Article 51 Self-Defence Against Individuals: IHL, IHRL, and the Failure to Restrain the Proliferation of Targeted Killing

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Abstract

Individuals are increasingly considered capable of orchestrating armed attacks that threaten States from abroad. Some States have responded by invoking self-defence under Article 51 against these individuals and quickly authorizing targeted killing operations. To escape the prohibition against arbitrary killing under international human rights law (IHRL), States must ensure that targeted killing operations only occur within a putative armed conflict, governed by international humanitarian law (IHL). States have therefore deployed a flexible combination of legal doctrines to expand the scope of armed conflict, namely by characterizing an accumulation of violent events as an armed attack, facilitating support to States already engaged in armed conflict, expanding the set of individuals taking direct part in hostilities, and diluting the definition of an "imminent" attack. As such, the exercise of Article 51 against individuals blurs the distinction between war and peace by shielding isolated instances of targeted killing behind a legal regime – IHL – designed to regulate intense inter-State war. Recent efforts to foreground IHRL have not prevented targeted killing from becoming a permanent feature of international peace. Though IHL and IHRL co-apply in wartime, international jurisprudence and commentary indicates that killing in conformity with IHL will systematically violate the right to life. This uncertainty leaves States without guidance, even as drone technology risks proliferating targeted killing and as States look to make weapon designers and nuclear scientists liable to legitimate attack.

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Introduction: The Individualization of War

War has traditionally been practiced and understood as a depersonalized, inter-collective confrontation. For Walzer, this collectivizing reality explains why the state of war is governed by a special self-contained legal regime – the "war convention" – whereas peacetime criminal law is governed by the individualized principles of ordinary morality.[1]

Yet warfare no longer opposes purely anonymous groups. In the ongoing Russo-Ukraine War, Ukrainian forces acting on US intelligence have systematically targeted specific high-ranking Russian officers.[2] Nor is this tactic restricted to the killing of combatants within a *pre-existing* international or non-international armed conflict (IAC or NIAC). Two recent cases demonstrate the proliferation of targeted killing. In 2015, the UK conducted its first drone strike outside of a military campaign in order to kill Reyaad Khan, an ISIL attack-planner. And in 2020, a US drone strike killed Iranian General Qasem Soleimani in circumstances detached from prior hostilities.

Individuals – rather than States or non-state armed groups (NSAGs) – are increasingly considered capable of orchestrating armed attacks that threaten States from abroad, beyond the reach of capture by law enforcement. In response, some States have resorted to invoking the right to self-defence under Article 51 of the UN *Charter* directly against these individuals (though the nominal target remains a State or NSAG), thus enabling the use of force to "disrupt" the individual and the threat of armed attack.[3] On the basis of this *jus ad bellum*, individuals are hunted down and killed. This tactic is called targeted killing, a term defined as the "intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, […] against a specific individual who is not in the physical custody of the perpetrator."[4]

The individualization of war affects the viability of the law of armed conflict (LOAC) by blurring the crucial distinction between *jus ad bellum* and *jus in bello*. To escape the international human rights law (IHRL) prohibition against the arbitrary deprivation of life under Article 6 of the International Covenant on Civil and Political Rights (ICCPR), States must ensure that targeted killing occurs within a putative armed conflict, triggering the application of the more permissive international humanitarian law (IHL) regime.[5] Thus the exercise of Article 51 against

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[1] Michael Walzer, *Just and Unjust Wars*, 5th ed (New York: Basic Books, 2015) at 44.
[2] See Julian E Barnes, Helene Cooper & Eric Schmitt, "U.S. Intelligence Is Helping Ukraine Kill Russian Generals, Officials Say", *The New York Times* (4 May 2022).
[3] See e.g. Permanent Representative of the United Kingdom to the UN, *Letter to the President of the Security Council*, UN Doc S/2015/688 (7 September 2015) (invoking self-defence against ISIL to justify the killing of Reyaad Khan). See also Kimberley N Trapp, "Can Non-State Actors Mount an Armed Attack?" in Marc Weller, Alexia Solomou & Jake William Rylatt, eds, *The Oxford Handbook of the Use of Force in International Law*, 1st ed (Oxford: Oxford University Press, 2015) 679 at 680 (the State practice of self-defence against NSAGs rejects the traditional LOAC requirement that the NSAG's actions be attributable to a State).
[4] Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Study on Targeted Killings*, HRC, 14th Sess, UN Doc A/HRC/14/24/Add.6 (2010) at para 1.
[5] See Agnès Callamard, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Use of Armed Drones for Targeted Killing*, HRC, 44th Sess, UN Doc A/HRC/44/38 (2020) (IHRL is the regime "most protective of victims" and "privileges individual rights over State rights" at para 43) [Callamard, *Armed Drones*]; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 6 (entered into force 23 March 1976).

individuals short-circuits both IHRL and IHL, in that the isolated use of force to "disrupt" a lone individual is intentionally shielded by the *lex specialis* of a legal regime – IHL – primarily designed to regulate high-intensity inter-State war.[6] This short-circuiting is exacerbated by hawkish legal doctrines that re-interpret IHL principles in order to systematically classify threatening individuals as:

1. combatants in a low-level IAC (aka a "mini-IAC"); or
2. civilians taking direct part in hostilities in a NIAC.

In practice, the result of this logic is indistinguishable from robust self-defence (aka self-defence targeting), a theory which rejects *jus in bello* and asserts that States acting in self-defence have the right to kill individuals regardless of their status under international law.[7] Robust self-defence represents the culmination of war's individualization, allowing States to identify an individual as threatening and kill them in a single leap of legal theory, undermining both ICCPR Art.6 and the fundamental prohibition against the use of force under Article 2(4) of the UN *Charter*.

This paper proceeds in three parts. Section I presents the precedent for targeted killing in armed conflict. Section II analyzes the 'doctrine' of robust self-defence and the LOAC's failure to restrict the proliferation of targeted killing. Firstly, as in the Soleimani case, a State may link an individual to an IAC by claiming that they orchestrated an armed attack. The LOAC restricts this argument by delimiting the time during which an armed attack is deemed to be ongoing, but – due to the low IAC threshold – fails to prevent States from triggering fresh mini-IACs. Secondly, in most counterterrorism cases a State will link an individual to a NIAC, which are relatively more common and feature armed attacks by definition. The LOAC restrains this argument with a high NIAC threshold, which requires warring NSAGs to satisfy the criteria of protracted violence and sufficient organisation. However, in practice this threshold does not safeguard individual rights due to a kaleidoscope of legal doctrines that have eroded these criteria, eased the ability of States to support a State engaged in a NIAC, and expanded the set of individuals said to be taking direct part in hostilities. Thirdly, as in the Khan case, where the putative armed conflict has lulled and no armed attack is ongoing, States can act in pre-emptive self-defence against individuals alleged to pose a threat of imminent armed attack. This final argument rejects the LOAC requirement that the necessity of self-defence be "instant [and] overwhelming".[8] Rather, "imminent" merely means that the window to "disrupt" an individual is closing.

Can the law of war's inadequacies be corrected by applying IHRL to targeted killing cases? Section III argues that recent efforts have not helped. The Human Rights Committee (HRC) asserts that IHL and IHRL are co-applicable to the wartime use of force, yet lead to divergent assessments of legality.[9] As such, the use of force in conformity with IHL will systematically violate the right to life. This legal uncertainty leaves States without proper

[6] See e.g. David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton: Princeton University Press, 2004) at 296-9 (IHL principles are notoriously open to interpretation).
[7] See Alston, *supra* note 4 at paras 42-3.
[8] RY Jennings, "The *Caroline* and McLeod Cases" (1938) 32:1 Am J Intl L 82 at 89.
[9] See Human Rights Committee, *General Comment No 36: Article 6, Right to Life*, HRC, 124th Sess, UN Doc CCPR/C/GC/36 (2019) at paras 64, 67 [*General Comment 36*].

guidance at a time when the proliferation of drone technology is making targeted killing ever more accessible, and when States are looking to expand the set of individuals liable to attack to include weapon designers and nuclear scientists.

I. The Legality of Targeted Killing

Although targeted killing has greatly enhanced the ability of States to engage in Article 51 self-defence directly against individuals, the deliberate use of lethal force against named persons is not itself a prohibited tactic under the LOAC. Contrary to the concepts of 'extrajudicial killing', 'summary execution' or 'assassination' with which it is often confused, targeted killing does not encompass the – illegal – use of lethal force for political purposes or by perfidious means, and is therefore lawful in the exceptional circumstance of armed conflict.[10] Whereas IHRL requires States to minimize the resort to killing, IHL permits States to kill combatants arbitrarily, to decline offering individuals the opportunity to surrender, to use lethal force prior to exhausting all other available means, and to kill bystanders proportionately to the military advantage gained.[11]

Targeted killing, like all uses of force *in bello*, is governed by the customary principles of military necessity, proportionality, and distinction. Necessity means attacks may only be directed against combatants to secure a military advantage. Proportionality requires that force be limited by the necessity that justifies it; attacks must not cause incidental injury to civilians "excessive in relation to the concrete and direct military advantage anticipated".[12] Distinction means attacks must distinguish (and be conducted by weapons capable of distinguishing) civilians and military objectives.[13] Given the lengthy premeditation typically involved in targeted killing operations, the customary principle of precaution in attack is also particularly relevant. Article 57 of Additional Protocol I requires that, in order to spare civilians of unintended injury, the military commanders and intelligence agents who plan and order attacks must exercise "basic due diligence" by taking all feasible precautions in choosing targets, in the choice of means and

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[10] See Alston, *supra* note 4 at para 10; Michael N Schmitt, "State Sponsored Assassination in International and Domestic Law" (1992) 17:2 Yale J Intl L 609 at 611-12 (1992). IACHR, *Report on the Situation of Human Rights in Chile*, OEA/Ser.L/V/II.66/doc.17 (1985) at para 29ff. See e.g. US Department of Defense, *Law of War Manual* (Washington, DC: Office of General Counsel, 2016) at 57, n 45; UK Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict* (Swindon, UK: Joint Doctrine and Concepts Centre, 2004) art 5.13. See also *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 art 37 (entered into force 7 December 1978) (prohibiting killing by resort to perfidy). See *contra* Asa Kasher & Amos Yadlin, "Assassination and Preventive Killing" (2005) 25:1 SAIS Rev Intl Affairs 41 at 41-4.

[11] See Nils Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008) at 51-60. But see Adil Ahmad Haque, "After War and Peace" in Dapo Akande, David Rodin & Jennifer Welsh, eds, *The Individualisation of War: Rights, Liability, and Accountability in Contemporary Armed Conflict* (Oxford University Press: forthcoming) at 11 (instead of a positive right, combatants enjoy only an immunity from prosecution for acts conforming with the LOAC).

[12] Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (New York: Cambridge University Press, 2005) at 46 (rule 14); see International Law Association, "Final Report on Aggression and the Use of Force" (2018), online (pdf) at 12; *Protocol I*, *supra* note 10, art 51(5)(b).

[13] See Henckaerts & Doswald-Beck, *supra* note 12 at 25 (rule 7); *Protocol I*, *supra* note 10, arts 48, 52(2).

methods of attack, and in the actual conduct of operations.[14] A "feasible" precaution is merely one that is practicable, given resource constraints, technological limits, and tactical concerns.[15] Targeting mistakes must be followed up with appropriate actions designed to prevent recurrence.

On the *ad bellum* side, Article 51 of the UN *Charter* leaves open the possibility that private individuals can trigger the right of self-defence, thus making them liable to the use of defensive force. Prior to the *Charter*, States invoked a right of self-defence against individuals in numerous cases, including the seizure of vessels engaged in smuggling.[16] Article 51 now limits this right by conditioning the recourse to self-defence on the occurrence of an armed attack. Neither the *Charter* nor treaty otherwise limit the "inherent right" of self-defence or restrict it to particular assailant; rather, the definition of "armed attack" is provided by customary law. As noted by the International Law Association, self-defence is a right "triggered by an act, rather than the actor".[17] Since 2001, the UN Security Council has repeatedly recognized that the right to self defence may be exercised in relation to terrorist acts committed by non-State groups.[18] Following 9/11, both NATO and the Organization of American States invoked their collective security arrangements, even though both organizations previously required an armed attack attributable to a State to trigger the use of force in self-defence.[19] At that time, the international community viewed al-Qaeda and the Taliban as legitimate targets. More recently, the States of the Global Coalition against Daesh have engaged in collective self-defence against Daesh in Iraq and Syria. It follows that a sufficiently grave terror attack launched by even a single individual may amount to an armed attack.[20]

The contrary view expressed by the ICJ in the *Wall* Advisory Opinion in 2004, namely that Article 51 requires an armed attack by one State against another State, has been sharply criticized as unrealistic, poorly reasoned, and contrary to State practice.[21] Indeed, the ICJ only distinguished the facts of the *Wall* case from the 9/11 attacks on the basis that Israel exercised control over the Occupied Palestinian Territory. But this distinction is itself unclear, given that the 9/11 attackers resided within the US and seized aircraft there (though they received training abroad). In *Armed Activities*, the ICJ did not find that attacks by anti-Ugandan rebels were attributable to the DRC, and instead held that Uganda's military had used supposedly defensive force against DRC territory far removed from the border regions in which anti-Ugandan rebels

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[14] See *Protocol I*, *supra* note 10, art 57; Henckaerts & Doswald-Beck, *supra* note 12 at 51 (rule 15); Asaf Lubin, "The Reasonable Intelligence Agency" (2022) 47 Yale J Intl L 119 at 133.
[15] Lubin, *supra* note 14 at 133.
[16] See Humphrey Waldock, "The Regulation of the Use of Force by Individual States in International Law" in *Collected Courses of the Hague Academy of International Law*, vol 81 (Brill, 1952) 451 at 464-6.
[17] International Law Association, *supra* note 12 at 15, fn 95.
[18] See UNSC Res 1368, UNSCOR, 2001, UN Doc S/Res/1368 (2001) (regarding the 9/11 attacks); UNSCOR, 61st Year, 5489th Mtg, UN Doc S/PV.5489 (2006) [provisional] (a majority of UNSC members recognized the right of Israel to defend itself against non-State actors in Lebanon); UNSC Res 2249, UNSCOR, 2015, UN Doc S/Res/2249 (2015) (regarding the threat posed by ISIL).
[19] See Trapp, *supra* note 3 at 692.
[20] See International Law Association, *supra* note 12 at 14.
[21] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136 at para 139 [*Wall*]; see *contra* Elizabeth Wilmshurst, "Principles of International Law on the Use of Force by States in Self-Defence" (October 2005), online (pdf): *Chatham House* [ILP WP 05/01] (surveying experts); see also Trapp, *supra* note 3.

operated.[22] This echoed the earlier *Nicaragua* case, where the Court held that the US-supported Contras had primarily attacked the Nicaraguan State rather than the independent rebels operating against El-Salvador.[23] Given its finding, the Court in *Armed Activities* declined to address whether contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces. In light of recent developments in State practice and the accompanying *opinio juris*, the ICJ's restrictive reading of Article 51 should be understood as requiring that an armed attack be attributable to a State only if that State itself is to be targeted by the defensive use of force.[24]

Notwithstanding these developments in customary international law, the *locus classicus* of targeted killing (if indeed one exists) occurred in the pre-*Charter* era, in a context of prototypical inter-State war. The target was Admiral Isoroku Yamamoto, the architect of the Japanese attack on Pearl Harbour. In 1943, Yamamoto was on an inspection tour in the South Pacific hundreds of kilometres behind the frontline when his plane was intercepted and shot down by US aircraft, acting on intelligence from cracked Japanese naval codes.[25] The operation was not uncontroversial; the decision to hunt down Yamamoto may have involved presidential approval. John Paul Stevens, one of the codebreakers involved, would later opine that killing a particular individual was "a lot different than killing a soldier in battle and dealing with a statistic."[26] Intuitive moral unease is the common reaction to targeted killing operations. Given the secrecy surrounding targeting decisions and the general anonymity of wartime killing, the instinctive question is to ask *why* a particular individual was worth identifying and deliberately killing. The lower the apparent importance of a target, the more a targeted killing will seem intuitively suspicious.[27]

Yet Yamamoto was clearly an enemy combatant, and a high-ranking one at that.[28] Indeed, the idea that high-ranking combatants are always fair game under IHL and IHRL now seems to be widely accepted. Legal scholars have not objected to the targeted killing of Russian generals by Ukraine. Nor has the targeted killings of senior irregular combatants, namely the series of leaders of ISIL and al-Qaeda (most recently of Ayman al-Zawahiri in July 2022) prompted much criticism from the international community. Objections tend to focus on the targeting State's violation of a neutral State's sovereignty; recall for example the 2011 special forces raid that killed Osama Bin Laden in Pakistan. Thus targeted killing is perceived as emerging from the principle of relativity of rights – a measured balance between the host State's right of territorial integrity and the targeting State's right of self-defence – while the underlying legitimacy of

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[22] See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, [2005] ICJ Rep 168 at paras 81-6, 146 (regarding the need to attribute rebel attacks to the DRC) [*Armed Activities*].
[23] See *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, [1986] ICJ Rep 14 at para 156 [*Nicaragua*].
[24] See Trapp, *supra* note 3 at 689.
[25] See Craig Symonds, *World War II at Sea* (New York: Oxford University Press, 2018) at 410-4.
[26] Diane M Amann, "John Paul Stevens, Human Rights Judge" (2006) 74:4 Fordham L Rev 1569 at 1583.
[27] See e.g. Tamar Meisels & Jeremy Waldron, *Debating Targeted Killing: Counter-Terrorism or Extrajudicial Execution?* (New York: Oxford University Press, 2020) at 214-5.
[28] See also UK War Office, *The Law of War on Land being Part III of the Manual of Military Law*, art 115 (London: HM Stationery Office, 1958) (citing a 1943 raid on Rommel's HQ as lawful under the assassination ban).

targeted killing as the tactic of first resort in the Article 51 toolkit is slowly bolstered by State practice against rebels.

However, the breadth of the so-called 'Yamamoto precedent' should not be overstated. Speaking to the press on the day of the killing of General Soleimani, a senior US official claimed, "It's shooting down Yamamoto in 1942 [sic]."[29] This reasoning begs the question of whether an armed conflict already existed between the US and Iran.

II. Adequacies and Inadequacies of the Law of War

To come within the 'Yamamoto precedent' such that IHL applies, the targeting State must be engaged in an IAC or NIAC and must establish that the target is an enemy combatant or civilian directly participating in hostilities. Furthermore, given the general prohibition on the use of force under Article 2(4) of the UN *Charter*, the decision to prosecute an armed conflict must conform with *jus ad bellum* criteria, namely the just cause of self-defence against an (imminent) "armed attack". Although no exact definition exists, an armed attack clearly involves violence of a gravity and severity greater than the use of force.[30] Importantly, this reveals a gap between the definition of an armed attack, triggering the right to self-defence, and that of an armed conflict, triggering the application of IHL.[31] This gap results in the possibility of a low-level IAC where none of the belligerents are clearly authorized to use defensive force. Hereinafter, the term "mini-IAC" is used to refer to an IAC (typically brief in duration) that involves uses of force not intense enough to clearly amount to armed attacks.

Tying the Individual to a mini-IAC

Whether ongoing low-level violence constitutes an armed conflict is a threshold question. For inter-State violence the threshold is minimal: any resort to hostile armed force between States triggers an IAC. This is indicated by a purposive reading of Common Article 2, which provides that the Geneva Conventions "apply to all cases of declared war or of *any other armed conflict*" [emphasis added] between two or more States.[32] An IAC arises whether or not the concerned States recognize the state of belligerency. In his commentary, Pictet stated that:

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[29] "Senior State Department Officials on the Situation in Iraq" (3 January 2020), online: *Office of the Spokesperson*. See also Harold Hongju Koh, "The Obama Administration and International Law" (Address delivered at the Annual Meeting of the American Society of International Law, 25 March 2010).

[30] See *Nicaragua*, *supra* note 23 (an armed attack is "the most grave form of the use of force", contrary to "mere frontier incidents" at paras 191, 195); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226 (Article 51 applies "regardless of the weapons employed." at para 39) [*Nuclear Weapons*] ; Yoram Dinstein, *War, Aggression, and Self-Defence*, 5th ed (New York: Cambridge University Press, 2012) at 196 (only lethal cyber activities amount to an armed attack). See *contra Oil Platforms (Islamic Republic of Iran v. United States of America)*, [2003] ICJ Rep 161 ("the mining of a single military vessel might [trigger the self-defence right]" at para 72) [*Oil Platforms*].

[31] See Laurie R Blank, "Irreconcilable Differences: The Thresholds for Armed Attack and International Armed Conflict" (2020) 96:1 Notre Dame L Rev 249 at 278-82. But see Dinstein, *supra* note 30 (the gap is "quite narrow", given that States violating Article 2(4) have "very little effective protection" at 193).

[32] *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 UNTS 31 art 2 [*First Geneva Convention*].

> Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2 […]. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to the human person as such is not measured by the number of victims.[33]

As such, a minor skirmish between the armed forces of two States or the capture of a single soldier are sufficient to trigger an IAC. Indeed, pursuant to the "first shot" doctrine, any unconsented-to military operations by one State in the territory of another State amount to an IAC – even in the absence of reciprocal fighting. This functional approach ensures that the key protections of IHL are always applicable to protect the victims of inter-State violence. For instance, the First Geneva Convention provides that captured combatants are automatically afforded prisoner-of-war status and that wounded combatants are to be treated and have their identity recorded.[34] On the other hand, some individuals may see their rights reduced by the application of IHL. Notably, Additional Protocol I permits military operations to kill civilians and destroy civilian objects incidentally, where this collateral damage is not disproportionate to the concrete and direct military advantage anticipated.[35] Although belligerents are obliged to take feasible precautions to remove the civilian population under their control from the vicinity of military objectives, there is no such obligation on individual civilians to remove themselves.[36] Thus IHL expressly envisages the arbitrary killing of civilians on the basis of their physical proximity to military objectives.

Consider the targeted killing of General Qasem Soleimani by an American drone strike on 3 January 2020. This strike killed nine individuals besides Soleimani, including five Iraqis. Given this incidental loss of life, the US was keen to have the IHL regime apply (this analysis sets aside the violation of Iraq's sovereignty). In its brief Article 51 submission to the UN Security Council, the US argued that it acted in response to an "escalating series of armed attacks in recent months" by Iran and Iran-backed militias against US forces in the Middle East.[37] This language echoes the "accumulation of events" doctrine (discussed below), though the facts show that only two principal incidents of reciprocal violence occurred prior to the strike. On 19 June 2019, Iran shot down a US Navy surveillance drone in the Strait of Hormuz, to which the US responded with a cyberattack that disabled Iranian weapons systems. Months later, on 27 December 2019, Kata'ib Hizballah, one of the Iran-backed militias in Iraq, launched a rocket attack against a military base that killed a US contractor and injured four US soldiers. Two days later, the US replied with airstrikes against several Kata'ib Hizballah targets in Iraq and Syria, causing about 20 deaths, to which supporters of the militia responded by attacking the US embassy in Baghdad, damaging embassy property.[38] Did these incidents constitute an IAC? If so, did any use of force amount to an armed attack that could be tied to Soleimani?

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[33] Jean S Pictet, ed, *Commentary on the Geneva Conventions of 12 August 1949*, vol 1 (Geneva: ICRC, 1952) at 32.
[34] See *First Geneva Convention*, *supra* note 32, arts 4, 12, 16.
[35] See *Protocol I*, *supra* note 10, arts 51(5)(b), 57.
[36] *Ibid*, art 58(a).
[37] Permanent Representative of the United States to the UN, *Letter to the President of the Security Council*, UN Doc S/2020/20 (8 January 2020).
[38] See Olivier Corten et al, "The Crisis Between Iran, Iraq and the United States in January 2020: What Does International Law Say?" (15 January 2020), online (pdf): *Centre de droit international* at 8.

Given the low IAC threshold, the Geneva Academy concluded that Iran and the US were engaged in an IAC in June 2019.[39] Indeed, the US cyber-attack alone may have been sufficient to trigger an armed conflict.[40] This conflict was a mini-IAC, given its brief duration and the fact that the damage was purely material, rather than involving the loss of life. Whether a second Iran-US IAC occurred in December 2019 is significantly less clear, since such a finding requires attributing the actions of Iran-backed NSAGs to the State of Iran. Recall that Kata'ib Hizballah's armed attack must have been attributable to Iran if Iran itself was to be subject to the defensive use of force by the US. Pursuant to the effective control test, a State can only be deemed responsible for the acts of proxy forces that it directs or commands.[41] Where a State does not exercise such a high degree of operational control, even the preponderant provision of financial and/or material support is insufficient for attribution.[42] However, the ICJ has also confusingly suggested that the less restrictive overall control test may be suitable for the classification (but not attribution) of a situation of armed conflict under IHL, which may result in cases being governed by the law of IACs but not being attributable to a State.[43] On the facts, Kata'ib Hizballah was not only dependent on Iranian support but had openly pledged loyalty to Iran and regularly met with Soleimani (the group's Iraqi leader was among those killed by the drone strike). Iranian advisors also helped the group develop and manufacture weapons. Although this suggests a relationship greater than a mere dependency on material support, the US adduced no evidence of Iranian command and control activities in its Article 51 submission. Thus, although the December 2019 rocket attack may well have amounted to an armed attack, it cannot be said that Iran ordered the attack. As such, there cannot have been an ongoing Iran-US IAC in early January 2020, ruling out the possibility that the US acted in self-defence against an Iranian armed attack.

Even if, *arguendo*, the rocket attack launched by Kata'ib Hizballah was attributable to Iran, the US would have had to surmount another legal safeguard: the LOAC delimits the duration of an IAC depending on the extent of the violence in question. Recall that US forces were attacked on 27 December and the US responded with airstrikes on 29 December – yet the targeted killing of Soleimani occurred on 3 January. As a general rule, an IAC only terminates when there is no real likelihood that hostilities will resume; a relatively stable and permanent peace is required. As Milanovic explains, "it would be both impractical and would open the door to abuse to treat every lull in the fighting as an end to an IAC and each resumption of combat as

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[39] See Miloš Hrnjaz, "The War Report: The United States of America and the Islamic Republic of Iran: An International Armed Conflict of Low Intensity" (December 2019), online (pdf): *Geneva Academy* at 2, 5-6.
[40] *Ibid* at 6; see Tristan Ferraro & Lindsey Cameron, "Article 2: Application of the Convention" in *Commentary on the First Geneva Convention*, 2nd ed (Geneva: ICRC, 2016) at paras 253-6.
[41] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, HRC, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) 59, art 8 [*Draft Articles*].
[42] See *Nicaragua*, *supra* note 23 at para 115 (effective control is more than "general control" by a State over a highly dependent NSAG). See *contra Prosecutor v Duško Tadić*, IT-94-1-A, Judgement (15 July 1999) at paras 120, 122, 131 (ICTY, Appeals Chamber) (establishing the "overall control" test, satisfied where a State coordinates or helps in the general planning of a group's military activity).
[43] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, [2007] ICJ Rep 43 at para 404.

the start of a new one".[44] In *Gotovina*, the ICTY warned that, once the LAOC has become applicable, "one should not lightly conclude that its applicability ceases"; such a "revolving door" approach to the LOAC would cause considerable legal uncertainty for conflict participants.[45] However, an open-ended approach is not appropriate in every situation. The ICRC specifies that, in situations where belligerent States are clearly no longer involved in armed confrontation, such as where an IAC consists of sporadic and temporary violent incidents, IHL will simply cease to apply "once the conditions that triggered its application in the first place no longer exist".[46] In the present case, the last violent incident in the series – and thus the IAC itself – had already ended when the US decided to target Soleimani. Similarly, once an armed attack is clearly over, "the legal 'clock' resets" and evidence of a further imminent attack is required for lawful self-defence.[47] Thus the retaliatory barrage of ballistic missiles launched by Iran on 8 January, five days after Soleimani's death, was itself an unlawful breach of Article 2(4). This assessment was endorsed by the UN Special Rapporteur, who stated that proof of a further imminent attack would be necessary in order to avoid blurring the distinction between *jus ad bellum* and *jus in bello*.[48]

Therefore, although the gap between the IAC and armed attack thresholds means that IHL may apply even before Article 51 is triggered, the LOAC adequately mitigates the risk that States will succeed in justifying targeted killing by exploiting an *ongoing* mini-IAC. During a series of discrete and sporadic violent incidents – a situation often euphemistically described as a "shadow war" or as a period of "heightened tensions" – the resort to self-defence (and the attendant danger of an escalating retaliatory cycle) can be restricted by sharply delimiting the duration of each use of force, especially where the use of force in question amounts to an armed attack. An armed attack is not ongoing merely because a wider IAC has yet to terminate, and a mini-IAC can itself quickly terminate for want of attacks. Indeed, barring an exceptional situation, it seems that a mini-IAC will typically terminate in a mere matter of hours. In addition, if this strict temporal aspect of the *jus ad bellum* is satisfied, the criterion of military necessity is a final safeguard for the targeted individual. For instance, the military necessity of targeting Soleimani in January was undermined by the fact that the US had already responded to the Kata'ib Hizballah rocket attack with airstrikes in late December.[49] Nor did the intervening damage to the property of the US embassy in Baghdad constitute a fresh attack giving rise to the *jus in bello* necessity for targeting Soleimani.[50] Similarly, it would not have been necessary for US forces to target Soleimani in June 2019, given that the destruction of a drone is a materiel loss lacking the gravity of an armed attack. Indeed, since the *jus ad bellum* necessity of

[44] Marko Milanovic, "The End of Application of International Humanitarian Law" (2014) 96:893 Intl Rev Red Cross 163 at 171.
[45] *Prosecutor v Ante Gotovina et al*, IT-06-90-T, Judgement, vol 2 (15 April 2011) at para 1694 (ICTY, Trial Chamber).
[46] Tristan Ferraro & Lindsey Cameron, *supra* note 40 at para 281.
[47] Adil Ahmad Haque, "U.S. Legal Defense of the Soleimani Strike at the United Nations: A Critical Assessment" (10 January 2020), online: *Just Security*.
[48] See Agnès Callamard, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Annex*, HRC, 44th Sess, Annex, UN Doc A/HRC/44/38 (2020) 23 at para 63 [Callamard, *Annex*].
[49] See Corten et al, *supra* note 38 at 7-8.
[50] See e.g. *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, [1980] ICJ Rep 3 at paras 57, 64, 91 (embassies can be the object of an armed attack).

self-defence requires that "no realistic alternative means of redress is available" to the State, a lethal response may have been unnecessary even if Iran had downed a manned US Navy aircraft rather than a drone.[51]

Yet these safeguards struggle to address a key element of the retaliatory cycle – the first decision to use force. There remains a risk that States will use force in order to trigger a fresh IAC, thus benefiting from IHL even where the *jus ad bellum* criteria are not clearly satisfied. Pursuant to the traditional "first shot" doctrine, even a single bloodless cyberattack conducted by a civilian agency may trigger a mini-IAC.[52] As such, the co-application of IHRL is required to prevent States from undertaking targeted killings where no armed attack has yet occurred. In the NIAC context, where armed attacks occur by definition, the LOAC problem instead manifests itself in the form of non-belligerent States targeting individuals who merely "enable" armed attacks by others.

Tying the Individual to a NIAC

At first glance, the NIAC legal framework makes it relatively harder for States to connect an individual to an armed conflict. The NIAC threshold is higher than the IAC threshold, though this is not stated by the Geneva Conventions, which do not define a "conflict not of an international character".[53] Additional Protocol II simply states that internal disturbances and tensions such as riots and "isolated and sporadic acts of violence" do not amount to armed conflict.[54] Per the ICTY's *Tadić* formula, a NIAC exists whenever there is "protracted armed violence between government authorities and organized armed groups or between such groups within a State."[55] In practice, the outbreak of intense violence may itself indicate that a NSAG satisfies the required degree of organization.[56] In unclear cases, ICTY jurisprudence lists factors to be used to determine whether a NSAG meets the criteria of (1) protracted armed violence, and (2) organisation. Regarding the organisation criterion, relevant factors include the group's command structures and disciplinary mechanisms; logistical and operational capacity; and ability to speak with one voice.[57] Together, these factors are designed to ensure that the NSAG is capable of implementing IHL. Regarding the armed violence criterion, relevant factors include the duration, frequency, and extent of violent incidents; the number of irregular combatants, refugees, and casualties; and the reaction of the government and international community.[58]

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[51] Dinstein, *supra* note 30 at 209-10.
[52] See Tristan Ferraro & Lindsey Cameron, *supra* note 40 at para 255 (there is already a consensus among scholars that cyber operations having similar effects to "classic kinetic operations" amount to an IAC).
[53] *First Geneva Convention*, *supra* note 32 art 3.
[54] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609, art 1(2) (entered into force 7 December 1978). See also *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002), art 8(2)(f).
[55] See *Prosecutor v Duško Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) at para 70 (ICTY, Appeals Chamber).
[56] See Lindsey Cameron et al, "Article 3: Conflicts Not of an International Character" in *Commentary on the First Geneva Convention*, *supra* note 40, at paras 378, 434.
[57] See *Prosecutor v Ramush Haradinaj*, IT-04-84-T, Judgment (3 April 2008) at para 60 (ICTY, Trial Chamber) [*Haradinaj*].
[58] See *Prosecutor v Ljube Boškoski*, IT-04-82-T, Judgment (10 July 2008) at para 177 (ICTY, Trial Chamber).

Thus, since even the repeated use of lethal force is potentially insufficient to trigger a NIAC, the threshold is clearly higher than the threshold for an armed attack. Unlike in the IAC case, here there is no *jus ad bellum*-IHL gap open to abuse by the "first shot" doctrine. This remains true even for isolated incidents, which would have to be of exceptional gravity in order to demand the application of IHL relative to NIACs.[59]

In reality, the higher NIAC threshold does not function as a strong safeguard for individual rights due to a kaleidoscope of legal doctrines that have eroded the criteria of armed violence and organization; allowed States to join pre-existing NIACs simply by supporting a belligerent State; and reduced the threshold at which an individual is deemed to be taking direct part in hostilities. In addition, the next subsection addresses how NIACs are susceptible to State arguments that an individual poses an "imminent" threat of armed attack, which allows the State to re-engage in fighting even when too much time has passed since the last incident of violence.

Firstly, the accumulation of events doctrine (aka *Nadelstichtaktik* or "needle-prick" theory) has undercut the violence criterion. Given the armed attack threshold, mere uses of force may leave States without effective protection under Article 51. The accumulation of events doctrine addresses this issue by holding that incidents of violence "linked in time, source and cause" may qualitatively amount to an armed attack.[60] This not only permits self-defence, but allows defensive force to be proportional to the violence as a whole. ICJ jurisprudence and State practice generally accept that a series of limited attacks can constitute an armed attack when treated holistically.[61] For instance, the ICJ's *Nicaragua* decision considered whether cross-border raids could "singly or collectively" amount to an armed attack.[62] The analysis seeks to determine whether when attacks are conducted as part of a concerted pattern of activity or a "continuous, overall plan of attack purposely relying on numerous small raids".[63] Such a reference to planning (the *animus aggressionis*) indicates that transforming uses of force into an armed attack does not just trigger self-defence, but may also generate a new NIAC. Indeed, although the accumulation of events doctrine is applicable to all armed conflicts, it is more susceptible to abuse in a NIAC context, given that irregular combatants frequently rely on hit-and-run tactics. Furthermore, the attribution of attacks is far more difficult when faced with multiple decentralized NSAGs versus few States.[64] Unless States scrupulously identify successive attacks and provide evidence that

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[59] See Melzer, *Targeted Killing*, *supra* note 11 at 256-7; see e.g. *Juan Carlos Abella v. Argentina* (1997), Inter-Am Comm HR, No 55/97 at paras 154-6, *Annual Report of the Inter-American Commission on Human Rights: 1997*, OEA/Ser.L/V/II.98/doc.6 (1998) [*Abella*] (IHL relating to internal hostilities was applied due to the intensity of the fighting, the insurgents' high degree of military organization, and the direct involvement of State armed forces).

[60] Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Leiden: Cambridge University Press, 2010) at 168.

[61] *Ibid* at 171-2 (finding significant State practice in favor of the accumulation of events doctrine). See *Nicaragua*, *supra* note 23 at para 292 (considering attacks as a whole); *Armed Activities*, *supra* note 22 at para 146 (considering whether attacks "could be regarded as cumulative in character"); *Oil Platforms*, *supra* note 30 at para 64 (dealing with "a series of attacks"); *Legality of Use of Force (Yugoslavia v. Belgium)*, Order of 2 June 1999, [1999] ICJ Rep 124 at para 28 (finding that the dispute regarded the legality of NATO bombings "taken as a whole").

[62] *Nicaragua*, *supra* note 23 at para 231.

[63] See Daniel Bethlehem, "Self-Defence Against an Imminent or Actual Armed Attack by Nonstate Actors" (2012) 106:4 Am J Intl L 769 at 774-6 (principle 4). Ruys, *supra* note 60 at 168.

[64] See e.g. *Oil Platforms*, *supra* note 30 at para 55ff (addressing the challenge of attributing attacks to a State when non-State groups are fighting in close proximity).

they are sufficiently interlinked, then there remains a real risk that several attacks of uncertain provenance will be amalgamated and attributed to a NSAG with the intent to generate an armed attack of sufficiently grave violence to both quickly trigger a NIAC and justify an otherwise disproportionate response.[65] Once under the cover of IHL, the State could eliminate alleged irregular combatants by invoking Article 51 self-defence against the imminent threat of a further armed attack (discussed below). This risk is exacerbated by the pragmatic consideration that an armed group will often fail to meet the requisite degree of organization when violence first breaks out, further opacifying the already complex attribution problem.[66] The ICRC, in recognition of the fact that NSAGs typically feature a horizontally decentralized power structure, rather than the relatively rigid top-down hierarchy typical of State armed forces, notes only that "some degree of organization" is required.[67]

Secondly, despite the recent attention on mini-IACs prompted by the killing of Soleimani, internal and cross-border NIACs are currently far more common and thus more readily exploited. Of the examples of targeted killing listed in the 2010 report of the UN Special Rapporteur, every instance occurred in a NIAC, namely between Russia and Chechen rebels; the US and al-Qaeda; Sri Lanka and the Tamil Tigers; and Israel and Hamas.[68] In 2020, the Rapporteur cited NIACs between Turkey and the PKK; Nigeria and Boko Haram; Pakistan and the Taliban; and Iraq and ISIL.[69] This multiplicity of conflicts gives non-belligerent States ample opportunity to justify a targeted killing by forum-shopping via Article 51 collective self-defence.[70] Furthermore, a State can rely on the ICRC's recently developed "support-based approach" to become a new party to a pre-existing NIAC simply by backing a belligerent. [71] The intervening State can provide support of its own accord, or can do as part of a coalition, international organization or peacekeeping force (e.g. as a troop-contributing country). Crucially, this approach triggers the application of IHL to the forces of the supporting State, even where the armed violence criterion is not yet satisfied as between the supporting State and its NSAG adversary.[72] Instead of engaging in reciprocal fighting, a supporting State need only perform an act designed to directly impair the military capabilities of the adversary, such as transporting troops or refueling aircraft. If the resulting impairment is not substantial, this act may need to be undertaken repeatedly. This ensures that protections of IHL apply to all military operations conducted by peacekeepers, but also allows a supporting State to benefit from IHL even without having suffered an armed attack (or series of attacks) which would otherwise be prerequisite to joining a NIAC. In practice, this

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[65] See Ruys, *supra* note 60 at 168ff. See also *Haradinaj*, *supra* note 57 ("protracted armed violence" refers "more to the intensity of the armed violence than to its duration" at para 49).
[66] See Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, 1st ed (Oxford: Oxford University Press, 2012) at 172-4.
[67] Yves Sandoz, Christophe Swinarski & Bruno Zimmermann, eds, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987) at 1352.
[68] See Alston, *supra* note 4 at para 7.
[69] See Callamard, *Armed Drones*, *supra* note 5 at para 8.
[70] See *Nicaragua*, *supra* note 23 at para 199 (for collective self-defence, a State must declare itself the victim of an armed attack and request help).
[71] Tristan Ferraro, "The Applicability and Application of International Humanitarian Law to Multinational Forces" (2013) 95:891-892 Intl Rev Red Cross 561 at 583-7. See also See *Draft Articles*, *supra* note 41, art 6 (States can avoid international responsibility by placing their forces at the disposal of another State).
[72] See Ferraro, *supra* note 71 at 584.

means States can dispense with the need to collect evidence of an imminent armed attack. Once the territorial State has consented to the provision of support, the intervening State can simply decide to launch extraterritorial attacks against 'terrorist organizations' and immediately proceed with airstrikes.

Thirdly, some influential States have expanded the bases on which an individual is liable to legitimate attack *in bello*, shifting the boundary in the combatant-civilian binary on which the crucial principle of distinction rests. In an IAC, pursuant to Additional Protocol I, combatants have the right to participate directly in hostilities, but are obliged to distinguish themselves from the civilian population by carrying their arms openly during each military engagement and preparatory deployment.[73] As such, combatants may be targeted at any time and place, subject to the IHL rules of necessity and proportionality, whereas civilians may exceptionally be targeted "*for such time* as they take a direct part in hostilities" [emphasis added].[74] In contrast, NSAGs are not constituted by combatants, making the IHL rules governing NIACs far more uncertain.[75] The ICRC explains that individuals may become liable to attack in one of two temporally distinct ways:

1. Members of a NSAG cease to be civilians for as long as their continuous function is to take a direct part in hostilities (aka "continuous combat function"). These members are irregular combatants, targetable like combatants.[76]
2. Civilians may also lose their protection against direct attack, but only for the duration of each act amounting to direct participation in hostilities. Each act must (i) be likely to harm military operations or civilians, (ii) cause this harm directly, and (iii) be designed to support a party to the conflict.[77]

The latter test has prompted criticisms of a legal whack-a-mole (aka the "revolving door" theory) caused by terrorists only briefly losing their civilian status when in the midst of launching an attack and then regaining non-combatant immunity immediately upon laying down their arms.[78] Unlike in the case of soldiers, it may be impossible to discern when an irregular combatant has 'retired' from service. But these low-level armed civilians are not likely to be candidates for targeted killing. More fundamentally, the notion of "direct part" is often considered too restrictive where it excludes NSAG members who plan and/or direct attacks without themselves

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[73] See *Protocol I*, *supra* note 10, arts 43-44.
[74] *Ibid*, arts 50(1), 51 (in cases of doubt, there is a presumption of civilian status).
[75] See e.g. *Protocol II*, *supra* note 54 (applicable only NIACs akin to traditional civil wars).
[76] See Nils Melzer, ed, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva: ICRC, 2009) at 34 (this excludes individuals with exclusively political or admin functions); Nils Melzer, "Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities" (2010) 42:3 New York J Intl L & Politics 831 (an NSAG "can be limited to those persons who represent the functional equivalent of 'combatants' in [an IAC]" at 850).
[77] See Melzer, *Interpretive Guidance*, *supra* note 76 at 16-17 (this includes individuals, like reservists, who exercise a combat function on a "merely spontaneous, sporadic or unorganized basis" at 25).
[78] See David Kretzmer, "Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?" (2005) 16:2 Eur J Intl L 171 at 193; Mark Maxwell, "Rebutting the Civilian Presumption: Playing Whack-A-Mole Without a Mallet?" in Claire Oakes Finkelstein, Jens David Ohlin & Andrew Altman, eds, *Targeted Killings: Law and Morality in an Asymmetrical World*, 1st ed (Oxford: Oxford University Press, 2012) 31 at 46.

being armed.[79] In the words of Kenneth Watkin, "It is not just the fighters with weapons in their hands that pose a threat."[80] For instance, a strict reading of the direct participation standard would render the targeted killing of Osama bin Laden unlawful under IHL and IHRL, given that he was unarmed at the time, was not given a chance to surrender, probably had little control over al-Qaeda operations outside of Pakistan, and given that the raid was not described by the US as being necessary to prevent a known (imminent) armed attack.[81] Given the unappealing possibility that the self-declared civilian leadership of terror groups might be protected from direct attack, legal experts have interpreted the "continuous combat function" to include individuals who enable NSAGs to engage in hostilities via their functional membership in the group.[82] This is illustrated by the so-called "Syrian Cook Question" reportedly posed by Israel's Military Advocate General:

> If Israel were in a normal state of war with Syria, any Syrian combatant could be killed legitimately, even an army cook in a rear echelon. By that standard, [in the Israel-Palestine conflict] any person assisting Hamas would qualify as a target, too. This might potentially include woman who washed a suicide bomber's clothes before he set out on his mission or a taxi driver who knowingly took activists from one place to another. [83]

Predictably, this logic – though theoretically sound – has caused an overcorrection in the practice of targeted killing. During the War in Afghanistan, US special forces targeted individuals based on a classified list that included Taliban-linked drug lords as well as "bombmakers, commanders, financiers, people who coordinate the weapons transport and even [public relations] people."[84] Israel, which has openly pursued a targeting killing policy since 2000, considers people take direct part in hostilities when they recruit attackers; lend crucial funds; prepare devices for acts of terror or provide essential ingredients for such devices.[85] That is without addressing Israel's clandestine activities; in recent years, Mossad agents have reportedly killed aerospace and electrical engineers working for Hamas and – in the IAC context – a Syrian rocket scientist as well as the chief of Iran's nuclear program.[86] To the extent that this limited State practice has

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[79] See George P Fletcher, "The Indefinable Concept of Terrorism" (2006) 4:5 J Intl Crim Justice 894 at 898; Sandoz, *supra* note 67 at 618-19.
[80] Kenneth Watkin, "Humans in the Cross-Hairs: Targeting and Assassination in Contemporary Armed Conflict" in David Wippman & Matthew Evangelista, eds, *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts* (Ardsley, NY: Transnational, 2005) 137 at 147.
[81] See Nicholas Schmidle, "Getting Bin Laden", *The New Yorker* (1 August 2011) (describing the raid); Nelly Lahoud et al, "Letters from Abbottabad: Bin Ladin Sidelined?" (3 May 2012), online (pdf): *Combating Terrorism Center at West Point* (analyzing declassified documents).
[82] See Maxwell, *supra* note 78 at 55-58 (a useful interpretation should capture the conduct of al-Qaeda plotters like Anwar al-Awlaki); Jens David Ohlin, "Targeting Co-Belligerents" in *Targeted Killings*, *supra* note 78, 60 at 85-89.
[83] Ronen Bergman, *Rise and Kill First: The Secret History of Israel's Targeted Assassinations*, translated by Ronnie Hope (New York: Random House, 2018) at 510. See *contra* Melzer, "Keeping the Balance", *supra* note 76 (warning against overextending membership criteria "to include all persons accompanying or supporting [an NSAG]" at 850).
[84] US, Senate Committee on Foreign Relations, 111th Cong, *Afghanistan's Narco War: Breaking the Link Between Drug Traffickers and Insurgents* (S Rep No 111-29) (Washington, DC: US Government Printing Office, 2009).
[85] See Asa Kasher & Amos Yadlin, *supra* note 10 at 48.
[86] See also Bergman, *supra* note 83 at xix (Mossad has killed at least six Iranian scientists, mostly on their way to work in the morning).

already altered the direct participation standard, the change is the result of a Melian dialogue between States and is clearly not universalizable. States are unlikely to accept the exploitation of targeted killing by non-State adversaries, whether or not these adversaries abide by similar standards of proof and evidentiary certainty. For instance, States would unequivocally reject the idea that NSAGs could legitimately target employees in their defence industries.[87] Any such change to the LOAC must therefore be halted by the co-application of IHRL principles prohibiting arbitrary killing.

Imminence: A Poor Proxy for Necessity

Where a putative armed conflict has lulled such that an armed attack is not ongoing, States seeking to justify a targeted killing operation must rely on the notion of an imminent armed attack. As one Israeli officer said of a target, "He's not shooting at us yet, but he's on his way."[88] Contrary to what this quote might suggest, States rarely invoke pre-emptive self-defence under Article 51 in a vacuum; an imminent armed attack is typically preceded by other (armed) attacks. Indeed, the *Caroline* case – the *locus classicus* of the customary right of self-defence – illustrates this reality when viewed through the modern LOAC. On 7 December 1837, rebels in Upper Canada fought a minor battle with British forces. The rebels then retreated across the US border to an island in the Niagara River, from which they sporadically fired cannons at shipping in the river and where they were supplied, armed, and reinforced by the *Caroline* steamboat.[89] On 29 December, a British militia launched a nighttime raid across the border, destroying the steamboat with little loss of life. The British response can therefore be seen (1) as self-defence against ongoing attacks amounting to an armed attack pursuant to the accumulation of events doctrine; or (2) since an armed attack was not ongoing (recall the strict temporality assessment of the Soleimani case), the legal 'clock' may have reset, requiring the British to produce evidence of a fresh imminent attack. On the latter view, imminence is a useful tool for States looking to re-engage in a NIAC or mini-IAC where the latest armed attack is too ancient to give right to self-defence. However, States may abuse this tool to join a NIAC or trigger a fresh mini-IAC on the basis of flimsy evidence, pursuant to the hawkish doctrines that have diluted the concept of imminence into a poor proxy for necessity.

Indeed, some influential States have hollowed out the imminence test as a reaction to the novel challenges of the 'war on terror'. Rather than the classic test, pursuant to which the necessity of self-defence must be "instant, overwhelming, and leaving no choice of means, and no moment for deliberation", a 2011 DOJ white paper stated that an imminent threat does not require "clear evidence that a specific attack […] will take place in the *immediate future*"

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[87] See Jeremy Waldron, "Justifying Targeted Killing with a Neutral Principle?" in *Targeted Killings*, *supra* note 78, 112. See e.g. Tamar Meisels & Jeremy Waldron, *supra* note 27 at 112 (suggesting a hypothetical situation wherein Palestinian militants attack the buses collecting Israeli aerospace employees for work).
[88] Deborah Sontag, "Israelis Track Down and Kill a Fatah Commander", *New York Times* (10 November 2000).
[89] See Craig Forcese, *Destroying the Caroline: The Frontier Raid that Reshaped the Right to War* (Toronto: Irwin Law, 2018) at 19-21.

[emphasis added].[90] The white paper also quoted the UK Attorney-General, who in 2004 testified that the concept of an imminent attack "will develop to meet new circumstances and new threats".[91] Such statements indicate a shift away from a strict adherence to the temporal aspect of imminence. In 2012, Sir Daniel Bethlehem set out a multifaceted assessment of imminence.[92] The Bethlehem principles established that the concept of imminence is not just a matter of timing; rather, the concept reflects (a) the threat's nature and immediacy, as well as the anticipated attack's (b) probability, (c) link to a concerted pattern of ongoing armed activity (i.e. an accumulation of events), and (d) likely scale, including that of the resulting injury. The principles also incorporate a "window of opportunity" for the use of defensive force, namely (e) the likelihood that there will be other opportunities to undertake effective action in self-defence that may be expected to cause less serious collateral injury. The latter idea is controversial, given that assessments of likelihood – even if reasonable and objective – are difficult to reconcile with the fundamental notion of necessity. Self-defence must be the *only* available effective measure to prevent further attacks. If "specific evidence" of an upcoming attack is not required, the danger is that pre-emptive self-defence will quickly become preventive, relying on the "last opportunity to act" justification to unlawfully halt the development of a nebulous threat in the (distant) future. As a UN Panel noted in 2004, only by putting preventive military action before the UN Security Council can the norm of non-intervention be preserved.[93]

These developments culminated in the 2015 drone strike that killed Reyaad Khan, an ISIL recruiter and attack-planner, as well as two ISIL associates. This strike was the first targeted killing by the UK of a terrorist "outside participation in a military campaign", and consequently depended on several distortions of the LOAC.[94] Firstly, Iraq's appeal to the UN Security Council for military assistance and the resulting US-led Global Coalition against Daesh imply that the support-based approach triggered the application of IHL as between the UK and ISIL.[95] Thus the UK became a new party to the Iraq-ISIL NIAC and benefited from IHL even in the absence of an armed attack against itself. Secondly, regarding *jus ad bellum*, the UK claimed that Khan was linked to seven major terror plots in 2015 (since these plots were thwarted, the accumulation of events doctrine does not apply) and therefore posed an imminent threat of armed attack. However, no reasonable and objective evidence of this threat was shared, beyond a reference to the general risk that "the timescale between Khan contacting an operative, recruiting them and providing targets could be [short]".[96] Nor did it appear that the temporal aspect of imminence

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[90] Jennings, *supra* note 8 at 89; US Department of Justice, "White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force" (8 November 2011) at 7.
[91] UK, HL Deb (21 April 2004), vol 660, col 370 (Lord Goldsmith).
[92] See Daniel Bethlehem, "Self-Defence Against an Imminent or Actual Armed Attack by Nonstate Actors" (2012) 106:4 Am J Intl L 769 at 774-6 (principle 8). See also Wilmshurst, *supra* note 21 (many eminent international jurists emphasise that imminence should reflect the wider circumstances of the threat).
[93] High Level Panel on Threats, Challenges and Change, *Report, A More Secure World: Our Shared Responsibility*, 59th Sess, UN Doc A/59/565 (2004) at paras 190-1 (condemning the preventive self-defence of the 'Bush doctrine').
[94] UK, Intelligence and Security Committee of Parliament, *UK Lethal Drone Strikes in Syria* (HC 1152, 2017) at 1.
[95] *Ibid* (the UK cannot otherwise benefit from IHL simply by asserting that it "always adheres to [IHL] when applying military force" at 27). See UK, Joint Committee on Human Rights, *The Government's Policy on the Use of Drones for Targeted Killing* (HC 574 / HL Paper 141, 2016) at 57-9.
[96] *UK Lethal Drone Strikes*, *supra* note 94 at 9, 14. See also Joint Committee, *supra* note 95 at 44.

was the government's main source of concern. Indeed, a Parliamentary inquiry concluded that the issue of imminence "appears to centre [on a] concern that – due to gaps in coverage – a plot might go undetected", suggesting that the government had engaged in unlawful preventive self-defence by improperly reading an expanded concept of imminence into the principle of necessity.[97] Thirdly, regarding *jus in bello*, the UK implicitly relied on a broad definition of the "continuous combat function" to allow Khan to be targeted like a combatant. The inquiry noted that the threat posed by Khan "did not lie in him conducting his own attack"; rather, he was an "enabler" who recruited and encouraged individuals to conduct attacks, including by providing practical instructions on making improvised explosive devices and by indicating the dates and locations of public events to target.[98] Given that Khan did not carry arms, it remains an open question what conduct – if any – would have allowed him to reacquire non-combatant immunity and signal this status to targeting States. Taken together, these distortions of the LOAC amounted to robust self-defence that ignored IHRL and blurred *ad bellum* considerations into the determination of Khan's *in bello* status.

III. Co-Applying IHRL to Targeted Killing

The above analysis indicates that the law of war is not sufficient to restrict the proliferation of targeted killing. Two main problems stand out: (1) the very low IAC threshold and the support theory mean that States will routinely trigger the application of IHL even where the *jus ad bellum* is not clearly satisfied, and (2) a broad definition of "direct participation in hostilities" means that individuals are liable to attack *in bello* even when their function within an NSAG and/or role in an armed conflict is unclear or sporadic. Both of these problems are compounded by the dilution of the imminent armed attack test, making robust self-defence policies more attractive to States.

How can human rights law reaffirm individual rights where a State engages in robust self-defence or intentionally uses the LOAC regime to shield a marginal case of defensive targeted killing? In contrast to the LOAC, the basic protection afforded by Article 6 of the ICCPR is much less open to interpretation. In the words of the UN Human Rights Committee, the prohibition on the arbitrary deprivation of life essentially means that the "intentional taking of life by any means is permissible only if it is strictly necessary in order to protect life from an imminent threat."[99] The overarching trend in international jurisprudence holds that IHRL applies to the extraterritorial use of force by States, on the basis that the use of force constitutes an exercise of power and authority by the State over the targeted individual.[100] But notable

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[97] *UK Lethal Drone Strikes*, *supra* note 94 at 15. See also Callamard, *Armed Drones*, *supra* note 5 (an attack cannot be deemed imminent merely "if it is believed that a further delay in response would prevent the State under threat to defend itself" at para 54).

[98] *UK Lethal Drone Strikes*, *supra* note 94 at 9, 17.

[99] *General Comment 36*, *supra* note 9 at para 12.

[100] *Ibid* at para 63; Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, HRC, 80th Sess, UN Doc CCPR/C/21/Rev.1/Add.13 (2004).at para 10; *Wall*, *supra* note 21 at paras 107-11; *Franklin Guillermo Aisalla Molina (Ecuador v. Colombia)* (2010), Inter-Am Comm HR, No 112/10, *Annual Report of the IACHR: 2010*, OEA/Ser.L/V/II.140/doc.10 (2010) at para 98 [*Molina*];

exceptions to this trend exist. In the 2021 *Georgia v Russia (II)* case, the European Court of Human Rights (ECtHR) held that IHRL applies where troops exercise control over occupied territory or detained persons – but is substantively inapplicable during active hostilities, "in a context of chaos".[101] This decision has been maligned by scholars as arbitrarily reasoned and regressive. Indeed, the ECtHR itself seemed of two minds, finding that States, though not under a substantive duty to refrain from unjustified uses of lethal force, are nonetheless under a procedural duty to investigate potentially unlawful uses of force.

In contrast, the ICJ has consistently affirmed that the ICCPR is capable of extraterritorial application on a functional basis. Persons are subject to a State's jurisdiction for the purposes of the ICCPR when that State's military activities impact their "enjoyment of the right to life" in a "direct and reasonably foreseeable manner".[102] Furthermore, jurisprudence and legal doctrine hold that applying IHRL to a targeted killing does not entail the disapplication of IHL. A disapplication approach would entail losing the universal jurisdiction regime for war crimes and might also result in a legal "black hole", given that some States still object to applying IHRL extraterritorially.[103] Instead, barring derogations, both branches of international law co-apply.[104]

Jurisprudence

That IHL and IHRL are co-applicable to the wartime use of force was established when the ICJ abandoned the *lex specialis* doctrine first adopted in its *Nuclear Weapons* Advisory Opinion, pursuant to which compliance with IHL discharged IHRL obligations during armed conflict.[105] In legal interpretation, the *lex specialis* principle that the special law created for a particular situation should govern that situation, taking precedence over other legal regimes of more general scope. The co-applicability approach has been gaining favor since 1996. In a 1997 case regarding a NIAC triggered by a single armed attack, the Inter-American Commission on Human Rights (IACHR) held that the more detailed provisions of Additional Protocol II were the *lex specialis* vis a vis the ICCPR, but nonetheless decided to apply the higher standard of protection from each body of law in a complementary fashion.[106] The Inter-American Court of

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Armando Alejandre Jr et al (Cuba) (1999), Inter-Am Comm HR, No 86/99, *Annual Report of the IACHR: 1999*, OEA/Ser.L/V/II.106/doc.6 (1999) at para 23.

[101] *Georgia v. Russia (II)*, No 38263/08 (21 January 2021) at para 126 [*Georgia (II)*]. See also *Banković and others v. Belgium and others*, No 52207/99, [2001] XII ECHR 890 (holding that NATO airstrikes in Belgrade that killed 16 persons did not fall within the jurisdiction of the ECHR).

[102] See *Wall*, *supra* note 21 at paras 107-11. See also *Armed Activities*, *supra* note 22 at paras 216-7. *General Comment 36*, *supra* note 9 at para 63.

[103] Eliav Lieblich, "Targeted Killing of General Soleimani: Why the Laws of War Should Apply, and Why it Matters" (13 January 2020), online: *Just Security*. See e.g. Andrea Goia, "The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict" in Orna Ben-Naftali, ed, *International Humanitarian Law and International Human Rights Law* (New York: Oxford University Press, 2011) 201 at 209-11 (regarding the unclear extraterritorial application of the ECHR).

[104] See e.g. Haque, "After War and Peace", *supra* note 11 (in wartime, States can derogate from the ECHR "to the extent strictly required by the exigencies of the situation" at 9).

[105] See *Armed Activities*, *supra* note 22 at para 216. See *contra Nuclear Weapons*, *supra* note 30 at para 25; *Wall*, *supra* note 21 at para 106. But see Joint Committee, *supra* note 95 at 42 (the UK government recently relied on the doctrine); US Department of Defense, *supra* note 10, art 1.6.3.1 (subscribing to the doctrine).

[106] See *Abella*, *supra* note 59 at para 166; *American Convention on Human Rights*, 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978), art 29(b) (the "most-favorable-to-the-individual-clause").

Human Rights (IACtHR) has also decided cases of domestic armed conflict on the basis that the legal regime most protective of victims should apply.[107] However, in a more recent case, the IACtHR quite a different formulation akin to the systemic integration approach prescribed for use in treaty interpretation: IHL can serve "as a supplementary norm of interpretation" for IHRL provisions (and vice versa).[108] As discussed below, the normative value of human rights law is still reliant on a lack of putative armed conflict. Where an armed conflict is found, IHRL typically plays second fiddle to IHL.

The international court cases dealing with uses of force in the context of marginal NIACs have typically applied IHRL without serious regard for IHL principles.[109] In *McCann*, UK special forces had killed three members of the IRA in Gibraltar; the IRA members were unarmed but were suspected of carrying the detonator for a radio-controlled car bomb (a timer-controlled car bomb was later found in Spain). The ECtHR ruled that the use of lethal force was strictly proportionate to the legitimate aim of protecting persons against unlawful violence, but a narrow majority also held that the anti-terrorist operation as a whole violated the right to life because it was not planned or controlled such as to minimise the soldiers' recourse to lethal force.[110] In order to make these substantive obligations more effective in practice, the Court in *McCann* also invented a procedural obligation: States must investigate their potentially unlawful uses of lethal force (e.g. via an inquest that is extensive, independent, and public).[111] The Court did not address whether the bombing planned by the IRA extended the armed conflict in Northern Ireland to the territory of Gibraltar. This was despite the fact that the IRA claimed the three deceased as "volunteers on active service" and that the UK's intelligence assessments were largely informed by the IRA's use of increasingly sophisticated radio-controlled bombs in that conflict.[112] Similarly, in *Finogenov* the Court held that Russia's use of an incapacitating gas to end a hostage-taking by Chechen rebels in a Moscow theatre (killing 131 civilians and 40 rebels) was not disproportionate, but that Russia had violated the right to life by its "inadequate planning and conduct of the rescue operation" and by failing to conduct an effective investigation.[113] Again the Court did not consider the relevance of the armed conflict in Chechnya, nor the possibility that the theatre siege itself constituted an armed attack grave enough to trigger a fresh NIAC in Moscow.

In contrast, in the *Abella (La Tablada)* case, the IACHR held that an assault by 42 armed persons against the Tablada barracks in Buenos Aires – leading to 30 hours of combat – constituted an armed attack due to the assault's careful planning, coordination, and execution, as well as the choice to attack a military objective.[114] This armed attack triggered a NIAC between

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[107] See *Las Palmeras v. Colombia* (2001), Inter-Am Ct HR (Ser C) No. 90, *Annual Report of the IACtHR: 2012*, 1.
[108] See *Case of the Santo Domingo Massacre (Colombia)* (2012), Inter-Am Ct HR (Ser C) No. 259 at para 24, *Annual Report of the Inter-American Court of Human Rights: 2012*, 58; *Vienna Convention on the Law of Treaties*, 23 May 1969, UNTS 1155 (entered into force 27 January 1980), art.31(3)(c).
[109] See Goia, *supra* note 103 at 215-6 (despite being competent to do so, the ECtHR – unlike the IACHR – has rarely referred to IHL expressly).
[110] See *McCann and Others v. the United Kingdom* (1995), 324 ECHR (Ser A) 161 at paras 200, 213 [*McCann*].
[111] *Ibid* at para 159.
[112] Ian Jack, "Gibraltar" (24 October 1988), online: *Granta*; *ibid* at paras 189-90.
[113] *Finogenov and Others v. Russia*, No 18299/03 & 27311/03, [2011] VI ECHR 365 at paras 266, 282, 298.
[114] See *Abella*, *supra* note 59 at para 155.

the attacking rebels and the Argentinian military, leading to the application of Common Article 3 of the Geneva Conventions. As a result, the Commission found that the attackers had temporarily lost their IHRL protections regarding "precautions in attack and against […] indiscriminate or disproportionate attacks pertaining to peaceable civilians".[115] Rather, due to their hostile acts, the attackers became legitimate military targets under IHL and were "subject to direct *individualized* attack to the same extent as combatants" [emphasis added].[116] Thus the Commission seemed to accept the possibility of targeted killing when an individual assumes a combatant role by directly taking part in fighting, whether singly or in a group. Only once the attackers were captured did IHL and IHRL co-apply, namely regarding Argentina's inhumane treatment of captives. Argentina also failed to uphold its obligation to exhaustively investigate the serious allegations of human rights violations.[117]

Where a NIAC is in the phase of active hostilities, international courts have found human rights violations by implicitly applying IHL. Indeed, for the ECtHR, IHL may be the only source of norms, given its recent ruling that the applicability of IHRL to active hostilities is limited to the procedural obligation to investigate.[118] In the *Isayeva* case regarding Russia's bombing of a town occupied by Chechen rebels, the Court acknowledged that – given "the conflict in Chechnya at the relevant time" – Russia had the right to use military aviation and artillery against the rebels in order to protect persons, even though there was no evidence before the Court of a likely threat to Russian forces.[119] Rather than turning to the freestanding IHRL standard of necessity, the Court implicitly relied on the IHL principles of distinction, precaution, and proportionality. It concluded that Russia's use of very powerful bombs on the town and its lack of rules of engagement did not demonstrate the requisite care for civilians, violating the right to life (as did the failure to properly investigate).[120] Similarly, in the *Isayeva, Yusupova and Bazayeva* case regarding Russia's bombing of a civilian convoy, the Court's analysis proceeded on the assumption that the Russian military "reasonably considered that there was […] a risk of attack from illegal insurgents", and resorted to an air strike as a legitimate response.[121] Again the Court relied on IHL, namely the principle of precaution in attack, to find an IHRL violation. The latter approach to armed conflict was affirmed in the *Özkan* case, where the Court determined that Turkey's use of missiles, grenades, and mortars against a village occupied by PKK fighters was not disproportionate, given the ongoing "serious disturbances in south-east Turkey involving armed conflict".[122] Thus the *lex specialis* doctrine lives on in altered form: there is a quasi-presumption that the wartime use of force has a legitimate protective aim (i.e. that it is non-arbitrary under the ICCPR) and requires the use of heavy weapons. But this presumption does not extend to counterterrorism operations on territory under the State's effective control, no matter how serious the injury already caused by the non-State group.

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[115] *Ibid* at para 178.
[116] *Ibid*.
[117] *Ibid* at paras 234, 236.
[118] See *Georgia (II)*, *supra* note 101.
[119] *Isayeva v. Russia*, No 57950/00 (24 February 2005) at paras 180–1.
[120] See Goia, *supra* note 103 at 227-32.
[121] *Isayeva, Yusupova and Bazayeva v Russia*, Nos 57947/00, 57948/00 & 57949/00 (24 February 2005) at para 181.
[122] See *Ahmet Özkan and Others v. Turkey*, No 21689/93 (6 April 2004) at paras 305–6.

Targeted killing poses a particular challenge to the IHL-IHRL divide because operations are often undertaken extraterritorially; in situations that straddle the line between armed conflict and mere violent incidents; and against persons whose role in the fighting may be unclear. Cases of extraterritorial targeted killing may often lead to inter-State disputes of a kind not well suited to judicial resolution. For instance, in 2008 the Columbian military mounted an airstrike and ground incursion two kilometers within Ecuador in order to kill Raúl Reyes, a FARC leader. During this operation, one Ecuadorian citizen was allegedly extrajudicially executed. Following a diplomatic crisis, the IACHR ruled the dispute admissible by rejecting Colombia's argument that it had not exercised extraterritorial jurisdiction over the area and persons attacked.[123] Ultimately, the two States reached a friendly settlement involving "reparations and investment" along the border.[124]

National courts in Israel and Germany have dealt more closely with the practice of targeted killing, even as UK and US courts have denied justiciability on the basis of the "political questions" doctrine.[125] In 2006, the Israeli Supreme Court departed from the LOAC in an effort to regulate the government's targeted killing policy.[126] Unusually, the Court characterized the Israel-Palestine conflict as an IAC, rather than a NIAC, thus benefiting from a relatively stronger legal framework (only Common Article 3 of the Geneva Conventions and Additional Protocol II apply to NIACs) without having to decide the content of customary international law.[127] Such internationalization of conflict is possible under Additional Protocol I, but would require both a unilateral declaration on the part of the Palestinian people and ratification of the Protocol by Israel.[128] In addition, despite referring to IHL as the *lex specialis* applicable to armed conflict, the Court used IHRL principles (citing *McCann* in particular) in order to fill several "lacuna" regarding the wartime use of force against civilians taking direct part in hostilities, namely:

1. Even if Israeli forces had identified the civilian target as legitimate, they could not kill the person "if less harmful means can be employed".[129] Here, the Court referred to the principle of proportionality under Israel's domestic law (rather than IHL). The Court further noted that the alternative non-force means of arrest, investigation, and trial might be particularly practical in situations of belligerent occupation.[130]
2. After each targeted killing, there must be an independent investigation of the "precision of the identification of the target and the circumstances of the attack".[131] Investigating the use of force is the procedural element of the *McCann* protections.

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[123] See *Molina*, *supra* note 100 at paras 103, 107.
[124] *Franklin Guillermo Aisalla Molina (Ecuador v. Colombia)* (2013), Inter-Am Comm HR, No 96/13, *Annual Report of the Inter-American Commission on Human Rights: 2013*, OEA/Ser.L/V/II/doc.50 (2013) at paras 14, 15.
[125] See e.g. *QOTAO Khan v SS for Foreign and Commonwealth Affairs*, [2014] EWCA Civ 24; *Bin Ali Jaber v United States*, 861 F (3d) 241 (DC Cir 2017) (the counterpart to the Ramstein airbase case, *infra* n 86).
[126] See *The Public Committee Against Torture in Israel v The Government of Israel*, [2006] HCJ 769/02 (Israel) [*Public Committee*].
[127] *Ibid* at para 16ff.
[128] See *Protocol I*, *supra* note 10, arts 1(4), 96(3).
[129] *Public Committee*, *supra* note 126 at para 40.
[130] See *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287, art. 5 [*Fourth Geneva Convention*].
[131] *Public Committee*, *supra* note 126 at para 40.

Of these, only the investigation requirement is concordant with IHL. Customary international law already imposes an obligation on States to investigate and "repress" alleged grave IHL violations that amount to war crimes.[132] Furthermore, several articles of the Geneva Conventions contemplate an obligation to investigate and "suppress" all other IHL violations, meaning that States must adopt a range of administrative mechanisms other than the imposition of individual criminal liability.[133] Targeting mistakes are therefore not exempted from potential scrutiny. However, it remains that mistakes of fact that are both honest and reasonable (i.e. subjectively and objectively reasonable) may excuse a violation of humanitarian law.[134] This is also true under human rights law; *McCann* requires soldiers to "honestly believe" that lethal force was necessary, and that commanders plan and control the overall operation reasonably.[135] On the other hand, the *jus ad bellum* does not admit a mistake of fact doctrine; the necessity of resorting to defensive force is assessed in a "strict and objective" fashion, leaving no allowance for any "measure of discretion".[136] This would potentially make States more wary of resorting to force in cases of imminent armed attack. Even if violations of IHL and IHRL are excusable as long as soldiers and commanders demonstrated "essential care", States remain under the procedural obligation to take "appropriate actions" – including effective investigations – to prevent the recurrence of targeting mistakes and demonstrate genuine respect for the law.[137] In practice, investigations should be facilitated by the fact that targeted killing is typically preceded by extensive deliberation and often occurs outside of the "context of chaos" of active hostilities on the battlefield.

A minimal force requirement, on the other hand, goes to the very heart of the IHL-IHRL tension since, under the LOAC, the principle of last resort is part of the *jus ad bellum* necessity of self-defence – and not *jus in bello* determinations of military necessity.[138] Combatants, including irregulars, are liable to wholesale killing purely on the basis of their status. As such, if the targeted killing of an alleged irregular combatant causes no collateral injury, then concerns that the killing was disproportionate because nonlethal means were overlooked are better understood as going to the necessity of using lethal force on an individual whose combat function was uncertain. In 2019, the German Higher Administrative Court found that US drone operations launched from Ramstein airbase had likely violated the LOAC by engaging in unnecessary self-defence where the time and place of future armed attacks was unknown, as well

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[132] See Henckaerts & Doswald-Beck, *supra* note 12 at 607 (rule 158).
[133] See *First Geneva Convention*, *supra* note 32, art. 49; *Fourth Geneva Convention*, *supra* note 130, arts. 149(3), 146; *Protocol I*, *supra* note 10, art. 85.
[134] See Marko Milanovic, "Mistakes of Fact When Using Lethal Force in International Law: Part I" (14 January 2020), online: *EJIL: Talk!*. See also Lubin, *supra* note 14 at 136. See e.g. "Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia" (13 June 2000), online: *ICTY* (the bombing of the Djakovica Convoy was an honest mistake in that neither the aircrew nor their commanders displayed a sufficient "degree of recklessness in failing to take precautionary measures" at para 70; similarly, the first bombing of the train at Grdelica Gorge was an honest mistake, but the second may have indicated "an element of recklessness in the conduct of the [aircrew]" at para 62) ["Final Report to the Prosecutor"].
[135] *McCann*, *supra* note 110 at paras 194, 200.
[136] *Oil Platforms*, *supra* note 30 at para 73.
[137] *Central Front (Partial Award) (Ethiopia's Claim 2)*, XXVI Eritrea-Ethiopia Cl Trib Reps 155 (28 April 2004) at para 110.
[138] See Jens David Ohlin & Larry May, *Necessity in International Law*, (NY, Oxford University Press, 2016) at 116.

as by targeting civilian supporters of terrorist groups and former irregular combatants.[139] However, the Court also resurrected the *lex specialis* doctrine by asserting that any targeted killing that satisfies the LOAC cannot violate Article 6 of the ICCPR. As such, the Court could only conclude that the US had engaged in arbitrary killings by failing to establish an effective official mechanism to investigate any drone strikes alleged or suspected to be unjustified. Ultimately, this decision was itself overturned on the non-legal ground that Germany's relations with the US were sufficient to ensure that drone strikes out of Ramstein complied with international law.[140]

Contextual and Situational Analysis

The jurisprudence reveals a common theme across use of force cases: the IHRL standard of (absolute) necessity will likely be unrealistic "where the authorities had to act under tremendous time pressure and where their control of the situation was minimal."[141] A strict standard of minimal force is also challenging for soldiers to apply and judicial bodies to adjudicate, given that judges should avoid merely second-guessing States on the basis of speculation or hindsight.[142] However, the extent to which IHRL is complemented or informed by military necessity remains an uncertain exercise performed case-by-case. For instance, the UN Special Rapporteur questioned whether IHL was the best "fit" for the Soleimani strike, given its non-battlefield setting, and suggested that additional IHRL constraints could apply if "allowed or mandated" by the specific situation, namely the "location, circumstances, possibilities of armed resistance and planning involved."[143] This is too vague to meaningfully guide State conduct and fails to address the underlying problem that the lawfulness of a targeted killing operation can and often will diverge depending on the legal regime considered. Courts may often avoid this problem by finding that both branches of international law were violated (i.e. that IHRL was violated because of an IHL violation), or that neither were. But as Laurie Blank opined regarding the Osama bin Laden case:

> [w]hen the [LOAC] mandates the use of deadly force as a first resort and [IHRL] prohibits the use of deadly force except as a last resort, we can see that the two paradigms will often be irreconcilable when applied to the same incident. And yet both legal regimes have the protection of persons as a core value.[144]

Recently, the HRC's General Comment 36 clarified the practical meaning of "arbitrariness" for the purpose of the prohibition against the arbitrary deprivation of life under Article 6 of the ICCPR. In one way, the Comment reconciled the LOAC and IHRL rules by establishing that

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[139] See Jürgen Bering, "Legal Explainer: German Court Reins in Support for U.S. Drone Strikes" (22 March 2019), online: *Just Security*.
[140] See Matthew Dwelle, "US Base Off-Base? Drone Hub Faces Challenge in German Court" (17 April 2021), online: *Columbia Journal of Transnational Law*.
[141] *Finogenov and Others v. Russia*, *supra* note 113 at para 211.
[142] See Ohlin & May, *supra* note 138 at 115-6; see e.g. *Abella*, *supra* note 59 at para 181.
[143] Callamard, *Annex*, *supra* note 48 at paras 36, 49, 50.
[144] Laurie Blank, "Finding the Paradigm: Investigating Bin Laden's Demise" (8 May 2011), online: *Jurist*. See *General Comment 36*, *supra* note 9 at para 12 (lethal force "must represent a method of last resort").

violations of the *jus ad bellum*, namely launching a war of aggression, are "ipso facto" violations of the right to life.[145] The same logic also applies to violations of the *jus in bello*; for instance, disproportionate or indiscriminate killings are arbitrary. However, the same logic does not work in reverse; the two branches of international law do not always converge on one conclusion. Rather than addressing this tension, the HRC enigmatically proposed that the use of lethal force by States in conformity with "humanitarian law and other applicable international law norms is, *in general*, not arbitrary" [emphasis added].[146] Given that an armed conflict may involve thousands of uses of lethal force, this vague pronouncement amounts to an admission that States following the IHL principles of necessity, proportionality, and distinction will systematically violate the ICCPR.

General Comment 36 is inadequate for at least three reasons. Firstly, the concept of military necessity under humanitarian law is fundamentally at odds with the strict necessity standard under human rights law.[147] As discussed above, IHL permits the wholesale killing of regular and irregular combatants even when they do not pose a direct threat (recall the Syrian Cook Question) and even when they could be safely captured, as long as doing so secures an objective military advantage.[148] In contrast, the IHRL standard of strict necessity mandates that lethal force be used minimally and as a last resort. The notion of last resort is not foreign to armed conflict, but its relevance is limited to *jus ad bellum* justification. States must exhaust *all* non-violent options – not merely all feasible options – before coercive force can be justified, in accordance with the general principle that States must resolve their international disputes peacefully, itself a corollary of the Article 2(4) prohibition on the use of force. Thus, under the LOAC, the initiation of armed conflict must be non-arbitrary, whereas the conduct of hostilities against combatants remains an arbitrary process.

Secondly, even if a target meets the criterion of military necessity, the incidental killing of civilians in compliance with the IHL principle of proportionality is arguably always arbitrary under IHRL. This arbitrariness is caused by the "lack of predictability" and of due process from the point of view of the civilian deprived of life.[149] Under the IHL regime, civilians are liable to incidental killing due to the value placed on a military target by an attacker; their physical proximity to that target; the characteristics of the weaponry available to and used by the attacker; and the absence of other proximate civilians whose injury would make the anticipated level of incidental killing disproportionate. Recall that under IHL there is no obligation on civilians to remove themselves from the vicinity of military objectives.[150] Thus the death of civilians does not depend on the (il)legality of their own conduct, challenging the key IHRL notion that the legitimate protective aim of a military strike or law enforcement operation is sufficient to make

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[145] *General Comment 36*, *supra* note 9 at para 70.
[146] *Ibid* at para 64.
[147] See Ohlin & May, *supra* note 138 at 121-40.
[148] See e.g. Joint Committee, *supra* note 95 (in war, "[s]omeone is killed justifiably if there is sufficient evidence that they are a combatant" at 53-4). See also Callamard, *Armed Drones*, *supra* note 5 at paras 45-8. See *contra* Melzer, *Interpretive Guidance*, *supra* note 76 (reiterating Pictet's controversial idea that refraining from giving an adversary the opportunity to surrender may "defy basic notions of humanity" at 82).
[149] *General Comment 36*, *supra* note 9 at para 12.
[150] See *Protocol I*, *supra* note 10, arts 58(a) (this obligation is incumbent on belligerents only).

incidental killings non-arbitrary. Furthermore, the standard of proportionality is itself less strict under IHL. For instance, an ICTY report into the bombing of Radio Television of Serbia concluded that between 10 and 17 civilian casualties was not "clearly disproportionate" to the legitimate goal of disabling the Serbian military command and control system – a result likely at odds with IHRL, given the decision to bomb an urban studio rather than transmitters.[151]

Thirdly, under the LOAC only one belligerent in a bilateral armed conflict can satisfy the *jus ad bellum* standard of lawful self-defence, but IHL nevertheless applies to the combatants on each side agnostically.[152] This approach ensures the protection of victims of war regardless of their circumstances and prevents an unlimited violent escalation. This agnosticism is also reflected by the rules of individual criminal liability. Ordinary foot soldiers are not policymakers and therefore cannot be held criminally responsible for fighting in support of an illegal war, assuming that their personal wartime conduct is otherwise lawful.[153] In contrast, if the fact that a State has launched an armed conflict without a legitimate protective aim is sufficient to make the ensuing *in bello* killing of combatants and incidental killing of civilians arbitrary under IHRL, then human rights law applies asymmetrically rather than agnostically. In the context of the Russo-Ukraine War, the application of IHRL would therefore mean that rank-and-file Russian soldiers and conscripts are engaged in arbitrary deprivations of life simply due to participating in Russia's war of aggression (a *jus ad bellum* violation), notwithstanding their personal conformity with humanitarian law. If as a result these combatants are also rendered liable to non-arbitrary retaliatory attack or targeted killing by Ukraine, then the resulting human rights asymmetry will render IHRL useless as a constraint in wartime and will only serve to cement the fundamental IHL-IHRL tension.

Conclusion: Targeting "Enablers"

The proliferation of targeted killing has not been adequately restrained by the law of war. In particular, (1) the very low IAC threshold and the support theory mean that States will routinely trigger the application of IHL regardless of the *jus ad bellum*, and (2) permissive interpretations of "direct participation" mean that an increasingly broad set of civilian individuals are liable to attack *in bello*. On the *jus ad bellum* side, the armed attack threshold has been diminished by the dilution of the imminence standard and by State practice favoring the accumulation of events doctrine. The result – as seen in the Soleimani and Khan cases – is that States have not only needed little evidence to invoke Article 51 against individuals, but have also immediately proceeded with extraterritorial strikes that preclude any "ex post facto judgment of lawfulness".[154] When pressed regarding any suspected violations of human rights, States insist

[151] "Final Report to the Prosecutor", *supra* note 134 at para 77.
[152] See Waldron, *supra* note 87 at 116. See e.g. *Abella*, *supra* note 59 ("application of [IHL] is not conditioned by the causes of the conflict" at para 173). See also Walzer, *supra* note 1 (the "equality of the battlefield distinguishes combat from domestic crime." at 128).
[153] Michael J Davidson, "War and the Doubtful Soldier" (2005) 19:1 Notre Dame J L, Ethics & Pub Policy 91 at 125. See also Francois Bugnion, "Guerre juste, guerre d'agression et droit international humanitaire" (2002) 84: 847 Intl Rev Red Cross 523 at 538ff.
[154] Callamard, *Annex*, *supra* note 48 at para 50.

that their acts conformed with the law of war. Yet this incarnation of robust self-defence is corrupted by its essential contradiction: the concept of armed conflict is a poor shield for isolated instances of lethal force. IHL is permissive because it was designed to regulate the chaos of inter-State war. To only apply IHL to marginal NIACs and mini-IACs would amount to enshrining the law of war as the *lex specialis* on all territories outside of the targeting State's effective control, subverting the Article 2(4) prohibition against the use of force and compromising the distinction between war and peace.

The IHRL regime addresses the LOAC's overextension by mandating the establishment of effective national mechanisms to investigate targeted killings alleged to be unjustified. This makes clear that even the wartime use of force by States is a matter of international law and not merely national policy, rejecting the notion that the decision to use force is nonjusticiable (aka the political questions doctrine). However, the co-application of IHRL and IHL also creates an inherent tension, given that the ICCPR Article 6 prohibition against the arbitrary deprivation of life requires States to minimize their recourse to lethal force. In practice, this "strict necessity" standard means that the planning and/or control of counterterrorism and military operations will systematically violate the right to life (recall *McCann*) – despite the exercise of force itself being in conformity with IHL. Thus States are left without proper legal guidance even as the proliferation of drone technology is making targeted killing ever more accessible.

Legal uncertainty only benefits those influential States looking to justify expanding the set of individuals liable to attack beyond the traditional IHL category of civilians directly participating in hostilities. Just war theorists argue that not every civilian should be immune from attack even as combatants like the Syrian Cook are liable to wholesale killing. For Walzer, combatants lose their immunity because of the threat they pose to their adversary; as such, this threatening status should extend to on-duty munitions workers.[155] Just war revisionists argue that this does not go far enough. Instead, individuals should be targeted on the basis of enabling unjust or wrongful threats; this would capture some scientists developing prohibited weapons.[156] Some States have adopted similar ideas. The US Law of War Manual states that the participation of civilians in the Manhattan Project "was of such importance as to have made them liable to legitimate attack".[157] Ultimately, the individualization of war is on the rise because it can present a morally compelling alternative to the LOAC. The great risk is that discarding the crucial civilian-combatant distinction will make ultra-short international wars a permanent feature of international 'peace'.

[155] See Meisels & Waldron, *supra* note 27 at 122-5.
[156] *Ibid* at 125-8.
[157] See e.g. US Department of Defense, *supra* note 10 at 230, fn 245.

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