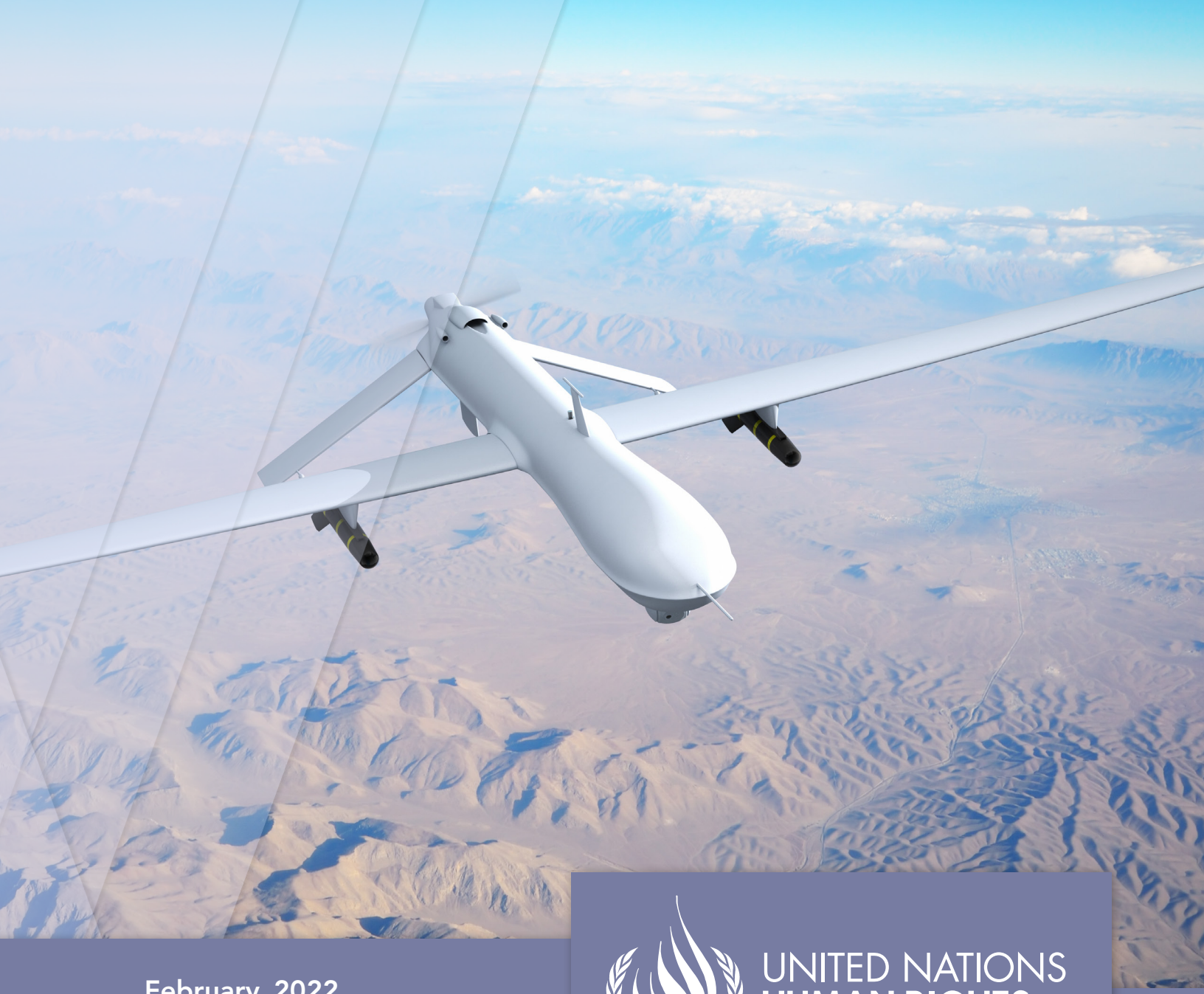

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SPECIAL PROCEDURES

SPECIAL RAPPORTEURS, INDEPENDENT EXPERTS & WORKING GROUPS

Position of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on

# THE USE OF ARMED DRONES IN THE CONTEXT OF COUNTER-TERRORISM

## Acknowledgements

This position paper is presented by Professor Fionnuala Ní Aoláin, the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. Work on this report was led by Adriana Edmeades Jones, Legal Advisor to the Special Rapporteur. Facilitation and publication management for this work was provided by the Human Rights Center at the University of Minnesota Law School, which provides ongoing programme management support to the mandate of the Special Rapporteur. Facilitation and programme management for the work of the Special Rapporteur was led by Karen Reyes Tolosa, Human Rights Officer, Office of the High Commissioner for Human Rights (OHCHR).

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# 1 INTRODUCTION

THE PAST TWO YEARS HAVE SEEN A NUMBER of high-profile and fatal drone strikes. In August 2021, a drone strike in Kabul killed 10 civilians,[1] and in the same month in Iraq a series of strikes targeted a meeting of Yazidi militia, causing the transfer of injured militia members to hospital where four were then killed by drone strike, together with four medical staff.[2] In September 2021, it was reported that the leader of ISIS in the Greater Sahara, Adnan Abu Walid al-Sahrawi, was killed in Mali.[3] Perhaps the most high profile of all the strikes has been the July 2022 killing in Kabul of Ayman Mohammed Rabie Al-Zawahiri, the imputed General Emir of Al-Qaeda since the death of Osama bin Laden.[4] A series of lethal strikes in Gaza during 'Operation Breaking Dawn' followed in August 2022.[5] And on 10 October 2022, a drone strike in northern Syria killed a member of ISIL/Daesh.[6]

The use of armed drones worldwide, both within the confines of formal armed conflicts in particular geographical locations and as part of an asserted global counter-terrorism response, remains a matter of substantial controversy, and poses an ongoing risk to civilians and a challenge to human rights protection. Despite urging States over the past decade to agree, adopt, and abide by consistent standards on the lawful use of armed drones, little concrete progress has been made.

## Previous Work of the Mandate in Respect of Armed Drones

The Special Rapporteur recalls the work of previous holders of her Mandate over the past 15 years in respect of the use of armed drones.

In his 2013 third annual report to the General Assembly,[7] the then Special Rapporteur Mr Ben Emmerson provided an update on the inquiry launched in January 2013 regarding the use of drones in extraterritorial lethal counter-terrorism

[1] US Central Command, 'General Kenneth F McKenzie Jr, Commander of US Central Command and Pentagon Press Secretary, John F Kirby, Hold a Press Briefing (17 September 2021), available at: https://www.centcom.mil/MEDIA/Transcripts/Article/2781320/general-kenneth-f-mckenzie-jr-commander-of-us-central-command-and-pentagon-pres/;

[2] UN Assistance Mission for Iraq, 'UN condemns loss of life in Ninewa airstrike, calls for investigation,' Press Release (19 August 2021), available at: https://iraq.un.org/index.php/en/140850-un-condemns-loss-life-ninewa-airstrike-calls-investigation;

[3] Announcement by President Macron on Twitter (16 September 2021), available at: https://twitter.com/EmmanuelMacron/status/1438272942786351116?ref;

[4] 'Afghanistan: UN human rights experts warn of bleak future without massive turnaround,' OHCHR Special Procedures Statement (12 August 2022), available at: https://www.ohchr.org/en/statements/2022/08/afghanistan-un-human-rights-experts-warn-bleak-future-without-massive-turnaround; and P Baker et al., 'US Drone Strike Kills Ayman al-Zawahiri, Top Qaeda Leader,' The New York Times (1 August 2022), available at: https://www.nytimes.com/2022/08/01/us/politics/al-qaeda-strike-afghanistan.html

[5] Israeli Air Force, 'The RPAV Division in Operation "Breaking Dawn"' (18 August 2022), available at: https://www.iaf.org.il/9538-55600-en/IAF.aspx

[6] See: Rt Hon Ben Wallace MP, UK Minister for Defence, 'Update: air strikes against Daesh' (13 October 2022), available at: https://www.gov.uk/government/news/update-air-strikes-against-daesh

[7] A/68/389 (18 September 2013).

Photo by Levi Meir Clancy

operations. The report reviewed dozens of strikes in Afghanistan, Pakistan, Yemen, Libya, Iraq, Somalia, and Palestine from 2001 to 2013[8] and highlighted a profound lack of transparency over States' deployment of armed drones which '*creates an accountability vacuum and affects the ability of victims to seek redress.*'[9] This call for transparency built upon the work of the previous Mandate holder, Mr Martin Scheinin. In his country visit to Israel in 2007,[10] Mr Scheinin commented upon the practice of targeted killing in the context of counter-terrorism operations,[11] and called for the adoption of clear laws and guidelines on the practice, to include thorough and independent investigations after the fact.[12] The 2013 report identified a series of matters of ongoing legal controversy including: (a) whether the international law doctrine of self-defence allows strikes in States '*unwilling or unable*' to prevent attacks from non-State actors;[13] (b) what the traditional criterion of the '*imminence*' of a threatened attack means in justifying strikes in self-defence;[14] and (c) how the international human rights law restriction on *arbitrary* deprivation of life may be satisfied in a worldwide counter-terrorism campaign outside the traditional boundaries of a formal armed conflict where international humanitarian law ('IHL') may not obviously apply.[15]

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[8] A/68/389, [25]-[40].

[9] A/68/389, [41].

[10] A/HRC/6/17/Add.4 (16 November 2007).

[11] A/HRC/6/17/Add.4, [51]-[53].

[12] A/HRC/6/17/Add.4, [62]. See also the follow-up report at: A/HRC/20/14/Add.2 (15 June 2012), [41].

[13] A/68/389, [55]-[56].

[14] A/68/389, [57]-[58].

[15] A/68/389, noting: [62]-[65] (the absence of a defined geographical scope of the conflict); [66]-[67] (the way in which members of terrorist organizations do not readily fit definitions of belligerents under IHL); [68] (the argument that terrorist hostilities need not meet the threshold of intensity traditionally required for the application of the law of armed conflict); and [69]-[72] (the way in which non-combatants are targeted by drone strikes).

In his 2014 third annual report to the Human Rights Council,[16] the Special Rapporteur analysed 37 specific drone strikes and identified 30 in which there was a plausible indication that civilians had been killed, suffered life-threatening injuries, or had their lives put at immediate risk.[17] Further, the Special Rapporteur again stated that there is 'an urgent and imperative need to reach a consensus between States' on a range of issues: (a) whether the principle of self-defence allows a non-consensual lethal counter-terrorism drone strike against a State in response to a threat from a non-State actor with which the State has no operational connection on the basis that the State is *unwilling or unable* to prevent the attack; (b) whether self-defence entitles a State to carry out pre-emptive operations; (c) whether the international humanitarian law (IHL) test of intensity of hostilities can be satisfied by the aggregation of armed attacks to determine whether, taken as a whole, they satisfy the threshold for an armed conflict; (d) whether IHL permits the targeting of persons directly participating in hostilities who are located in a non-belligerent State; (e) whether the armed attacks perpetrated by Al-Qaida satisfy the criteria of organization and intensity required to qualify as an armed conflict; (f) whether the correct test for determining when a person may be targeted with lethal force under IHL is that they hold a 'continuous combat function;' (g) whether participation in hostilities through providing accommodation, food, financing, recruitment, or logistical support amounts to direct participation in hostilities justifying targeting with lethal force; and (h) whether IHL imposes an obligation to capture rather than kill a legitimate military target where that is feasible.[18] The Special Rapporteur specifically requested that the States involved in lethal drone operations should set out their positions on these important legal questions.[19]

Further, in the Special Rapporteur's 2017 sixth annual report to the Human Rights Council,[20] he observed that there had been no formal response to the call in his 2014 report for States to set out their position on the key legal issues identified,[21] but noted that the US[22] and United Kingdom[23] had made pronouncements acknowledging that international law, including IHL, applies to the use of drones, and setting out some relevant positions on those States' approaches to the question of imminence in self-defence.[24] The 2017 report also welcomed, from the point of view of promoting transparency, the July 2016 release by the US of figures on combatant and non-combatant deaths resulting from 473 US drone strikes in Afghanistan, Iraq, and the Syrian Arab Republic from 2009 to 2012.[25]

Since the last time that this Mandate has formally addressed the issue of the use of armed drones in the counter-terrorism context, States have continued to deploy this technology as a means for the targeted killing of alleged terrorists overseas both within and outside the formal confines of armed conflict. Further, States have begun to

16 A/HRC/25/59 (11 March 2014).

17 A/HRC/25/59, [33].

18 A/HRC/25/29, [71].

19 A/HRC/25/29, [72] and [75].

20 A/HRC/34/61 (21 February 2017).

21 A/HRC/34/61, [25].

22 United States Government, 'Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations' (December 2016); Brian Egan (the Legal Adviser, US Department of State), 'International Law, Legal Diplomacy, and the Counter-ISIL Campaign,' speech at the 110th Annual Meeting of the American Society of International Law (1 April 2016).

23 Rt Hon J Wright KC MP, Attorney-General of the UK, 'The Modern Law of Self-Defence' (International Institute for Strategic Studies, 11 January 2017), available at: https://www.ejiltalk.org/the-modern-law-of-self-defence/. The same position has been endorsed by Australia. See: Sen the Hon G Brandis KC, Attorney-General of Australia, 'The Right of Self-Defence Against Imminent Armed Attack in International Law' (Speech at University of Queensland, 11 April 2017), available at: https://www.ejiltalk.org/the-right-of-self-defence-against-imminent-armed-attack-in-international-law/

24 A/HRC/34/61, [27]-[28].

25 A/HRC/34/61, [29].

*Photo by U.S. Department of Defense Current Photos*

expand the domestic use of armed drones within their own borders, and new technologies have been developed, including nanodrones, drones armed with non-lethal weaponry, and non-incendiary lethal drones, which raise novel human rights concerns. The Special Rapporteur considers that the time is ripe for a further assessment of the praxis of armed drone use from the point of view of human rights compliance.

## The Scope of the Mandate with Respect to Conflict Settings

The focus of the Mandate is the promotion and protection of human rights and fundamental freedoms in all contexts where States take actions relating to counter-terrorism, national security, and countering violent extremism. That scope does not distinguish between action within and outside conflict settings. When establishing the Mandate, the Commission on Human Rights specifically contemplated that it would consider actions taken in the context of armed conflict and at the international plane by noting that '*States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law.*'[26]

Since counter-terrorism operations and measures are frequently undertaken in the context of armed conflict[27] where IHL either does, or arguably may, apply, the Special Rapporteur is necessarily bound to consider the ways in which IHL and international human rights law interact.

As noted in the Special Rapporteur's 2020 annual report,[28] while IHL and international human rights law are distinct '*these bodies of law operate – whether sequentially or in tandem – to ensure the protection of individuals and optimize the rights of individuals by specifying the duties of States (and non-State armed groups under [IHL]) in the most precarious and fraught of circumstances.*'[29] Accordingly, '*[t]here is now a broad consensus that certain fundamental norms that can be derived from both human rights law and [IHL], specifically norms that protect persons from arbitrary deprivations of life, liberty and property, as well as hostage-taking, at the hands of State actors, apply at all times during*

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[26] UN Commission on Human Rights, Resolution 2005/80 on Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, UN Doc. E/CN.4/RES/2005/80 (21 April 2005), [1].

[27] As observed in: A/73/361 (3 September 2018), [46].

[28] A/75/337 (3 September 2020).

[29] A/75/337, [13]. The complementarity of IHL and international human rights protections for individuals, even as the two legal regimes have fundamentally opposed attitudes to the legality of the recourse to war in the first place, is discussed in W 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,' (2007) 40(2) Israel Law Review 592-613.

Photo by Airman 1st Class Michelle J. Ulber

*an armed conflict, including in conflicts in which acts of terrorism occur. The complementarities between those legal regimes affirm that the implementation of [IHL] operates as a gateway, in specific contexts, to the meaningful protection of certain human rights, and that the overlap between the legal regimes serves to deepen the obligations of States with regard to certain inalienable rights.'*[30]

The proper protection of individuals' fundamental and non-derogable rights in the context of counter-terrorism operations requires compliance with IHL rules (which protect such rights) where such rules apply, as well as with international human rights law, which continues to apply in situations of armed conflict,[31] albeit modified to the extent that IHL is lex specialis on a particular issue and to the extent that a State has lawfully derogated from specific norms of human rights law where the armed conflict constitutes a public emergency threatening the life of the nation.[32] But the operation of IHL rules, which may restrict the protections offered by IHL according to specific criteria (such as the status of the conflict – whether international or non-international, the status of the individuals involved – whether members of regular or irregular forces, or the degree of their participation in hostilities) do not constrain the complementary protection offered by international human rights law. If certain situations or actions are not regulated by IHL in a conflict setting, there is no

[30] A/75/337, [15].

[31] As confirmed by the UN Human Rights Committee in General Comment 36, UN Doc. UN Doc. CCPR/C/GC/36 (30 October 2018) ('General Comment 36'), [64]. See also: UN Human Rights Committee, General Comment 31, UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004), [11]; and UN Human Rights Committee, General Comment 29, UN Doc. CCPR/C/21/Rev.1/Add.11 (31 August 2001), [3].

[32] A/75/337, [17]. This position has been repeatedly endorsed by the ICJ. See: Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 ICJ Rep p66, [24]-[25]; and Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Rep p136, [105]-[106].

legal 'black hole' in coverage: rather, international human rights law will govern. The alternative would, as the Special Rapporteur has previously observed, '*undermine the Charter of the United Nations, serve the unilateral interests of particular States over the common good and corrode the integrity of the global legal order.*'[33]

It follows, then, that consideration of States' understanding of, and compliance with, IHL in relation to their armed drone operations forms an integral part of the Special Rapporteur's role, pursuant to the terms of the Mandate, in examining the protection of human rights and fundamental freedoms while countering terrorism.[34] Reviewing the protection of human rights necessarily entails consideration of all applicable legal frameworks, including both IHL and international human rights law as they overlap and interact in the counter-terrorism and conflict space.

The Special Rapporteur is mindful that States' duty to safeguard the lives and rights of those within their jurisdiction implies the obligation to take necessary and adequate measures to prevent, combat, and punish activities that endanger those lives, such as threats to national security or violent crime, including terrorism. As the UN Human Rights Committee observed, in its *General Comment 36* on the right to life, '*States parties are obliged to take adequate preventive measures in order to protect individuals against reasonably foreseen threats of being murdered or killed by criminals and organized crime or militia groups, including armed or terrorist groups.*'[35] In taking steps to protect the lives of individuals from such threats, however, States are equally obliged to comply with and respect international law, including IHL where applicable, and international human rights law, which in turn requires due respect for the rights of all, which does not exclude those who perpetrate such threats. Indeed, respect for human rights should not be considered a fetter on efficient protection of individuals from terrorism: on the contrary, the effective combating of terrorism relies upon and requires respect for human rights.[36]


*Photo by ev*

[33] A/75/337, [15].

[34] See the most recent extension of the Mandate at: A/HRC/RES/49/10 (12 April 2022), [1], affirming (by way of cross reference to previous Resolutions), the terms of A/HRC/RES/15/15, [2].

[35] *General Comment 36*, [21].

[36] As recognized in the Global Counter-Terrorism Strategy adopted by the General Assembly, which emphasizes that effectively combating terrorism and ensuring respect for human rights are not competing, but rather complementary and mutually-reinforcing, goals. See: Resolution 75/291 *The United Nations Global Counter-Terrorism Strategy: seventh review*, UN Doc. A/RES/75/291 (2 July 2021).

# 2 KEY ISSUES

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## States' Positions on International Legal Frameworks for Use of Drones Overseas

As identified in the Special Rapporteur's 2013 report to the General Assembly, the lawfulness of the lethal use of armed drones at international law depends in turn upon a series of legal questions including: (a) whether or not the international law doctrine of self-defence permits pre-emptive lethal drone strikes (due to the criterion of responding to an *imminent* threat being capable of wide interpretation); (b) whether or not lethal drone strikes may be launched, pursuant to the doctrine of self-defence, against the territory of a foreign State in response to a threat not from that State itself, but from a non-State actor with which the State has no connection but in circumstances where the State is *unwilling or unable* to prevent the attack; and (c) whether or not strikes occurring outside defined geographical areas of armed conflict are properly governed by IHL rules on targeting of individuals.

### Imminence

The use of force by a State outside its own territory is generally unlawful, subject to narrow exceptions.

This principle, part of customary international law,[37] is set out in Article 2(4) of the Charter of the United Nations.[38] Without host State consent or authorization from the United Nations Security Council,[39] it is only permissible in the tightly confined circumstances of the right of self-defence set out in Article 51 of the UN Charter and as permitted under customary international law.[40]

Article 51 of the UN Charter[41] provides that '*[n]othing in the … Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.' The content of that right to self-defence has long been the subject of controversy. The International Court of Justice ('ICJ') has stated, in the Armed Activities (DR Congo v Uganda) case, that 'Article 51 of the Charter may justify the use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security interests beyond those parameters*' as other means should be referred to the Security Council.[42]

A number of States have made clear in the past 20 years that they interpret the right to self-defence as entitling States not only to respond to armed attacks which are ongoing, but also in *anticipatory* self-defence against imminent attacks.[43] While recognizing that there are debates among international lawyers,[44] the Special Rapporteur accepts that the dominant contemporary international position is that the use of lethal force in anticipatory self-defence by a State may be lawful so long as it responds to an *imminent* threatened armed attack, and where that response is necessary and proportionate.

The United Nations High-Level Panel on Threats, Challenges, and Change, seeking to set out uncontroversial propositions of international law, including that '*a threatened State, according to long established international law, can take military action as*

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[37] See the statement of the Permanent Court of International Justice that '*the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State:' The Case of the SS Lotus (France v Turkey)* 1927 PCIJ (ser A) No 10, p18.

[38] United Nations, Charter of the United Nations (1945) 1 UNTS XVI ('UN Charter'), Article 2(4).

[39] Under Chapter VII of the UN Charter.

[40] Noting that, as the ICJ observed in the Nicaragua case, the reference in Article 51 to the *'inherent right'* of self-defence indicates that *'customary international law continues to exist alongside treaty law:' Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States) (Merits)* ICJ Rep (1986) 14 (*'Nicaragua case'*), [176].

[41] UN Charter, Article 51.

[42] *Case Concerning Armed Activities on the Territory of the Congo (DR Congo v Uganda)* ICJ Rep (2005) 168, [148]. This clarification addressed (and rejected) the obiter comments of Judge Schwebel in his dissenting opinion in the Nicaragua case. Judge Schwebel expressed concerns that, despite the disavowal of a decision on the lawfulness of anticipatory self-defence, the Nicaragua decision might be read as impliedly prohibiting such a doctrine, and commented: *'I wish … to make clear that, for my part, I do not agree with a construction of the United Nations Charter which would read Article 51 as if it were worded: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if, and only if, an armed attack occurs…" I do not agree that the terms or intent of Article 51 eliminate the right of self-defence under customary international law, or confine its entire scope to the express terms of Article 51:' Nicaragua* case, Dissenting Opinion of Judge Schwebel, [173].

[43] See the comments of Australia, Germany, Israel, Japan, and the UK on the UN Secretary-General's 'In Larger Freedom' report: Australian Statement, Plenary Exchange on the Secretary-General's Report 'In Larger Freedom' (7 April 2005); Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (2010), pp331-332; Israeli Ministry of Foreign Affairs, 'United Nations Reforms – Position Paper of the Government of Israel' (1 July 2005); Press Statement of the Japanese Ministry of Foreign Affairs (27 September 2002); and UK Statement, General Assembly debate on Freedom From Fear (21 April 2005), UN Doc. A/59/PV.85, p26.

[44] See, generally: C Gray, *International Law and the Use of Force* (3rd ed, 2008), p160-165; and Ian Brownlie, *Principles of Public International Law* (James Crawford ed, 8th ed, 2012), p750ff. [NB: Need to check against latest editions (respectively, 4th edition of Gray and 9th edition of Crawford/Brownlie).]

*long as the threatened attack is imminent, no other means would deflect it and the action is proportionate.*'[45] The criterion of *imminence* of the threat has long been part of formulations of lawful self-defence, appearing in the statements of customary international law exchanged between the USA and UK in the 1837 *Caroline* incident[46] and cited in the judgments of the Nuremberg Tribunal.[47] United Nations bodies have proceeded on the basis that the condition of *imminence* in lawful anticipatory self-defence is a distinct criterion. The High-Level Panel on Threats, Challenges, and Change adverted to '*the threatened attack [being] imminent*' as a factor separate from the requirements that '*no other means would deflect it*' (i.e. necessity) and '*the action is proportionate.*'[48] And the Human Rights Council, in analysing the test which Israeli interception action against the humanitarian assistance flotilla in 2010 would need to satisfy, stated that it would require '*reasonable suspicion that [the flotilla] … posed an imminent and overwhelming threat to Israel and there was no alternative but to use force to prevent it (self-defence under Article 51 of the United Nations Charter).*'[49]

As to the *meaning* of the criterion of imminence, the Special Rapporteur acknowledges that, in the years since the previous Special Rapporteur's 2013 call for clarification of this aspect of the rules governing armed drone strikes, three States – the United States, the United Kingdom, and Australia – have issued official positions, all within a year of each other in the period April 2016 to April 2017.[50] Each of these statements endorsed an approach first proposed by Sir Daniel Bethlehem KC in an eight-page 2012 scholarly article,[51] which asserted that '*[w]hether an armed attack may be regarded as "imminent" will fall to be assessed by reference to all relevant circumstances, including (a) the nature and immediacy of the threat, (b) the probability of an attack, (c) whether the anticipated attack is part of a concerted pattern of continuing armed activity, (d) the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action, and (e) the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage.*'[52]

According to this approach, the *timing* of a threatened attack – that is to say, its temporal proximity – is only one consideration among many in an assessment of the imminence of an armed attack. While the '*immediacy of the threat*' is one of the factors for consideration, it is neither necessary to, nor determinative of, imminence, and may, rather be displaced or outweighed by other parts of the factor-based assessment.

The Special Rapporteur considers that this asserted *flexibility* as to the meaning of the criterion of imminence is out of keeping with the position at international law, which instead requires a temporal focus in assessing the imminence criterion. This asserted flexibility is a serious threat to human rights protection, since it entails a more permissive environment with respect to the use of lethal force, increasing the likelihood of violations of the right to life, and, by virtue of the departure from established legal limits on the use of force, increasing the likelihood that interferences with rights are arbitrary,

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45 Report of the High-Level Panel on Threats, Challenges, and Change addressed to the Secretary-General (1 December 2004), UN Doc. A/59/565 ('High-Level Panel Report'), [188].

46 *British and Foreign State Papers, 1840-1841* (1857), Vol 29, p1129.

47 *Nuremberg Trial (Judgment)* (1 October 1946) *1 International Military Tribunal* 171, 207.

48 High-Level Panel Report, [188]

49 Human Rights Council, Report of the International Fact-Finding Mission to Investigate Violations of International Law, Including International Humanitarian and Human Rights law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance (27 September 2010), UN Doc. A/HRC/15/21, [56].

50 See, respectively: B Egan, Legal Adviser, US Department of State, 'Remarks Re International Law, Legal Diplomacy, and the Counter-ISIL Campaign' (American Society of International Law, 1 April 2016), available at: https://2009-2017.state.gov/s/l/releases/remarks/255493.html; Wright, above n 23; and Brandis, above n 23.

51 Bethlehem, 'Principles Relevant to the Scope of a State's Right to Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106 *American Journal of International Law* 770.

52 Bethlehem, 775.

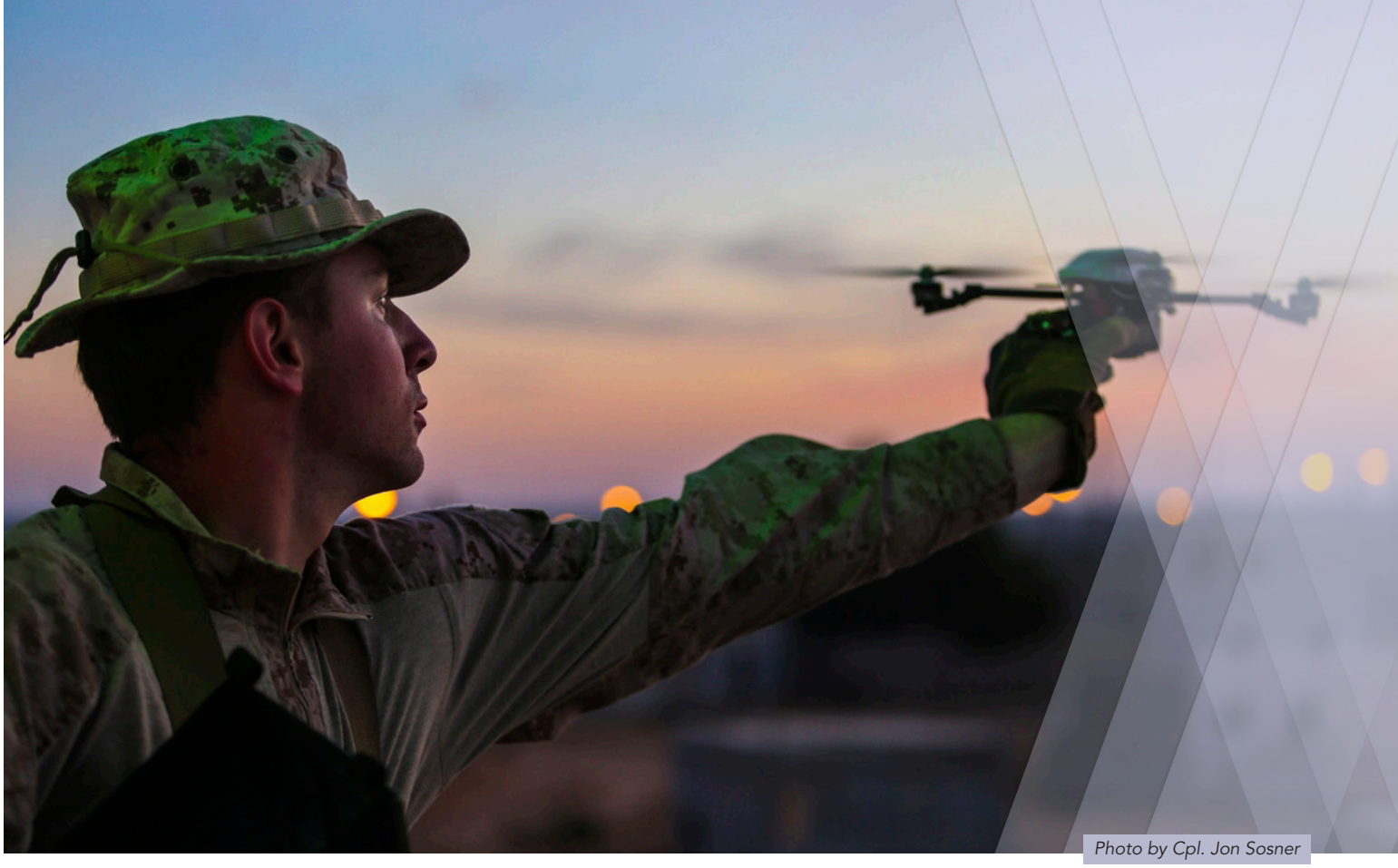

Photo by Cpl. Jon Sosner

disproportionate, and not restricted only to those which are necessary.

First, on a natural interpretation of the term *imminence*, the word coveys the notion of some degree of proximity in time.[53] The ICJ in the *Gabcíkovo-Nagymaros Project* case,[54] in analysing a criterion of '*imminent peril*' in justifying State action pursuant to a principle of non-military '*necessity*,' had the following to say:[55] *'"[i]mminence" is synonymous with "immediacy" or "proximity" and goes far beyond the concept of "possibility." As the International Law Commission emphasized in its commentary [to the ASR], the "extremely grave and imminent" peril must "have been a threat to the interest at the actual time."'*[56] Roberto Ago, writing as the Special Rapporteur of the International Law Commission on State Responsibility in 1980, also described imminence in terms of temporal emergency, commenting: '*a State acting in self-defence … acts in response to an imminent danger – which must … be serious, immediate and incapable of being countered by other means.*'[57]

In terms of State practice, there has historically been general support for the proposition that any threatened armed attack must be *temporally proximate* for it to be considered imminent. States have taken care to identify the temporal proximity of attacks against which they take action in anticipatory self-defence, such as in the Israeli attack on Iraq's Osirak nuclear reactor in 1981,[58] and the US strikes

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[53] O Bakircioglu, *Self-Defence in International and Criminal Law: The Doctrine of Imminence* (2011), p196, emphasizing that imminence signifies *'the temporal facet of self-defence.'*

[54] *Case Concerning the Gabcíkovo-Nagymaros Project (Hungary v Slovakia)* ICJ Rep (1997) 7 (*'Gabcíkovo-Nagymaros Project* case').

[55] Under ASR, Article 25.

[56] Gabcíkovo-Nagymaros Project case, [54].

[57] Ago Report, [88].

[58] See: Repertoire of the Practice of the Security Council, Supplement 1981-1984 (1992), UN Doc. ST/PSCA/1/Add.9, p203.

against Qaddafi's Libya in 1986.[59] The 2018 UK All Party Parliamentary Group on Drones Inquiry Report following the 2015 UK drone strike on the British citizen Reyaad Khan in Syria concluded that the ordinary meaning of imminence *'requires an assessment of temporal factors only and translates to an attempt to answer the question: is the attack about to happen?'*[60]

Further, if the criterion of imminence is stripped of its temporal character and divorced from the requirement of specificity, it inevitably leaves the door open to action against non-imminent or remote threats/theoretical threats. Action against remote or theoretical threats that have not materialized is in the realm of what is generally termed pre-emptive self-defence – the approach advocated in the US White Paper on lethal operations against al-Qaida.[61] The legal position with respect to the such use of force is clear: such action is generally accepted to be a prohibited use of force contrary to Article 2(4) of the UN Charter, for which Article 51 provides no lawful justification. On the basis of a wide survey of the publicly-stated positions of various States (including France, Germany, Japan, Switzerland, Uganda, Singapore, Liechtenstein, Korea), it has been concluded that *'support for self-defence against non-imminent threats is virtually non-existent'* as a matter of customary international law.[62]

The Special Rapporteur notes that the statements provided by the US, UK, and Australia in 2016-2017 regarding the purported entitlement to use armed drones overseas against threats other than those which are imminent in a strict temporal sense, go some way to discharging those States' obligations to provide transparency as to the purported legal basis for their drone operations.

But the Special Rapporteur considers that the position thereby expressed is not representative of settled international law on the use of force for lawful self-defence. This is not just a matter of academic concern. The deployment of armed drones pursuant to unorthodox legal theories against remote or theoretical threats is not, in the view of the Special Rapporteur, consistent with the promotion and protection of human rights, since it fails to conform with the requirement that deprivation of life be non-arbitrary (in the sense of being in conformity with clear international and domestic legal standards, thereby also providing legal certainty), and appears likely to violate the criteria of necessity and proportionality. If threats are remote or theoretical, rather than imminent, a proportionate response does not necessitate lethal force.

### 'Unwilling and Unable'

As traditionally conceived, the use of force in self-defence (whether against an actual or an imminent armed attack) in violation of the territorial integrity of a Member State has only been justified on the basis of the target State's responsibility for the armed attack against which the use of force in self-defence responds. Where such armed attack is launched by the State itself, that responsibility will be straightforward.

But where the attack is carried out by a non-State actor, the traditional position has been that a State may only be fixed with responsibility in certain circumstances: where the non-State actor is in fact a *de jure* organ of the State;[63] and where the non-State actor is (while not under the strict or overall control of the State such that it is a properly characterized as a *de jure* State organ) still, for the purposes of a particular period or operation, under the effective control of the State.[64] Those bases

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[59] See: Statement by Larry Speakes, White House spokesman (14 April 1986) available at https://www.reaganlibrary.archives.gov/archives/speeches/1986/41486f.html.

[60] UK All Party Parliamentary Group on Drones Inquiry Report, 'The UK's Use of Armed Drones: Working With Partners' (July 2018), p36.

[61] US Department of Justice, 'Lawfulness of a Lethal Operation Directed against a US Citizen Who is a Senior Operational Leader of Al-Qa'ida or an Associated Force,' White Paper (8 November 2011).

[62] T Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (2010), p336.

[63] See: UN General Assembly, Resolution No 56/83 on the Responsibility of States for Internationally Wrongful Acts (28 January 2002), UN Doc. A/RES/56/83 ('ASR'), Article 4.

[64] ASR, Article 8.

of State responsibility justifying responsive action have been explored by the ICJ in the *Nicaragua* case[65] and the *Bosnian Genocide* case,[66] and are in keeping with each State's obligation, pursuant to the UN General Assembly's 'Declaration on Principles of International Law Concerning Friendly Relations,' to refrain from *'organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory.'*[67]

As identified by the previous Special Rapporteur in his 2013 report, however, in the aftermath of the terrorist attacks of September 11, 2001, a number of States have asserted that a principle of customary international law has evolved which permits a State to use force in self-defence against an armed attack by a non-State actor on the territory of a host State. This position has been held even where there is no suggestion that the acts of the non-State actor are under the control of the host State, but apply so long as the host State is *'unwilling or unable'* to suppress the attack.[68] The formulation *'unwilling or unable'* does not appear in the UN Charter, the Charter negotiating history, or the jurisprudence of the ICJ,[69] but has been asserted by various States as a rule of customary international law nonetheless.

The response to the September 11, 2001 attacks is often cited as an example of lawful action in self-defence against the territory of a host State (Afghanistan) unwilling or unable to prevent armed attacks carried out from there (by Al-Qaida). It is certainly true that, in the immediate aftermath of the attacks, the UN Security Council expressly recognized the *'inherent right of individual or collective self-defence in accordance with the Charter'* in its Resolutions 1368[70] and 1373,[71] both of which were adopted unanimously.

Further, in 2015, a number of States participating in the coalition bombing of Syria – United States,[72] Australia,[73] Canada [74] and Turkey[75] – explicitly invoked, in their letters to the Security Council, the right to use force in the territory of a State unwilling and unable to prevent the attack of a non-State actor. Germany also invoked a variation of the principle contending that States subject to an armed attack by ISIL which originated in a part of Syrian territory not under the effective control of the Syrian government are justified in taking action

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65 *Nicaragua case*, [109]-[115].

66 *Application of the Convention on the Prevent and Punishment of the Crime of Genocide (Bosnia & Herzegovina v Serbia & Montenegro)* ICJ Rep (2007) 43, [399]-[400].

67 UN General Assembly, *'Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations,'* UNGA Resolution 2625 (XXV) (24 October 1970), UN Doc. A/RES/25/2625.

68 Christof Heyns, Dapo Akande, Lawrence Hill-Cawthorne, and Thompson Chengeta, 'The Right to Life and the International Law Framework Regulating the Use of Armed Drones in Armed Conflict or Counter-Terrorism Operations' (December 2015), submitted to the UK Parliament's Joint Committee on Human Rights.

69 See: M O'Connell, C Tams, and D Tladi, *Self-Defence Against Non-State Actors* (2019). The origins of the 'unwilling and unable test' is often attributed to the statements of the US ambassador to the United Nations to support Israel's hostage rescue operation at Entebbe in Uganda (without Ugandan consent).

70 UN Security Council, Resolution 1368 (12 September 2001), UN Doc. S/RES/1368.

71 UN Security Council, Resolution 1373 (28 September 2001), UN Doc. S/RES/1373.

72 US Letter to the Security Council (23 September 2014) available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_695.pdf

73 Australia's Letter to the Security Council (9 September 2015) available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_693.pdf

74 Canada Letter to the Security Council (31 March 2015) available at https://www.documentcloud.org/documents/3125806-CANADA-SYRIA-Isil-3-31-2015.html

75 Turkey's Letter to the Security Council (24 July 2015) available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_563.pdf

under Article 51 of the Charter in self-defence.[76] The UK did not mention the 'unwilling or unable' principle in any letters to the Security Council, but the then Prime Minister did make reference to it in Parliament,[77] and the Attorney-General referred to it in his speech endorsing the Bethlehem principles on self-defence.[78]

But at the same time, a substantial number of States participating in the coalition bombing of Syrian territory never referred to the 'unwilling and unable' test in UN proceedings.[79] Further, the group of Arab states which formed a significant portion of those participating, uniformly refused to endorse an 'unwilling or unable' principle justifying breach of territorial integrity, and a number of States specifically denounced the bombings as infringing Syrian sovereignty.[80] Further, over 300 academics in international law from across the world signed *'A plea against the abusive invocation of self-defence as a response to terrorism,'*[81] stating that they there is no support in either existing legal instruments or the case law of the ICJ for the unwilling and unable test. The signatories urge that accepting the doctrine *'entails a risk of grave abuse in the military action may henceforth be conducted against the will of a great number of States under the sole pretext that, in the intervening State's view, they were not sufficiently effective in fighting terrorism.'*

More recently, in February 2021, Mexico convened an Arria-Formula (i.e. informal) meeting of the UN Security Council on the topic 'Upholding the collective security system of the UN Charter: the use of force in international law, non-state actors and legitimate self-defense.'[82] That meeting considered, inter alia, the question of whether a State being 'unwilling or unable' to prevent threats from non-State actors justified the use of force against it. Australia, Azerbaijan, Belgium, Denmark, Estonia, the Netherlands, Turkey, the UK, and the US asserted an expansive right to use force in self-defence against non-State actors in the territory of another State. Brazil, China, Mexico, and Sri Lanka categorically rejected such an asserted right. A further group of States – Austria, France, India, Norway, Pakistan, Qatar, Russia, St Vincent and the Grenadines – took positions somewhere in between those two poles, recognizing that there may be exceptional circumstances in which the use of force against a State in response to non-State actors could be lawful, but rejecting a general justification in all circumstances where the host State is 'unwilling or unable' to prevent the non-State actors threatened attacks.[83] The Chair's summary accordingly concluded that, *'there was considerable agreement about the need to discuss whether the right to self-defence could justify military action against non-State actors, such as terrorist groups, under exceptional circumstances – an evidently controversial question. While some referred to the "unwilling or unable doctrine," others rejected its validity, including by referring to the principle of non-intervention and by reiterating that any military action in another State's territory would require the territorial State's consent or the Security Council's authorization. It was clear that there is, as yet no common view on this issue and that substantive differences remain.'*[84]

The Special Rapporteur notes therefore that, insofar as States carry out armed drone operations overseas

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[76] Germany's Letter to the Security Council (10 December 2015) available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/418/63/PDF/N1541863.pdf?OpenElement

[77] HC Hansard (26, November 2015) Oral Answers to Questions available at https://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm151126/debtext/151126-0001.htm

[78] Wright, above n 23.

[79] Of the 15 States that have participated in the US-led coalition only four have explicitly invoked the 'unwilling and unable' test in letters send to or in debates that took place in the Security Council. See O Corten, 'The "Unwilling or Unable" Test: Has It Been, and Could It Be, Accepted?' (2016) 29 *Leiden Journal of International Law* 777.

[80] Ibid., 788.

[81] 'A plea against the abusive invocation of self-defence as a response to terrorism' available at http://cdi.ulb.ac.be/wp-content/uploads/2016/06/A-plea-against-the-abusive-invocation-of-self-defence.pdf

[82] A video record of the meeting is available at: https://www.unmultimedia.org/avlibrary/asset/2604/2604457/

[83] See the compendium of statements at: A/75/993-S/2021/247 (16 March 2021).

[84] Ibid., Annex II, p3.

in the territories of other States without consent on the basis that the target State is *'unwilling or unable'* to prevent attacks from non-State actors, they do so by relying on a purported novel rule of international law which has not clearly crystallized. In the absence of such a rule, armed drone strikes in such circumstances occur in violation of State sovereignty and in violation of the prohibition of the use of force.

### Strikes Outside Areas of Armed Conflict

Where States have advanced justifications for the use of armed drones overseas, they have sometimes relied upon the suggestion that IHL – the law applicable to situations of armed conflict, and which allows for the lethal targeting of individuals who directly take part in hostilities – applies without geographic limitation so long as the targeted person is a participant in a non-State terrorist group.

The United States has maintained throughout the past twenty years that there exists a global armed conflict of a non-international nature with Al-Qaeda, ISIL/Daesh, and other organizations, the reach of which extends across multiple territories. That expansive scope of the asserted armed conflict is set out in the original domestic legislative authority in the United States – the 2001 Authorization for Use of Military Force[85] – which permits *'all necessary and appropriate force against those nations, organizations, or persons [the President] determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.'*[86]

This posture that there exists an ongoing global non-international armed conflict has been widely criticized, with many, including previous holders of this mandate, the United Nations High Commissioner for Human Rights, the International Committee of the Red Cross ('ICRC'), and certain

*Photo by The National Guard*

States taking the view that the disparate and poorly coordinated nature of terrorist groups carrying out attacks worldwide since 11 September 2001 fails to display the degree of unified organization required to indicate a single party involved in a consistent armed conflict.[87] The shifting focus of the drone campaign against Al-Qaeda and ISIL/Daesh and others – initially in Afghanistan, then moving to Iraq and Syria, all the while embracing more than 14,000 drone strikes across those nations and in Pakistan, Somalia, and Yemen and now, with the strike against Al-Zawahiri, Afghanistan again – underscores the departure of the claimed 'war on terror' from any paradigm of a single, consistent, ongoing armed conflict. In turn, this raises fundamental questions about the parallel applicability of international human rights law, and the ways in which the use of such technology violates the right to life, and associated rights of individuals subject to targeting.

The Special Rapporteur notes,[88] that few States have accepted the premise that there is a global, continuing armed conflict which entitles the US government and its allies to launch strikes against any other nation's territory merely because of a determination that a suspected terrorist – directly or indirectly associated with an unspecified and shifting cast of enemy groups – may be present in that State's territory.

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[85] Public Law 107-40, Sept. 18, 2001.

[86] Available at: https://www.congress.gov/107/plaws/publ40/PLAW-107publ40.pdf

[87] ICRC 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts,' 31st International Conference of the Red Cross and Red Crescent (October 2011), pp10-11, available at https://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf

[88] Echoing legal commentators: B Saul, 'The Unlawful US Killing of Ayman Al-Zawahiri,' LawFare (17 August 2022), available at: https://www.lawfareblog.com/unlawful-us-killing-ayman-al-zawahri

# 3 RELEVANCE TO HUMAN RIGHTS COMPLIANCE

THE SPECIAL RAPPORTEUR EMPHASIZES THAT the applicability of international legal standards governing the lawful use of force is not an abstract academic question, or a question separate from a human rights assessment of lethal drone strike events. That is because, as a matter of basic principle under international human rights law – namely the principle of legal certainty – the use of lethal force to deprive a person of the right to life must be exercised in all cases in a manner which is non-arbitrary.[89] As the UN Human Rights Committee observed in its *General Comment 36*, the right to life is *'the supreme right from which no derogation is permitted even in situations of armed conflict or other public emergencies which threatens the life of the nation'*[90] and deprivation of life will be arbitrary *'if it is inconsistent with international law or domestic law.'*[91] On the contrary, *'use of lethal force consistent with international humanitarian law and other applicable international law norms is, in general, not arbitrary,'* and so *'State parties should, in general, disclose the criteria for attacking with lethal force individuals or objects whose targeting is expected to result in deprivation of life, including the legal basis for specific attacks, […] the circumstances in which relevant means and methods of warfare have been used, and whether less harmful alternatives were considered.'*[92] Where States rely upon purported justifications which do not find adequate support in international law, the result is that such actions by definition violate the fundamental human rights principle of non-arbitrariness. The Special Rapporteur thus finds that contemporary extra-territorial use of drones involves arbitrary use of force under international human rights law standards, in violation of the requirement of legal certainty and the particular requirement, in the context of the right to life, that States must restrict their actions so far as possible in favour of those which are non-lethal.

Further, each of the departures from legal orthodoxy identified above portend a more permissive regime for the use of lethal force against remote threats (the weakened 'imminence' criterion), in more locations (the 'unwilling and unable' threshold for violating sovereignty), and/or against persons simply because of their identification with a specified non-State group (the asserted permanent global armed conflict). That necessarily increases the likelihood of lethal action being taken, which in turn increases the likelihood of violations of the right to life, both of targets and civilians. Any move to a more permissive international environment for threats to life must be resisted in the strongest terms.

## Discretionary Drone Strike Policies Fail to Satisfy Human Rights Standards for Planning and Investigation

As set out above, the Special Rapporteur is concerned that the purported legal position advanced by certain States carrying out lethal drone strikes against terrorist targets does not have a firm grounding in settled principles of international law. But yet more concerning is the apparent trend in recent years which sees States failing even to advance a formal legal justification for such actions

[89] ICCPR, Article 6(1).

[90] *General Comment 36*, [2]. See also: UN Human Rights Committee, *General Comment 6*, UN Doc. HRI/GEN/1/Rev.1 at 6 (1994), [1].

[91] *General Comment 36*, [12].

[92] *General Comment 36*, [64].

Photo by Markus Spiske

according to established doctrines of international law, and thus apparently relying upon discretionary policies regarding targeted killing of terrorists which fail to demonstrate human rights compliance.[93]

The past 18 months has seen a series of lethal drone strikes which have not been accompanied by formal statements made by responsible States setting out how such strikes comply with applicable domestic and international law standards. The US drone strike killing Al-Zawahiri in Kabul on 30 July 2022 was announced the following day by US President Biden in terms which made no mention of international or domestic law frameworks said to justify the action. Instead, President Biden's remarks stated that *'[f]rom hiding, [Al-Zawahiri] coordinated al Qaeda's branches and all around the world – including setting priorities, for providing operational guidance that called for and inspired attacks against U.S. targets. He made videos, including in recent weeks, calling for his followers to attack the United States and our allies. Now justice has been delivered, and this terrorist leader is no more.'*[94] It is notable that in specific and high-profile cases the State instigating the use of force has made no immediate report of the incident to the Security Council.[95] Such use of force would have obliged reliance under Article 51 of the UN Charter if the State concerned is relying upon the right to self-defence at international law.

Failure to ground counter-terrorism drone strikes in formal legal frameworks are noteworthy in

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[93] The two concerns are linked, as observed by the then Special Rapporteur on extrajudicial, summary or arbitrary executions, Prof Christof Heyns, in his 2014 report to the General Assembly: *'Legal uncertainty in relation to the interpretation of important rules on the international use of force presents a clear danger to the international community. To leave such important rules open to interpretation by different sides may lead to the creation of unfavourable precedents where States have wide discretion to take life and there are few prospects of accountability.'* A/HRC/26/36 (1 April 2014), [137].

[94] See: Remarks by President Biden on Successful Counterterrorism Operations in Afghanistan, The White House (1 August 2022) ('Biden Remarks'), available at: https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/08/01/remarks-by-president-biden-on-a-successful-counterterrorism-operation-in-afghanistan/

[95] While the UK government publicly acknowledged a lethal strike on 10 October 2022 in Syria, no notification of the strike to the Security Council has taken place. Rt Hon Ben Wallace MP, UK Minister for Defence, 'Update: air strikes against Daesh' (13 October 2022), available at: https://www.gov.uk/government/news/update-air-strikes-against-daesh

*Photo by Airman 1st Class Danielle Dawson*

circumstances where States have previously offered specific justifications pursuant to Article 51 to the Security Council of lethal armed drone strikes as constituting exercises of the right to self-defence,[96] and also where military strikes *other than* drone strikes against terrorists continue routinely to be notified to the Security Council.[97]

The absence of clarity with respect to the legal frameworks upon which States rely is exacerbated in circumstances where States fail to have in place robust pre-strike oversight or post-strike investigative processes. The activation of such investigative processes is essential to the protection of the right to life under international human rights law.[98] With respect to pre-strike oversight, the Special Rapporteur notes with concern the manner in which States carrying out drone strikes against terrorist targets have consistently failed to confirm or deny the existence of targeting lists or the conditions for target selection and have refused to submit such policies to public or legislative scrutiny. The Special Rapporteur is concerned that governments that appear to engage in the ongoing use of targeted killings by drones have not confirmed the existence of a 'kill list' of terrorist targets for drone strikes, thereby shielding strikes from legislative scrutiny, and do not have systematic processes for after-the-fact investigation.[99]

With respect to post-strike investigations, no State currently has any systematic process for the public review of lethal drone strikes so as to determine the degree to which such strikes comply with the State's obligations under international law, IHL, and international human rights law. The short-lived US

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[96] See e.g. the UK strike in Syria in August 2015 and the US strike on the Iranian General Qasem Soleimani in January 2020. Letter dated 8 January 2020 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, S/2020/20 (9 January 2020).

[97] See, for instance, the US government's notification of strikes against facilities in Syria and Iraq in June 2021. Letter dated 29 June 2021 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, S/2021/614 (30 June 2021).

[98] *General Comment 36*, [12]-[13] and [28]-[29].

[99] See the concerns expressed by the UK Parliament Intelligence and Security Committee, 'UK Lethal Drone Strikes in Syria' (2017), [72], available at: https://isc.independent.gov.uk/wp-content/uploads/2021/01/20170426_UK_Lethal_Drone_Strikes_in_Syria_Report.pdf. Further, the Special Rapporteur notes that the governing policy for US overseas armed drone operations has never been submitted to Congressional oversight, and has instead been contained in a series of executive policies (the Obama Administration 2013 Presidential Policy Guidance, the Trump Administration 2017 'Principles, Standards and Procedures for US Directed Action Against Terrorist Targets,' and now reportedly the Biden Administration Presidential Policy Memorandum), all of which have been classified.

process for release of unclassified summaries of strikes against terrorist targets, and assessments of combatant and non-combatant deaths,[100] enacted by the Obama Administration in July 2016 and welcomed by the previous Special Rapporteur Mr Emmerson in his 2017 report,[101] was revoked by the Trump Administration in March 2019[102] and has not been reinstated. While the Special Rapporteur notes the efforts of civil society organizations such as the Bureau of Investigative Journalism[103] and Drone Wars[104] in seeking to track and assess drone strikes in certain locations, such third-party assessment is necessarily limited, not least because many strikes remain secret for long periods after their occurrence and, in any event, little detail is typically provided publicly by States.

The Special Rapporteur makes clear that the continuing absence of robust pre- and post-strike assessments, and the resort by States to secret policies as guidance for lethal drone strikes is fundamentally inconsistent with well-established principles of international human rights law when the right to life is implicated by State action. The obligation to safeguard the right to life is manifold, and two aspects of it are particularly relevant in this respect. First, States have an obligation, in planning operations which may endanger the right to life, to ensure that they consider ahead of time whether the particular action is necessary and proportionate to the intended objectives. Second, States have a duty to conduct an investigation of any alleged breaches of the right to life committed by their agents or technologies that operate to take or harm life.

As to planning, the Special Rapporteur recalls the judgment of the European Court of Human Rights in *McCann v United Kingdom* (a case regarding a lethal counter-terrorism operation against IRA members in Gibraltar). In that case, the Grand Chamber held that deprivations of life must be subject to *'the most careful scrutiny, particularly where deliberate lethal force is used, taken into consideration not only the actions of the agents of the State who actually administer the force but also all surrounding circumstances including such matters as the planning and control of the actions under examination.'*[105] The factors which need to be taken into account when planning are noted by the Human Rights Committee in *General Comment 36* as follows:

> '[the action] must be strictly necessary in view of the threat posed …; it must represent a method of last resort after other alternatives have been exhausted or deemed inadequate; the amount of force applied cannot exceed the amount strictly needed for responding to the threat; the force applied must be carefully directed – only against the attacker; the threat responded to must involve imminent death or serious injury. The use of potentially lethal force for law enforcement purposes is an extreme measure, which should be resorted to only when strictly necessary in order to protect life or prevent serious injury from an imminent threat.'[106]

States must, therefore, ensure that their intelligence, law-enforcement and military agencies carry out rigorous analysis prior to arriving at any decision about the use of drones which may have targeting capacity in a domestic context. General plans and general orders to target identified significant individuals will not suffice without a direct link between the targets and imminent threats to others.

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100 President of the United States of America, 'United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force,' Executive Order 13732 of July 1, 2016, available at: https://www.federalregister.gov/documents/2016/07/07/2016-16295/united-states-policy-on-pre--and-post-strike-measures-to-address-civilian-casualties-in-us

101 A/HRC/34/61, [29].

102 President of the United States of America, 'Revocation of Reporting Requirement,' Executive Order 13862 of March 6, 2019, available at: https://www.federalregister.gov/documents/2019/03/11/2019-04595/revocation-of-reporting-requirement

103 See: https://www.thebureauinvestigates.com/projects/drone-war

104 See: https://dronewars.net/a-complete-list-of-uk-air-and-drone-strikes-in-iraq-and-syria-2014-2021/

105 *McCann v United Kingdom* [1995] ECHR 31; (1996) 21 EHRR 97 (GC), [150].

106 *General Comment 36*, [12].

As to investigation, the duty is well-recognized in international law, including by the Human Rights Committee (in its *General Comment 31*),[107] the Inter-American Court (in the *Montero-Aranguren v Venezuela* case),[108] the European Court (in the *Jordan and McKerr* cases),[109] and the African Commission on Human and Peoples' Rights (in its *General Comment 3*).[110] The key features of this obligation of investigation recognized at international law have been set out in authoritative form in the revised version of the Minnesota Protocol on the Investigation of Potentially Unlawful Death:[111]

- First, the investigation must be prompt. Persons who become aware of a potential violation of the right to life are required to report to their superiors quickly;[112]
- Second, the investigation must be both effective and thorough. In this regard, the Minnesota Protocol concludes that investigations *'must, at a minimum, take all reasonable steps to: (a) identify the victim(s); (b) recover and preserve all material probative of the cause of death, the identity of the perpetrator(s) and the circumstances surrounding the death; (c) identify the possible witnesses and obtain their evidence in relation to the death and the circumstances surrounding the death; (d) determine the cause, manner, place and time of death, and all the surrounding circumstances …; and (e) determine who was involved in the death and their individual responsibility for the death;'*[113]
- Third, investigations and the persons conducting them must also *'be, and must be seen to be, independent of undue influence'*[114] and investigators *'must be impartial and must act at all times without bias. They must analyse all evidence objectively. They must consider and appropriately pursue exculpatory as well as inculpatory evidence;'*[115] and
- Finally, international law requires that investigations of rights violations be transparent, *'including through openness to the scrutiny of the general public and of victims' families.'*[116]

States must ensure that their lethal armed drone operations are conducted pursuant to robust legal frameworks which provide for, inter alia, adequate pre-strike planning and post-strike investigation processes compliant with the standards recognized by international human rights law. Insofar as States opt instead for secrecy and discretionary policies in their counter-terrorism drone operations, they fail to demonstrate compliance with their obligations to protect and promote international human rights.

## Development of International Law on Application of Human Rights Obligations to Extraterritorial Actions

The Special Rapporteur notes that, at the same time that States have been pursuing lethal drone strike policies overseas, there has been a consistent move in international law to recognize that States' human

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[107] *General Comment 31*, [15] and [18].

[108] *Montero Aranguren et al (Detention Center of Catania) v Venezuela*, Judgment of 5 July 2006, IACtHR (Ser.C) no. 150, [66].

[109] *Jordan v United Kingdom* [2001] ECHR 327; (2003) 37 EHRR 2; and *McKerr v United Kingdom* [2001] ECHR 329; (2002) 34 EHRR 20.

[110] African Commission on Human and Peoples' Rights, *General Comment 3*, Adopted during 57th Ordinary Session (November 2015) (*'African Commission General Comment 3'*), [2] and [15].

[111] United Nations Office of the High Commissioner for Human Rights, 'The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions' (2017) ('Minnesota Protocol').

[112] Minnesota Protocol, [23]. See also: *Anzualdo Castro v Peru*, Judgment of 22 September 2009, IACtHR (Ser.C) no. 202 (2009), [134].

[113] Minnesota Protocol, [25].

[114] Minnesota Protocol, [28].

[115] Minnesota Protocol, [31].

[116] Minnesota Protocol, [32]. See also: *African Commission General Comment 3*, [7].

rights obligations are not geographically bounded by their own borders. It is no longer the case that States may consider themselves unrestricted in their actions abroad, even when those actions – taking place outside the confines of armed conflict – may not be subject to the rules of IHL.

States owe human rights obligations wherever they have jurisdiction in respect of particular conduct or persons. While the most obvious basis of jurisdiction is that a violation occurs within the confines of a State's own territory,[117] the consistent approach of international human rights law has been to recognize alternative bases for jurisdiction outside a State's territory where a State either: (a) exercises *physical control or authority* over a person (for instance, when they are in the State's custody albeit on foreign soil);[118] or (b) exercises *effective control* over an area outside the State's territory.[119] These situations are not an exhaustive list of situations where jurisdiction arises, since jurisdiction is a factual and specific enquiry.

Where action outside a State's territory potentially endangers life (through the use of remote strikes) but may not involve any physical presence in a territory, the primary paradigms do not apply, but the same principles underpinning them have been recognized to justify the extension of States' jurisdiction all the same. The Human Rights Committee, in its *General Comment 36* on the right to life considers that jurisdiction arises over persons when there is a foreseeable impact by the State (by whatever means, including extraterritorially) on the person's right to life.

The Human Rights Committee notes that every State:

> 'has an obligation to respect and 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. This includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner.'[120]

This approach is in line with the Committee's jurisprudence, namely that it would be '*unconscionable*' to interpret the '*responsibility under article 2 of the Covenant [i.e. the responsibility to secure rights to all individuals 'subject to its jurisdiction'] as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.*'[121] That view is also adopted by the African Commission on Human and Peoples' Rights General Comment on the right to life, which notes that a *'State shall respect the right to life of individuals outside its territory,'*[122] and the views of the Inter-American Commission on Human Rights that a State *'may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that State's own territory.'*[123]

These views reflect a wider development towards what it termed by leading international lawyers a

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[117] Jurisdiction was described as 'primarily' territorial in *Al-Skeini v United Kingdom* [2011] ECHR 1093; (2011) 53 EHRR 18 (GC) ('*Al-Skeini*') at [109].

[118] *Al-Skeini*, [134] and [136], referring to *Öcalan v Turkey* [2005] ECHR 282; (2005) 41 EHRR 45 (GC) ('Öcalan') at [91]). See also: *Jaloud v Netherlands* [2014] ECHR 1292; (2015) 60 EHRR 29 (GC); and *Pisari v Moldova and Russia* [2015] ECHR 403.

[119] *Al-Skeini*, [138].

[120] *General Comment 36*, [63].

[121] *Lopez Burgos v Uruguay*, [12.3]; and *Celiberti de Casariego v Uruguay*, [10.3].

[122] *African Commission General Comment 3*, [14].

[123] *Victor Saldaño v Argentina*, Report No 38/99, [17].

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'functional approach' to jurisdiction,[124] and General Comment 36 can be viewed as 'shift[ing] the focus of the jurisdictional inquiry from that of power or control over territory or over the person, to that of power of control over the enjoyment of the right to life.'[125] Indeed, many view the 'functional' analysis of jurisdiction as the fundamental explanation of States' human rights obligations, with the paradigms of territorial sovereignty, power over persons, and effective control of areas extraterritorially merely as specific instances of the general principle.[126] Jude Bonello of the European Court of Human Rights in his concurring opinion in the Al-Skeini case stated as much:

> '12. Jurisdiction means no less and no more than "authority over" and "control of," In relation to Convention obligations, jurisdiction is neither territorial nor extra-territorial: it ought to be functional – in the sense that when it is within a State's authority and control whether a breach of human rights is, or is not, committed, whether its perpetrators are, or are not, identified and punished, whether the victims of violation are, or are not, compensated, it would be an imposture to claim that, ah yes, that State had authority and control, but, ah no, it has no jurisdiction.
>
> 13. The duties assumed through ratifying the Convention go hand in hand with the duty to perform and observe them. Jurisdiction arises from the mere fact of having assumed those obligations and from having the capability to fulfil them (or not fulfil them).'[127]

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[124] Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' (2013) 7 *The Law & Ethics of Human Rights* 47. Prof Shany was, together with Sir Nigel Rodley, co-author of the draft of *General Comment 36*.

[125] See: Marko Milanovic, 'The Murder of Jamal Khashoggi: Immunities, Inviolability and the Human Right to Life' (2020) 20(1) *Human Rights Law Review* 1, 23.

[126] S Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (2012) 25 *Leiden Journal of International Law* 857, 874-876.

[127] *Al-Skeini*, Concurring Opinion of Judge Bonello, [12]-[13].

The then United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Ms Agnès Callamard explicitly endorsed this approach to jurisdiction in her report on the investigation into the unlawful death of Jamal Khashoggi, concluding that a State's responsibility to protect the right to life *'may be invoked extra-territorially in circumstances where that particular State has the capacities to protect the right to life of an individual against an immediate or foreseeable threat to his or her life.'*[128] The Special Rapporteur continued:

> 'Such understanding of the scope of the responsibility to protect [the right to life] is particularly relevant when applied to agencies whose mandate may have an extra-territorial scope. To the extent that they perform their functions outside national borders, or that their functions concern other States, such functions should include, whenever they may reasonably do so, the protection of those whose lives are under a foreseeable threat.'[129]

That approach is also consistent with the Human Rights Committee's existing analyses of various situations worldwide: in respect of the use of drones in foreign territory by the United States,[130] and in respect of the use of foreign surveillance programs by the United Kingdom.[131] The Special Rapporteur further notes two recent decisions of the European Court of Human Rights in which State human rights obligations have been held to be owed in relation to the investigation of deaths resulting from military operations overseas[132] and the process for repatriating persons located overseas,[133] which further demonstrate that the traditional territorial limit of human rights law has been superseded.

The use of drone strikes overseas falls well within the scope contemplated by the Human Rights Committee's reference to persons whose right to life is *'impacted by [a State's] military or other activities in a direct and reasonably foreseeable manner.'*[134] A killing via military airstrike concerns decisions directly taken by a State official to launch a strike at an identified target. That is the case even though the person is not (yet) within the physical control of the State, or on territory subject to that State's effective control. That is what the European Court of Human Rights held in *Pad v Turkey* (where the fact that *'fire discharged from [Turkish] helicopters had caused the killing of the applicant's relatives'* in Northern Iraq enlivened Turkey's responsibility regardless of its lack of territorial control).[135]

[128] Annex to the Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Investigation into the Unlawful Death of Mr Jamal Khashoggi, A/HRC/41/CRP/1 (19 June 2019) ('Khashoggi Report'), [360].

[129] Khashoggi Report, [361].

[130] Human Rights Committee, Concluding Observations on the United States of America, UN Doc. CCPR/C/USA/CO/4 (23 April 2014).

[131] Human Rights Committee, Concluding Observations on the United Kingdom, Un Doc. CCPR/C/GBR/CO/7 (17 August 2015).

[132] *Hanan v Germany* [2021] ECHR 131 (GC).

[133] *HF and MF v France* [2022] ECHR 678 (GC).

[134] *General Comment 36*, [63].

[135] *Pad and ors v Turkey*, App No. 60167/00, Decision of 28 June 2007, [54].

# 4 NEW TECHNOLOGIES

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A NUMBER OF LETHAL DRONE STRIKES carried out in the past two years have been reported, albeit never to date formally acknowledged, as using the new technology of the Hellfire AGM-114R9X ('R9X') missile rather than a conventional explosive warhead.[136] The R9X missile relies upon kinetic energy (that is, the force of direct impact) and blades to lacerate and kill its target, rather than explosive or incendiary damage. Such missiles are widely suspected to have been used in the killings of the Al-Qaida operatives Abu Khayr Al-Masri in Syria in 2017 and Jamal Al-Badawi in 2019 in Yemen, Major General Qasem Soleimani, the commander of the Iranian Quds force in Iraq in 2020, and Al-Zawahiri in 2021.[137] The intended advantage of the R9X missile is that it minimizes civilian casualties by restricting the scope of fatal force to only the specific intended target.

While the R9X missile appears generally less prone to cause civilian casualties given the absence of

[136] S Favier, 'Mort d'Ayman Al-Zawahiri: qu'est-ce que le missile Hellfire R9X que les Américains sont susceptibles d'avoir utilisé?,' *Le Monde* (2 August 2022), available at: https://www.lemonde.fr/international/article/2022/08/02/mort-d-ayman-al-zawahiri-qu-est-ce-que-le-missile-hellfire-r9x-que-les-americains-sont-susceptibles-d-avoir-utilise_6136949_3210.html; G Lubold and W Strobel, 'Secret US Missile Aims to Kill Only Terrorists, Not Nearby Civilians,' *The Wall Street Journal* (9 May 2019), available at: https://www.wsj.com/articles/secret-u-s-missile-aims-to-kill-only-terrorists-not-nearby-civilians-11557403411; and Center for Strategic and International Studies, Missile Defense Project, 'Hellfire,' available at: https://missilethreat.csis.org/missile/agm-114-hellfire

[137] See: G Lubold and W Strobel, ibid; and S Roblin, 'Did the US Use New Joint Air-To-Ground To Kill Iran's General Soleimani?,' *Forbes* (4 January 2020), available at: https://www.forbes.com/sites/sebastienroblin/2020/01/04/did-the-pentagon-use-new-joint-air-to-ground-missiles-in-killing-of-general-soleimani/?sh=3943d944bb63

the blast radius resulting from other kinds of drone strikes, the precision of any particular strike cannot be a substitute for legal analysis or human rights compliance. The minimizing of civilian casualties may be a factor relevant to the *proportionality* of the damage caused by a strike but is not of itself sufficient retrospectively to clothe a strike with the condition of having been necessary. Minimizing extraneous casualties does not of itself render the deprivation of the life of a targeted individual lawful *per se*. It must be reiterated: terrorists, like all other individuals worldwide, have the right to life. States must not murder them in retaliation for prior acts of violence, even terrorist atrocities.[138] States must not kill any person without lawful basis and unless it is absolutely necessary to do so.[139]

But further, as recently observed by the previous Special Rapporteur on extrajudicial, summary and arbitration executions, the persistent argument that drones enable surgical strikes with minimal casualties must be treated with scepticism.[140] Supposedly precise strikes in the past have caused substantially greater civilian casualties than initially acknowledged by the States carrying out those strikes. Partly, that is due to the reliance upon complex intelligence networks which are fallible, and which have a track record of mistakenly identifying civilians as legitimate targets. The lack of human rights compliant investigative processes following such lethal strikes has continued to undermine the protection right to life as well as the individual rights to accountability and remedy owed to the victims of violations. Indeed, the Special Rapporteur is concerned that over-confidence in the supposedly more precise capabilities of new drone technologies will lead to a lessened emphasis on the importance of rigorous assessment of the quality of human intelligence to verify targets, especially as on-the-ground intelligence capabilities are withdrawn. Failures of intelligence are not issues remediable by more precise missiles and can be expected to persist so long as human rights deficient lethal drone policies do.

Finally, the harms caused by lethal drone campaigns arise not only from unintended civilian casualties, but also from the persistent environment of threat, brutality, and sudden trauma.[141] Such effects are not alleviated – at any rate not quickly – by substituting a kinetic missile for an incendiary one. The brutal and human rights violative nature of the weaponry remains a constant, as will the chronic psychological harm of armed drone warfare impacting on the right to life, the right to be free from torture, inhuman and degrading treatment, and a range of connected rights including the essential right to family life.


*Photo by Office of Naval Research*

[138] ICCPR, Article 6 *'guarantees this right for all human beings, without distinction of any kind, including for persons suspected or convicted of even the most serious crimes:' General Comment 36*, [3].

[139] *General Comment 36*, [12].

[140] Hence the 'myth of the surgical strike:' see A/HRC/44/38, [15]-[21].

[141] A/HRC/44/38, [20].

# 5 DOMESTIC DEPLOYMENT OF ARMED DRONES

FINALLY, THE SPECIAL RAPPORTEUR NOTES THAT armed drones – previously restricted to military operations against terrorists overseas – are now increasingly becoming a feature of domestic counter-terrorism and policing strategies.

Drone technology has followed the same well-worn path from battlefield to the policing home front which has been observed in policing tactics and weaponry generally. This move from justification in the context of conflict and counter-terrorism to 'regular' homeland tracks a consistent pattern where the exceptionality of counter-terrorism consistently moves to the local, domestic and 'regular' legal system. Particularly following the adoption in 2016 by the US Federal Aviation Authority of a rule permitting deployment of drones within domestic civilian airspace,[142] the use of drones by domestic law enforcement, first in the United States and then globally, has rapidly expanded. According to research from the Electronic Frontier Foundation and the University of Nevada, more than a thousand police departments in the United States are currently using drone technology.[143] At least 40 out of 43 police forces in the United Kingdom use drones.[144] Police forces in Europe, China, India, Israel, the Gulf, South America, and Australia are using them as well.[145]

It is notable that in a number of national contexts the justification for such use also tracks national security and counter-terrorism imperatives, argued to be necessary to counter 'domestic terrorism' or protect 'critical infrastructure' from terrorist attack. The first generation of drones used domestically by law enforcement performed surveillance functions – CCTV cameras in the sky. But the current generation are routinely equipped with enhanced features such as thermal and night-vision imaging, automatic target tracking, loudspeakers and spotlights. Further, drone manufacturers have developed models fitted with non-lethal weapons aimed at the police market. The French drone manufacturers have models for sale to law enforcement which can carry up to eighteen tear gas grenades.[146] A South African drone manufacturer Desert Wolf has developed a drone

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[142] See: https://www.faa.gov/uas/media/Part_107_Summary.pdf

[143] See: https://atlasofsurveillance.org/atlas

[144] See: C Cole and J Cole, 'Benchmarking police use of drones in the UK,' *Drone Wars* (2 November 2020), available at: https://dronewars.net/2020/11/02/benchmarking-police-use-of-drones-in-the-uk/ Not all forces publish details regarding their use of drones. Those which do include: West Midlands Police (https://www.west-midlands.police.uk/frequently-asked-questions/police-drones); Dorset Police (https://www.dorset.police.uk/support-and-guidance/safety-in-your-community/use-of-drones/); Lancashire Police (https://www.lancashire.police.uk/about-us/our-organisation/unmanned-aerial-vehicles-drones-uav/); Sussex Police (https://www.sussex.police.uk/police-forces/sussex-police/areas/au/about-us/governance-and-processes/drones-unmanned-aerial-vehicles/); and Kent Police (https://www.kent.police.uk/foi-ai/kent-police/who-we-are/unmanned-aerial-vehicle-drones/).

[145] 'Presentation made at the informal expert meeting organized by the state parties to the Convention on Certain Conventional Weapons 13-16 May 2014, Geneva, Switzerland, by Christof Heyns, SR on extrajudicial, summary or arbitrary executions' (13 May 2014), https://www.ohchr.org/en/statements/2014/07/presentation-made-informal-expert-meeting-organized-state-parties-convention.

[146] See: C Enemark, 'Armed Drones and Ethical Policing: Risk, Perception, and the Tele-Present Officer,' (2021) 40(2) *Criminal Justice Ethics* 124-144. For an example, see Drone Volt's Hercules 10 Teargas model: https://www.aeroexpo.online/prod/drone-volt/product-180237-28892.html

with high-capacity paint-ball barrels capable of firing solid pellets, paint balls, or pepper spray.[147] The US company Chaotic Moon Studios (since acquired by Accenture)[148] developed a stun-gun equipped model as early as 2014.[149] The public justification for such weapons is linked directly to the articulation of domestic national security risk and challenges both from within and without the nation state.

Nor are these theoretical capabilities. While domestic legal frameworks tend to be vague as to the law enforcement powers with respect to drones, at least some jurisdictions have prospectively granted explicit authority for the use of armed drones in the future.[150] It is important to underscore that the capacities to build and work such technology have come about by way of their acceptance and tolerance in conflict and national security contexts, and it is that normalization that then enables the pathway to regular use in national law-enforcement settings. Given the substantial human rights concerns which have been identified in the past two decades with respect to the deployment by States of armed drones in conflict settings overseas, it is imperative that States treat the proliferation of such technology in domestic settings with caution, and subject the use of such technology to robust oversight mechanisms in full compliance with international human rights law.

*Photo by Harrison Kugler*

147 L Kelion, 'African firm is selling pepper-spray bullet firing drones,' *BBC News* (18 June 2014), available at: https://www.bbc.co.uk/news/technology-27902634. See: https://www.desert-wolf.com/dw/products/unmanned-aerial-systems/skunk-riot-control-copter.html

148 See: https://newsroom.accenture.com/news/accenture-acquires-chaotic-moon-to-continue-growing-its-digital-design-and-innovation-capabilities.html

149 See: K Chayka, 'Watch This Drone Taser a Guy Until He Collapses,' *Time* (11 March 2014), available at: https://time.com/19929/watch-this-drone-taser-a-guy-until-he-collapses/

150 The US state of North Dakota in 2015 was the first American jurisdiction to provide for 'less than lethal' uses of force by drones (tear gas, tasers, rubber bullets and pepper spray). See: North Dakota House Bill 1328, available at: https://www.ndlegis.gov/assembly/64-2015/regular/bill-overview/bo1328.html?bill_year=2015&bill_number=1328. See also: H Austin, 'North Dakota becomes first US state to legalise use of armed drones by police,' *The Independent* (9 September 2015), available at: https://www.independent.co.uk/news/world/americas/north-dakota-becomes-first-us-state-to-legalise-use-of-armed-drones-by-police-10492397.html.

# 6 RECOMMENDATIONS

The Special Rapporteur Makes the Following Recommendations:

States must ensure that, in their policies and procedures for the use of armed drones overseas both within and outside conflict settings, they strictly observe the established rules of international law and international humanitarian law, rather than adopting interpretations of international law which increase the likelihood of violations of the right to life. Any move to a more permissive international environment for the use of armed force which threatens the right to life is inconsistent with human rights protection;

The use of drones requires precise and tailored human rights compliant domestic regulation (publicly available) that addresses the precise legal obligations of states to protect and promote the right to life, including the obligation to investigate and provide accountability and redress for any violations of that right, as required by international law;

The extra-territorial use of drones engages clear and defined human rights and international humanitarian law obligations that should be enforced by States. Specifically, in planning any operation that involves the use of force which entails a risk of death or serious injury, State authorities must ensure that such action:

(a) is only available in response to a threat of imminent death or serious injury;

(b) is strictly necessary in view of such threat;

(c) represents a method of last resort after other alternatives have been exhausted or deemed inadequate;

(d) deploys an amount of force which cannot exceed the amount strictly needed for responding to the threat; and

(e) is carefully directed against the threat alone;

States should confirm that the rules which apply to the use of armed drones are technology-neutral, and apply equally regardless of developments in drone technology; and

The use of armed drones for domestic counter-terrorism and/or law enforcement purposes should be subject to robust and transparent oversight mechanisms in full compliance with international human rights law.