联 合 国 A/HRC/44/38

大 会

Distr.: General
15 August 2020
Chinese
Original: English

人权理事会
第四十四届会议
2020 年 6 月 15 日至 7 月 3 日
议程项目 3
促进和保护所有人权——公民权利、政治权利、
经济、社会及文化权利，包括发展权

使用武装无人机进行定点清除

法外处决、即决处决或任意处决问题特别报告员的报告*, **

概要

法外处决、即决处决或任意处决问题特别报告员阿涅丝·卡拉马尔的本报告是根据理事会第 35/15 号决议提交人权理事会的。特别报告员在报告中讨论了使用武装无人机进行定点清除的问题，特别是考虑到过去五年无人机的使用激增及其能力不断扩大，并提出了旨在规范无人机使用和加强问责的建议。

* 本报告逾期提交，以反映最新动态。

** 本报告附件不译，原文照发。

GE.20-10777 (C) 140920 210920
2010777

目录

一. 导言

1. 武装无人机，无论是由国家还是非国家行为体部署的，如今都可以深入国家领土进行打击，以个人和公共基础设施为目标。虽然一些“事件”，例如 2020 年 1 月对伊朗少将卡西姆·苏莱马尼的无人机袭击(见附件)或针对沙特阿拉伯石油设施的无人机袭击，[1] 引起了强烈的政治反应，但绝大多数无人机定点清除[2] 在国家和国际两级几乎没有受到公众审视。然而，无人机技术和无人机袭击对国际法律标准、禁止任意杀戮的规定、对允许使用武力的合法限制以及本为维护和平与安全而建立的机构构成了根本性挑战。

2. 这并不是说，武装无人机对遵守适用国际法方面的削弱负有主要或全部责任。在阿富汗、利比亚、阿拉伯叙利亚共和国和也门以及在巴勒斯坦被占领土等地，蓄意袭击平民以及学校、医院和救护车等民用物体的行为，表现了对最基本人道主义原则的悲剧性漠视。[3] 然而，虽然调查机构、调查委员会、大会和安全理事会的审议已导致对这些违反国际人道法的行为和由此造成的大规模侵权行为进行了一些谴责，但相比之下，武装无人机定点清除尽管造成了重大平民伤亡，其后果却被各国和机构相对忽视。

3. 可以提出一个合理的论点，即单独谈论无人机是误入歧途的，因为许多定点清除都是通过常规手段进行的，例如由特种作战部队进行的。事实上，这些常规手段也引发了严重关切。因此，本报告载有调查结论，适用于所有形式的定点清除，无论采用的方法如何。然而，如果我们要跟上影响生命权的当前和预期的事态发展，了解武装无人机技术的特殊性是至关重要的。

4. 前两位特别报告员重点关注使用无人机进行定点清除的问题，阐述了三个法律制度下适用的法律义务。他们感到遗憾的是，各国对自身的义务不够明确，没有问责，而且各国对规则的解释宽泛而放任。[4] 2013 年，当时的法外处决、即决处决或任意处决问题特别报告员警告说，最先获得无人机的第一批国家大规模使用武装无人机，这种行为如果不受质疑，可能会对国际安全的基石造成结构性损害，并开创先例，从长远来看，会破坏对全球生命的保护。[5]

---

[1] 2019 年 9 月 14 日，与巡航导弹并排飞行的无人机击中了沙特阿拉伯东部阿布盖克和库莱斯的石油加工设施，这些设施提供了世界石油供应的 6%。也门胡塞运动声称对此负责。一些国家认为伊朗伊斯兰共和国应对此负责。这些无人机可能是 UAV-X 型。联合国检视小组发现，这些无人机是由德国和中国的发动机提供动力的。

[2] 定点清除是指国家或非国家武装行为体在和平时期以及在国际和非国际武装冲突中，通过无人机、狙击手开火、近距离射击、导弹、汽车炸弹、毒药等方式故意、预谋及蓄意使用致命武力。虽然在大多数情况下，定点清除侵犯了生命权，但在武装冲突的特殊情况下，这种行为可能是合法的(A/HRC/14/24/Add.6，第 7-10 段)。

[3] 当绝大多数战争伤亡是平民时，很明显，区分、相称、必要和预防等原则在很大程度上被忽视了。见 S/2019/373。据估计，85%的战争伤亡是平民。

[4] A/HRC/26/36 和 A/68/382 和 Corr.1。

[5] A/68/382 和 Corr.1, 第 16 段。

5. 七年后，世界进入了所谓的“第二个无人机时代”，[6] 在这个时代，大量国家和非国家行为体正在部署越来越先进的无人机技术，[7] 使无人机的使用成为一个重大的国际安全问题。[8] 2020 年 1 月，某国的一架武装无人机首次在第三国领土上定点袭击了一名外国的高级官员，这是一个重大的事态演变和升级。

6. 正是在这种背景下，本报告力求更新以前的调查结果。[9] 本报告探寻无人机扩散的原因及其预期结果的法律影响；质疑使用无人机所立足和据以正当化的法律依据；并确定监管无人机使用和应对定点清除的机制和机构(或缺乏情况)。报告显示，在冲突、不对称战争、反恐行动和所谓的和平局势中保护生命权的关键问题上，无人机是吸引批评的焦点。由于它们导致大量非法死亡和任意杀戮，无人机也暴露了受命保护人权、民主、和平与安全的国家和国际机构的严重失败。

二. 武装无人机的使用日益增多

A. 按行为体、地点和国家划分的扩散

7. 截至 2020 年，至少有 102 个国家获得了活跃的军用无人机库存，约有 40 个国家拥有或正在采购武装无人机。据信，35 个国家拥有最大和最致命级别的机型。[10] 自 2015 年以来，埃及、伊拉克、伊朗伊斯兰共和国、以色列、尼日利亚、巴基斯坦、沙特阿拉伯、土耳其、阿拉伯联合酋长国、大不列颠及北爱尔兰联合王国和美利坚合众国[11] 据称使用了无人机，包括出于定点清除等使用武力的目的使用无人机。

8. 自 2015 年以来，武装无人机已被用于在国家领土上、非国际武装冲突之内和之外攻击国内目标。据报告，土耳其在国内使用无人机打击库尔德工人党[12]；尼日利亚在 2016 年证实对博科圣地后勤基地发动了袭击。[13] 2015 年，巴基斯坦据称在一次击毙三名“高知名度恐怖分子”的行动中首次使用了武装无人机。[14]

[6] https://theintercept.com/2019/05/14/turkey-second-drone-age/?comments=1。

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

[8] www.mitpressjournals.org/doi/full/10.1162/ISEC_a_00257#fn31。根据其大小和能力，军用无人机分为三级：第一级(小型无人机)；第二级(重量在 150 公斤至 600 公斤之间的中型无人机)；和第三级(最大和最致命的无人机)。

[9] 特别报告员感谢巴赫·阿韦兹贾诺夫、卡罗琳·霍恩、詹姆斯·罗杰斯和萨拉·凯瑟琳娜·斯坦所作的宝贵贡献。

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

[11] 法国在 2019 年 12 月正式进行了第一次无人机袭击，原因是运动战术支持(www.france24.com/en/20191224-france-says-it-carried-out-first-armed-drone-strike-in-mali)。据称，俄罗斯联邦在进行“猎户座”无人机的作战试验时在阿拉伯叙利亚共和国实施了打击(https://nationalinterest.org/blog/buzz/russia%E2%80%99s-predator-drone-flew-strikes-syria-93366)。

[12] www.theguardian.com/news/2019/nov/18/killer-drones-how-many-uav-predator-reaper。另见土耳其政府 2018 年袭击的视频：www.youtube.com/watch?v=gQRNI6NDmAQ。

[13] https://twitter.com/NigAirForce/status/958004984343343106。另见尼日利亚政府的袭击视频：www.youtube.com/channel/UC2Jf80aJw_wGhA5AzP_9iLg/search?query=drone。

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

2016 年，伊拉克同样购买了无人机，对安巴尔省的伊拉克和黎凡特伊斯兰国进行了打击。[15]

9. 据报告，至少有 20 个武装非国家行为体获得了武装和非武装无人机系统，[16] 包括利比亚国民军、沙姆解放组织、巴勒斯坦伊斯兰圣战组织、委内瑞拉军事叛逃者、库尔德工人党、毛特组织、哈利斯科新生代卡特尔、胡塞武装和伊黎伊斯兰国。[17] 武装团体使用了市售“现成”系统和国家出售的无人机，并开发了自己的无人机。[18] 非国家行为体还部署了数十架无人机。例如，2017 年，在伊拉克摩苏尔，在 24 小时的时间内，打击伊拉克人、库尔德人、美国和法国军队的“各种形状和大小的无人机不少于 82 架”。[19] 哈夫塔尔武装部队对反对派目标进行了 600 多次无人机袭击，[20] 据称造成大量平民伤亡，包括 2019 年 8 月针对一个拘留中心的移民的袭击。[21]

10. 商用无人机技术的出口促进了无人机的扩散并降低了成本。预计将有越来越多的国家开发或获得武装无人机，在今后 10 年内，40%以上的无人机将配备武装，其中约 90%属于第三级无人机。[22]

B. 扩展的能力、功能和形式

11. “第二个无人机时代”的特点也表现在技术本身的渐进式转变。目前，无人机仍然容易受到探测和技术挑战的影响。它们往往被部署在“低成本、低风险的冲突交战中，目的是尽量减少地面部队的数量”。[23] 然而，无人机正在变得更隐蔽、更快、更小、更具杀伤力，更容易被数千公里外的团队操作，因此越来越能够在近距离和远距离进行定点清除。

12. 例如，第三级军用无人机系统可以在空中停留 20 多个小时，以 300 公里以上的时速飞行 1,000 多公里，并携带沉重的有效载荷和一套复杂的硬件和软件，这意味着它们可以收集大量数据，甚至可以截获通过手机和电脑传输的私人对话。[24] 航程 100 公里的小型无人机可以 150/225 公里的时速飞行，携带 30 公斤

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

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

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

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

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

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

[21] https://news.un.org/en/story/2020/01/1056052。

[22] 引用于 www.sdu.dk/cws/-/media/cws/files/cws_military_drones_in_europe_report.pdf，第 52 页。

[23] 同上，第 48 页。

[24] 这些包括“死神”，非武装的“全球鹰”，“苍鹭”和武装的“翼龙-II”无人机。

重具有空爆碎片爆炸能力的弹头。虽然一些无人机是在冲突战区内操控的，[25] 但另一些无人机是通过近乎实时的卫星连接进行操作的：位于冲突区附近的一个团队引导无人机起飞和降落，而位于数千英里外的传感器操作员则控制飞行中的无人机并指示打击。[26]

C. 无人机扩散：成问题的逻辑

13. 无人机技术的吸引力解释了扩散：

(a) 效率。无人机的生产成本相对较低，易于部署，而且省力，这意味着，选择定点清除比定位、拘留/逮捕目标等替代方案在财力上不那么昂贵；

(b) 适应能力。无人机是真正的全地形载体，可以由不同的行为方出于各种目的在不同的环境中部署，[27] 而且它们可以顺应正在进行的技术创新；

(c) 可否认性。由于无人机可以远距离秘密操作，其使用既容易否认，也更难确定责任人。此外，无人机通常看起来很相似，具有相似的设计、航程和致命能力。在同一地理区域活动的国家和非国家行为体可以部署完全相同的品牌和型号；

(d) 有效性。无人机提供了前所未有的利于其部署者的不对称优势，承诺只造成有限的损害，仅针对预定目标而不伤及其他，并且对攻击发起方造成直接损害的风险极小乃至无风险；[28]

(e) 可接受性。无人机技术在很大程度上被视为是“无血、无痛、无味”的，[29] 因此，通过提供“威胁并在必要时从远处实施暴力而几乎没有人员伤亡的技术能力和道德要求”，被视为(更具)道德的战争的保障；[30]

(f) 政治收益。正如一些无人机袭击所表明的那样，一个国家有能力在不造成任何伤亡的情况下清除知名目标，这对执政的政府来说是一种政治收益，尽管其可能并不会取得长远的军事胜利。

14. 然而，这些特征，无论是单独的还是集体的，都提出了令人不安的道德和人权问题，而且，同样重要的是，编造了危险的神话。

[25] http://drones.cnas.org/reports/a-perspective-on-france/。

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

[27] 这包括徘徊或“持续监视”，允许无人机在一个地理位置停留 14 个小时左右，并在认为必要时进行打击。

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

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

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

D. 外科手术打击的神话

15. 军方官员和其他人辩称，无人机可以进行最外科手术般的打击；无人机持续的监视能力提供了明显的军事优势；无人机更长的续航时间可带来详细的战情情报；而且，这种提高的准确性伴随着更少的附带伤亡。但这些断言并不都有证据支持。无人机袭击造成的伤亡比人们承认的要多得多。[31]

16. 需要跨团队、跨机构和跨国家进行的情报收集和复杂协调、通过视觉画面传输命令以及其他因素增加了无人机技术的使用不准确(甚或实际误用)的风险。在实践中，发生人为错误进而向无人机传输瑕疵指令的可能性远远高于人们通常承认的水平。[32]

17. 在所谓的指定个人打击[33] 或特征打击中，[34] 一个主要问题存在于识别目标的那一刻。指定个人打击可能是基于各种国家机构收集的关于特定个人的情报，而特征打击则是基于与恐怖分子有关的界定性特征(例如，制造炸弹或携带武器)以及基于性别和年龄等元数据，这是非常成问题的。[35] 这两种打击都依赖于往往很复杂的线人和分析师网络，以及通常错综复杂和猜测性信息。错误是不可避免的。

18. 此外，即使无人机(最终)准确而“成功地”击中了预定目标，有证据表明，经常有许多其他人死亡，有时是由于无人机进行了多次袭击。造成这些伤亡很可能构成违反国际人道和/或人权法。[36] 平民死亡和无人机的行动也疏远了当地民众，进一步降低了他们提供情报的意愿，并产生了可能助长进一步冲突的不满情绪。[37]

19. 无人机袭击造成平民伤亡的实例包括：

(a) 对 2010-2011 年美国无人机袭击阿富汗的机密数据分析表明，无人机袭击造成平民伤亡的可能性是常规空袭的 10 倍；[38]

---

[31] 统计平民死亡人数或附带伤亡人数可暗示着，预期目标被合法地剥夺了生命。情况并非如此，下文突出说明了这一点。然而，此处的焦点是杀害了并非无人机袭击目标的人。

[32] 与 Lawrence Lewis 和 James Rogers 进行的访谈, 2020 年 3 月。

[33] 据指称，不担任领导作用的低级别步兵也成为目标。与 Camilla Molyneux 和 Aditi Gupta 进行的访谈，2020 年 3 月。

[34] Kevin Jon Heller, “‘One hell of a killing machine’: signature strikes and international law”, Journal of International Criminal Justice, vol. 11, No. 1 (March 2013), pp. 89-119.提交人发现，有大量美国实施的特征打击违反了国际人道法。

[35] https://wilpf.org.uk/wp-content/uploads/2014/12/sex-and-drone-strikes.pdf。

[36] https://civiliansinconflict.org/wp-content/uploads/2020/02/PDF-Report-for-Website.pdf。

[37] 与 Camilla Molyneux 和 Aditi Gupta 的访谈，2020 年 4 月。

[38] 与 Lawrence Lewis 的访谈，2020 年 3 月，他指出，美国已采取步骤处理培训和使用方面的风险因素。他问道：“对于其他正在获得无人驾驶能力的军队，我们将会看到什么样的问题，这些问题会持续多久？”

(b) 对 2009 年至 2014 年也门无人机袭击进行的研究表明，在所有平民死亡人数中，超过 80%是由无人机造成的。[39] 这些数据还突显了不正确情报造成的人类损失。例如，也门有 17 名男子多次遭到袭击；空袭造成另外 273 人死亡，几乎占所有确认的平民伤亡人数的一半，占所有有记录的儿童死亡人数的 100%；[40]

(c) 2015 年在巴基斯坦，针对 24 名男子的空袭失误造成 874 名他人死亡，其中包括 142 名儿童，占巴基斯坦无人机袭击造成的所有已确认平民伤亡的 35%；[41]

(d) 自 2017 年以来，也门中部、索马里南部和阿拉伯叙利亚共和国的平民伤亡增加，[42] 包括摩苏尔(据称 200 名平民)、阿勒颇(一座清真寺)[43] 和拉卡(一所学校)。据称在阿富汗曾发生空袭失误，[44] 而在索马里，据报告空袭导致了伤亡人数的增加。[45]

20. 武装无人机袭击造成的平民伤害远不仅限于杀戮，在此类袭击中受伤的人数更是多得多。[46] 虽然武装无人机和非战斗无人机的后果仍有待系统研究，但有证据表明，在“无人机持续盯视和噪音下生活的民众经历了普遍的威胁和日常恐怖”。[47] 时刻担心无人机来袭造成的压力[48] 会造成重大的心理伤害，包括创伤后应激障碍，[49] 使日常活动陷入瘫痪，[50] 并造成基本上无法统计的社会经济负担，特别是对妇女而言。[51]

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

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

[41] 同上。

[42] https://airwars.org/news-and-investigations/shadow-american-war-syria/。

[43] https://airwars.org/news-and-investigations/unilateral-strike/。

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

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

[46] http://www.christopherjferguson.com/Drones.pdf。

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

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

[49] www.christopherjferguson.com/Drones.pdf。

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

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

21. 在武装冲突中，通过加强协调、改进数据分析、更好地培训无人机操作员和系统地对袭击进行评估，已减少了平民伤亡。[52] 例如，北大西洋公约组织 2018 年保护平民战略和概念设立了军民协调小组，负责记录和调查指控。减轻平民伤害的努力将平民保护纳入军事力量规划和使用的所有环节。对造成平民死亡的事件进行系统审查也有助于避免操作缺陷。[53] 特别报告员强烈鼓励采取这种措施，其中应包括对可能违反国际法的行为进行强有力的调查。[54]

E. 缺乏透明度和问责

22. 与前任特别报告员的调查结果相呼应的是，[55] 证据继续表明，违反调查[56]和在适用情况下惩罚违反国际人道或人权法的责任人的国际义务，也是无人机行动的特征。有关信息几乎完全得不到公开披露，[57] 因为无人机的定点是保密的，这种保密也影响了对平民死亡的调查。

23. 在没有进行实地、打击后评估的情况下，当局依赖无人机袭击前和袭击后的视频信号来检测平民伤亡，这可能会使大量平民伤亡(包括那些被错误识别为“敌人”的人)未被发现。研究表明，在伊拉克和阿拉伯叙利亚共和国，初步军事估计遗漏了 57%的伤亡。[58] 虽然平民应该在报告和问责机制中发挥核心作用，但令人遗憾的是，对于受无人机袭击影响的家庭，似乎没有报告机制。然而，事实证明，民间社会和媒体，包括对军事当局来说，在提供准确的平民伤亡计算方面是非常宝贵的，这对于更全面地了解行动的影响也是至关重要的。[59] 但归根结底，对武装无人机行动的范围和由此造成的平民伤亡缺乏透明度和问责，这是国家政策和法律漏洞造成的。[60]

24. 无人机位于若干监督制度的交叉点，但作为情报资产，又以某种方式游离于这些监督制度之外。正如时任美国总统巴拉克·奥巴马在 2013 年 5 月所承认的，由于指挥或操作无人机的人几乎或完全不面对任何风险，包括承担法律责任的风险，“在决策上阻碍使用武力的惯常屏障受到了侵蚀…因为它们不会吸引

[52] https://aoav.org.uk/2020/protecting-medical-care-in-conflict-a-solvable-problem/。

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

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

[55] A/68/382 和 Corr.1。

[56] 非洲委员会要求尼日尔对法国和美国在其领土上的无人机袭击展开自己的调查。

[57] https://civiliansinconflict.org/wp-content/uploads/2020/02/PDF-Report-for-Website.pdf。

[58] 与 Lawrence Lewis 进行的访谈, 2020 年 3 月。

[59] https://civiliansinconflict.org/wp-content/uploads/2020/02/PDF-Report-for-Website.pdf。

[60] 例见，www.whitehouse.gov/presidential-actions/executive-order-revocation-reporting-requirement。

‘部署部队所受到的公众监督’”。[61] 一般来说，在国内层面，似乎有很多漏洞可以避免审查，特别是因为这一事项可能属于许多机构的职权范围，同时又没有人负责。[62]

25. 很少有国家将无人机置于议会的监督之下。一般而言，一个国家使用无人机进行致命打击不需要事先得到议会的批准，[63] 即便根据第一击原则，使用无人机可能会引发国际武装冲突。

26. 使用无人机进行域外杀戮引发道德、管辖权和问责问题。关于前者，除其他外，国际法院[64] 和欧洲人权法院[65] 已确定，人权条约义务原则上可适用于一国在其领土以外的行为。[66] 人权事务委员会已经确定，缔约国有义务以直接和合理可预见的方式尊重并确保生命权受到其军事或其他活动影响的所有人的生命权。[67] 这种情况适用于无人机袭击及其目标，这应被视为属于操作无人机的国家的管辖范围。

27. 然而，司法实践与这些规范性论点并不一致。到目前为止，法院拒绝监督使用无人机进行域外定点清除的做法，辩称此类事项是政治性的，或涉及国家间的国际关系，因此不应由法院审理。[68] 全面否认域外使用致命武力的可裁判性，不符合公认的国际法、条约、公约和议定书原则，侵犯了生命权和补救权。

28. 这种情况有一些值得注意的近期例外，这可能预示着对在武力行为中使用无人机的法律回应会更强烈。一项分水岭裁决是莱茵－威斯特法伦高级行政法院关于德国作为源自拉姆施泰因空军基地的美国无人机行动东道国的法律责任的裁决。在编写本报告时，该裁决在开创先例方面的影响尚不确定，但其调查结果至关重要：

---

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

[62] www.opensocietyfoundations.org/publications/armed-drones-in-europe；Jameel Jaffer, The Drone Memos: Targeted Killing, Secrecy, and the Law (The New Press, 2015)；与 Aditi Gupta 和 Camilla Molyneux 的访谈，2020 年 3 月。

[63] 有关欧洲情况的深入分析，参见 www.opensocietyfoundations.org/publications/armed-drones-in-europe。

[64] 在巴勒斯坦被占领土修建隔离墙的法律后果，咨询意见，《2004 年国际法院案例汇编》，第 136 页，第 109 段。

[65] Al-Skeini 等人诉联合王国(第 55721/07 号申诉)，2011 年 7 月 7 日的大审判庭判决，第 106-186 段；Loizidou 诉土耳其，15318/89 号申诉，1995 年 3 月 23 日的判决；Ilaşcu 诉摩尔多瓦和俄罗斯，第 48787/99 号申诉，2004 年 7 月 8 日的判决，第 392 段；Al-Skeini 等人诉联合王国(第 27021/08 号申诉)，2011 年 7 月 7 日的大审判庭判决；

[66] A/68/382 和 Corr.1，第 45 段。

[67] 人权事务委员会，关于生命权的第 36 号一般性意见(2018 年)，第 63 段。

[68] 例见，联合王国上诉法院，Noor Khan 诉外交和英联邦事务大臣案，2014 年 1 月 20 日的判决。

(a) 由于德国提供的协助和在美国空袭中发挥的核心作用，德国对美国进行的无人机袭击拥有管辖权。换言之，德国有义务保护被攻击者的生命权；

(b) 预防性自卫在国际法中没有依据；

(c) 德国应作出更大努力，确保美国在涉及德国领土(拉姆施泰因空军基地)的军事行动中尊重国际法；

(d) 美国对通过拉姆施泰因空军基地进行的活动的合法性保证不足；

(e) 向美国非法打击提供协助是一个法律问题，而不是政治问题，因此不能仅通过外交政策来为其辩护。

29. 保护生命是国家的最高责任，位于国家使用武力的权力的核心。鉴于这些行为及其后果的严重性，应建立有效的议会和司法机制，以监督、审查和(或)批准一国在国内和境外使用致命武力的情况，并使其能够跟上技术和武器发展的步伐。这种监督的触发因素及其范围必须相应地演变，特别包括作战与非作战行动之间的界限模糊的地方。

三. 使用无人机进行的定点清除和国际法

30. 正如前一位特别报告员所说，[69] 要想合法，无人机袭击必须满足所有适用的国际法律制度的法律要求：规范国家间使用武力的法律(诉诸战争权)、国际人道法和国际人权法。

31. 诉诸战争权本身不足以指导域外使用武力。虽然根据《联合国宪章》，诉诸战争权是国家之间的问题，但对个人负有其他义务。因此，即使根据《宪章》第五十一条袭击是合法的，也不能预先排除其根据国际人道或人权法的不法性。正如国际法委员会所说：“至于国际人道法规定的义务以及在不可减损的人权条款方面，自卫并不解除行为的不法性。”[70]

32. 虽然前几任特别报告员曾将这种方法应用于和平和非国际武装冲突局势，但当前事件要求本特别报告员结合国际武装冲突以及国际人道法和国际人权法之间的互补性如何运作来审议这些法律问题。

A. 保护防止任意杀戮

33. 保护生命不受任意剥夺是习惯国际法的规则，是国际法的一般原则，也是强行法的规则。《世界人权宣言》、《公民及政治权利国际公约》和区域公约都承认这一点。[71]

[69] A/68/382 和 Corr.1。

[70] “国家对国际不法行为的责任条款草案”，《2001 年国际法委员会年鉴》，第二卷(第二部分)和更正，第 76-77 段，见第 74 页。

[71] A/68/382 和 Corr.1，第 30 段。

34. 各国、国际机构和法院强调了国际人道法和国际人权法的互补性。[72] 国际人权法在战争和公共紧急状态期间继续适用这一确立已久的原则[73] 已在国际判例[74] 和人权条约中得到确认，包括其克减情况。[75]

35. 尽管如此，对定点清除的法律评估可能会根据所考虑的政权不同而产生不同的结果。作为一般原则，根据国际人权法，蓄意、有预谋的杀害个人是非法的，除非是作为最后手段实施的，而且对于防止迫在眉睫的生命威胁是绝对必要的。然而，根据国际人道法，要使蓄意杀戮合法，目标必须是正当目标(即，战斗人员或直接参与敌对行动的平民)，而且，杀戮必须以区别、相称和预防等原则为指导。

36. 缔约国从事国际法界定的侵略行为并造成剥夺生命的情况，这种事实本身就违反《公民及政治权利国际公约》第六条，[76] 不论这些行为是否也违反了国际人道法。未能采取一切合理措施以和平方式解决国际争端的缔约国，可能未履行其确保生命权的积极义务，[77] 这一联系尚未由国际人道法或根据国际人道法得到确立。

37. 多年来，这些分歧一直是争论的主题，主要是围绕特别法学说的争论，该学说宣称，为某种特定情况设立的法律体系应管辖该情况，优先于其他法律制度。将特别法适用于国际人道法和国际人权法之间的关系可以追溯到 1996 年。[78] 它承认，国际人权法提供的保护不会在战争时期停止，除非受到克减，但根据国际法院，对于被视为是“任意的情形”，其定义对应于“适用的特别法，即武装冲突中适用的法律”。[79] 根据这一办法，如果国际人道法和国际人权法的适用导致不同结果，将根据人道法标准和测试来评估杀戮的合法性。[80]

---

[72] 例见，国际人权会议关于武装冲突中的人权问题的第 23 号决议(A/Conf.32/41)；大会第 2444(XXIII)号决议和安全理事会第 237(1967)号、第 1649(2005)号和第 1882(2009)号决议；使用或威胁使用核武器的合法性，咨询意见，《1996 年国际法院案例汇编》，第 226 页。在巴勒斯坦被占领土修建隔离墙的法律后果，咨询意见，《2004 年国际法院案例汇编》，第 136 页。美洲人权法院，Serrano-Cruz 姐妹诉萨尔瓦多，初步反对意见，2004 年 11 月 23 日；Marko Milanović, “Norm conflicts, international humanitarian law and human rights law”, in International Humanitarian Law and International Human Rights Law, Orna Ben-Naftali, ed. (Oxford University Press, 2011).

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

[74] 例见，“以核武器相威胁或使用核武器的合法性”，咨询意见，《1996 年国际法院案例汇编》，第 226 页。

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

[76] 人权事务委员会，第 36 号一般性意见，第 64 段。

[77] 同上，第 70 段。

[78] 使用或威胁使用核武器的合法性，咨询意见，《1996 年国际法院案例汇编》，第 226 页。另见：Marko Milanović, “The lost origins of lex specialis”, in Theoretical Boundaries of Armed Conflict and Human Rights, Jen David Ohlin, ed. (Cambridge University Press, 2014).

[79] 使用或威胁使用核武器的合法性，咨询意见，《1996 年国际法院案例汇编》，第 226 页；第 240 页，第 25 段。

[80] 俄罗斯联邦在 1995 年 6 月 19 日关于以核武器相威胁或使用核武器的合法性问题的书面声明和评论中提出了这一观点，美国在 1995 年 6 月 20 日的书面声明中提出了这一观点。

38. 然而，该学说在概念上的清晰是虚幻的。首先，取代或修改一般法律体系的特别法的概念并未受到国际法或国内法中关于不同法律制度之间关系的各种规则的支持。其次，很少有国家实践或法律确信支持这一理论。直到 1996 年，没有人建议在战争法和和平法之间进行刚性的典型区分，也没有任何一种将特别法凌驾于一般法律之上的总括原则。[81] 1996 年后，国际法院本身改变了方向。在关于刚果民主共和国诉乌干达的判决中，它没有提到特别法，而是确定了，“国际法的两个分支，即国际人权法和国际人道法，都应被纳入考虑”。[82]

39. 最后，特别法在适用于在第三国领土上行动的无人机实施的定点清除时用途有限。红十字国际委员会认为，国际人道法不允许以直接参与敌对行动但位于非交战国的人为目标，否则整个世界可能成为战场。[83] 这一立场已经得到了其他方面的支持。[84]

40. 特别报告员认为，很少有情况会导致不同的评估结果。必须注意不要制造虚构的冲突来处理一些国家造成的法律扭曲问题。然而，在存在不确定性的情况下，可以采取某些步骤来澄清问题。

41. 第一个优先事项是，在严格和客观解读构成武装冲突的要素基础上，确定某一局势是属于国际武装冲突还是非国际武装冲突。对于使用无人机进行定点清除的情况，可以识别出四种有关场景：

(a) 第一种场景是，无人机袭击既不是发生在国际武装冲突中，也不是发生在非国际武装冲突中。对于这种袭击，必须根据国际人权法进行评估，同时考虑到更大的背景、是否激活了克减情形(如相关判例中所强调的)以及有关局势的具体情况；[85]

(b) 第二种场景是，无人机袭击发生在国际或非国际武装冲突中，在涉及交火、常规空袭和其他军事行动的激烈和公开的敌对行动过程中发生或与之相伴发生；

(c) 第三种场景是，尽管某一国家或区域可能受到国际或非国际武装冲突的影响，但无人机袭击的地点远离任何战场，而是在没有军事活动、驻军、控制或交战的地区或时间进行袭击。这是一种切实相关的场景：[86] 在许多当代冲突中，前线的位置零散而不可预测，往往使一个国家或区域的大片地区完全或几乎不受激烈或持续的敌对交火的影响；

(d) 第四种场景是，无人机袭击是可能引发国际武装冲突的第一击。在袭击之前、同时，甚至在袭击之后，都不存在构成冲突的其他要素或行为。

---

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

[82] 刚果境内的武装活动(刚果民主共和国诉乌干达)，判决，《2005 年国际法院案例汇编》，第 168 页起，见第 242 页，第 216 段。

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

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

[85] 欧洲人权法院，Al-Saadoon 和 Mufdhi 诉联合王国，申请号 61498/08, 2010 年 3 月 2 日的判决；McCann 和其他人诉联合王国，申请号 18984/91, 1995 年 9 月 27 日的判决。

[86] 这是特别报告员在上一份关于非国家武装行为体的报告中所辩护的立场。

42. 在第一种场景下，适用的法律是明确的。相比之下，在后三种场景下，[87] 特别是后两种场景下，对定点清除合法性的评估结果可能会有所不同。

43. 一种方法是适用对受害者给予最大保护的法律制度，[88] 或将个人权利置于国家权利之先的法律制度。[89] 然而，在这些情况下，国际人道法总是会被国际人权法取代。

44. 根据另一种方法——体系整合方法，[90] 这种方法源自《维也纳条约法公约》第三十一条第三款(丙)项并已被国际法院适用[91] ——使用国际法的不同规则来评估情况和(或)支持对以基于《公约》的权利作出有目的的解释。[92] 这种做法符合《公民及政治权利国际公约》和区域文书中的克减条款，适用于紧急状况或战争等特殊情况。[93] 这种方法有当代判例的支持。[94] 对于上述场景，体系整合方法不会只考虑国际人道法，而是会一并考虑人权条约义务、同时期军事行动的地域性和范围以及国家的整体行为。[95]

45. 以色列最高法院在“以色列禁止酷刑公共委员会诉以色列政府案”中的判决是体系整合方法的一个实例：

> 对于直接参与敌对行动的平民，如果可以使用危害较小的手段，则不得在其直接参与敌对行动时予以攻击。在我们的国内法中，这一规则是相称性原则所要求的。的确，在各种军事手段中，必须选择对被害者的人权损害最小的手段。因此，如果直接参与敌对行动的恐怖分子能够被逮捕、审讯和审判，就应该采用这些手段。

46. 在这种情况下，法院要求逐案进行分析，同时确认，上述做法尽管并非始终可行，但始终应当作为一种可能性得到考虑。

---

[87] 在上述第二种情况下，国际人权法继续适用，但以特别报告员的观点(如下所述)，当前的背景和情况要求评估武装无人机袭击的合法性是否符合国际人道法原则，特别是保护平民免受蓄意或不成比例攻击的原则。

[88] Alonso Gurmendi Dunkelberg, “There and back again: the inter-American human rights system’s approach to international humanitarian law” (8 March 2017)；美洲人权法院，Las Palmeras 诉哥伦比亚，2001 年 12 月 6 日的判决。

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

[90] www.tandfonline.com/doi/abs/10.1080/18918131.2017.1353213?journalCode=rnhr20。

[91] 石油平台案(伊朗伊斯兰共和国诉美利坚合众国)，判决，《2003 年国际法院案例汇编》，第 161 页。

[92] Milanović, “The lost origins of lex specialis”.

[93] A/HRC/37/52。克减必须是精准的、例外的和暂时的。

[94] 例见，美洲人权委员会，Juan Carlos Abella 诉阿根廷，1997 年；美洲人权法院，圣多明各大屠杀诉哥伦比亚，2012 年 11 月 30 日的判决，第 211-236 页；刚果境内的武装活动(刚果民主共和国诉乌干达)，判决，《2005 年国际法院案例汇编》，第 168 页起，见第 242 页，第 216 段。

[95] 正如 Dapo Akande 在 2019 年所强调的那样，“在某些情况下，随后的做法可以合法地用来解释《宪章》……人们可以想到对“威胁和平”概念的解释，即将内部事务或人道主义挑战包括在内。这为现在安理会多次授权使用武力保护平民或在国内局势中使用武力打开了大门。”(www.ejiltalk.org/the-diversity-of-rules-on-the-use-of-force-implications-for-the-evolution-of-the-law/)。

47. 非洲人权和民族权委员会补充说，“如果军事必要性不要求武装冲突各方在实现正当军事目标时对其他方面合法的目标使用致命武力，但允许目标例如被抓获而不是被杀死，那么，努力选择这一做法可以最好地确保对生命权的尊重”。[96]

48. 红十字国际委员会的观点略有不同，(有争议地)强调要考虑道德上的要求而非仅仅考虑局势上的必要性，指出在显然没有必要使用致命武力的情况下杀死对手或不给其投降的机会，是对人性的基本概念的不尊重。[97]

49. 因此，在上述模棱两可的场景下评估定点清除的合法性时，可以采用两种思路。两者都以一定程度的变动性为前提，这是整体背景和具体情况所要求的：

(a) 第一种思路是，一个法律体系可以为另一法律体系提供解释性参考。根据人道法评估定点清除是否合法时应参考人权原则，这意味着，目标是战斗人员还是参与敌对行动的平民不能被视为决定性因素；[98]

(b) 第二种思路是，根据两套法律制度对有关局势或行动进行评估，然后确定是否应适用人权制度固有的一些额外限制，因为背景情况允许或要求这样做。

50. 特别报告员认为，凡是对使用武力的情况的有效评估必然离不开这种背景和局势分析，[99] 在上文所述的场景下亦是如此。为了遵守国际人权法，这意味着通过考虑到所涉地点、情形、武装抵抗的可能性和所涉规划等因素的局势分析，评估必要性、相称性和预防性。[100] 这还意味着，在没有必要、可能造成不成比例的伤害或本可以通过可行的预防措施合理避免的情况下，使用致命武力是不合理的或不被允许的。[101]

B. 自卫法

51. 根据《联合国宪章》，所有会员国在国际关系中应避免对任何国家的领土完整或政治独立进行武力威胁或使用武力(第二条第四款)。为了充分保护禁止使用武力的规定，只有三种狭义规定的情况属于例外：[102] (a) 安全理事会授权；(b) 国家同意在其领土上发动攻击；(c) 针对武装袭击的自卫。[103]

---

96 关于《非洲人权和民族权宪章》所载生命权(第四条)的第 3 号一般性意见，第 34 段。

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

98 这种方法并非没有风险，例如两个法律体系被互换使用，或者人道法概念的使用方式损害了整个人权制度的完整性。https://harvardnsj.org/wp-content/uploads/sites/13/2014/01/Modirzadeh-Final.pdf；William Schabas, “Lex specialis?Belt and suspenders? The parallel operation of human rights law and the law of armed conflict, and the conundrum of jus ad bellum”, Israel Law Review, vol. 40, No. 2 (2007), pp. 592–613；Milanović, “Norm conflicts, international humanitarian law and human rights law”.

99 例见，www.ohchr.org/Documents/Issues/Executions/HumanRightsDispatch1.pdf。

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

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

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

103 然而，《宪章》并没有定义武装攻击；该问题是根据相应国家实践确认的法律确信解释的。

52. 国际判例和国家实践在很大程度上表明，只有在面对现有威胁时才能援用自卫。然而，根据《宪章》第五十一条，为防止迫在眉睫的攻击而采取狭义规定的先发制人的自卫行为是合法的，这一观点已在一定程度上得到接受，[104] 只要威胁是“即时的、压倒性的、别无选择的、没有考虑时间的”。[105]

53. 然而，在所谓的“反恐战争”的背景下，过去二十年来，少数有影响力的国家试图扩大这种理解，尽管有大量的意见和国家实践反对这种理解。[106] 特别报告员认为，最近这些占少数的解释造成了令人不安的法律扭曲。

54. 首先，它们造成了时间扭曲。根据扩张主义的解释，可以采取先发制人的自卫行为，以针对所认为的安全威胁，[107] 包括攻击计划可能尚未完全为人所知的非国家行为体的威胁。[108] 在这种解释下，[109] 迫切性不再只是一个时间标准。[110] 实际上，如果据信进一步推迟回应会导致受到威胁的国家无法进行自卫，袭击就可以被视为迫在眉睫。[111] 因此，迫在眉睫性被解读包含在必要性原则之中。

55. 其次，造成了地域扭曲。根据这一解释，一旦一国“合法地对某一特定行为体使用武力进行自卫，以回应该团体的实际或即将发动的武装攻击”，就没有必要重新评估未来攻击的迫在眉睫性。[112] 一国有权对该国宣布与之处于战争状态的特定非国家团体在任何地方使用武力，包括在东道国领土上使用武力，如果东道国不能或不愿意应对这些团体的威胁的话。[113]

56. 有时被贴上“全球非国际武装冲突”标签，[114] 扩张主义学说的这一层面遭到红十字国际委员会和其他方的强烈反对，他们认为，必须对包括反恐在内的各种暴力局势采取逐案分类的办法。有些局势可以归类为国际武装冲突，有些局势可以归类为非国际武装冲突，有些局势可以归类为国际化的非国际武装冲突，而各种恐怖主义行为可能发生在任何武装冲突之外。

---

104 A/HRC/59/565 和 Corr.1，第 188 至第 192 段；A/59/2005 和 Corr.1，第 124 段。

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

106 A/68/382 和 Corr.1，第 87 段。

107 然而，这受到联合国的谴责(A/59/565 和 Corr.1)。

108 Daniel Bethlehem 建议，对迫在眉睫性的评估应包括威胁的性质和紧迫性、袭击的可能性、关于持续武装活动形态的信息、袭击的规模(例如可能的伤害)以及是否可能有其他机会采取附带伤害、损失或损害较不严重的有效自卫行动。如果有合理和客观的依据，可据以得出结论认为，袭击迫在眉睫，时间、地点和方式不会排除自卫的权利。见：https://legal.un.org/counsel/Bethlehem%20-%20Self-Defense%20Article.pdf。

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

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

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

112 https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.Pdf. 另见 S/2019/804 和 www.ejiltalk.org/a-collective-failure-to-prevent-turkeys-operation-peace-spring-and-natos-silence-on-international-law/。

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

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

57. 这种地域扭曲也未能支持诉诸战争权和战时法法律制度之间的区别：针对(迫在眉睫的)武装袭击是否合法地主张了自卫权，对于袭击在人道法下的合法性没有影响。

58. 第三，扭曲了主权原则。扩张主义解释力图允许各国在另一国领土上对构成直接和迫在眉睫的攻击威胁的武装团体采取未经同意的军事行动，前提是东道国不能或不愿意消除其构成的威胁。

59. 这一学说违背了对主权的普遍理解，根据这种理解，在另一国领土上针对武装团体的自卫只有在该团体的行为可归咎于东道国的情况下才是正当的。[115] 否则，域外使用武力是对主权的非法侵犯，[116] 因此可能是侵略行为，除非它是在东道国同意或安全理事会事先授权的情况下进行的。

C. 扩张主义的努力意味着什么

60. 就无人机袭击而言，诉诸这些法律扭曲仅限于对抗非国家行为体的威胁。2020 年 1 月 3 日对苏莱马尼将军及其同伴的定点清除是已知的第一起一国援引自卫为由在另一国领土上攻击一个国家行为体的事件，因而牵涉到《宪章》第二条第四款所载的禁止使用武力的规定。

61. 对定点清除苏莱马尼将军的分析得出的一些重要结论(见附件)包括：

(a) 在这一事件中，美国使用武力不仅针对伊朗伊斯兰共和国，也针对伊拉克。美国在没有事先征得伊拉克同意的情况下在该国领土上杀害苏莱马尼将军，侵犯了伊拉克的领土完整；[117]

(b) 在美国提出的理由(以及后来伊朗伊斯兰共和国提出的为 2020 年 1 月 8 日采取的行动辩护的理由)中，没有证据表明威胁迫在眉睫(美国)；事实上，没有提到迫在眉睫的威胁(伊朗伊斯兰共和国)。相反，两国都将重点放在过去的事件上。只要有任何证据表明美国和伊朗的打击是报复或反击行为，那么根据诉诸战争权，每种行为都是非法的；

(c) 这些辩护理由还产生了弱化诉诸战争权与战时法之间区别的效果。如果允许模糊这些界限，各国可以通过从不同的法律领域挑选理由来支持其行为的合法性。必须明确区分诉诸战争权和战时法，以确保各自的保障及其互补性；

(d) 将“第一枪”理论应用于对国家行为体的定点清除，就意味着这样一种真实的可能性：世界上任何地方的所有士兵都可成为正当目标。

[115] 在巴勒斯坦被占领土修建隔离墙的法律后果，咨询意见，《2004 年国际法院案例汇编》，第 136 页。刚果境内的武装活动(刚果民主共和国诉乌干达)，判决，《2005 年国际法院案例汇编》，第 168 页。

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

[117] 同上。

62. 使用无人机定点清除一名国家行为体对未来行为的全部影响尚不清楚。已知的是，过去 20 年的法律扭曲，加上“第二代无人机时代”的技术实力，使得武力的使用大幅增加：低强度冲突的发生几乎乃至完全没有了地理或时间上的边界。[118] 在第三国定点清除一名国家行为体，将“所谓的‘反恐战争’的标志性手段纳入了国家间关系的范畴”，[119] 并突显了“反恐战争”论的扩张[120] 对国际和平构成的真正风险。[121]

63. 国际社会现在必须面对这样一个非常现实的前景：各国可能在没有明显战争的情况下从战略上选择消灭高级军事官员，并试图以袭击目标是构成未来潜在威胁的“恐怖分子”为理由为这种杀戮辩护。

64. 换言之，在 20 年来扭曲国际法和一再大规模违反人道法之后，[122] 定点清除苏莱马尼将军不仅是逐渐的滑坡。而是断崖式的下落。[123]

四. 国际审查和监督

65. 一些国家试图证明使用无人机进行定点清除的正当性，就必须进行复杂的法律扭曲，即便如此，许多此类杀戮要么符合《公民及政治权利国际公约》第六条下的任意剥夺生命，要么属于违反诉诸战争权的行为。一些杀戮，连同他们所谓的“附带”伤亡，也可能违反国际人道法。然而，由于缺乏对这些事件的调查，使它们与真相和问责隔绝。

66. 在国际一级，应当在何处审查这些事项，而且审查方式应具有切实影响并鼓励各国认真对待审查结果呢？不幸的是，迄今为止，国际监督机制未能以应有的严肃性处理这一局势。例如，联合国裁军研究所在 2017 年的一项广泛研究中发现，迫切需要处理在使用武装无人机方面缺乏透明度、监督和问责的问题。[124]

67. 鉴于这一发现并铭记《宪章》第五十一条对全球和平与安全(联合国的主要使命)的重要性，似乎有理由提出，援引第五十一条为无人机或其他工具定点清除做法辩护的国家应向国际社会提供充分的理由，而不是草率的报告。此类理由应包括“外部威胁迫在眉睫的证据和将采取的应对措施的相称性。对第五十一条的过度扩张和不加约束的解释是对基于规则的国际秩序的威胁，是促进国际和平与安全的障碍。”[125]

---

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

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

[120] 例见，A/73/361。

[121] 一国使用武力侵犯另一国的主权、领土完整或政治独立可能构成侵略行为。截至 2018 年，国际刑事法院对侵略罪拥有管辖权。

[122] 例见，www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=25520&LangID=E；A/HRC/43/57。

[123] Marko Milanović 讲话大意(访谈，2020 年 3 月)。

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

[125] 列支敦士登(S/PV.8699，第 37 页)。

68. 然而，各国几乎没有提供证据证明威胁迫在眉睫，而对于这些威胁，它们提出了先发制人自卫和定点清除的主张。第五十一条呈件的质量很差，而且雪上加霜的是，不将呈件通报各国已成为常例。哈佛法学院国际法和武装冲突项目对第五十一条呈件的广泛研究表明，“显然，常例是，这种关于使用武力的声明不会被通报给会员国”。[126] 这一点十分令人关切，因为这也意味着，各国经常对第五十一条呈件保持沉默，可能并非故意为之，甚至可能不是有意识为之。[127]

69. 安理会本身几乎未对第五十一条主张作出过回应。学术分析表明，安理会对自卫呈件“迄今为止最常见的反应”是完全不作正式回应。从 1945 年到 2018 年，“在已确定的自卫来文中，安全理事会仅对约十分之一作出了正式回应(即至少在安理会的行动或主席声明中以一段条文作出回应)”。[128] 在作出正式回应的情况下，安理会更多的是用政治的而不是法律的术语表述其回应，表达了关切但没有提供法律评估或作为建议提出问责和纠正行动。尽管《宪章》的完整性、第三国主权和生命权多次受到侵犯，但安理会只有一次质疑了域外定点清除的合法性。[129] 安理会之所以不作正式回应，可能是因为常任理事国使用否决权的情况大幅增加，特别是在使用武力和定点清除等敏感问题上。

A. 国家与寂静之声

70. 会员国也没有公开回应涉及先发制人自卫的案件，包括使用无人机的情况。例如，即使面对联军在 2014 年至 2017 年期间对阿拉伯叙利亚共和国的大量袭击，虽然“几个国家已经作出反应…有的使用“法律词汇”，有的使用回避的语言…大多数国家都保持沉默。”[130]

71. 国家和其他国际行为体的沉默是否代表默许，像一些学者所说的那样？[131] 简短的回答是否定的，[132] 但这样说的原因值得详细说明。从本质上讲，这个问

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

[127] 随着时间的推移，已经制定了几个机制，以确保汇总并分享各国和安全理事会关于第五十一条(除其他外)的呈件。然而，许多报告的编写被推迟几年，这使得它们的政策价值很有限，不过，这并不是为了否定这种机制的其他贡献。

[128] Lewis, Modirzadeh and Blum, Quantum of Silence.

[129] 安全理事会第 573(1985)号决议。

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

[131] 在 Lewis, Modirzadeh and Blum, Quantum of Silence 一书(第 70-79 页)中，介绍并分析了这些观点。

[132] 正如奥地利常驻联合国代表于 2020 年 1 月 13 日所说的那样，(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/)：

> 我们关切地注意到，援引《宪章》第五十一条规定的固有自卫权单方面使用武力的案件越来越多。这些案件以及联合国其他会员国不公开表达其对每一个案件的法律意见这一事实，可能不会被解释为可能会导致侵蚀《宪章》第二条第四款的一项新的国家实践或法律确信，而国际法委员会已将该条款确定为强制性规范(强行法)。

题涉及自卫权的起源和性质，而自卫权是强行法禁止在国际关系中使用武力的狭义例外。要想辨明国家在这一领域的沉默的含义，这并非易事，尤其是因为，沉默在不同情况下可以传达非常不同的含义，既可以表示默许，也可以暗示反对。它可能表示完全没有任何意见，或者单纯地缺乏兴趣。它也可能表示恐惧或不情愿。

72. 法律起点是，一项强行法规范只能被另一项强行法规范修改。[133] 但是，必须极其谨慎地考虑以下观念：国家沉默可以修改一个强制性规范的内容，包括其辅助条款(例如，公认的规范例外情况)。[134] 关于国家沉默可能改变禁止使用武力或其狭义自卫例外的内容的说法，特别是声称要扩大诉诸武力理由的说法，很难予以辩护。

73. 国际法委员会 2018 年的立场没有就这些事项提供足够指导。关于沉默在条约解释中的潜在作用问题，委员会认为，“在有关情况要求作出某种反应时，一个或多个缔约方的沉默可能构成对嗣后实践的接受”。[135] 然而，委员会缓和了这一一般概念，强调称“沉默或不作为在确立解释协定方面的相关性的高低，很大程度上取决于具体案件的具体情况”。[136]

74. 习惯国际法的一个构成要素是，一般惯例必须被接受为法律(法律确信)，对于这项要素，委员会的结论是，在有关国家有能力做出反应并且有关情况也要求做出某种反应的情况下，对一种惯例经过一定时间而没有做出反应，可用作法律确信的证据。[137]

75. 各国对委员会立场的反应显示出明显缺乏协商一致意见。有些国家告诫说，他们可能会私下而非公开地表达意见，其被视为的不反应或沉默可能是政治和外交考虑的结果，而不是因为他们同意国家行为背后的法律立场。值得注意的是，法学家们强调，当国家的想法是出于自身利益或胁迫之动机时，它可能缺乏“真实性”，因此没有法律效力。[138]

76. 《宪章》第五十一条要求会员国立即向安全理事会报告据称为行使个人或集体自卫权而采取的措施。面对向安理会提交的援引过于宽泛的自卫主张的“第五十一条呈件”，安理会、其理事国或其他国家表面上的沉默是否能够扩大条约或习惯国际法规定的关于诉诸武力进行自卫的理由？

---

[133] www.ejiltalk.org/the-diversity-of-rules-on-the-use-of-force-implications-for-the-evolution-of-the-law。Akande 还指出，在某些情况下，可以正当地用嗣后实践来解释《宪章》，例如与保护责任有关的做法。

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

[135] 大会正式记录，第七十三届会议，补编第 10 号(A/73/10)，第 15 页。

[136] 同上，第 80 页。

[137] 同上，第 120 页。

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

77. 对于《宪章》的解释以及法律确信的形成或表达，安全理事会的决议和辩论可能具有相关意义。[139] 此外，通过安理会的谴责和相关做法以及各国的法律确信，包括在安理会辩论中表达的法律确信，与安理会有关的某些做法可能有助于一般国际法习惯规则的出现、具体化或巩固。[140] 而且，在某些情况下，国家的沉默有可能影响某些原则的形成、识别、修改和终止。[141] 然而，这些条件在第五十一条来文中远远没有得到满足。

78. 就以行使自卫权为名提出的诉诸武力的广泛主张而言，理论上可能的修改国际法的模式在很大程度上是不可接受的。此外，部分因为没有同时和有系统地向各国通报“第五十一条来文”，所称的各国的沉默不能被视为故意之举，甚至不能被视为有意识之举，当然也不能证明各国的真实想法。[142] 正如墨西哥常驻纽约联合国代表团的一名法律顾问所解释的，安全理事会程序缺乏透明度是许多会员国保持沉默的主要原因，这“因此不能被视为默许对《联合国宪章》第五十一条关于在第三国对恐怖分子使用武力的任何新解释…大多数联合国会员国都被蒙在鼓里。”[143]

79. 然而，尽管有一个强有力的假设，即沉默本身并不构成接受一种立场，但出于几个原因，面对不正当自卫主张时普遍保持沉默的情况是非常令人不满意的：

(a) 首先，许多国家的沉默似乎产生了不幸的效果，放大了少数国家力图扩大诉诸武力理由的声音。其不成比例的影响力当然在法律学术方面得到了反映；

(b) 第二，国家沉默容易受到广泛的解释、曲解和误解，特别是来自于发起行动的国家；

(c) 第三，作为国际社会的成员，特别是在这个有人试图产生规范上的波动、削弱对自卫的严格要求的时期，各国有责任发声维护法律稳定；[144]

(d) 第四，所涉问题的严重性——因为它们牵涉到当代国际法律体系的基本准则，违反这些准则会影响所有国家——应当迫使各国发声。

---

[139] 例如，前南斯拉夫问题国际法庭在“检察官诉 Tadić 案”的 1995 年 10 月 2 日裁决中，认为安全理事会决议“与法律确信的形成极为相关”。另见 www.law.umich.edu/facultyhome/drwcasebook/Documents/Documents/ILA%20Report%20on%20Formation%20of%20Customary%20International%20Law.pdf and Jessica S. Burniske, Naz K. Modirzadeh and Dustin A. Lewis, Armed Non-State Actors and International Human Rights Law: An Analysis of the Practice of the U.N. Security Council and U.N. General Assembly (Harvard Law School Program on International Law and Armed Conflict, June 2017).

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

[141] 同上，第 80 页。

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

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

[144] Starski, “Silence within the process of normative change and evolution of the prohibition on the use of force”, p. 125.

80. 沉默，尽管通过曲折和间接的途径，最终仍然可以影响规范及其发展。在法律的各种复杂因素中，沉默可能是危险的，尤其是因为它是模棱两可的。明确同意一项行动是一种信号，直接不同意也是一种信号。但是，当什么都没说的时候，传达的是什么信号呢？通过沉默搞政治和因为政治而沉默，都可能是致命的。沉默相当于对非法杀戮视而不见。

81. 各国如果没有意识到可能需要做出回应，自然也就无法决定是否应当发声。应当直接地、可靠地和有系统地向所有国家通报提交给安全理事会的关于使用武力和定点清除的来文，以及安理会和其他国家的回应(或无回应)。应该恢复和促进关于严重国际关切问题的多边讨论。

82. 到目前为止，使用无人机进行的袭击和定点清除还没有成为强有力的国际辩论和审查的对象。安全理事会缺乏行动；不论愿意与否，国际社会基本上保持沉默。这是不可接受的。

五. 结论

83. 当被问及为什么要攀登珠穆朗玛峰时，一位著名登山者反驳道：“因为它就在那里”。随着公众舆论反对在海外军事行动中牺牲士兵的生命，武装无人机的使用呈指数级增加。在当前的“第二个无人机时代”，无人机也已成为享有盛誉的、有效的和高效的武器，许多国家都渴望加入“无人机力量俱乐部”。[145] 但无人机的存在本身并不能成为恣意部署的理由，反对大规模杀伤性武器、化学武器和其他滥杀伤武器的公约就是例证。

84. 尤其令人不安的是，对于使用无人机进行的定点清除行动背后的“斩首”[146]战略的道德、合法性和有效性，没有公开讨论；对于无人机是否真的具有所称的效果，没有公开讨论；对于无人机在可持续地保护人的生命和维护全球和平这一长期愿景方面的成功程度，也没有公开讨论。相反，战争已经被正常化，成为了正当而必要的和平伴生物，而不是和平的对立面。我们必须尽我们所能来抵抗。

85. 为有效应对武装无人机和定点清除所带来的诸多挑战，各国、国际决策机构和其他有关行为体应：

(a) 制定并承诺在使用武装无人机方面实行严格的透明度、监督和问责标准；

(b) 采取有效措施，通过出口和多边军备控制制度和/或根据国际条约控制无人机扩散；

(c) 公开讨论使用无人机进行定点清除对国际法构成的挑战；

(d) 指出任何不遵守《联合国宪章》使用武力的情况并拒绝接受这种使用武力的所谓法律依据；

(e) 调查所有与使用无人机有关的非法死亡指控，包括在各国未这样做的时候，通过国际机构进行调查。

[145] 另请参阅 www.senat.fr/rap/r16-559/r16-5591.pdf。

[146] 试图清除被视为敌对的武装团体或政府的领导权的战略。

六. 建议

86. 除了重申其前任的建议外，[147] 特别报告员还提出以下建议。

87. 关于法律框架：国际人权法应继续适用于武装冲突，与国际人道法相辅相成。对袭击和杀戮合法性的评估应考虑到两个法律体系，采取体系整合方法，并进行或开展背景/情况分析。

88. 安全理事会应举行正式会议，审查和辩论根据《宪章》第五十一条收到的所有主张。

89. 秘书长应设立国际调查委员会或实况调查团，调查使用无人机进行的定点清除。

90. 人权高专办应向人权理事会提交一份追踪无人机袭击和伤亡情况的年度报告。

91. 会员国应：

(a) 设立关于第五十一条主张的讨论论坛，以交流关于自卫权的实施、范围和限制的信息；[148]

(b) 建立一个透明的多边进程，以制定关于无人机使用的健全标准；

(c) 如果未能完成(b)，志同道合的国家应设立一个专家组来制定这种标准(以有时限的论坛的形式)，供国家、学者和民间社会确定和加强法律规范和问责机制；

(d) 请专家或机构公开将可能已经引发或正在迅速演变为国际或非国际武装冲突的武装冲突和局势进行分类；

(e) 支持关于在必须审查大规模暴行和自卫主张时禁止安全理事会理事国使用否决权的倡议，并支持每当安理会就这些事项投否决权票时自动召开大会[149]；

(f) 支持秘书长的保护平民战略，赋予该战略明确的任务，并通过关于在城市地区使用爆炸性武器的具体指导；

(g) 通过一项关于加强保护平民免受在人口稠密地区使用爆炸性武器造成的人道主义伤害的强有力的政治宣言。

92. 使用武装无人机的国家应：

(a) 在援引第五十一条时，提供详尽的理由，包括正在进行或迫在眉睫攻击的证据，以及关于将采取的应对措施的相称性的信息；

(b) 成立一个专门的平民伤亡缓解和调查小组，并配备相应的资源，以了解无人机行动的影响并准确记录平民伤害；

(c) 扎实调查平民伤害指控，包括利用外部来源，并公布数据和调查结果。

---

[147] A/68/382 和 Corr.1。

[148] A/AC.182/L.154。

[149] S/PV.8699, 第 37 页。这样的讨论将在不影响任何可能结果的情况下进行，并且不论可被一票否决的决议草案的内容如何。

93. 协助其他国家无人机方案的国家应：

(a) 凡有任何协助安排，均通知议会；

(b) 建立健全的监督框架，确保其不参与非法行动，并确保国家官员承担刑事责任(仅凭保证是不够的)；

(c) 对于涉及在未与东道国发生冲突的国家使用武力的情况，武力的使用应以遵守国际人权法为指导。

94. 出口武装无人机技术的国家应：

(a) 对军用和军民两用无人机技术转让实行更严格的管制，并采用明确的标准防止不负责任的转让；

(b) 将保护平民和遵守国际人道法纳入关于武装无人机的继续支持、销售和培训的审评工作和协定之中；

(c) 制定一个最终用途行动的专门监测程序，以分析无人机袭击的结果及其对平民的影响。

95. 议会应：

(a) 建立议会监测和监督的审查程序，以确定和限制不能公开辩论部署武力的具体情况；

(b) 辩论一般性政策，涉及使用武力的情况，包括以定点清除为目的使用武力，特别是在未获得议会批准的情况下。

96. 使用武装无人机的武装团体应遵守国际人权和人道法，包括国际法之下禁止任意杀戮的规定，调查所有指控的违法行为，并定期提交跟踪无人机袭击和伤亡情况的报告。

Annex

I. The targeted killing of General Soleimani

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

The case in question

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

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

4. Some hours after the strike, the US Department of Defense (DoD) claimed that the US military[3] had taken this "decisive" action against General Soleimani at the direction of US President Trump.[4]

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

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

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

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

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

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

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

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

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

7. Seventy-two hours after their attacks, the Iranian authorities also confirmed that an Iranian missile had struck down "by mistake" Ukraine International Airlines Flight 752 en route from Tehran to Kiev shortly after take-off. All 176 passengers and crew were killed, including 82 Iranians, 55 Canadian citizens and 30 Canadian permanent residents, 11 Ukrainians, 10 Swedes, 4 Afghans, and 3 British nationals.[8] The authorities insisted that the strike was a "mistake" of missile operators who had confused the civilian aircraft for a US missile or a plane. A safety investigation, led by Iran, was initiated shortly after the strike, supported by accredited representatives and experts from the affected countries. The investigation has, however, experienced delays due to the Covid19 pandemic[9].

8. In the months before the events of January 2020, Iran, what the US deemed "Iran-supported militias", and the US had engaged in a series of attacks and counter-attacks. US "interests in the Middle East region"[10] were allegedly targeted, to which the US had responded.[11] In addition, on 27 December, a rocket attack reportedly by Kata'ib Hezbollah, occurred in Kirkuck. On 29 December, a US strike against five facilities in Iraq and the Syrian Arab Republic controlled by Kata'ib Hezbollah killed allegedly 24 people and wounded 50.[12] Despite these incidents, it appeared both Iran and the US wished to avoid a "full-out conventional war."[13]

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

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

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

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

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

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

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

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

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

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

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

[14] See communications from Special Rapporteurs to the Government of Iraq: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25020.

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

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,[16] and its respect is applicable extra-territorially (GC36, para. 63). As is well recognized, international human rights law continues to apply in armed conflict situations.

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

III. Context and Implications: An international armed conflict?

12. General Soleimani, his companions in the Islamic Revolutionary Guard Corps, and those of Iraq's PMF[17] all had a military status, according to the information publicly available. Had the strike occurred within the setting of an armed conflict, under international humanitarian law they could have constituted legitimate military targets as combatants. IHL does not prohibit the killing of belligerents, but it does prohibit killings of civilians and persons hors de combat, as well as indiscriminate attacks and those resulting in an excessive loss of civilians.[18] Whether and how this legal regime applies to all those killed, i.e. not only to General Soleimani[19] but also to all his Iraqi and Iranian companions[20], is thus crucial to the determination of the lawfulness of the strike.

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

[16] A/HRC/35/23, para. 26.

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

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

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

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

Non-International Armed Conflict?

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

An International Armed Conflict?

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

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

17. The Special Rapporteur believes that the determination of the existence of an international armed conflict, given its grave implications for the societies involved, should not rely exclusively on the laws of war, but also consider and integrate analyses and case law in relation to human rights conventions and their derogations.[28]

---

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

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

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

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

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

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

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

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

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

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

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

21. However, in the aftermath of the Soleimani strike, some legal researchers observed that the killings of 3 January 2020 did not start an IAC between Iran and the United States, as an IAC had began much earlier with the attacks by Iran and its "proxies"[32] on US forces in Iraq in November and December 2019.[33] Their analysis concludes that the strike against Soleimani -- referred to as an "enemy combatant" -- was thus part of an on-going IAC and, as such, his killing was legitimate with the loss of nine other lives "considered proportionate collateral damage of a precision drone strike to eliminate the mastermind behind the ongoing series of attacks against the United States." Their analysis does not factor in the implications of fact that the strike and those before it took place on the territory of a third State – that of Iraq.

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

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

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

[30] Citing J. Grignon, "The Beginning of Application of International Humanitarian Law, International Review of the Red Cross", 2014, 152.

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

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

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

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

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"[35]. The report refers to "heightened tensions" in the six months preceding the strike against General Soleimani, including the December 2019 incidents with the strike itself described as an "escalation." The report stops short of deeming these to be or to have triggered an IAC. Other analyses of the December 2019 incidents and the January 2020 targeted killings conclude along similar lines.[36]

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

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

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

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

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

[35] https://fas.org/sgp/crs/mideast/R45795.pdf p. 2.

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

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

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

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

companions would be considered a conflict zone, but that everywhere else in the immediate surrounds of the convoy – as far as the Iraqi government and people were aware – was a non-conflict zone. It is understood that IHL may be applied to an act rather than spatially. Nevertheless, when the "first strike" theory is operationalized, its result may be the existence of an IAC limited to the vehicle in which General Soleimani was travelling and inevitably the asphalt within its immediate proximity. But as limited as these are spatially, they nevertheless are located on Iraq's sovereign territory.

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

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

31. The determination that the strike prompted an IAC would imply that the parties are bound by their obligations under the Geneva Convention. According to the Geneva Academy, the conclusion that the shooting down of a military drone triggers an IAC is "the only way to fulfil the goals of IHL … Even if the armed forces of one state attack one military target in the territory of another state, it is crucial to apply this principle in order to protect civilians in that territory[40]." Under this approach, the strike against Soleimani, in continuing or triggering an IAC, imposed obligations upon the striking State to protect civilians, among other requirements. It is unclear whether the US intended to abide by IHL when striking General Soleimani, although one hopes that they sought to do so. Indeed, humanitarian law principles of distinction and proportionality are reflected in the 2016 Report on the legal and policy frameworks guiding the United States' use of military force and the 2019 Presidential Policy Guidance.[41] In contrast however, the US has continuously insisted that its human rights obligations do not apply extraterritorially, thereby potentially leaving a black hole with no legal standards, should IHL not apply.[42]

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

33. The identity of States involved in specific incidents, their relations, and the domestic legal frameworks within which they operate, ought to be considered when conducting a technical assessment of the determination of an international or non-international armed conflict, but these factors cannot solely be determining[43]. Such an approach in particular ignores the complementary of IHL and IHRL in armed conflict situations, confirmed by international jurisprudence[44] and the text of human rights treaties, including derogations[45].

[40] Geneva Academy, December 2019, p.5.

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

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

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

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

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

Further, by rejecting its human rights obligations extraterritorially, the US is an outlier, particularly as it relates to the obligation to abide by *jus cogen* norms, such as the prohibition against arbitrary killings.

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

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

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

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

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

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

[46] ICRC's 2011 Challenges of Modern Warfare, at 21–22.
[47] ICRC 2011 Challenges of Modern Warfare at 21–22.
[48] See also Public Committee Against Torture v. Government, 2006, para 4, applying IHRL principles to targeted strikes in a non-battlefield environment.
[49] https://www.icrc.org/en/document/explosive-weapons-cities-civilian-devastation-and-suffering-must-stop.
[50] Supreme Court of Israel, *Public Committee against Torture in Israel v. Government of Israel*, 2006.
[51] https://opiniojuris.org/2020/01/20/soleimani-and-targeted-killings-of-enemy-combatants-part-i-revisiting-the-first-shot-theory/.

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

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

41. The right to life must also be respected extraterritorially. The International Court of Justice,[53] the Human Rights Committee[54], the Inter-American Commission on Human Rights[55] and the European Court of Human Rights[56] 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 jurisdiction[57], one that derives from a State's (uniquely located) capacities to respect or protect human rights, including the right to life, of people over which they have some degree of control: a State "has an obligation to respect and to ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control".[58] This is a position that the Special Rapporteur endorses and has applied in her thematic reports.[59]

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

44. States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 of the Covenant[62] while States parties that fail to take all reasonable measures to settle their international disputes by peaceful means might fall short of complying with their positive obligation to ensure the right to life.[63]

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

---

[52] Human Rights Committee, General Comment No. 36, para. 67. See also Legality of the Threat or Use of Nuclear Weapons, 1996, ICJ Rep, para 25; Legal Consequences of the Construction of a Wall in the Occupied Territory 2004, ICJ Rep136 para. 106; see also UNSC Resolution 2249 (2015).

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

[54] General comment No. 31 (2004).

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

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

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

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

[59] A/HRC41/36; A/HRC/38/44; A/74/318.

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

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

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

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

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

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

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

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

48. The targeted killing of General Soleimani raises however three issues at least, which are difficult if not impossible to reconcile with the aforementioned standards guiding the use of force: (i) the planning inherent to a drone strike indicating premeditation and the absence of considering alternative options (except calling off the strike); (ii) the absence of evidence that the target presented an imminent or even actual threat to life: even when incorporating the secrecy inherent to intelligence work, the information provided by the US authorities are remarkably vague and inconsequential as far as a possible imminent threat is concerned[69]; (iii) the killing of 9 other persons in addition to that of General Soleimani, who individually have not been identified and assessed as presenting imminent threats. Five of these were civilians of Iraq, a US partner.

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

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

[65] Human Rights Committee, General Comment No. 36, para 67.
[66] https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-108231%22]} para. 211–212.
[67] *Finogenov v. Russia*, 2011 32; 3.
[68] http://iusgentium.ufsc.br/wp-content/uploads/2017/08/Texto-Cmpl-McCANN-AND-OTHERS-v-UK.pdf.
[69] https://www.justsecurity.org/68094/how-to-think-about-the-soleimani-strike-in-four-questions/.
[70] https://www.reuters.com/article/us-iraq-security-blast-intelligence/trump-says-soleimani-plotted-imminent-attacks-but-critics-question-just-how-soon-idUSKBN1Z228N.

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

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

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

53. The Special Rapporteur is mindful of the variety of sanctions and designations attached to General Soleimani, including the 2007 UN Security Council Resolution 1747 against Iran nuclear and ballistic program (24 March 2007),[74] the US Executive Order 13382 against "Proliferation Activities and Support for terrorism" (25 October 2007),[75] the European Union Regulation 611/2011 concerning restrictive measures in view of the situation in the Syrian Arab Republic (23 June 2011)[76], and the US "Foreign Terrorist Organization" designation of 15 April 2019[77]. The IRGC were reportedly involved in shooting Iranian protestors in 2019[78] while the al-Qads forces were implicated in the ground-offensive to besiege eastern Aleppo city.[79] The Special rapporteur is also aware of the extent to which he appeared to be revered in Iran. Meeting the procedural obligations of IHRL would have allowed evidence to be presented regarding the human rights violations he may have been responsible for, incited or permitted. The proper course was to join forces with others to bring him and others associated with him to justice in the appropriate international forum. Any concerns the US or other countries might have had about possible inadequacies of international justice should have been addressed through strengthening those institutions, not disregarding them altogether.

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

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

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

[71] Elisabeth Wilmhurst, Principles of International Law on the Use of Force in Self-defence, p. 9.
[72] https://publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/574.pdf p. 53.
[73] Ibid.
[74] https://www.un.org/securitycouncil/s/res/1747-%282007%29.
[75] https://2001-2009.state.gov/r/pa/prs/ps/2007/oct/94193.htm.
[76] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:164:0001:0003:EN:PDF.
[77] https://www.state.gov/designation-of-the-islamic-revolutionary-guard-corps/.
[78] https://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=25393&LangID=E.
[79] A/HRC/34/64.
[80] R.Y. Jennings, "The *Caroline* and *McLeod* cases", *American Journal of International Law*, January 1938. See also UN Doc A/59/565 and Corr.1, at para. 188, www2.ohchr.org/English/bodies/hrcouncil/docs/gaA.59.565_En.pdf.

the Charter. One must not "ascribe to State's legal views which they do not themselves formulate."[81]

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

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

58. The first incident listed, which occurred almost 5 months prior to the strike, was a "threat," not an attack, against a US ship by an Iranian unmanned aerial system: a threat is not an attack for purposes of Art. 51, unless it is recent and provides evidence that indicates an imminent attack. The second incident listed, which occurred almost 6 months prior to the strike, was the shooting down of a US drone by an Iranian missile; Iran claimed the drone entered its airspace. Even if such an attack sufficed under Art. 51, which is questionable, the attack had clearly concluded well before January 2020.[86]

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

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

---

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

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

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

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

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

[86] Ibid.

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

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

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

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

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

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 President,[92] Secretary of State[93] and the National Security Advisor[94] did mention the "imminence" of *future* attacks, but none provided a basis for the claim. Indeed, the Attorney General of the United States has stated that imminence was a "red herring", relying instead on the past attacks as adequate grounds for the strike.[95] But all of these attacks, to the extent that they were directed against the United States, had all concluded in the past. If an "attack is clearly over, then the legal "clock" resets. If no further attack is imminent, then there is nothing to lawfully defend against. This is the time for negotiation, Security Council intervention, diplomatic relations and possibly military preparation. This is not the time for armed force."[96]

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

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

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

---

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

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

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

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

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

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

[98] See Wilmhurst, Op cit., p. 9.

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

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

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

VI. Involvement of a third state in the drone strike

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

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

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

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

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

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

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

[104] https://digitallibrary.un.org/record/3846366?ln=en.

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."[105]

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

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

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

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

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

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

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

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

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

74. It is possible that the US is attempting to expand this "unwilling and unable" doctrine to State actors by expanding its terrorist designations from ANSAs to State entities. The U.S. declared the Islamic Revolutionary Guard Corps (IRGC), which is part of the Iranian government, as a foreign terrorist organization in April 2019.[112] This framing may place the conduct of the US against General Soleimani and any member of that force within its counter-terrorism measures. However, it must be understood that neither Art. 51 justifications nor human rights obligations are modified by virtue of the classification by one or several States of a particular individual or group as "terrorist". Such classifications have no binding effect on other States, including in this case Iraq. While the U.S. had classified the IRGC as a foreign terrorist organization in April 2019,[113] there was no duty placed on any other nation to adopt that same classification and certainly no obligation to act against members of the group so identified or its leaders through the use of force. Iraq was not, in other words, obligated to take any action against General Soleimani.

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

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

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

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

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

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

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

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

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

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 attacked could still occur without him, although possibly not in the short-term.[117]

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

79. There is an obligation on a State considering conducting a targeted killing on another State's official on the territory of a third State to also factor into their assessment of necessity and proportionality the third state's sovereignty, as well as the risks to the population and infrastructure of the third State. The equal sovereignty of States is one of the highest principles of international law and a cornerstone of the UN. So weighty is the test of this obligation that involving a non-consenting state in any act of self-defense may well be always disproportionate[119] and thus, always unjustified.

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

81. The implication as far as the targeted killing of General Soleimani is concerned is that it was an arbitrary killing for which the US is responsible: "States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 of the Covenant."[121] This is an approach backed up by almost universal jurisprudence[122] and expert comments.[123]

VII. In conclusion

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

[117] Ibid.

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

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

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

[121] General Comment No. 36, at 70.

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

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

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 Iraq and the Syrian Arab Republic. But absent an actual imminent threat to life, the course of action taken by the US was unlawful.

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

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

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

---

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

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

[126] Special Procedures communications, Iran, 19 February 2020. https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile? gId=25070.

[127] Special Procedure communication, Iraq, 13 January 2020. https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25020.

[128] https://undocs.org/S/2020/26.