EXECUTIVE SUMMARY

States frequently take actions and make statements that implicate international law. But because States do not — and, indeed, could not — express a view on each such act or statement by all other States at all times, silence seems to be the norm, rather than the exception, in international relations.

When States and other international actors do not express their views on a particular incident, issue, or statement that implicates international law, what is the legal significance, if any, of their silence? Does it denote acquiescence, either with the status quo or with a recent potential departure from the status quo? Does it represent a type of unuttered protest, perhaps meant to signify an objection or a lack of agreement? Might their silence have no legal significance at all? Who makes this determination? And who benefits, and who loses, from a finding that a particular silence does or does not yield legal consequences?

Despite certain specific provisions, international law does not offer clear general guidance on what could or should be inferred from apparent silence or inaction. Nevertheless, international actors have long imbued silence with legal significance, at least in some instances. None of these practices has been consistent, however.

In international scholarly discourse, the silence of States and other international actors has been routinely invoked as proof of support for particular legal views. Not least, this practice has been noticeable, and with apparently increasing frequency, in the jus ad bellum field: the legal regulation of the threat or use of force in international relations. Moreover, where scholars in this field invoke silence as legally significant, those invocations are more often than not submitted in favor of relatively wide claims to use force. Of course, academic writings are by no means determinative in discerning what a legal rule is, let alone how it should be interpreted or applied. Still, legal scholarship often informs debates in all fields of law, and international law is no exception.

In this paper, we examine the actual and potential roles of silence as an element of jus ad bellum treaty law and customary international law. By silence, we mean a lack of a publicly discernible response either to conduct reflective of a legal position or to the explicit communication of a legal position. We focus here on the silence of States and the United Nations Security Council as the primary actors who are positioned to shape, interpret, and apply jus ad bellum. We evaluate how silence has been employed by various scholars in making legal arguments in this field, and how silence may have the potential to affect the formation, identification, modification,
and termination of various doctrines.

We submit that there is no quantum of silence that has clear doctrinal force. We argue that, at least in relation to *jus ad bellum*, only certain forms of *qualified silence* — whether of States or of the Security Council — may be capable of contributing to legal effects. We further contend that, due in part to the nature and status of the norms underlying this field, those forms of qualified silence ought not to be lightly presumed. Arguably, there is a strong, if rebuttable, presumption that silence alone does not constitute acceptance of a *jus ad bellum* claim. Still, States and other international actors should be aware of the possible role that their silence could play in the identification and development of *jus ad bellum*.

We complement our analysis with an Annex that offers the most comprehensive catalogue to date of communications made by U.N. Member States to the Security Council of measures taken in purported exercise of the right of self-defense. The catalogue records more than 400 communications made since the founding of the United Nations in late October 1945 through 2018. These communications reflect the views of the submitting State(s) on the scope of the right to employ force on the purported basis of self-defense. Notably, U.N. Member States are apparently not made aware of such statements on the use of force as a matter of routine practice. This means that, at least in some instances, States might fail to comment on or otherwise react to other States’ positions on the use of force, not as a deliberate choice but for lack of awareness.

If this is correct, two conclusions follow. The first relates to our suggestion that only qualified silence be accorded potential legal significance: if States are unaware of practices or positions forwarded by other States, it is difficult to see how the silence of those unaware States can carry normative value. The other is that especially in the *jus ad bellum* field, the fact that States are not routinely made aware contemporaneously of self-defense communications made to the Security Council under article 51 of the U.N. Charter is, in our view, a significant concern that ought to be addressed as a matter of priority.

The questions of what silence means as a matter of international law and under what conditions it may and should be relied upon merit closer attention and discussion. Furthermore, States that are concerned about existing *jus ad bellum*, or about how that law may be developing, may wish to consider the contexts in which they speak out and those in which they remain silent.