difficulties faced by States in protecting their populations from terrorist violence, and recognises the complexity of this problem.”⁶⁶

47. For instance, in *Finogenov v. Russia* (2011),⁶⁷ the ECtHR ruled that there had been no violation of the right to life when the Russian state used gas to resolve a hostage crisis in a theatre because the authorities were acting under time pressure and their control of the situation was minimal. It found that the authorities could reasonably have concluded from the circumstances that there existed a real and serious risk for the lives (in this case of the hostages), and that the use of lethal force was sooner or later unavoidable. In another case,⁶⁸ the Court determined that in order to ascertain whether a State has used reasonable force in relation to the right to life, it must examine the planning of the operation, and its investigation, along with its actual execution. Only with this latter did the Court find that the use of force has not been disproportionate because the soldiers were acting in reaction to a “genuine belief” that it was necessary to shoot the suspects in light of the alternatively grave consequences.

48. The targeted killing of General Soleimani raises however three issues at least, which are difficult if not impossible to reconcile with the aforementioned standards guiding the use of force: (i) the planning inherent to a drone strike indicating premeditation and the absence of considering alternative options (except calling off the strike); (ii) the absence of evidence that the target presented an imminent or even actual threat to life: even when incorporating the secrecy inherent to intelligence work, the information provided by the US authorities are remarkably vague and inconsequential as far as a possible imminent threat is concerned⁶⁹; (iii) the killing of 9 other persons in addition to that of General Soleimani, who individually have not been identified and assessed as presenting imminent threats. Five of these were civilians of Iraq, a US partner.

49. The United States report to the Security Council about the strike makes no reference to the General himself, speaking only of leadership elements of the Iranian Revolutionary Guards. Public statements in the immediate aftermath of the drone strike, particularly that of President Trump himself, spoke of Soleimani plotting imminent and sinister attacks on American diplomats and military personnel “but we caught him in the act and terminated him”.⁷⁰

50. The Special Rapporteur appreciates the need for careful analysis and consideration in protecting the public against threats. However, striking well before an attack is imminent – on the grounds that this is the best shot – makes the actual existence of the threat difficult to evaluate after the fact and increases the likelihood that alternatives – such as capture and detention – are never really considered. A threat to life is not imminent if it has “not yet crystallized” but “might materialize at some time in the future”. Otherwise, one excludes

⁶⁵ Human Rights Committee, General Comment No. 36, para 67.

⁶⁶ <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-108231%22%5D%7D> para. 211–212.

⁶⁷ *Finogenov v. Russia*, 2011 32; 3.

⁶⁸ <http://iusgentium.ufsc.br/wp-content/uploads/2017/08/Texto-Cmpl-McCANN-AND-OTHERS-v-UK.pdf>.

⁶⁹ <https://www.justsecurity.org/68094/how-to-think-about-the-soleimani-strike-in-four-questions/>.

⁷⁰ <https://www.reuters.com/article/us-iraq-security-blast-intelligence/trump-says-soleimani-plotted-imminent-attacks-but-critics-question-just-how-soon-idUSKBN1Z228N>.

“any possibility of an ex post facto judgment of lawfulness by the very fact that it aims to deal in advance with threats that have not yet materialized”.⁷¹

51. The right to life imposes procedural obligations as well. The “use of lethal force by the state must be effectively regulated by a clear legal framework and the planning and control of any particular operation must be such as to minimize the risk of loss of life”.⁷² In addition, “there must be an effective independent investigation capable of leading to accountability for any unlawful deprivation of life”.⁷³

52. Attention to procedural obligations would help alleviate concerns about substantive violations. If the US, or other States, were more transparent as to the evidence on which their determinations were made, and allowed those determinations to be investigated and challenged, then concerns about potential unlawful killings could be addressed. Moreover, these procedures would aid in developing more robust standards for imminence, necessity and proportionality by giving facts and substance to the decisions made.

53. The Special Rapporteur is mindful of the variety of sanctions and designations attached to General Soleimani, including the 2007 UN Security Council Resolution 1747 against Iran nuclear and ballistic program (24 March 2007),⁷⁴ the US Executive Order 13382 against “Proliferation Activities and Support for terrorism” (25 October 2007),⁷⁵ the European Union Regulation 611/2011 concerning restrictive measures in view of the situation in the Syrian Arab Republic (23 June 2011)⁷⁶, and the US “Foreign Terrorist Organization” designation of 15 April 2019⁷⁷. The IRGC were reportedly involved in shooting Iranian protestors in 2019⁷⁸ while the al-Qads forces were implicated in the ground-offensive to besiege eastern Aleppo city.⁷⁹ The Special rapporteur is also aware of the extent to which he appeared to be revered in Iran. Meeting the procedural obligations of IHRL would have allowed evidence to be presented regarding the human rights violations he may have been responsible for, incited or permitted. The proper course was to join forces with others to bring him and others associated with him to justice in the appropriate international forum. Any concerns the US or other countries might have had about possible inadequacies of international justice should have been addressed through strengthening those institutions, not disregarding them altogether.

V. Lawfulness of the killing under *jus ad bellum*

54. Under the UN Charter, States are expected to commit to “refrain in their international relations from the threat or use of force against the territorial integrity or political Independence” of any State and to “settle their international disputes by peaceful means”. Art. 2 (3), 2 (4). However, a State retains the right “of individual or collective self-defence if an armed attack occurs” (Art. 51). Although there is continuous debate over the precise contours of this right (to self-defence) there appears to be a consensus that a State can defend itself against a current, ongoing attack as well as an attack that is imminent, where the attack is “instant, overwhelming and leaving no choice of means, no moment of deliberation.”⁸⁰

55. On January 8, 2020, the United States submitted a letter to the Security Council about the strike against General Soleimani, fulfilling an obligation under Art. 51. This letter provides the US formal explanation as to why its strike constituted an act of self-defence. As such, this letter should be the sole basis in determining the legality of the strike under the

⁷¹ Elisabeth Wilmhurst, *Principles of International Law on the Use of Force in Self-defence*, p. 9.

⁷² <https://publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/574.pdf> p. 53.

⁷³ *Ibid.*

⁷⁴ <https://www.un.org/securitycouncil/s/res/1747-%282007%29>.

⁷⁵ <https://2001-2009.state.gov/r/pa/prs/ps/2007/oct/94193.htm>.

⁷⁶ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:164:0001:0003:EN:PDF>.

⁷⁷ <https://www.state.gov/designation-of-the-islamic-revolutionary-guard-corps/>.

⁷⁸ <https://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=25393&LangID=E>.

⁷⁹ A/HRC/34/64.

⁸⁰ R.Y. Jennings, “The *Caroline* and *McLeod* cases”, *American Journal of International Law*, January 1938. See also UN Doc A/59/565 and Corr.1, at para. 188, www2.ohchr.org/English/bodies/hrcouncil/docs/gaA.59.565_En.pdf.

Charter. One must not “ascribe to State’s legal views which they do not themselves formulate.”⁸¹

56. The United States asserts that the strike was “in response to an escalating series of armed attacks in recent months by the Islamic Republic of Iran and Iran-supported militias on U.S. forces and interests in the Middle East region, in order to deter the Islamic Republic of Iran from conducting or supporting further attacks against the United States or U.S. interests, and to degrade the Islamic Republic of Iran and Islamic Revolutionary Guard Corps Qods Force-supported militias’ ability to conduct attacks.”⁸²

57. This statement alleges an ongoing series of attacks, thereby entitling the United States to defend itself.⁸³ The International Court of Justice has intimated that a series of attacks, collectively, could amount to an armed attack.⁸⁴ But on its face, the letter fails to describe even one ongoing attack. It describes separate and distinct attacks, not necessarily escalating, that are not related in time or even targets.⁸⁵

58. The first incident listed, which occurred almost 5 months prior to the strike, was a “threat,” not an attack, against a US ship by an Iranian unmanned aerial system: a threat is not an attack for purposes of Art. 51, unless it is recent and provides evidence that indicates an imminent attack. The second incident listed, which occurred almost 6 months prior to the strike, was the shooting down of a US drone by an Iranian missile; Iran claimed the drone entered its airspace. Even if such an attack sufficed under Art. 51, which is questionable, the attack had clearly concluded well before January 2020.⁸⁶

59. The letter generically identifies “attacks on commercial vessels off the port of Fujairah and in the Gulf of Oman that threaten freedom of navigation and the security of international commerce,” as well as “missile and unmanned aircraft attacks on the territory of Saudi Arabia.” However, the United States was not the target of these attacks, and none of the countries involved asked the United States to use force against Iran in their defense. They do not provide grounds to the United States itself for a claim of self-defense.⁸⁷

60. The core of any argument that there was an ongoing attack seems to turn on attacks by “Qods Force-backed militia groups in Iraq, including Kata’ib Hizballah”⁸⁸ against bases where US personnel were present. However, nowhere in the letter does the United States state that Iran had “overall control”⁸⁹ over these groups;⁹⁰ instead the United States claims that Iran “backed” them. According to the ICJ, assistance to armed groups “in the form of the provision of weapons or logistical or other support” does not constitute an armed attack.⁹¹

61. At no point in its Art. 51 letter, filed a full 5 days after the strike, does the United States state that it was defending against an imminent attack. In public statements, the US

⁸¹ *Nicaragua v United States of America*, Merits, Judgment, ICJ Reports 1986, 14 at 134, para 266.

⁸² <https://www.justsecurity.org/wp-content/uploads/2020/01/united-states-article-51-letter-soleimani.pdf>.

⁸³ <https://gpil.jura.uni-bonn.de/2020/01/the-u-s-killing-of-iranian-general-qasem-soleimani-of-wrong-trees-and-red-herrings-and-why-the-killing-may-be-lawful-after-all/>.

⁸⁴ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Reports 2003, para. 64.

⁸⁵ <https://www.justsecurity.org/68008/u-s-legal-defense-of-the-soleimani-strike-at-the-united-nations-a-critical-assessment/>.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.* See also <https://www.justsecurity.org/68094/how-to-think-about-the-soleimani-strike-in-four-questions/>.

⁸⁸ <https://www.justsecurity.org/wp-content/uploads/2020/01/united-states-article-51-letter-soleimani.pdf>.

⁸⁹ *ICTY, Prosecutor v. Tadic*, 15 July 1999, paras. 120, 131, 137.

⁹⁰ The US Department of Defense statement on January 2, 2020 stated that he “orchestrated” and “approved” the attacks in December in Iraq. <https://www.defense.gov/Newsroom/Releases/Release/Article/2049534/statement-by-the-department-of-defense/>. However, while it is certainly possible that the US has evidence to this effect, this allegation is not made in the subsequent US official letter to the UN, nor was this evidence provided.

⁹¹ <https://www.justsecurity.org/68008/u-s-legal-defense-of-the-soleimani-strike-at-the-united-nations-a-critical-assessment/>.

President,⁹² Secretary of State⁹³ and the National Security Advisor⁹⁴ did mention the “imminence” of *future* attacks, but none provided a basis for the claim. Indeed, the Attorney General of the United States has stated that imminence was a “red herring”, relying instead on the past attacks as adequate grounds for the strike.⁹⁵ But all of these attacks, to the extent that they were directed against the United States, had all concluded in the past. If an “attack is clearly over, then the legal “clock” resets. If no further attack is imminent, then there is nothing to lawfully defend against. This is the time for negotiation, Security Council intervention, diplomatic relations and possibly military preparation. This is not the time for armed force.”⁹⁶

62. The US administration reiterated its reliance on past attacks in correspondence to the US Congress in which it argued that regardless of the threat of further attacks, the “series of attacks that preceded the January 2 strike” justified sufficiently the conduct of self-defense.⁹⁷ Such argument appears in effect to suggest that retaliation after an armed attack has occurred is permissible – without any need to prevent further imminent attack.

63. This argument weakens the distinction between *jus ad bellum* and *jus in bello*: the use of force under Art. 51 is narrowly constructed to be an exception from the general prohibition of the use of force under Art. 2(4). The existence of previous attacks could be a legal argument for the legality of the use of force under international humanitarian law – if an international armed conflict between the states existed prior to the strike. However, the strike itself cannot be justified on the basis of retaliation/reprisal/degrading forces under *jus ad bellum*. Were the blurring of these lines to be allowed, states could cherry-pick rationalizations from the different legal frameworks to justify acts of aggression. A clear distinction between *jus ad bellum* and *jus in bello*, as well as between self-defense and retaliation/international armed conflict, must be maintained to secure the safeguards of each system and their complementary function.

64. It is possible that the US may have had intelligence indicating Iran’s control and direction over Kata’ib Hizballah and the existence of imminent attacks. This intelligence might also have shown that the US had no alternative to intervene to prevent an attack planned by General Soleimani, other than this strike. The divergent public statements by US officials as to the grounds for the attack makes this possibility somewhat remote. Nonetheless, if this were the case, the US should have brought this evidence, in a form that protected its sources, to the Security Council for public examination.⁹⁸ Otherwise, Art. 51 becomes a convenient excuse for any use of force at the whims of a State against another State.

⁹² Stracqualursi/Hansler, Pompeo: Strike on Soleimani disrupted an “imminent attack” and “saved American lives”, CNN, Jan. 3, 2020, <https://edition.cnn.com/2020/01/03/politics/mike-pompeo-iran-soleimani-strike-cnntv/index.html>.

⁹³ Stracqualursi/Hansler, Pompeo: Strike on Soleimani disrupted an “imminent attack” and “saved American lives”, CNN, Jan. 3, 2020, <https://edition.cnn.com/2020/01/03/politics/mike-pompeo-iran-soleimani-strike-cnntv/index.html>.

⁹⁴ Brice-Saddler, Trump says Iranian military leader was killed by drone strike “to stop a war”, warns Iran not to retaliate, Washington Post, Jan. 4, 2020.

⁹⁵ https://www.washingtonpost.com/politics/four-embassies-the-anatomy-of-trumps-unfounded-claim-about-iran/2020/01/13/2dcd6df0-3620-11ea-bf30-ad313e4ec754_story.html.

⁹⁶ <https://www.justsecurity.org/68008/u-s-legal-defense-of-the-soleimani-strike-at-the-united-nations-a-critical-assessment/>.

⁹⁷ Notice on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations, <https://www.justsecurity.org/wp-content/uploads/2020/02/notice-on-the-legal-and-policy-frameworks-guiding-the-united-states-use-of-military-force-and-related-national-security-operations.pdf>; see also <https://www.justsecurity.org/69163/the-trump-administrations-latest-failed-attempt-to-justify-the-soleimani-strike/>.

⁹⁸ See Wilmhurst, Op cit., p. 9.

65. It is worth noting that only some States have sought to defend the legality of the strike against General Soleimani while most “were more reluctant to express views in legal terms” and the “majority of States remain(ed) silent”.⁹⁹

66. Although this case study concerns the strike against General Soleimani, it is important to note that this strike did not justify Iran’s subsequent actions against the United States. On January 8, Iran launched more than a dozen missiles at military bases in Iraq hosting US forces. In their communication to the Security Council, Iran claimed its right to self-defence under Article 51 but made no reference to an imminent or ongoing armed attack by the US. These Iranian attacks also fail to qualify as self-defense under Art. 51.

67. It may well be that these acts of military force between the US and Iran signal further normative dislocation and disintegration of the framework upon which global peace and security has been based and normatively regulated for the past 75 years. However, and for immediate purpose, the one certitude derived from both the US and Iranian official statements is that their respective strikes were unlawful under *jus ad bellum*. Both armed attacks appear designed to retaliate, and the top officials in both countries focused primarily on that goal in their public statements.¹⁰⁰ Under the UN Charter, armed attacks for purposes of retaliation are never permissible.¹⁰¹

VI. Involvement of a third state in the drone strike

68. The attack against General Soleimani occurred in Iraq, a sovereign State, without its consent. As such, it was a use of force against Iraq and a violation of its sovereignty. A senior Iraqi military official was killed, Abu Mahdi al-Mohandes, deputy commander of Iraq’s Popular Mobilization Forces (PMFs), as well as 4 men from PMF’s forces.¹⁰² In its letter to the UNSC, the United States failed to address or justify the killing of these men or explain why its violation of Iraqi sovereignty was justified. There have been no official explanations to the UNSC indicating whether these men were targets because considered part of the ongoing or imminent attack that the United States claimed to have defended itself against, or whether they were deemed “collateral damage”.¹⁰³

69. Iraq formally protested this strike to the UNSC.¹⁰⁴ Speaking of Iran and the US, it stated that it had “repeatedly asked our allies in the war on ISIL to refrain from drawing Iraq into their bilateral conflict. We have stressed that Iraq must not become the theatre of that conflict; its sole focus is on combating ISIL, and it earnestly endeavours to maintain strong relations with the two parties.” It stated that the US drone strike “amounts to an aggression against the State, Government and people of Iraq” and “a flagrant violation of the terms under which United States forces are present in the country”. Iraq called on the “Security Council

⁹⁹ <https://www.justsecurity.org/68173/compilation-of-states-reactions-to-u-s-and-iranian-uses-of-force-in-iraq-in-january-2020/>.

¹⁰⁰ On January 4, 2020, President Trump tweeted: “*They attacked us, & we hit back. If they attack again, which I would strongly advise them not to do, we will hit them harder than they have ever been hit before!*” The day before, on January 3, 2020, President Rouhani had stated: “*There is no doubt that the great nation of Iran and the other free nations of the region will take revenge on this horrible crime from criminal America.*” See <https://www.justsecurity.org/68173/compilation-of-states-reactions-to-u-s-and-iranian-uses-of-force-in-iraq-in-january-2020/>.

¹⁰¹ <https://www.ejiltalk.org/iran-unlawfully-retaliates-against-the-united-states-violating-iraqi-sovereignty-in-the-process/>.

¹⁰² The PMF militias were incorporated into the Iraqi military in 2016. All five men were members of Kata’ib Hezbollah (KH), and Mr. Al-Mohandes had been its founder. <https://www.justsecurity.org/67917/united-states-killed-iraqi-military-official-and-iraqi-military-personnel-in-the-two-recent-attacks/>.

¹⁰³ News reports suggest that the US knew that these men had come into the target zone; it would have called off the strike if “Iraqi government officials allied with the US” had been there. KH is on the US State Department list of Foreign Terrorist Organizations. <https://www.justsecurity.org/67917/united-states-killed-iraqi-military-official-and-iraqi-military-personnel-in-the-two-recent-attacks/>. It should be noted that KH launched the attacks in December against US outposts, so one could argue that Iraq forces fired the first shot.

¹⁰⁴ <https://digitallibrary.un.org/record/3846366?ln=en>.

to condemn the air strike and assassination, which amount to extra-judicial killings and contravene with the human rights obligations of the United States.” On January 9, 2020, Iraq formally protested the strikes by Iran on Iraqi territory.

70. International law has traditionally required either valid consent of the State for the use of force in its territory or the acts of the target must somehow be attributable to the territorial State. Iraq did not consent, and while one could argue that the Kata’ib Hezbollah attacks in December were attributable to Iraq, none of the other attacks in the US Art 51 letter, justifying the strike, related to Iraq at all. The US has not provided any evidence that any attacks by Kata’ib Hezbollah were imminent. The failure of the United States to justify and formally explain its violation of Iraqi sovereignty should end the analysis. Without justification, this constitutes, as Iraq claims, an act of aggression, and all resulting deaths arbitrary deaths for which the United States bears responsibility.

71. Nonetheless, the US Secretary of Defense has suggested the US felt justified to strike General Soleimani in Iraq because of Iraq’s alleged failure to prevent Iranian attacks. On January 2, 2020, he issued a statement that he had “urged the Iraqi government to take all necessary steps to protect American forces in their country. I personally have spoken to Iraqi leadership multiple times over recent months, urging them to do more.”¹⁰⁵

72. Since 9/11, the US and other States have articulated the “unwilling and unable” doctrine to permit strikes within a territorial State without consent: according to the US, as articulated with respect to attacks on ISIL in the Syrian Arab Republic, “States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 of the Charter of the United Nations, when ... the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks.”¹⁰⁶ This doctrine has been used by the US, the UK, and others to justify targeting inter alia the Taliban in Afghanistan, and ISIL in the Syrian Arab Republic or providing support for those attacks. To the extent that other states have taken any position, the support for this doctrine is mixed,¹⁰⁷ but it has been used to justify the use of military force.¹⁰⁸ Russia has articulated this doctrine with respect to the Chechen in Georgia, but has rejected it with respect to Syria; Turkey has defended its actions against the PKK and Daesh in Iraq on the basis of this doctrine;¹⁰⁹ and Israel has similarly defended its actions against Hezbollah in Lebanon and against alleged Iran-backed forces in Syria.¹¹⁰

73. Even if valid, the “unwilling and unable” doctrine does not justify the strike within Iraq. First, as an initial matter, the extension of this doctrine to State actors, as opposed to armed non-state actors (ANSAs), appears fundamentally untenable, at least under the circumstances of this case. The threat of Iran was not “located” in Iraq, as this doctrine requires. The attacks listed by the US as justification for the strike occurred throughout the Middle East, not just in Iraq, and only two of those listed in the US Art. 51 notification were launched from Iraq. General Soleimani was traveling in Iraq on January 3, 2020, and the US took that opportunity to attack him there. However, despite travel bans imposed by the US, General Soleimani travelled throughout the Middle-East and also, apparently, to Russia. Does this mean that the US is justified in targeting General Soleimani and other Iranian officials in any State to which they travel? Would the threat from Iran then be “located” in

¹⁰⁵ <https://www.defense.gov/Newsroom/Releases/Release/Article/2049227/statement-by-secretary-of-defense-dr-mark-t-esper-as-prepared/>; see also <https://www.defense.gov/Explore/News/Article/Article/2050341/senior-dod-official-describes-rationale-for-attack-on-quds-force-commander/> (quoting unnamed senior defense officials stating “We have been very clear with Iran and our Iraqi partners that these increasing attacks need to stop and that we would hold Iran directly responsible for any harm to U.S. personnel”).

¹⁰⁶ Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General.

¹⁰⁷ <https://www.ejiltalk.org/a-plea-against-the-abusive-invocation-of-self-defence-as-a-response-to-terrorism/>.

¹⁰⁸ <https://www.lawfareblog.com/which-states-support-unwilling-and-unable-test>

¹⁰⁹ <https://www.documentcloud.org/documents/3125882-TURKEY-IRAQ-Pkk-Isil-12-18-2015.html>.

¹¹⁰ See <http://opiniojuris.org/2011/12/15/ashley-deeks-failure-to-defend-the-unwilling-or-unable-test/>;

those countries, making those countries subject to attacks? What would be the basis for determining whose territory could be targeted?¹¹¹

74. It is possible that the US is attempting to expand this “unwilling and unable” doctrine to State actors by expanding its terrorist designations from ANSAs to State entities. The U.S. declared the Islamic Revolutionary Guard Corps (IRGC), which is part of the Iranian government, as a foreign terrorist organization in April 2019.¹¹² This framing may place the conduct of the US against General Soleimani and any member of that force within its counter-terrorism measures. However, it must be understood that neither Art. 51 justifications nor human rights obligations are modified by virtue of the classification by one or several States of a particular individual or group as “terrorist”. Such classifications have no binding effect on other States, including in this case Iraq. While the U.S. had classified the IRGC as a foreign terrorist organization in April 2019,¹¹³ there was no duty placed on any other nation to adopt that same classification and certainly no obligation to act against members of the group so identified or its leaders through the use of force. Iraq was not, in other words, obligated to take any action against General Soleimani.

75. Second, to justify a strike against the sovereignty of a third State, the US must show that the State was unwilling or unable to prevent an ongoing or imminent attack and that the strike in that State was necessary and proportionate. Yet, most of the prior attacks listed in the US Art 51 notification did not involve Iraq and, as noted, the US has presented no evidence nor has any emerged, to suggest that Iraq was the intended location of any imminent attack by Iran and the IRGC. Although President Trump at one point suggested that the US embassy in Iraq was a target of Iran, he quickly expanded this to four embassies, and neither claim was confirmed by administration officials. Instead, it appears that officials believed that General Soleimani intended generally to “escalate hostilities toward U.S. interests in the Middle East, to include possible attacks on diplomatic and military facilities.”¹¹⁴

76. At base, the primary US justification for the strike in Iraq seems to be deterrence: it was necessary, in the US view, to kill General Soleimani now to deter future attacks, even though their time and place were not known. This focus on the imminent need for a strike in self-defense reflects the recent attempt by some countries to delink imminence from a temporal definition – an attack will occur soon. Instead, it is connected to necessity – whenever or wherever an attack might occur, self-defense must necessarily occur now to prevent it.¹¹⁵ But even this expanded notion of imminence and necessity fails in this case.

77. To make this claim of imminence and necessity, “the US would need to demonstrate that Soleimani posed an imminent threat, that it had to strike at the general when and where it did, that it could not ask the Iraqi government for permission (e.g., on the basis of its alleged collusion with Iran) and that it could not wait to strike at Soleimani elsewhere.”¹¹⁶ Not surprisingly, the US has not attempted to make these claims. Even at the most basic level, the US did not demonstrate that striking Soleimani was “necessary”: unlike an attack on the

¹¹¹ <https://www.ejiltalk.org/the-killing-of-soleimani-the-use-of-force-against-iraq-and-overlooked-ius-ad-bellum-questions/>.

¹¹² Statement from the President on the Designation of the Islamic Revolutionary Guard Corps as a Foreign Terrorist Organization, Issued on April 8, 2019, <https://www.whitehouse.gov/briefings-statements/statement-president-designation-islamic-revolutionary-guard-corps-foreign-terrorist-organization/>.

¹¹³ Canada listed Revolutionary Guard Qods Force as a terrorist entity in December 2012; Saudi Arabia designated them as a group suspected of terrorism in October 2018; the European Union levied financial sanctions on them in March 2012.

¹¹⁴ https://www.washingtonpost.com/politics/four-embassies-the-anatomy-of-trumps-unfounded-claim-about-iran/2020/01/13/2dcd6df0-3620-11ea-bf30-ad313e4ec754_story.html; see also <https://www.nytimes.com/2020/01/04/us/politics/trump-suleimani.html>.

¹¹⁵ <https://www.ejiltalk.org/the-soleimani-strike-and-self-defence-against-an-imminent-armed-attack/>. The US applies the Bethlehem Principles which list a variety of factors to consider in determining imminence. One critical factor is “What is the last feasible window of opportunity to act against the threatened armed attack?” See explanation of application of Bethlehem Principles by Attorney-General of Australia, <https://www.ejiltalk.org/the-right-of-self-defence-against-imminent-armed-attack-in-international-law/>.

¹¹⁶ <https://www.ejiltalk.org/the-soleimani-strike-and-self-defence-against-an-imminent-armed-attack/>.

actual person or people carrying out the attack, or on the equipment to be used in the attack, an attack on the leader in an attempt to deter further attacks may not be effective as future attacks could still occur without him, although possibly not in the short-term.¹¹⁷

78. Thirdly, there is no evidence that Iraq was unable or unwilling to defend US forces on its territory. This doctrine historically has been used in circumstances where a State is unable to control actors or regions of the country or where it is in some way complicit in allowing the target to operate and plan attacks. Iraq in contrast is a US ally and has been actively cooperating with the US in combatting ISIL; yet the US did not even consult Iraq before this strike. There has been no evidence brought forward by the US as to what steps it had taken to seek Iraq's involvement and protection before taking the strike. Vague comments about conversations by one US official had with Iraq do not suffice.¹¹⁸

79. There is an obligation on a State considering conducting a targeted killing on another State's official on the territory of a third State to also factor into their assessment of necessity and proportionality the third state's sovereignty, as well as the risks to the population and infrastructure of the third State. The equal sovereignty of States is one of the highest principles of international law and a cornerstone of the UN. So weighty is the test of this obligation that involving a non-consenting state in any act of self-defense may well be always disproportionate¹¹⁹ and thus, always unjustified.

80. What is most telling is the failure of the US to even address the rights of Iraq and explain, and provide evidence for, its use of force against the country and its citizens. Until such an explanation is made, the conclusion must be that the strike is an act of aggression against Iraq, and the killing of its citizens and of non-citizens on its territory was unlawful and arbitrary under international law.¹²⁰

81. The implication as far as the targeted killing of General Soleimani is concerned is that it was an arbitrary killing for which the US is responsible: "States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 of the Covenant."¹²¹ This is an approach backed up by almost universal jurisprudence¹²² and expert comments.¹²³

VII. In conclusion

82. Accordingly, in light of the evidence that the US has provided to date, the targeting of General Soleimani, and the deaths of those accompanying him, constitute an arbitrary killing for which, under IHRL, the US is responsible. The strike was in violation of Art. 2 (4) of the UN Charter with insufficient evidence provided of an ongoing or imminent attack. No evidence has been provided that General Soleimani specifically was planning an imminent attack against US interests, particularly in Iraq, for which immediate action was necessary and would have been justified. No evidence has been provided that a drone strike in a third country was necessary or that the harm caused to that country was proportionate to the harm allegedly averted. While there is information suggesting that the US requested, at least in December 2019, that Iraq take action against Kata'ib Hezbollah, no evidence has been provided that Iraq was consulted on how to alleviate any threats posed to the US arising from the visit of General Soleimani, such that Iraq should bear the burden of addressing those threats. No evidence has been produced that there was no time for the US to seek aid from

¹¹⁷ Ibid.

¹¹⁸ <https://www.defense.gov/Newsroom/Releases/Release/Article/2049227/statement-by-secretary-of-defense-dr-mark-t-esper-as-prepared/>.

¹¹⁹ Akande and Liefländer, Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense, 107 *The American Journal of International Law* 563, 568 (July 2013).

¹²⁰ International Law Association Conference, Sydney (2018), Final Report on Aggression and the Use of Force, p. 16.

¹²¹ General Comment No. 36, at 70.

¹²² See e.g. Inter-American Commission on Human Rights, *Abella v. Argentina*, November 18, 1997, at 161; Inter-American Court of Human Rights, *Santo Domingo Massacre v. Colombia*, pp. 211–236; ICJ, *Democratic Republic of the Congo v. Uganda* (Judgment of 19 December 2005), paras. 216.

¹²³ Human Rights Committee, General Comment (GC) No. 36, at 64.

the international community, including the UNSC, in addressing the alleged imminent threats. Major General Soleimani was in charge of Iran military strategy, and actions, in Iraq and the Syrian Arab Republic. But absent an actual imminent threat to life, the course of action taken by the US was unlawful.

83. As noted in the introduction, in the months preceding the strike against General Soleimani, hundreds of Iraqis were wounded and killed in the context of peaceful demonstrations. Others lost their lives in the fight against what is left of ISIL and other groups which continue to operate. These deaths came less than two years after the end of a devastating conflict in which an estimated 30,000 Iraqi civilians were killed and another 55,000 were injured.¹²⁴

84. The strikes against General Soleimani and the US bases in Iraq resulted in far more casualties than their direct targets alone. 176 passengers lost their lives when an Iranian missile struck their plane, by “mistake” according to Iran, in the midst of escalating tensions.¹²⁵ UN Special Procedures also alleged that Iranians protesting the authorities’ lack of transparency over the incident were killed,¹²⁶ while Iraqi protesters continued to be targeted, killed or disappeared.¹²⁷

85. With Iraq increasing treated as if “an open arena for the settling of scores” and yet “a theatre for a potential war that could be further devastating to it and to the region and the entire world”,¹²⁸ it is impossible to sustain a plausible argument that somehow the two strikes were intended to contribute to or occurred as part of a post-conflict and reconstruction strategy. They did not. What these acts did convey however is scant concern for the well-being of the people of the countries affected, including an absence of concern for the rights and demands of the young demonstrators who across the region cry out for democracy and human rights.

¹²⁴ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/185/94/PDF/G1818594.pdf?OpenElement>.

¹²⁵ These included the US President January 4 threats to target 52 Iranian sites, including cultural sites <https://twitter.com/realdonaldtrump/status/1213593975732527112?s=11>.

¹²⁶ Special Procedures communications, Iran, 19 February 2020. <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25070>.

¹²⁷ Special Procedure communication, Iraq, 13 January 2020. <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25020>.

¹²⁸ <https://undocs.org/S/2020/26>.