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

Extrajudicial, summary or arbitrary executions

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, Agnes Callamard, is submitted to the Human Rights Council pursuant to Council resolution 35/15. It addresses the issue of targeted killings through armed drones, particularly in light of the proliferation in the use of drones and their expanding capability over the last 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.

** The annex of this report will be reproduced as received without editing or translation.

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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 Iran’s General Soleimani¹ or that against Saudi Arabia’s oil facilities² generate strong political reaction, the vast majority of targeted killings by drones³ are subjected to little public scrutiny at either national or international levels. And yet, drone technologies and drone attacks generate fundamental challenges to international legal standards, the prohibition against arbitrary killings and 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 compliance with applicable international law. Deliberate attacks on civilians and civilian objects such as schools, hospitals and ambulances in Afghanistan, Occupied Palestinian Territory, Syria, Yemen and Libya, to name but a few (S/2019/373), evidence the tragic disregard of the most essential humanitarian principles.⁴ Yet, while investigations, commissions of inquiries, UNGA and UNSC deliberations have led to some condemnation of these breeches 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 misplaced, given that many targeted killings are carried out by conventional means – e.g. Special Operations Forces. Indeed, these also raise serious concerns. The present report thus contains findings applicable to all forms of targeted killings, no matter their method. Nonetheless, understanding the particularities of armed drone technologies is crucial if we are to keep pace with current and expected developments impacting on the protection of the right to life.

4. Two previous Special Rapporteurs focused on drones’ 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 (*see A/HRC/26-36, A/68/382*). In 2013, then Special Rapporteur Christoff Heyns 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 with now vast array of State and non-State actors deploying ever more advanced

¹ See Annex One.

² On 14 September 2019, flown alongside cruise missiles, drones hit Aramco oil processing facilities at Abqaiq and Khurais in eastern Saudi Arabia, 6 percent of world oil supply. The Houthi movement in Yemen claimed responsibility. Some States deemed Iran responsible. The drones were possibly UAV X. The UN Panel that inspected them found they were powered by German and Chinese engines.

³ Targeted killings are the intentional, premeditated and deliberate use of lethal force, by States or armed non-State actors, in times of peace as well as 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, some may be legal: A/HRC/14/24/Add.6, para 7-10.

⁴ When the vast majority of wars’ 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% of war casualties are civilians.

⁵ A/68/382, para 14-16.

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

drone technologies⁷ making their use a major and fast becoming 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. 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. The 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.⁹ Since 2015, Israel, Iraq, Iran, UK, US, Turkey, UAE, Saudi Arabia, Egypt, Nigeria, and Pakistan¹⁰ 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 or outside non-international armed conflicts. Turkey has reportedly used drones domestically against the Kurdistan Worker's Party (PKK),¹¹ while Nigeria first confirmed attack was carried out against a Boko Haram logistics base in 2016.¹² In 2015 Pakistan allegedly used its armed drones for the very first time in an operation to kill three "high profile terrorists."¹³ Iraq has similarly purchased drones to carry out strikes against ISIS in Anbar province in 2016.¹⁴

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

⁸ https://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 (smallest drones); Class II (Mid-sized drones that weigh between 150 and 600 kgs); Class III (largest and most lethal drones).

⁹ <https://www.newamerica.org/international-security/reports/world-drones/who-has-what-countries-with-armed-drones/>.

¹⁰ Officially, France carried out its first drone strike in Dec 2019 for kinetic tactical support <https://www.france24.com/en/20191224-france-says-it-carried-out-first-armed-drone-strike-in-mali>. Russia allegedly conducted strikes in Syria whilst undertaking combat trials of the 'Orion'. <https://nationalinterest.org/blog/buzz/russia%E2%80%99s-predator-drone-flew-strikes-syria-93366>.

¹¹ <https://www.theguardian.com/news/2019/nov/18/killer-drones-how-many-uav-predator-reaper>; Turkish government video of a 2018 strike <https://www.youtube.com/watch?v=gQRNI6NDmAQ>.

¹² <https://twitter.com/NigAirForce/status/958004984343343106>; Nigerian government videos of strikes: https://www.youtube.com/channel/UC2Jf80aJw_wGhA5AzP_9iLg/search?query=drone.

¹³ <https://www.defensenews.com/air/2015/09/08/pakistan-surprises-many-with-first-use-of-armed-drone/>.

¹⁴ <https://www.popularmechanics.com/military/a21197/the-iraqi-army-is-flying-chinese-made-killer-drones/>.

9. At least 20 armed non-State actors have reportedly obtained armed and unarmed drone systems¹⁵ including the Libyan National Army, Harakat Tahrir al-Sham, Palestinian Islamic Jihad, Venezuelan military defectors, Partiya Karkerên Kurdistanê, Maute Group, Cártel de Jalisco Nueva Generación, the Houthis and ISIS.¹⁶ Armed groups have accessed commercially available “off-the-shelf” systems, drones sold by States and internally developed their own.¹⁷ Multi-drone deployment (in multiples of 10) have also been used by non-State actors. In 2017 in Mosul, Iraq, for example, within a 24-hour period “there were no less than 82 drones of all shapes and sizes” striking at Iraqi, Kurdish, US, and French forces¹⁸. The Haftar Armed Forces carried out over 600 drone strikes against opposition targets¹⁹ resulting allegedly in massive civilian casualties, including, in August 2019, against a migrant detention center.²⁰

10. Commercial and drone technologies exports have exacerbated drones’ proliferation and reduced their cost. It is expected that more and more countries will develop or acquire armed drones, and that, within the next ten years, over 40% of drones will be armed, with some 90% of these falling in the Class III category.²¹

B. Expanded capability, function and form

11. The “*second drone age*” is also characterized by a progressive transformation of the technology itself. As yet, 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 ground²².” However, now more capable of targeted killings both near and far, drones are becoming stealthier, speedier, smaller, more lethal and operable by teams located thousands of kilometres away.

12. For instance: Class III military drones’ systems can remain airborne for over 20 hours, fly more than 1,000 kms at speeds over 300 kms/hour, carrying heavy payloads and a sophisticated suite of hardware and software that means they can pick-up huge amounts of data, even private conversations transmitted from mobile phones and computers.²³ Smaller drones having a 100 km + range, can travel at 150/225 kms per hour, carrying a 30 kg warhead with air burst fragmentation explosive capacity. While some drones are piloted from within the theatre of conflict,²⁴ others are operated via near-real-time satellite connection: a team located near the zone of conflict guides the drone through take-off and

¹⁵ <https://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>.

¹⁶ <https://www.newamerica.org/international-security/reports/world-drones/non-state-actors-with-drone-capabilities>.

¹⁷ <https://www.conflictarm.com/dispatches/evolution-of-uavs-employed-by-houthi-forces-in-yemen/>.

¹⁸ <https://thebulletin.org/2019/10/the-dark-side-of-our-drone-future/>.

¹⁹ <https://www.iiss.org/blogs/analysis/2019/11/mide-uavs-in-libyas-civil-war>; https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/S_2019_914.pdf.

²⁰ <https://news.un.org/en/story/2020/01/1056052>.

²¹ <https://www.c4isrnet.com/newsletters/unmanned-systems/2018/12/26/what-does-2019-hold-for-russias-drones/> p. 52.

²² https://www.sdu.dk/cws/-/media/cws/files/cws_military_drones_in_europe_report.pdf p.48.

²³ These include the Reaper, the unarmed Global Hawk, the Heron, and the armed Wing Loong II.

²⁴ <http://drones.cnas.org/reports/a-perspective-on-france/>.

landing, while sensor-operators, located thousands of miles away, control the drone in flight and instruct strikes.²⁵

C. The 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 the option of targeted killing is a less financially onerous choice compared to the alternatives, such as “locate, detain/arrest”.

_____ (b) Adaptability: Drones are truly “all terrain”, deployable in a variety of settings for a range of purposes²⁶ by various actors, and they are amenable to ongoing technological innovations.

(c) Deniability: Operable at long range and clandestinely, the drone is both easy to deny and its operation more difficult to attribute. Drones further are not “indigenous” to their operators, bearing often similar look and design, range and lethal capability. The very same make and model may be deployed by different State and non-State actors operating in the same geographical area.

(d) Effectiveness: Drones offer unprecedentedly asymmetrical advantage in favour of their deployer; promising limited damage to other than the intended target, with low-to-no risk of direct damage for the initiator.²⁷

(e) Acceptability: Drone technologies are perceived as largely “bloodless, painless, and odorless”²⁸, the guarantors thus of (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”.²⁹

(f) Political gain: As a number of drones’ strikes have demonstrated, a country’s ability to take-out big-name targets, without any casualties on its side, is a political gain for the government at the time, even though it may not see ‘military victory’ in the longer term.

14. Yet, these characteristics, each on their own and all together, raise troubling moral and human rights question and, as importantly, present dangerous myths.

D. The myth of the surgical strike

15. Military officials and others have argued that drones enable the most surgical of strikes; that a drone’s capability for remaining on persistent over watch offers clear military advantages; that their greater endurance enhances detailed situational intelligence; and that with heightened accuracy comes far fewer collateral casualties. But these assertions are not all supported by evidence. Far more casualties are attributable to drone strikes than acknowledged³⁰.

²⁵ Arthur Holland Michel and James Rogers, forthcoming, 2020.

²⁶ This includes loitering or ‘Persistent Overwatch’ allowing an actor to hold in one geographical location for 14 hours or so and take strikes if needed.

²⁷ J. Rogers & A.H. Michel, *Drone Warfare*, 2020.

²⁸ https://www.mitpressjournals.org/doi/full/10.1162/ISEC_a_00257#fn28.

²⁹ Der Derian, *Virtuous War*, 2009, 241-244.

³⁰ Counting “civilian” deaths or “collateral” casualties can suggest that the intended targets were deprived of their lives legitimately. But this is not the case as highlighted below. Nevertheless, the focus here is on the killings of those who were not the targets of the drones strikes.

16. The intelligence gathering and complex coordination required across teams, agencies and countries, diffusion of controls over visuals, and other factors increase the risks of inaccuracy in use, if not actual misuse, of drone technology. In practice, the potential for human error and thus imperfect instruction of the drone is far higher than usually acknowledged.³¹

17. A major problem exists at the point of identification of the targets of so-called personality³² or signature strikes³³. The former may be based on intelligence gathered from various State agencies regarding specific individuals. The later, immensely problematic, are derived from defining characteristics associated with “terrorists” (e.g. bomb-making or carrying weapons) with indications that metadata, such as gender and age come into play.³⁴ Both are reliant on often complex networks of informers and analysts and each is commonly convoluted and speculative. Mistakes are inevitable.

18. Further, 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 humanitarian and/or human rights law.³⁵ Civilian deaths and drones’ operations also alienate local populations, further reducing willingness to provide intelligence and generating grievances that can feed further conflict.³⁶

19. Instances of civilian casualties from drone strikes include:

(a) Analysis of classified data on U.S. drone strikes in Afghanistan from 2010 to 2011 reveals that drone strikes had been ten times more likely to cause civilian casualties than conventional air attacks.³⁷

(b) Research conducted on Yemen drone strikes from 2009 to 2014 showed that more than 80 percent of the total number of civilian deaths were caused by drones.³⁸ Data also underline the human cost of incorrect intelligence: seventeen 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% of all recorded child deaths.³⁹

(c) In Pakistan, 2015 figures show that missed strikes targeting 24 men killed 874 other people, accounting for the 35% of all confirmed civilian casualties in Pakistani drone strikes and causing the deaths of 142 children.⁴⁰

³¹ Interviews (Larry Lewis, James Rogers) March 2020.

³² It has been alleged that low-level “foot soldiers” who “possess no leadership roles are also targeted. Interview, 2020.

³³ Kevin Jon Heller, *One Hell of a Killing Machine*, *Journal of International Criminal Justice* 11 (2013), 89-119. The author found that a significant number of US signature strikes violate IHL.

³⁴ Wilpf, *Sex and Drone Strikes*, 2014, p.5.

³⁵ <https://civiliansinconflict.org/wp-content/uploads/2020/02/PDF-Report-for-Website.pdf>.

³⁶ Interviews, April 2020.

³⁷ Dr. Lewis Lawrence, Interview, March 2020. He also noted that “The US has taken steps to address risk factors in training and in their employment... What kinds of issues will we see, and how long will they last, for other militaries now acquiring unmanned capabilities?”

³⁸ https://www.cna.org/cna_files/pdf/COP-2014-U-008746-Final.pdf p.46.

³⁹ https://reprieve.org/wp-content/uploads/2014_11_24_PUB-You-Never-Die-Twice-Multiple-Kills-in-the-US-Drone-Program-1.pdf, p. 6.

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

(d) Since 2017, civilian casualties have increased in central Yemen, Southern Somalia, Syria⁴¹ including Mosul (allegedly 200 civilians), Aleppo (a mosque⁴²) and Raqqa (a school). Strikes have allegedly gone wrong in Afghanistan⁴³ while those in Somalia have reportedly increased rate of casualties.⁴⁴

20. Civilian harm caused by armed drone strikes extends far beyond killings, with many more wounded⁴⁵. While the consequences of both armed and non-combat drones remain to be systematically studied, evidence shows that the populations living under “drones’ persistent stare and noise experience generalized threat and daily terror⁴⁶”. The strain of constant anticipation of a drone attack⁴⁷, cause significant psychological harm, including PTSD⁴⁸, cripple daily activities⁴⁹ and create largely unaccounted for socio-economic burdens, particularly on women⁵⁰.

21. In armed conflicts, civilians’ casualties have been reduced through stronger coordination, improved data analysis, better training of drones’ operators, and systematic evaluation of strikes.⁵¹ The NATO 2018 Protection of Civilians Strategy and Concept, for example, introduced civil-military coordination teams responsible for recording and investigating allegations. The civilian harm mitigation “life cycle” integrates civilian protection at all points in the planning and use of military force. Systematic review of incidents that have caused civilian deaths also help avoid operational deficiencies.⁵² The Special Rapporteur strongly encourages such measures which should include robust investigations into possible violations of international law.⁵³

E. The absence of transparency and accountability

22. Echoing findings of the previous Special Rapporteur (A/68/382), the evidence continues to suggest that drone operations are also characterized by violations of the

⁴¹ <https://airwars.org/news-and-investigations/shadow-american-war-syria/>.

⁴² <https://airwars.org/news-and-investigations/unilateral-strike/>.

⁴³ <https://www.amnesty.org/en/latest/news/2019/09/afghanistan-shocking-disregard-for-civilians-as-us-drone-strike-adds-to-death-toll/>.

⁴⁴ <https://www.amnesty.org/en/latest/news/2019/09/us-military-shows-appalling-disregard-for-civilians-killed-in-somalia-air-strike/>.

⁴⁵ <http://www.christopherjferguson.com/Drones.pdf>, p. 7.

⁴⁶ Ioannis Kalpouzos, *The Armed Drone*, in J. Hohmann and D. Joyce (eds), *International Law’s Objects*, 2018.

⁴⁷ <https://www-cdn.law.stanford.edu/wp-content/uploads/2015/07/Stanford-NYU-Living-Under-Drones.pdf>; <http://www.christopherjferguson.com/Drones.pdf>.

⁴⁸ <http://www.christopherjferguson.com/Drones.pdf>.

⁴⁹ <https://www.files.ethz.ch/isn/196761/Drone%20Chic%20Briefing%20April%202016.pdf>; <https://www.theatlantic.com/international/archive/2013/04/living-in-terror-under-a-drone-filled-sky-in-yemen/275373>.

⁵⁰ Kennedy-Pipe, C. et. al. *Terrorism and Political Violence*, 2016.

⁵¹ Larry Lewis, *Protecting Medical Care in Conflict*, 2019.

⁵² Larry Lewis, *Improving lethal Action*, September 2014.

⁵³ <https://www.geneva-academy.ch/joomlatools-files/docman-files/Guidelines%20on%20Investigating%20Violations%20of%20IHL.pdf>.

international obligation to investigate⁵⁴, and to punish, where applicable, those responsible for violations of international humanitarian or human rights law. There is little public disclosure⁵⁵, with targeted killings by drones wrapped up in a secrecy that extends to the investigation of civilian deaths.

23. Without on-the-ground, post-strike assessment, authorities rely on pre- and post-strike drone-video feeds to detect civilian casualties leaving potentially significant numbers of civilian casualties, including of those misidentified as “enemies”, undiscovered. Studies showed that in Syria and Iraq the initial military estimates missed 57% of casualties.⁵⁶ While civilian populations should be central to reporting and accountability mechanisms, regrettably, there seem to be no reporting mechanisms for families affected by drone strikes. And yet, civil society and media sources have proven invaluable, including to military authorities, for accurate counts of civilian casualties which is also essential for a fuller picture of the impact of operations.⁵⁷ Ultimately however, the lack of transparency, and accountability, about the extent of armed drones’ operations and consequent civilian casualties is the result of State policies and legal loopholes.⁵⁸

24. Drones sit at the intersection of several oversight regimes, but, being an intelligence asset, they somehow fall between them. With few to no risks involved for those directing or operating drones, including little risk 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 US President Barack Obama conceded in May 2013⁵⁹. In general, at the domestic level, there seems to be many loopholes by which to avoid scrutiny, not the least because the matter can fall within the remit of many agencies but under the responsibility of none.⁶⁰

25. Few countries have demarcated the drone for parliamentary oversight. In general, a country’s lethal use of drones is not subject to their parliament’s prior approval⁶¹, even though, under a first strike doctrine, their use may trigger an international armed conflict.

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 Justice⁶² and the European Court of Human Rights⁶³, amongst others, have established that human rights treaty obligations can apply in principle to the conduct of a State outside

⁵⁴ The African Commission requested to Niger that it launches their own investigations into French and US drone strikes on their soil.

⁵⁵ <https://civiliansinconflict.org/wp-content/uploads/2020/02/PDF-Report-for-Website.pdf>.

⁵⁶ Interviews, March 2020.

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

⁵⁸ See for instance US Executive Order 13732 <https://www.whitehouse.gov/presidential-actions/executive-order-revocation-reporting-requirement>.

⁵⁹ Michael C. Horowitz, et al, *International Security*, Vol. 41, No. 2 (Fall 2016), 7, 14; Jason Koebler U.S. News, May 23, 2013, <http://www.usnews.com/news/articles/2013/05/23/obama-administration-saw-drone-strikes-as-cure-all-for-terrorism>.

⁶⁰ See <https://www.opensocietyfoundations.org/publications/armed-drones-in-europe>; Jameel Jaffer, *The Drones Memos*, 2015; Interview, Aditi Gupta and Maxine Molyneux, March 2020

⁶¹ For an in depth analysis of the situation in Europe see <https://www.opensocietyfoundations.org/publications/armed-drones-in-europe>

⁶² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para. 109.

⁶³ *Al-Skeini and others v. the United Kingdom*, application No. 55721/07, Grand Chamber judgement of 7 July 2011, paras 106-186; *Loizidou v. Turkey*, application No. 15318/89, judgement of 18 December 1996; *Ilaşcu v. Moldova and Russia*, application No. 48787/99, judgement of 8 July 2004, para. 392; *Al-Jedda v. the United Kingdom*, application No. 27021/08, Grand Chamber judgement of 7 July 2011.

its territory.⁶⁴ 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 is impacted by its military or other activities in a direct and reasonably foreseeable manner (GC36, para 63). That scenario applies to drones strikes and their targets, who should be considered fall within the jurisdiction of the State operating the drone.

27. However, judicial practice is not yet in synch with these normative arguments. Thus far courts refuse to provide oversight to drones' targeted killings extra territorially, arguing that such matters are political, or relate to international relations between states and thus are non-justiciable.⁶⁵ A blanket denial of justiciability over the extra territorial 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 of a stronger legal response to drones use of force. A watershed ruling is that of Rhine-Westphalia Higher Administrative Court on German legal responsibilities as a host for US drones operations through Ramstein Air base. At the time of publication, 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 US by virtue of Germany's assistance and "central role" in US strikes: Germany has a duty to protect the right to life of those targeted.

(b) There are no basis in international law for the pre-emption basis to self-defence.

(c) Germany should invest greater effort to ensure respect for international law by US military operations involving Germany territory (Ramstein air base);

(d) US assurances regarding the legality of activities undertaken through Ramstein Base are insufficient;

(e) Assistance to unlawful US strikes is a matter of law, not politics and thus cannot be justified through foreign policy alone.

29. Protection of lives -- the highest of a State's responsibilities -- 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 lines between 'combat' and 'non-combat' operations are blurred.

III. Drones Targeted killings and international law

30. As argued by a previous Special Rapporteur (A/68/382), 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 (IHL) and international human rights law (IHRL).

31. On its own *jus ad bellum* is not sufficient to guide the use of force extra territorially. While *jus ad bellum* is a question between States under the UN-Charter, other obligations are owed to individuals. Accordingly, even the legality of a strike under Art. 51 of the UN Charter does not preclude its wrongfulness under humanitarian or human rights law. As the International Law Commission (ILC) Draft Articles on State Responsibility states: "*As to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defense does not preclude the wrongfulness of conduct.*"

⁶⁴ A/68/382 para 45.

⁶⁵ For instance *Noor Khan v The Secretary of State for Foreign and Commonwealth Affairs*.

32. While previous Special Rapporteurs applied this approach to situations of “peace” and to non-international armed conflicts (NIAC), current events oblige the present Special Rapporteur to consider these legal questions in reference to international armed conflicts (IAC) and the operationalization of the complementarity between IHL and IHRL.

A. Protection against arbitrary killings

33. The right to protection from arbitrary deprivation of life is a rule of customary international law as well as a general principle of international law and a rule of *jus cogens*. It is recognized by the UDHR, the ICCPR, and regional Conventions.⁶⁶

34. The complementarity of IHL and IHRL has been highlighted by States, international bodies and courts.⁶⁷ The well-established principle that IHRL continues to apply during war and public emergencies⁶⁸ has been confirmed by international jurisprudence⁶⁹ and the text of human rights treaties, including their derogations⁷⁰.

35. That said, the legal assessment of targeted killings may result in different outcomes depending on the regime considered. As a general principle, under IHRL the intentional, premeditated killing of an individual would be unlawful, unless it is a means of last resort and strictly necessary to protect against an imminent threat to life. To be lawful under IHL, on the other hand, the target of a deliberate killing must be a *legitimate target*, i.e. a combatant or a civilian directly participating in hostilities and be guided by the principles of distinction, proportionality, and precautionary measures.

36. State parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate, ipso facto, Article 6 of the ICCPR (GC36, para 64) whether or not they also violate IHL. State 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 (GC 36, para 70); a link not established by or under IHL.

37. These differences have been debated over the years; 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. *Lex specialis* application to the relationship between IHL and IHRL dates back to the ICJ’s Nuclear Weapons Advisory Opinion in 1996.⁷¹ It recognizes that the protection offered by IHRL does not cease in times of war except under derogations but the definition of what is considered to be arbitrary corresponds, according to the ICJ, to “the applicable *lex specialis*, namely, the law applicable in armed conflict.”⁷² Under this approach, if IHL and

⁶⁶ A/68/382, para 30.

⁶⁷ See, e.g., Tehran Conference, ‘Respect for Human Rights in Armed Conflicts’, UN Doc. A/Conf.32/41; UNGA Res. 2444 (1968); UNGA Res. 2647 (1970); UNSC Res. 237 (1967), UNSC Res. 1649 (2005), UNSC Res. 1882 (2009), See ICJ Decisions *Nuclear Weapons*; *Wall*; *Serrano-Cruz Sisters v. El Salvador*; Preliminary Objections, 23 November 2004, Inter-Am. Ct. H.R. Cited by Marco Milanovic, ‘Norm Conflicts, International Humanitarian Law and Human Rights Law’, *Journal of Conflict & Security Law* 14 (2009), pp.7-8.

⁶⁸ <https://www.justsecurity.org/34631/human-rights-armed-conflict-part/> and <https://www.justsecurity.org/34815/human-rights-armed-conflict-part-ii/> See also Haque, *Law and Morality at War*.

⁶⁹ See for instance ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996.

⁷⁰ Marco Milanovic, 2009.

⁷¹ Milanovic, *The Lost Origins of Lex Specialis*, 2014, p. 12.

⁷² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Rep. 226 (hereinafter *Nuclear Weapons*), para. 25.

IHRL would come to different outcomes, the lawfulness of a killing will be assessed according to humanitarian law standards and tests.⁷³

38. The doctrine conceptual clarity is however illusory. 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.⁷⁴ After 1996, the ICJ itself changed direction. In its Congo decision, 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.”⁷⁵

39. Finally, *lex specialis* would be of limited use when applied to drones’ targeted killings operated on the territory of third States. The 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 is potentially a battlefield,⁷⁶ a position endorsed by others.⁷⁷

40. The Special Rapporteur believes that situations resulting in differentiated assessment are few and far between. Care must be taken not to create fictional conflicts in order to address legal distortions established by some States and otherwise illegal conduct. However, to the extent that uncertainty exists, certain analytical 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 constitutive of armed conflicts, a situation amounts to an international or non-international armed conflict. Four scenarios as far as drones targeted killings may be identified:

(a) The first scenario is, simply put, that of **a strike but not in an international or non-international armed conflict**: in such case it must be assessed under IHRL. That assessment should take into account the larger context, whether derogations have been activated, as is highlighted by the jurisprudence⁷⁸, and the specifics of the situation.

(b) Under a second scenario, **the drone strike occurs in an IAC or NIAC** in the midst of, or alongside, active and open hostilities involving exchange of fire, conventional air strikes and other military deployments.

(c) Under a third scenario although a country or region may be affected by an IAC or NIAC, the particular drone strike is **distant from any battlefields**: it takes place in areas, or at a time, of no military activity, presence, control or engagement in the

⁷³ This opinion was postulated by Russia and the US in the proceeding before the ICJ in the Nuclear Weapons Advisory Opinion, Written Comments of Russia, 19 June 1995, at 9-10; Written Comments of the United States, 20 June 1995, at 20.

⁷⁴ Milanovic, 2014, p.19.

⁷⁵ Democratic Republic of the Congo v. Uganda, 2005, para 216.

⁷⁶ HRC/25/59; A/68/389; ICRC, “The use of armed drones must comply with laws”, 10 May 2013, available from www.icrc.org/eng/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm; Advisory Committee on Issues of Public International Law, “Main conclusions of advice on armed drones” (The Hague, July 2013).

⁷⁷ HRC/25/59; A/68/389; Advisory Committee on Issues of Public International Law, “Main conclusions of advice on armed drones” (The Hague, July 2013).

⁷⁸ ECHR, *Al-Saadoon and Mufdhi v. United Kingdom*; *McCann and Others v. United Kingdom*.

immediate surrounds. This is a pertinent scenario⁷⁹: many contemporary conflicts involve sporadic, unpredictable front-lines, leaving often large areas of the same country or region with little to no exposure to active or ongoing exchange of enemy fire.

(d) Under a related scenario, the drone strike itself is a **first strike**, potentially triggering an IAC with no other elements or acts constitutive of a conflict preceding or at the time of the strike, or perhaps even in its aftermath.

42. In the first scenario, the applicable body of law is clear. By comparison, assessment of the lawfulness of targeted killings in the last three⁸⁰, but particularly last two, scenarios, may vary.

43. One approach is to apply the legal regime that is the most protective of the victim(s)⁸¹, or which privileges individual rights over State rights⁸². In these instances, however, IHL would always be displaced in favor of IHRL.

44. Under another approach -- the *systemic integration* approach⁸³, derived from Article 31(3)(c) of the Vienna Convention on Treaties, and applied in the ICJs Oil Platforms case⁸⁴ -- the different rules of international law would be used to assess the situation and/or support a purposive interpretation of Convention-based rights.⁸⁵ This approach is in keeping with the derogation clauses of the ICCPR and regional instruments, applicable in the exceptional circumstances of emergency or war⁸⁶. It is backed up by contemporary jurisprudence⁸⁷. In the aforementioned scenarios, a *systemic integration* approach would not consider humanitarian law alone but would consider human rights treaties obligations, the territoriality and scope of contemporaneous military actions and State behaviour overall⁸⁸.

45. An example of the systemic integration approach is found in the *Targeted Killings* judgment of the Supreme Court 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,

⁷⁹ This is the position defended by the Special Rapporteur in a previous report on armed non-State actors. A/HRC/38/44.

⁸⁰ In the second scenario above, IHRL continues to apply, but in the Special Rapporteur views, as elaborated below, the immediate context and situation demand that the lawfulness of armed drones' strikes be assessed for compliance with IHL principles and particularly those protecting civilians from deliberate or disproportionate attacks.

⁸¹ Alonso Gurmendi Dunkelberg, *There and Back Again: The Inter-American Human Rights System's Approach to International Humanitarian Law* (March 8, 2017); IACHR, *Case of Las Palmeras v. Colombia*, 4 Feb 2000.

⁸² <http://opiniojuris.org/2020/01/13/the-soleimani-case-and-the-last-nail-in-the-lex-specialis-coffin/>.

⁸³ <https://www.tandfonline.com/doi/abs/10.1080/18918131.2017.1353213?journalCode=rnhr20>;

⁸⁴ *Oil Platforms (Islamic Republic of Iran v United States of America)* [2003] ICJ Rep 161.

⁸⁵ Marko Milanovic, 2014, p.27.

⁸⁶ A/HRC/37/52 Derogations must be well calibrated, exceptional and temporary.

⁸⁷ See e.g. Inter-American Commission on Human Rights, *Juan Carlos Abella v. Argentina*, 1997, at 161; Inter-American Court on Human Rights, *Santo Domingo Massacre v. Colombia*, pp. 211–236; ICJ, *Democratic Republic of the Congo v. Uganda*, 2005, paras 216.

⁸⁸ As highlighted by Dapo Okande, 2019: <https://www.ejiltalk.org/the-diversity-of-rules-on-the-use-of-force-implications-for-the-evolution-of-the-law/>, “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.”

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..." (Para 40)

46. The Court calls for a case by case analysis, recognizing that while that may not always be realizable it is a possibility which should always be considered.

47. The African Commission on Human and Peoples' Rights extrapolates further: "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."⁸⁹

48. In slight variation, the 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.⁹⁰

49. Two reasonings may thus be adopted when assessing the legality of targeted killings under the ambiguous scenarios above -- 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 assessment of the lawfulness of a targeted killing under humanitarian law should be done with reference to human rights principles in which case whether the target was a combatant or a civilian engaged in hostilities may not be considered determinative.⁹¹

(b) A 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 to do so.

50. It is the Special Rapporteur's opinion that such contextual and situational analyses are inherent to all effective assessments of the use of force⁹² including in the scenarios presented above. For compliance with IHRL, this means assessing necessity, proportionality and precaution through a situational analysis that takes into account the location, circumstances, possibilities of armed resistance and the planning involved.⁹³ It also means that the lethal use of force cannot be justified or allowed when it is not necessary, it is likely to cause disproportionate harm, or it reasonably could have been avoided by feasible precautionary measures.⁹⁴

B. The law of self-defense

51. The 1945 UN Charter states that all UN members "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state." There are just three exceptions narrowly constructed so as fully

⁸⁹ African Commission on Human and Peoples' Rights, General Comment 3, para 34.

⁹⁰ <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf>; See as well <https://harvardnsj.org/2013/06/are-we-reaching-a-tipping-point-how-contemporary-challenges-are-affecting-the-military-necessity-humanity-balance/>.

⁹¹ 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. See Naz K. Modirzadeh, *Folk International Law*, 2014, Harvard National Security Journal, p.296; William Schabas, *Belt or Suspenders*, *ISR. L. REV.* Vol. 40, No.2, pp. 592-613, 2007; Milanovic, 2019, 36.

⁹² See e.g. <https://www.ohchr.org/Documents/Issues/Executions/HumanRightsDispatch1.pdf>.

⁹³ UNODC and OHCHR, *Resource Book on the use of force*, 2017.

⁹⁴ N Melzer, *Human Rights Implications of the Usage of Drones*, 2013, p. 30.

protect the Charter's prohibition on the use of force⁹⁵: i) authorization by the UNSC; ii) state consent to attack on its own territory and 3) self-defense against an "armed attack"⁹⁶.

52. International jurisprudence and state practices had largely suggested that self-defense could only be invoked against a threat that is already there. However, the notion that a narrowly construed preemptive self-defense to prevent an imminent attack is legal under Art. 51 of the UN Charter, has been somewhat accepted⁹⁷ but limited to threats that are "instant, overwhelming and leaving no choice of means, no moment of deliberation."⁹⁸

53. Yet, in the context of the so-called "war(s) on terror", over the last two decades a small number of influential States have sought to expand those understandings despite the large body of opinion and State practice that oppose them.⁹⁹ It is the view of the Special Rapporteur that these recent minority interpretations create troubling legal "distortions".

54. First, a distortion of time: Under the expansionist interpretation, preemptive self-defense may be invoked against perceived security threats¹⁰⁰, including by non-state actors whose plans for attack may not yet be fully known¹⁰¹. Under this interpretation¹⁰², imminence becomes no longer just a temporal criterion.¹⁰³ Rather an attack can be "deemed" imminent if it is believed that further delay in response would result in the inability of the state under threat to defend itself, i.e. it is necessary to act before it is too late.¹⁰⁴ Imminence thus is read into the principle of necessity.

55. Second, a distortion of geography: Under this interpretation, once a State has "lawfully resorted to force in self-defense 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.¹⁰⁵ Under this interpretation, a State is authorized to use force against particular nonstate groups with whom the State has declared itself at war, anywhere,

⁹⁵ <https://www.washingtonpost.com/outlook/2019/10/22/turkey-is-violating-international-law-it-took-lessons-us/>.

⁹⁶ The UN Charter, however, did not define an armed attack with the matter interpreted according to opinion juris confirmed by corresponding State practice.

⁹⁷ A/59/565, paras 188-192; A/59/2005, paras 124.

⁹⁸ R. Y. Jennings, "The *Caroline* and *McLeod* cases", *American Journal of International Law*, January 1938.

⁹⁹ A/68/382, para 87.

¹⁰⁰ It was however condemned by the UN: A/59/565.

¹⁰¹ Bethlehem recommends that an assessment of imminence includes the nature and immediacy of the threat, the probability of an attack, pattern of continuing armed activity, the scale of the attack (e.g. likely injury), the likelihood of other opportunities to undertake effective action in self-defense, which 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-defense. Daniel Bethlehem, *Principles Relevant To The Scope Of A State's Right Of Self-Defense*, *The American Journal Of International*, 2012.

¹⁰² <https://www.justsecurity.org/wp-content/uploads/2017/01/United-Kingdom-Attorney-General-Speech-modern-law-of-self-defense-IISS.pdf>.

¹⁰³ Bethlehem, 2012.

¹⁰⁴ Elisabeth Wilmhurst, *Principles of International Law on the Use of Force by States in Self-Defence*, 2005, p. 9 <https://www.chathamhouse.org/publications/papers/view/108106>.

¹⁰⁵ https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf. See also S/2019/804 and <https://www.ejiltalk.org/a-collective-failure-to-prevent-turkeys-operation-peace-spring-and-natos-silence-on-international-law/>.

including on the territory of States hosting them, if the latter are unable or unwilling to deal with their threats¹⁰⁶.

56. Sometimes labelled a “global non-international armed conflict”¹⁰⁷, this dimension of the expansionist doctrine has been vigorously rejected by the ICRC and others who argue that a case-by-case approach to the classification of various violence 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 internationalised 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 lawfulness under humanitarian law.

58. Thirdly, a distortion of the principle of sovereignty: The expansionist interpretation seeks to permit States to engage in non-consensual military operations on 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 that emanates from these armed groups.

59. This doctrine contradicts the prevalent understanding of sovereignty, according to which self-defence against an armed group on the territory of another State can be justified only where the actions of the group are imputable to the host State.¹⁰⁸ Absent that, extraterritorial use of force is an unlawful violation of sovereignty¹⁰⁹ 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 drones’ 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 in 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 on the use of force in Article 2(4) of the UN Charter.

61. General Soleimani targeted killing is analysed in Annex One to this report. Some key findings include:

(a) In this instance, the use of force by the United States was directed not only at Iran but also at Iraq. By killing General Soleimani on Iraqi soil without first obtaining Iraq’s consent, the US violated the territorial integrity of Iraq.¹¹⁰

(b) The justifications advanced by the US (and then later by Iran) in defense of its January 8 actions, include no evidence that threats were imminent (US) and indeed make no reference to them (Iran). Both States focus instead on past incidents. To the extent that evidence points to the US and Iranian strikes being retaliations or reprisals, each would be unlawful under *jus ad bellum*.

(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,

¹⁰⁶ https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf p.9-11;

¹⁰⁷ <https://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>.

¹⁰⁸ See ICI, *Wall Advisory Opinion, 2004*, p. 136; *Congo v. Uganda, 2005*, p. 168.

¹⁰⁹ International Law Association, Sydney Conference (2018), Final Report on Aggression and the Use of Force, p. 16.

¹¹⁰ International Law Association, *ibid*.

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 drone targeted killing of a State actor for future conduct are unknown at this point. What is known is that legal distortions of the last twenty years, coupled with the technological prowess of the “second drone age”, have enabled a substantial increase in applications of the use of force: low-intensity conflicts are drawn-out with few if any geographical or temporal boundaries.¹¹¹ 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,”¹¹² and highlighted the real risks that the expansion of the “war on terror” doctrine¹¹³ poses to international peace.¹¹⁴

63. The international community must now confront the very real prospect that States may opt to “strategically” eliminate high ranking military officials outside the context of a “known” war, and seek to justify the killing on the grounds of the target’s classification as 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 law¹¹⁵, is not just a slippery slope. It is a cliff.¹¹⁶

IV. International Scrutiny and Oversight

65. Notwithstanding the legal gymnastics of a number of States as they attempt to justify drones targeted killings, many such killings qualify either as *arbitrary* under Article 6 of the ICCPR or as violations of *jus ad bellum*. Some killings, along with their so-called “collateral” casualties, may also violate international humanitarian law. However, an absence of investigation into these incidents leaves them sealed off from truth and accountability.

66. At international level, where are we to go to have these matters reviewed in a consequential way; in a manner that encourages States to take their consideration and resulting conclusions seriously? Unfortunately, to date international oversight mechanisms have not been able to address the gravity that the situation requires. In an extensive 2017 study, UNIDIR, for example, found there was a pressing need to address (the lack of) transparency, oversight and accountability of armed drones.¹¹⁷

67. Given this, the importance of Article 51 to global peace and security, the UN principal mission, it seems reasonable to suggest that States who invoke Article 51 to

¹¹¹ The International and Comparative Law Quarterly Vol. 65, Iss. 4.

¹¹² <https://www.justsecurity.org/67937/soleimani-strike-marks-a-novel-shift-in-targeted-killing-dangerous-to-the-global-order/>.

¹¹³ See e.g. A/73/361.

¹¹⁴ 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 ICC has jurisdiction over the crime of aggression.

¹¹⁵ See eg <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=25520&LangID=E; A/HRC/43/57>.

¹¹⁶ To paraphrase Marko Milanovic, Interview, March 2020.

¹¹⁷ <https://www.unidir.org/files/publications/pdfs/increasing-transparency-oversight-and-accountability-of-armed-unmanned-aerial-vehicles-en-692.pdf>.

justify targeted killings by drones or other tools “owe the international community a thorough justification, not a cursory report.” Such reports 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.*”¹¹⁸

68. Yet, the Article 51 reports submitted by States provide little by way of evidence for the imminence of the threats against which they are invoking claims of preemptive self-defense and targeted killings. The poor quality of the Article 51 reports is compounded by the fact that Member States are not informed of their submission as a matter of routine. Extensive study of Article 51 communications by the Harvard Law School Program on International Law and Armed Conflict shows that “*UN Member States are apparently not made aware of such statements on the use of force as a matter of routine practice*”. This is cause for significant concern for it also means that the silence with which States more often meet Art 51 reports may not be deliberate or even conscious.¹¹⁹

69. The UNSC itself has offered little response to Article 51 claims. Academic analysis shows that the SC’s “*most common reaction by far*” to self-defense 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-defense communications*”.¹²⁰ In those instances, the UNSC 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 UN Charter, the sovereignty of a third State as well as the right to life have been violated, in only one instance did the UNSC question the legality of an extraterritorial targeted killing¹²¹. The absence of formal engagement may result from the significant increase in the use of veto by SC permanent members, 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 of pre-emptive self-defense, including those where drones are used. For instance, even in the face of the vast numbers of strikes on Syria by Coalition Forces over the course of 2014 to 2017, while “*several states have reacted ... some with ‘legal vocabulary’, others using rather evasive language ...*”, “*most states have remained silent.*”¹²²

¹¹⁸ Liechtenstein: <https://undocs.org/S/PV.8699> p.37.

¹¹⁹ Several mechanisms have been devised over time to ensure that that States and UNSC communications on Article 51 (among others) are put together, shared and thus known. But the reports produced are often lagging several years behind and are thus of limited policy value, although this is not to reject their other contributions.

¹²⁰ Harvard study.

¹²¹ UNSC resolution 573, 4 October 1985.

¹²² Paulina Starski, Silence within the process of normative change, *Journal on the Use of Force and International Law*, 2017, p.48.

71. Does the silence of States and other international actors represent acquiescence, as some scholars have suggested?¹²³ The short answer is no¹²⁴ but the reasons for saying so are worth elaborating. In essence, the question concerns the origin and character of the right of self-defense, 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 has the capacity to 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 evidence 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.¹²⁵ 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.¹²⁶ Claims that State silence may change the content either of the prohibition on use of force or of the narrow self-defense exception to it, especially claims that purport to widen the grounds to resort to force, are difficult to defend.

73. The 2018 positions of the ILC do not provide sufficient guidance on these matters. Regarding the potential role of silence in treaty interpretation, the ILC formed the view that “[s]ilence on the part of one or more parties may constitute acceptance of the subsequent practice when the circumstances call for some reaction.”¹²⁷ Yet the ILC tempered this general notion by emphasizing that “[t]he 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.”¹²⁸

74. Regarding acceptance as law (*opinio juris*) -- a constituent element of customary international law with general practice -- the ILC 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.¹²⁹

75. States’ reactions to the ILC position reveal a clear absence of consensus. Some cautioned that their views may be expressed in private rather than publicly, and that perceived non-reaction or silence may be out of political and diplomatic considerations and 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.¹³⁰

76. Article 51 requires Member States to immediately report to the Security Council measures taken purportedly in the exercise of the right of individual or collective self-

¹²³ These views are presented and analyzed in the Harvard study – pp. 70-79.

¹²⁴ <https://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* 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*).”).

¹²⁵ Dapo Akande, 2019. He also points to occasions when subsequent practice can legitimately be used to interpret the Charter such as in relation to the Responsibility to Protect.

¹²⁶ Harvard study, p. 79.

¹²⁷ Int’l L. Comm., A/73/10, 70th Session, Supp. No. 10, 2018, 15.

¹²⁸ Id. at 80.

¹²⁹ ILC conclusion 10.3.

¹³⁰ Starsky p.21.

defence. In the face of an “Article 51 submission” to the UNSC that invokes an overly broad self-defense claim, is the apparent silence of the UNSC, its members or other States capable of widening the treaty or CIL grounds to resort to force in self-defense?

77. SC resolutions and debates may be relevant with respect to the interpretation of the Charter as well as to the formation, or expression, of *opinio juris*.¹³¹ Moreover, through the combined effects of its condemnations and relevant practices and States *opinionones juris*, including as expressed in SC debates, certain practices pertaining to the SC may contribute to the emergence, crystallization, or consolidation of a customary rule of general international law.¹³² And in certain circumstances, the silence of States has the potential to affect the formation, identification, modification, and termination of certain doctrines.¹³³ Such conditions, however, are far from met by Article 51 communications.

78. The theoretically possible modalities for modification of international law are largely inadmissible with respect to broad claims to resort to force couched in terms of exercising the right of self-defense. Further, 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.¹³⁴ As a legal advisor to Mexico’s mission to the UN in New York explains, the lack of transparency in SC procedure 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.*”¹³⁵

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-defense claims is highly unsatisfactory.

(a) Firstly, it seems as if the silence of many has the unfortunate effect of amplifying the voices of the few who seek to expand the grounds for resort 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-defense, States have a responsibility to secure legal stability by speaking up.¹³⁶

(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, we should not lose sight that silence can be dangerous; not the least because it is ambiguous. If one explicitly agrees with an action, that is a signal. If one directly disagrees, that too is a signal. But what is the signal when nothing is said? Politics through silence and silence because of politics, may be lethal. Silence effectively amounts to turning a blind eye to unlawful killings.

¹³¹ For instance, the ICTY has considered Security Council resolutions “of great relevance to the formation of *opinio juris*: Prosecutor v. Tadić, para. 133, cited by Constantinides, p.102; See also ILA Final report on the Formation of Customary International Law, London Conference 2000; Harvard study 2017.

¹³² Harvard study citing Professor Olivier Corten p.47.

¹³³ Harvard study, p. 80.

¹³⁴ Starsky, P.21.

¹³⁵ <https://www.justsecurity.org/63415/an-insiders-view-of-the-life-cycle-of-self-defense-reports-by-u-n-member-states/>.

¹³⁶ Starsky 125.

81. Of course, States cannot decide whether or not to speak out if they do not realise 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, of the Council's and other States' responses (or lack of response) to them. This pleads in favour of reviving and stimulating multilateral discussions on matters of grave international concern.

82. To date drones' attacks and targeted killings are not the object of robust international debates 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 did you want to climb Mount Everest?" a renowned mountaineer retorted "Because it's there." As public opinion 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'¹³⁷. But their mere existence 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 public discussion about the ethics, legality, and effectiveness of the "decapitation" strategy¹³⁸ at the heart of drones targeted killings, whether or not they have their effect as claimed, and about the measures 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 for transparency, oversight and accountability in the use of armed drones;**
- (b) **Undertake effective measures to control their proliferation through export and multilateral arms control regimes and/or under international treaties;**
- (c) **Openly discuss the challenges that drones' targeted killings pose to international law;**
- (d) **Call out any use of force not in compliance with the UN Charter and reject their purported legal underpinnings;**
- (e) **Investigate all allegations of unlawful deaths in relation to the use of drones, including through international bodies where States fail to do so.**

VI. Recommendations

86. **In addition to recommendations by the previous Special Rapporteur (A/68/382):**

87. **Legal Framework: International human rights law continues to apply in armed conflicts in complementarity with international humanitarian law. The**

¹³⁷ <https://www.senat.fr/rap/r16-559/r16-5591.pdf>.

¹³⁸ Strategy seeking to remove the leadership of an armed group or government deemed hostile.

assessment of the lawfulness of strikes and killings should consider both bodies of law, adopt a systemic integration approach and conduct a contextual/situational analysis.

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

89. The UN Secretary General should set up international inquiries or fact-finding missions to investigate drones' targeted killings.

90. The OHCHR should produce a yearly report tracking drones' strikes and casualties for discussion by the Human Rights Council.

91. At the level of the UN, Member States should:

(a) Set up an Article 51 discussion forum enabling exchange about the operation, scope and limits to the right to self-defense¹³⁹;

(b) Establish a transparent multilateral process for the development of robust standards in the use of drones;

(c) Failing b), like-minded States should establish a group of experts to develop such standards as part 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 in the direction of, international or non-international armed conflicts;

(e) Support the initiatives prohibiting the use of veto by UNSC members when mass atrocities and self-defense claims must be reviewed; Support the automatic convening of the General Assembly whenever a veto is cast in the Security Council¹⁴⁰ in relation to the matters;

(f) Support the UNSG Protection of Civilians Strategy by providing it a clear mandate, and adopting specific guidance on the use of explosive weapons in urban areas and human sufferings;

(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 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 drones' operations and accurately record civilian harm;

(c) Robustly investigate allegations of civilians' harms, including with external sources, and release data and findings.

93. States assisting other States' drones' programmes should:

(a) Inform Parliament of any assistance arrangements;

(b) Establish a robust oversight framework to ensure the State is not complicit in unlawful actions and State officials criminally liable; Receipt of assurances on their own is not sufficient;

¹³⁹ <https://undocs.org/A/AC.182/L.154>.

¹⁴⁰ 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.

(c) In situations involving the use of force in countries with which the Host State is not in conflict, adherence to IHRL must be considered.

94. States that export armed drones' technology should:

(a) Enact stricter controls on the transfer of military and dual-use drone technology and apply clear criteria to prevent irresponsible transfers;

(b) Include civilian protection and adherence to IHL for approval and continuance of support, sale and training on armed drones;

(c) Adopt a dedicated process of operational end-use monitoring to analyse the outcome of drones' strikes and civilians' impact.

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 use of force, including for purposes of targeting killing, and 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 the prohibition against 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.¹⁴¹

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.¹⁴²

4. Some hours after the strike, the US Department of Defense (DoD) claimed that the US military¹⁴³ had taken this "decisive" action against General Soleimani at the direction of US President Trump.¹⁴⁴

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.¹⁴⁵

6. Five days later, on January 8, Iran launched numerous pin-point precision¹⁴⁶ ballistic strikes, against two Coalition force bases in Iraq, including the Ain al-Assad airbase from

¹⁴¹ <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.

¹⁴² For a timeline of the event, see this video by Al Arabiya: <https://www.youtube.com/watch?v=7-egpOeaJU4>.

¹⁴³ 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>.

¹⁴⁴ <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."

¹⁴⁵ 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>.

¹⁴⁶ <https://ukdefencejournal.org.uk/soleimani-helped-turn-iran-into-one-of-the-most-effective-proponents-of-remote-warfare-his-impact-lives-on/>.

which the US drone strike against General Soleimani was launched. The strikes injured over 100 US servicemen, including 34 troops with traumatic brain injury.¹⁴⁷

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.¹⁴⁸ 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 pandemic¹⁴⁹.

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”¹⁵⁰ were allegedly targeted, to which the US had responded.¹⁵¹ 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 Syria controlled by Kata’ib Hezbollah killed allegedly 24 people and wounded 50.¹⁵² Despite these incidents, it appeared both Iran and the US wished to avoid a “full-out conventional war.”¹⁵³

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.¹⁵⁴

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

¹⁴⁷ <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>.

¹⁴⁸ <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.

¹⁴⁹ 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.

¹⁵⁰ <https://www.justsecurity.org/wp-content/uploads/2020/01/united-states-article-51-letter-soleimani.pdf>.

¹⁵¹ <https://www.nytimes.com/2019/06/23/us/politics/trump-iran-cyber-shadow-war.html>;

¹⁵² The NYT quoting an Hezbollah spokesperson: <https://www.nytimes.com/2019/12/29/world/middleeast/us-airstrikes-iran-iraq-syria.html>.

¹⁵³ See, e.g., <https://www.nytimes.com/2019/06/23/us/politics/trump-iran-cyber-shadow-war.html>.

¹⁵⁴ See communications from Special Rapporteurs to the Government of Iraq: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25020>.

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.¹⁵⁵

(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 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,¹⁵⁶ 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 PMF¹⁵⁷ 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.¹⁵⁸ Whether and how this legal regime applies to all those

¹⁵⁵ 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 Non-State Actors, 2012, <https://www.un.org/law/counsel/Bethlehem%20-%20Self-Defense%20Article.pdf>.

¹⁵⁶ A/HRC/35/23, para. 26.

¹⁵⁷ 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.

¹⁵⁸ 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/>.

killed, i.e. not only to General Soleimani¹⁵⁹ but also to all his Iraqi and Iranian companions¹⁶⁰, 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.

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 Queda and its affiliates (an anomalous assertion given Iran’s leading contribution to fight against ISIL).¹⁶¹ 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.”¹⁶² 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.¹⁶³ In this perspective, it is not necessary for the conflict to extend over time or to provoke a certain number of victims.¹⁶⁴

¹⁵⁹ 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 Iraq, Afghanistan, Lebanon, Syria and Yemen. The Quds Force is said to have worked closely with Iraq’s Popular Mobilization Forces in the fight against ISIL and allegedly provided close support to Syria’s government and forces throughout the past years’ conflict. For many human rights activists from Iran, Syria and Iraq, General Soleimani was deemed responsible for organising, supporting, inciting official and non-official forces involved in human rights violations.

¹⁶⁰ 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.

¹⁶¹ Statement from the President on the Designation of the Islamic Revolutionary Guard Corps as a Foreign Terrorist Organization, Issued on April 8, 2019.

¹⁶² 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>.

¹⁶³ 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.

¹⁶⁴ *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.

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.”¹⁶⁵ The Venice Commission also supports the application of an intensity threshold, arguing that an armed conflict “refers to protracted armed violence between States”.¹⁶⁶ 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.¹⁶⁷

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 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.¹⁶⁸

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.¹⁶⁹ 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.”¹⁷⁰ 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.¹⁷¹ 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.

¹⁶⁵ INTERNATIONAL LAW ASSOCIATION, THE HAGUE CONFERENCE (2010), USE OF FORCE, at 8 http://www.rulac.org/assets/downloads/ILA_report_armed_conflict_2010.pdf.

¹⁶⁶ Venice Commission, 66th Plenary Session (Venice, 17-18 March 2006), at 78.

¹⁶⁷ 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>.

¹⁶⁸ See e.g. ECHR, *Denmark, Norway, Sweden and the Netherlands v. Greece*.

¹⁶⁹ 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/>.

¹⁷⁰ Citing J. Grignon, ‘The Beginning of Application of International Humanitarian Law’, *International Review of the Red Cross*, 2014, 152.

¹⁷¹ <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>.

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”¹⁷² on US forces in Iraq in November and December 2019.¹⁷³ 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.¹⁷⁴ A range of scholarly sources and media outlets referred to the state of 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”¹⁷⁵. 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.¹⁷⁶

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”.¹⁷⁷ Iran’s foreign minister declared the strike an “act of

¹⁷² 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.

¹⁷³ <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/>.

¹⁷⁴ E.g. Deutscher Bundestag, Wissenschaftlicher Dienst, *Völkerrechtliche Aspekte des Konflikts zwischen Iran und den USA*, <https://www.bundestag.de/resource/blob/677272/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/>.

¹⁷⁵ <https://fas.org/sgp/crs/mideast/R45795.pdf> p.2.

¹⁷⁶ 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>.

¹⁷⁷ US official position: https://www.whitehouse.gov/wp-content/uploads/2020/02/SAP_SJ-RES-68.pdf.

terrorism," and Iran promised revenge.¹⁷⁸ 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.¹⁷⁹ 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 UN 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.

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

¹⁷⁸ <https://www.nytimes.com/2020/01/03/world/middleeast/iranian-general-qassem-soleimani-killed.html?referringSource=articleShare>.

¹⁷⁹ Article 2(1) common to the 1949 Geneva Conventions.

only way to fulfill 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 territory¹⁸⁰." 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.¹⁸¹ 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.¹⁸²

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 determining¹⁸³. Such an approach in particular ignores the complementary of IHL and IHRL in armed conflict situations, confirmed by international jurisprudence¹⁸⁴ and the text of human rights treaties, including derogations¹⁸⁵. 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"¹⁸⁶. 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.¹⁸⁷ Just as the ICRC finds these non-belligerent circumstances determinative for targeted strikes in a NIAC, should they not be

¹⁸⁰ Geneva Academy, December 2019, p.5.

¹⁸¹ U.S. Report on the legal and policy frameworks guiding the United States' use of military force and related national security operations, p. 25.

¹⁸² <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.

¹⁸³ <https://www.icrc.org/en/doc/assets/files/other/irrc-873-vite.pdf>.

¹⁸⁴ See for instance ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996.

¹⁸⁵ Marco Milanovic, 'Norm Conflicts, International Humanitarian Law and Human Rights Law', *Journal of Conflict & Security Law*, 2009.

¹⁸⁶ ICRC's 2011 Challenges of Modern Warfare, at 21-22.

¹⁸⁷ ICRC 2011 Challenges of Modern Warfare at 21-22.

found determinative in an attack against a State official on the territory of a third State as well?¹⁸⁸

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 confronting¹⁸⁹.

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 humanity¹⁹⁰.

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 peace¹⁹¹”

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.

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.¹⁹² The right to life must be protected and no arbitrary deprivations of life is allowed.

¹⁸⁸ See also *Public Committee Against Torture v. Government*, 2006, para 4, applying IHRL principles to targeted strikes in a non-battlefield environment.

¹⁸⁹ <https://www.icrc.org/en/document/explosive-weapons-cities-civilian-devastation-and-suffering-must-stop>.

¹⁹⁰ Supreme Court of Israel, *Public Committee against Torture in Israel v. Government of Israel*, 2006.

¹⁹¹ <https://opiniojuris.org/2020/01/20/soleimani-and-targeted-killings-of-enemy-combatants-part-i-revisiting-the-first-shot-theory/>.

¹⁹² 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).

41. The right to life must also be respected extraterritorially. The International Court of Justice,¹⁹³ the Human Rights Committee¹⁹⁴, the Inter-American Commission on Human Rights¹⁹⁵ and the European Court of Human Rights¹⁹⁶ 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 jurisdiction¹⁹⁷, 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"¹⁹⁸. This is a position that the Special Rapporteur endorses and has applied in her thematic reports¹⁹⁹.

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."²⁰⁰ 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 person²⁰¹. As the reach of a State's power expands, so too do its responsibilities.

44. State parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 of the Covenant²⁰² 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.²⁰³

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."²⁰⁴ The "existence and nature of a public emergency which threatens the life of the nation may ... be relevant to a determination of whether a particular

¹⁹³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para. 109.

¹⁹⁴ General comment No. 31 (2004).

¹⁹⁵ *Coard and others v. United States*, 1999, para. 37.

¹⁹⁶ For instance, *Al-Skeini and others v. the United Kingdom*, application No. 55721/07.

¹⁹⁷ M. Milanovic, "The Murder of Jamal Khashoggi" at 36, 2019 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3360647Milanovic.

¹⁹⁸ Human Rights Committee, General Comment No. 36, para. 63

¹⁹⁹ A/HRC41/36; A/HRC/38/44; A/74/318.

²⁰⁰ *Al Saadoon v Secretary of State for Defense*, [2015], para 117.

²⁰¹ Nils Meltzer, *Targeted Killing in International Law* (Oxford, United Kingdom, Oxford University Press, 2008).

²⁰² Human Rights Committee, General Comment No. 36, para 64

²⁰³ Human Rights Committee, General Comment No. 36, para 70

²⁰⁴ 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>.

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.”²⁰⁵

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.”²⁰⁶

47. For instance, in *Finogenov v Russia* (2011)²⁰⁷, 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 case²⁰⁸, 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 concerned²⁰⁹; 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”²¹⁰.

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

²⁰⁵ Human Rights Committee, General Comment No. 36, para 67

²⁰⁶ <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%5B%22001-108231%22%5D%7D> para 211-212.

²⁰⁷ *Finogenov v Russia*, 2011 32; 3.

²⁰⁸ <http://iusgentium.ufsc.br/wp-content/uploads/2017/08/Texto-Cmpl-McCANN-AND-OTHERS-v-UK.pdf>.

²⁰⁹ <https://www.justsecurity.org/68094/how-to-think-about-the-soleimani-strike-in-four-questions/>.

²¹⁰ <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.”²¹¹

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.”²¹² In addition, “there must be an effective independent investigation capable of leading to accountability for any unlawful deprivation of life.”²¹³

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)²¹⁴, the US Executive Order 13382 against “Proliferation Activities and Support for terrorism” (25 October 2007)²¹⁵, the European Union Regulation 611/2011 concerning restrictive measures in view of the situation in Syria (23 June 2011)²¹⁶, and the US “Foreign Terrorist Organization” designation of 15 April 2019²¹⁷. The IRGC were reportedly involved in shooting Iranian protestors in 2019²¹⁸ while the al-Qads forces were implicated in the ground-offensive to besiege eastern Aleppo city²¹⁹. 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,

²¹¹ Elisabeth Wilmhurst, Principles of International Law on the Use of Force in Self-defence, p.9.

²¹² <https://publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/574.pdf> p.53.

²¹³ Ibid.

²¹⁴ <https://www.un.org/securitycouncil/s/res/1747-%282007%29>

²¹⁵ <https://2001-2009.state.gov/r/pa/prs/ps/2007/oct/94193.htm>

²¹⁶ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:164:0001:0003:EN:PDF>

²¹⁷ <https://www.state.gov/designation-of-the-islamic-revolutionary-guard-corps/>

²¹⁸ <https://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=25393&LangID=E>

²¹⁹ A/HRC/34/64

where the attack is “instant, overwhelming and leaving no choice of means, no moment of deliberation.”²²⁰

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 Charter. One must not “ascribe to State’s legal views which they do not themselves formulate.”²²¹

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.”²²²

57. This statement alleges an ongoing series of attacks, thereby entitling the United States to defend itself.²²³ The ICJ has intimated that a series of attacks, collectively, could amount to an armed attack.²²⁴ 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.²²⁵

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 2020.²²⁶

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.²²⁷

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”²²⁸ against bases where US personnel were present. However, nowhere in the letter does the United States

²²⁰ R. Y. Jennings, “The *Caroline* and *McLeod* cases”, *American Journal of International Law*, January 1938. See also UN Doc A/59/565, at para. 188, www2.ohchr.org/English/bodies/hrcouncil/docs/gaA.59.565_En.pdf.

²²¹ *Nicaragua v United States of America*, Merits, Judgment, ICJ Reports 1986, 14 at 134, para 266.

²²² <https://www.justsecurity.org/wp-content/uploads/2020/01/united-states-article-51-letter-soleimani.pdf>.

²²³ <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/>.

²²⁴ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Reports 2003, para 64.

²²⁵ <https://www.justsecurity.org/68008/u-s-legal-defense-of-the-soleimani-strike-at-the-united-nations-a-critical-assessment/>.

²²⁶ *Ibid.*

²²⁷ *Ibid.* See also <https://www.justsecurity.org/68094/how-to-think-about-the-soleimani-strike-in-four-questions/>.

²²⁸ <https://www.justsecurity.org/wp-content/uploads/2020/01/united-states-article-51-letter-soleimani.pdf>.

state that Iran had “overall control”²²⁹ over these groups;²³⁰ 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.²³¹

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 President²³², Secretary of State²³³ and the National Security Advisor²³⁴ 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.²³⁵ 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.”²³⁶

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.²³⁷ 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

²²⁹ ICTY, Prosecutor v. Tadic, 15 July 1999, paras. 120, 131, 137.

²³⁰ 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.

²³¹ <https://www.justsecurity.org/68008/u-s-legal-defense-of-the-soleimani-strike-at-the-united-nations-a-critical-assessment/>.

²³² 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>.

²³³ 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>.

²³⁴ 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.

²³⁵ 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.

²³⁶ <https://www.justsecurity.org/68008/u-s-legal-defense-of-the-soleimani-strike-at-the-united-nations-a-critical-assessment/>.

²³⁷ 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/>.

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.²³⁸ Otherwise, Art. 51 becomes a convenient excuse for any use of force at the whims of a State against another State.

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."²³⁹

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.²⁴⁰ Under the UN Charter, armed attacks for purposes of retaliation are never permissible.²⁴¹

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.²⁴² In its letter to the UNSC, the United States failed to address or justify the killing of these men or

²³⁸ See Wilmhurst, Op cit., p 9.

²³⁹ <https://www.justsecurity.org/68173/compilation-of-states-reactions-to-u-s-and-iranian-uses-of-force-in-iraq-in-january-2020/>.

²⁴⁰ 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/>.

²⁴¹ <https://www.ejiltalk.org/iran-unlawfully-retaliates-against-the-united-states-violating-iraqi-sovereignty-in-the-process/>.

²⁴² 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/>.

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”.²⁴³

69. Iraq formally protested this strike to the UNSC.²⁴⁴ 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 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.”²⁴⁵

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 Syria, “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.”²⁴⁶ This doctrine has been used by the US, the UK, and others to justify targeting inter alia the Taliban in Afghanistan, and ISIL in Syria or providing support for those attacks. To the extent that other states have taken any position, the support for this

²⁴³ 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.

²⁴⁴ <https://digitallibrary.un.org/record/3846366?ln=en>.

²⁴⁵ <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”).

²⁴⁶ Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary General.

doctrine is mixed,²⁴⁷ but it has been used to justify the use of military force.²⁴⁸ 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 doctrine²⁴⁹; and Israel has similarly defended its actions against Hezbollah in Lebanon and against alleged Iran-backed forces in Syria.²⁵⁰

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 those countries, making those countries subject to attacks? What would be the basis for determining whose territory could be targeted?²⁵¹

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 2019.²⁵² 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 2019²⁵³, 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

²⁴⁷ <https://www.ejiltalk.org/a-plea-against-the-abusive-invocation-of-self-defence-as-a-response-to-terrorism/>.

²⁴⁸ <https://www.lawfareblog.com/which-states-support-unwilling-and-unable-test>

²⁴⁹ <https://www.documentcloud.org/documents/3125882-TURKEY-IRAQ-Pkk-Isil-12-18-2015.html>

²⁵⁰ See <http://opiniojuris.org/2011/12/15/ashley-deeks-failure-to-defend-the-unwilling-or-unable-test/>;

²⁵¹ <https://www.ejiltalk.org/the-killing-of-soleimani-the-use-of-force-against-iraq-and-overlooked-ius-ad-bellum-questions>.

²⁵² 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/>.

²⁵³ 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.

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.”²⁵⁴

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.²⁵⁵ 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 (eg, on the basis of its alleged collusion with Iran) and that it could not wait to strike at Soleimani elsewhere.”²⁵⁶ 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 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.²⁵⁷

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.²⁵⁸

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 disproportionate²⁵⁹ 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

²⁵⁴ 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>.

²⁵⁵ <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/>.

²⁵⁶ <https://www.ejiltalk.org/the-soleimani-strike-and-self-defence-against-an-imminent-armed-attack>.

²⁵⁷ *Ibid.*

²⁵⁸ <https://www.defense.gov/Newsroom/Releases/Release/Article/2049227/statement-by-secretary-of-defense-dr-mark-t-esper-as-prepared/>.

²⁵⁹ 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).

against Iraq, and the killing of its citizens and of non-citizens on its territory was unlawful and arbitrary under international law.²⁶⁰

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.”²⁶¹ This is an approach backed up by almost universal jurisprudence²⁶² and expert comments.²⁶³

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 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 Syria and Iraq. 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.²⁶⁴

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.²⁶⁵ UN Special Procedures also alleged that Iranians protesting the authorities’

²⁶⁰ International Law Association Conference, Sydney (2018), Final Report on Aggression and the Use of Force, p. 16.

²⁶¹ General Comment No. 36, at 70.

²⁶² See e.g. Inter-American Commission on Human Rights, *Abella v. Argentina*, November 18, 1997, at 161; Inter-American Court on 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.

²⁶³ Human Rights Committee, General Comment (GC) No. 36, at 64.

²⁶⁴ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/185/94/PDF/G1818594.pdf?OpenElement>.

²⁶⁵ These included the US President January 4 threats to target 52 Iranian sites, including cultural sites <https://twitter.com/realdonaldtrump/status/1213593975732527112?s=11>

lack of transparency over the incident were killed²⁶⁶, while Iraqi protesters continued to be targeted, killed or disappeared²⁶⁷.

85. With Iraq increasingly 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 world²⁶⁸”, 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.

²⁶⁶ Special Procedures communications, Iran, 19 February 2020. <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25070>.

²⁶⁷ Special Procedure communication, Iraq, 13 January 2020. <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25020>.

²⁶⁸ <https://undocs.org/S/2020/26>