ON HUMANITARIAN LAW AND THE U.S.
DOUBLE STANDARD

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Abstract: U.S. criticism of its client/ally Saudi Arabia regarding the killing of journalist Jamal Khashoggi immediately diminished the kingdom’s ability to secure funds for its latest mega development project, the Neom convention center. U.S. intelligence pinned the crime on aides to Crown Prince Muhammad Bin Salman (MBS). At the same time, a seemingly unauthorized operation, later attributed to former president Donald Trump, killed a top Iranian commander, Qasem Suleimani, by a drone strike. Congress was not involved and the UN protested this as a violation of Article 51 of its Charter, emphasizing that this was justified in a case of imminent threat, undertaken only by a state. Encouraged by drone technology, the U.S. found it easy to locate the target and minimize collateral damage. International lawyers and military experts are still debating the legitimacy of such action. The U.S. is persisting in claiming that it upholds the standards of international humanitarian law which sometimes sanctions targeted killing. A number of international law professors continue to deride U.S. action as illegal, while the latter continues to describe its actions as defensive in nature. Organizations such as Human Rights Watch lament the reluctance of previous U.S. presidents to define targeted killing.

Keywords: targeted killing, international humanitarian law, drones, UN Charter, Fourth Geneva Convention, laws of war.

No one anticipated that criticism levelled by the U.S. at its client/ally Saudi Arabia in the wake of the 2018 killing of journalist Jamal Khashoggi would force the kingdom to postpone its mega development plan for the resort convention center, Neom. The highly publicized execution of this prominent figure immediately threatened the kingdom’s prospects for securing financing and the services of high-tech companies. Even the architect, Baron Norman Robert Foster, renowned British designer and chief advisor to Crown Prince Muhammad Bin Salman (MBS), distanced himself from the project, fearing its negative impact on his professional reputation. Yet it was public knowledge that the Saudi economy was already ailing before the murder. When the prince unveiled plans for the new convention center, dubbed “Davos in the Desert,” celebrating its potential to live up to this comparison only three weeks after...
the murder took place on Turkish soil, global financiers boycotted the event. Even British entrepreneur, Richard Branson, terminated his efforts to secure financing in Riyadh for his own space companies. The U.S. campaign to implicate the Saudi Crown Prince in this high-profile murder continued into 2021. The case was investigated by the U.S. intelligence services which concluded that MBS himself had sanctioned the killing. President Joseph Biden’s administration, which declassified the four-page document, pointed a finger at key assistants to MBS and members of his own security detail as primary perpetrators of the murder. The report went on to stress the Crown Prince’s previous role in aiding various violent measures designed to silence the voices of Saudi dissidents abroad, including Khashoggi. A year after the murder, MBS, as the leader of Saudi Arabia’s day-to-day operations, attempted to deliver a public reckoning by detailing the journalist’s killing and dismemberment at the Saudi Consulate in Istanbul. Yet, the Saudi Government insisted all along that the murder was an unauthorized operation, denying the prince’s involvement. The U.S. countered by emphasizing the unlikelihood of such a major operation being undertaken without official authorization by the Crown Prince himself since he had total control of the kingdom’s security and intelligence organizations. The U.S. report was even specific, naming 21 Saudi officials who participated in undertaking the killing on MBS’s orders. These included, the report added, Saud al-Qahtani, one of the Crown Prince’s advisors and enforcers, as well as Ahmed al-Asiri, deputy head of Saudi Intelligence. Subsequently, rather than continue to deny the allegations, Saudi Arabia brought eleven people to trial, of whom eight were convicted of murder. But since their names were never revealed, human rights activists condemned what appeared to be an attempt to exonerate those who masterminded the operation.

In the meantime, another high-profile and seemingly unauthorized state operation, this time committed by the U.S., resulted in the killing of a non-U.S. citizen under the bright lights of the world press services. The victim in this case was high-ranking Iranian commander, Qasem Suleimani, who was killed on January 3, 2020, by a U.S. airstrike at Baghdad’s International Airport. The order for the killing was apparently issued by former U.S. President Donald Trump. Suleimani was Iran’s top security and intelligence commander and chief of the Quds (Jerusalem) Force of the Islamic Revolutionary Guards Corps. He was killed in a drone strike which also resulted in some collateral damage, causing the death of several officials of the Iraqi military, considered allies of Iran. The strike entailed the firing of an Am.MQ-9 Reaper drone which rained missiles on a convoy leaving the airport as it transported Suleimani and his companions. This high-value target had served for the previous two decades as the architect of most operations by Iranian Intelligence and the military. He was also rumored to be responsible for the security of Bashar al-Assad of Syria. The escalation by Trump followed the killing of an American contractor in Iraq on December 27, 2019. U.S. authorities also held Suleimani responsible for the
death of hundreds of American soldiers during the Iraqi insurgency. The Pentagon claimed that he planned to kill American diplomats and military personnel in Iraq and throughout the Middle East. The highly secretive mission which succeeded in killing him was launched during a rocket attack by an Iran-backed militia. The killing of this figure had previously been rejected by Presidents George W. Bush and Obama, fearing it would lead to a war between Iran and the U.S. Iran’s Foreign Minister, Javad Zarif, referred to the murder as an act of “international terrorism,” calling it “America’s rogue adventure.” Trump, after insisting that he didn’t want war, retorted: “I don’t think that would be a good idea for Iran. It would not last very long.” But Robert Malley, president and chief executive officer of the International Crisis Group, explained “whether the President intended or not, it is, for all practical purposes, a declaration of war.” Tracking Suleimani’s movements over time had been a top priority of American and Israeli spy agencies and militaries. When killed, Suleimani was in one of two cars which had met him at the bottom of the plane steps. Abu Mahdi al-Muhandis, an Iraqi military chief of the Popular Mobilization forces, which is part of the Iraqi military, was also in one of these cars.

At the time of his death, Suleimani was 62, and officials confirmed that his body was torn to pieces. There were several explanations as to what legal authority the U.S. was relying upon. The main one was that American presidents always claimed broad authority to act without any recourse to Congress whenever U.S. personnel or interests were facing an imminent and clear threat. Even the Pentagon appeared to lack any evidence to back up its claim that Suleimani was in the process of unleashing new attacks against Americans. It was mostly the U.S. and Israel which accused him of leading proxy attacks abroad. In addition to accusing him of responsibility for the death of Americans, Suleimani was said to have fortified several pro-Iranian organizations in the region, such as Hezbollah in Lebanon and paramilitaries in Iraq and Syria. More importantly, Trump accused him of “plotting to kill many more,” hinting at the right to launch preemptive attacks to eliminate the Iranian general, by adding that, “Suleimani should have been taken out many years ago.” The Pentagon was also supportive of this action, declaring in a statement, “At the direction of the President, the U.S. military has taken decisive defensive action to protect U.S. personnel abroad by killing Qasem Suleimani.” The statement promised that the U.S. would persist in taking the necessary steps to maintain the safety of its people and American interests wherever they are. Reference to those endangered interests focused on the recent assault on the U.S. embassy in Baghdad by radical Iraqi protesters, said to be authorized by Suleimani. Soon thereafter, Israel’s prime minister, Benjamin Netanyahu, referred to U.S. planners as having acted “swiftly, forcefully and decisively,” emphasizing that the U.S. acted in self-defense. President Trump’s Republican Party was all praise, particularly top House of Representatives’ leader Kevin McCarthy who described the attack as “a display
of resolve and strength.” Democratic Congressional leaders such as Nancy Pelosi, on the other hand, were more critical, adding that “the move risked dangerous escalation,” regretting that Congress was not consulted. But Mike Pompeo, Secretary of State, insisted on describing the attack on Suleimani as lawful and having saved lives.\textsuperscript{5} The Islamic State military group which had been targeted by Suleimani in the past, celebrated his demise as an act of “divine intervention” but stopped short of crediting the U.S.

International law held a different view of this act committed by a state. The UN took a cautious view of such events, since its Charter allows these interventions only in a clear situation of self-defense and only when undertaken by a state. This view, or the definition of self-defense, tends to be expanded to include the presumption of imminent attack. Yet, under customary international law, only states may take military action if a threatened military attack is about to be launched. But even such an action must meet the test of proportionality. This test for “anticipatory” self-defense remains very restricted. For instance, in a 2020 UN report on “targeted killing,” the self-defense argument was only permissible in a case of overwhelming instant threat which leaves no choice of other means since the time for deliberations would be very short. Moreover, the Trump administration floated the idea of targeting Iran’s cultural sites in addition to attacking Suleimani. Trump wrote in a tweet that the U.S. may attack these sites if U.S. assets were harmed, but Zarif warned that such an attack would be considered a war crime. The U.S. maintained that such an attack which would target 52 Iranian sites (each standing for the 52 American hostages seized by Iran several years earlier) would be considered legal. But there was a consensus that such attacks would violate international treaties to which the U.S. was signatory, such as the 1954 Hague Convention for the Protection of Cultural Property. Additionally, in 2017, the UN adopted a resolution re attacks by Islamic State, condemning the unlawful destruction of religious and historical sites such as Palmyra in Syria in 2015 and the Taliban’s destruction of Bamiyan Buddhas in Afghanistan in 2001. Even though the U.S. does not belong to the International Criminal Court (ICC), the U.S. is a signatory to other international treaties.\textsuperscript{6}

Terrorism, perhaps unsurprisingly, has always been defined as action committed by groups, and rarely by organized states. Ironically, the U.S. State Department defines it as “premeditated, politically motivated violence perpetrated against non-combatant targets by subnational groups or clandestine agents usually intended to influence an audience.”\textsuperscript{7} But since the act of targeted killing by a state is rarely, if ever, subjected to heavy condemnation, a clear definition of this activity may shed some light on its legitimacy and that of its perpetrators. What needs to be done, however, is to investigate how the changing technology of war has empowered states, rather than illegal groups, to wage lethal wars of destruction and incomparable genocide. Thus, focusing on the impact of drones on warfare and
international law addresses the core issue of how the changing technology of war is having an impact on warfare. This is similar in its intensity to changes wrought on warfare by new technologies during the Middle Ages. One of the most succinct arguments in this regard is offered by Ryan J. Vogel in a 2020 article on drone warfare and its impact on the law of armed conflict, which appeared in the Denver Journal of International Law and Policy. He began by disputing a statement by Harold Koh, Legal Advisor to the U.S. State Department, in which he wrote:

In all of our operations involving the use of force, including those in the armed conflict with al-Qaeda, the Taliban and associated forces, the Obama Administration is committed by word and deed to conduct ourselves with all applicable law . . . It is the considered view of this Administration that U.S. targeted practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the law of war.8

These unmanned aerial vehicles, or (UAVs), adds Philip Alston, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, are no more than predators deployed in a framework which will likely violate the basic tenets of international human rights law. Vogel reports that the U.S. currently regularly resorts to relying on these unmanned vehicles. This is because they are proven to be very reliable in terms of locating and executing targeted enemies while avoiding all the controversies arising from the use of traditional military forces. The background of these drones is even more intriguing since they were in the development process for a long time before becoming what former CIA Director Leon Panetta described as “The only game in town.”9 By 2001, the U.S. possessed a fleet of ten UAVs which were limited to use in reconnaissance missions. By 2007, the UAVs numbered more than 108. Other drones, namely the Global Hawk and the Shadow, were coming into increasing use. The former was the largest in the U.S. fleet, measuring 40 feet long and with a flying capacity twice as that of the Shadow. It is reported that more drones were used under the Obama administration than under any other preceding it. More importantly, the U.S. relies on the self-defense language implied in Article 51 of the UN Charter, by referring specifically to events of September 11, 2001, as an armed attack by a transnational terrorist organization, thereby justifying the use of the laws of armed conflict. It was Congress which granted legitimacy to this theory when it authorized the President after September 11, to exercise the right of self-defense in order to prevent the recurrence of similar terrorist attacks in the future.10

It is not surprising, therefore, that the UN is just now calling on the U.S. to justify its use of drones in a situation that is still a cause of perplexity and uncertainty among lawyers, legal experts, and public officials. Despite the absence of
rules, the U.S. did not utilize this technology in the early phase of its wars in Afghanistan and Iraq, it is still compiling arsenals of this new military technology and getting ready to rely on the self-defense argument resulting from the attacks of September 11. But there is still the question of how to define the geographic legitimacy of a location of a drone attack, since it is difficult to abandon the notion of a “global battlefield” where drones are concerned. This may depend on the imminence of an attack and the perceived need to widen the geographic field of a preventive strike, a situation in which the use of drones may appear to be an ideal choice.11 Clearly, legal minds are still struggling to define the use of this technology within the confines of a ‘just war’, if the efficiency of the new technology can be balanced against the legality of discriminate use targeting perpetrators of violence and not against civilian targets at all.

In his book, *Legitimate Target: A Criteria Based Approach to Targeted Killing* (Oxford University Press, 2013), Israeli American Professor of Law Amos N. Guiora examines this aspect of the policy that qualifies for the label of state terrorism but is rarely named as such. Often euphemistically declared as “neutralizing” the target, it is now here to stay. This is because, as a policy, it is now permanently and widely accepted, which is partially attributable to the fact that nation-states prefer it as a method of killing an individual under suspicion of engaging in terrorism. The policy has rarely been tested in an Israeli court of law. The test of its legitimacy as a policy in the U.S. has been confined to the executive branch which determines each case without recourse to the legislative or judicial branch. The executive branch alone determines who is a legitimate target and when that target may be eliminated. Guiora admits that the policy survives due to what he describes as the nation-state’s “aggressive articulation” of its right to pursue this practice as a form of legitimate self-defense.12 He claims that the nation’s right of self-defense which he experienced in Israel was never unlimited but was applied rigidly, largely due to the possibility of generating collateral damage. He claims that in Israel it is not sufficient to designate an individual as a legitimate target on the basis of verbal threats alone. Here, the Obama administration’s policy on the unleashing of drones as a form of targeted killing was simply a continuation of how counter-terrorism policy was defined in the U.S.13

Given this background, can the same state commit to upholding the standards of international humanitarian law while at the same time pursuing policies of targeted killing and preemptive assaults disguised as necessary defensive measures in the name of survival? More importantly, to whom should the commonly recognized standards of humanitarian law apply, and how enforceable are these within and between states? An article by Theodor Meron, an American judge who served on international military tribunals in the former Yugoslavia and in Rwanda, as well as a legal advisor to the Israeli Ministry of Foreign Affairs which he
counseled against the building of Jewish settlements on occupied Palestinian territory, describing it as a violation of the Fourth Geneva Convention for the Protection of Victims of War. Writing on the centennial of the 1907 Hague Convention on the Laws and Customs of War on Land and on the 50th anniversary of the Fourth Geneva Convention (1949) for the Protection of Victims of War, he reflected on ways in which international law could be applied for the protection of individuals in time of war and now signifies the whole body of law during armed conflict. Thus, Nazi conduct during wartime was eventually assessed according to the Nuremberg Charter and the 1949 Geneva Convention, as well as the Genocide Convention. Together, these helped move some state-to-state facets of humanitarian law to charging individuals and sometimes entire populations with criminal responsibility. Much of this resulting emphasis was due to the work of Jean-Henri Dunant, a Swiss humanitarian who provided a first-hand account of the suffering resulting from the 1862 Battle of Solferino. This led to the founding of the International Committee of the Red Cross (ICRC) which called for humanitarian treatment of the wounded on the battlefield.14

Thus, the struggle to amplify a body of laws and make it applicable to war situations and human suffering under Fascist and authoritarian regimes continues to this day. No one put it better than George Schwarzenberger who described the laws of war in the 1960s “as an attempt to balance the needs of war with the standards of civilization.”15 The term international humanitarian law, he added, had acquired a current meaning referring to the *jus in bello* as specifically those laws describing the manner of applying codes regarding the conduct of warfare. Therefore, international humanitarian law can be defined as that segment of international law that specifically relates to the interaction of different states. It also attempts to protect those individuals who are no longer participants in hostilities, such as the wounded and sick prisoners of war. Rules of the conduct of war, significantly, have also their parallels in other world cultures such as China, Japan, India, and the Islamic World. Yet these societies did not start codifying laws which operated during international warfare until the nineteenth century. From that point on, international lawyers began referring to these laws as the Lieber Code, written specifically to frame the conduct of Union Forces during the American Civil War, as an example of the first complete codification of the laws of war. The Battle of Solferino, however, was identified as the first significant event leading to the birth of modern international humanitarian law. This grew out of Dunant’s experiences as he witnessed the horrifying scenes of this battle.16

The question remains why would U.S. security services resort to committing this killing when the country enjoyed a mighty military capability allowing it to use more conventional methods of overcoming its enemies? The U.S. is said to operate 800 military bases in more than 70 countries around the world, the largest
being in Camp Humphrys, South Korea. Why pursue such a policy when international law clearly does not approve?

The killing of Qassim Suleimani by a U.S. strike was clearly illegal, argued Allonzo Gurmendi, a top professor of international law at the University of the Pacific in Lima, Peru. He asserted that this was the overwhelming conclusion of a battery of experts on international law throughout the world who qualified as experts in *jus ad bellum*. The Suleimani case is already affecting the conversation about targeted killing. The U.S. argues that it has a right to defend itself against anyone it designates as a terrorist and may carry out strikes to that effect in an expanding list of countries not involved in any armed conflict. The U.S. maintains that it needs to defend itself against non-state actors, even when this results in killings. Harold H. Koh, the past legal advisor to the State Department, submitted such an argument before the annual meeting of the American Society of International Law claiming that the U.S. is complying with the laws of war when it follows targeted killing in order to defend itself. He added that this was based on two principles: (1) The principle of distinction: requiring that attacks be limited to military objectives and no civilians or civilian objects will be the object of the attack. (2) The principle of proportionality, prohibiting attacks other than on military objectives, not causing civilian loss of life or damage to civilian objects. Koh gave as an example U.S. attacks on al-Qaeda.

Another argument is provided by professors Martin Senn and Jodok Troy who assert that targeted killing has always been a regular aspect of human history. People existing within organized political communities have often killed their tyrannical rulers in order to replace them with a more just form of government. Sometimes the assassins’ intent was to protect their own interests, or to target enemy military leaders in order to change the direction of war to their advantage. Despite the frequency of targeted killing, moral justification varied from time to time. Thus, in ancient Greece, some city states legislated permission to engage in this practice in order to preserve democratic rule. But in Europe of the Renaissance period, eliminating foreign leaders was accepted as a form of moral action resting on its own specific legitimacy. As we move into modern times, however, morality standards changed, leading to the emergence of new rules and laws curtailing the activity of targeted killing, which nevertheless continued under the cloak of secrecy. Today, the transformation of this practice is happening under more visible conditions. Additionally, the volume of targeted killing has increased since the early 2000s due to the increase in acts of terrorism. This was also facilitated by the technological revolution of the drone invention and methods of long-range surveillance. The transformed picture, hence, led to more visibility as the escalation became more public and policies of secrecy and denial were abandoned. Simply stated, targeted killing has moved from “the fringes of undercover activity to the
very core of policy-making in national security.” Significantly, there is a great
debate today, not over the effectiveness of the strategy used in eliminating the
threat of terrorism, but about collateral damage since proportionality is rarely
observed in these circumstances. The use of drones is still an uncertain factor in
these wars. Whether or not they contribute to a dramatic increase in casualties has
yet to be agreed upon.19

Much of the debate, however, remains focused on the question of domestic
accountability, especially regarding the U.S. practice of this type of warfare. Both
the U.S. and Israel continue to target human “terrorists” as a matter of securing their
defense system. Interestingly, the most important development in modern times has
been the strengthening of the Westphalian system of states by prohibiting the kill-
ing of state leaders, while at the same time sanctioning certain types of violence
between states. The killing of high-ranking state representatives has been prohib-
ited by the UN in 1973, as well as by the Organization of African Unity (OAU).
The theory of ‘just war’ emerged from these developments, calling for minimizing
the targeting of non-combatants, a policy which extends to wounded soldiers on the
battlefield, medical personnel, or killing by poisoning. This gave rise to what is
often described today as international humanitarian law.20 So, what is “targeted killing,” in the current accepted definition of wars, and when is it legitimate?

Some legal experts, such as professors Senn and Troy, strove to develop a readily acceptable definition of “targeted killing” in the following words:

to denote a form of lethal violence directed against preselected individuals.
Between targeted killing and its conceptual opposite of un-targeted or random
killing lies a continuum of killings with different degrees of targetedness such as
mass casualty terrorism, carpet bombings or cruise-missile strikes . . . Third, and
most importantly, the use of lethal violence is directed against a person or group
of persons that the source considers prominent or culpable. These two attributes
of the target denote that targeted killing involves a process of selecting individuals
due to their elevated positions in religious, political, or military hierarchies or the
appraisal that their behavior has violated (or will violate) a community’s legal or
ethical principles.21

Human Rights Watch (HRW), however, decries the fact that neither the presiden-
cies of George W. Bush nor that of Obama defined targeted killing nor what body
of law can be applied to it. HRW asserts that the only applicable body of law is
international human rights law (IHRL), also known as the laws of war. This applies
to most armed conflicts, whether those taking place among states or between states
and non-states armed group. These rules are also embodied in the Geneva
Convention of 1949 and its two additional protocols, the 1907 Hague Regulations,
as well as the customary laws of war. IHRL allows the use of lethal force outside of situations of armed conflict only when necessary for saving human lives. This is allowed if the targeted individual presents an immediate threat which could result in the loss of more lives. The UN Basic Principles on the Use of Force and Firearms are just as restrictive, prohibiting preemptive lethal attacks under most conditions. However, Harold Koh told the Society of International Law in 2010 that the U.S. is in a continuous situation of armed conflict with Al-Qaeda, meaning that a situation of war here always prevails.

Other studies have demonstrated that the legality of targeted killing is a revolving phenomenon. The first time a predator drone was used in a case of this kind was on November 3, 2002, when the CIA-led American Drone Program advised the military to launch such an attack and kill Qaed Senyan al-Harithi, an alleged Yemeni terrorist. From then on, the drones’ low-risk use to reach formerly unreachable zones of combat was fully demonstrated. Before then, targeted killing was known by such names as assassinations, surgical strikes, executive action, “wet operations” according to military usage.

If anything, targeted killing remains restricted by a body of laws which demands clear evidence of the danger posed by certain individuals, particularly during a situation of war, before sanctioning such a severe action. Sadly, most of these laws are considered incidental to the conduct of war and are easily sidelined. Part of the reason for this is the fact that organized states, not individuals, make these distinctions and are in the habit of ignoring various bodies of international humanitarian law. We now have a specific designation for this severe state policy, referring to it as “targeted killing,” which entails the taking of human life under the justification of posing a severe threat to the community. This indicates that the practice is here to stay, whether justifiable by human insecurity and fear or not. Some protests against this clandestine policy, however, continue to emanate from organized human rights groups, such as Human Rights First. Thus, a statement was issued by this group on January 7, 2020, in the wake of the assassination of General Suleimani, expressing serious concerns on several grounds, mainly because the U.S. failed to be transparent about the legal ramifications of this case. The statement added that the act was not only illegal, but was also morally reprehensible, diminishes the credibility of the U.S. to hold international criminals accountable, and renders the U.S. militarily vulnerable as it invites retaliation. The organization specifically lamented President Trump’s revocation of the Reporting Requirement on Legal Strikes, calling this action unnecessary, claiming it takes the U.S. a step backward in the area of transparency and accountability. The absence of any institutional oversight of executive privilege in this area continues to be a matter of concern. Add to this the war-mongering habits of some populist presidents, which allows for the use of a wide range of policies and military tools in the name
of protecting the nation from an imminent threat. In most cases, this turns out to be a manufactured threat at best.

NOTES

9. Ibid., pp. 103–104.
10. Ibid., p. 104.
13. Ibid.