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## An Imperfect War: The Legality of the 'Soleimani Strike' and Why the Biden Administration Should Adopt Its Precedent for Future Operations in Iraq and Afghanistan

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**AN IMPERFECT WAR: THE LEGALITY OF  
THE ‘SOLEIMANI STRIKE’ AND WHY  
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OPERATIONS IN IRAQ AND  
AFGHANISTAN**

*By Stephen Jackson\**

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## I. INTRODUCTION

On January 2, 2020, President Donald Trump ordered the Department of Defense (DoD) to target and kill a notorious enemy of the United States, Major General Qasem Soleimani.<sup>1</sup> Soleimani, the commander of Iran’s Islamic Revolutionary Guard Corp (IRGC), was traversing the Baghdad International Airport in the early hours of January 3, 2020, local time, when an MQ-9 Reaper fired missiles at Soleimani’s vehicle, resulting in the General’s death.<sup>2</sup> A public outcry immediately ensued, where lawmakers claimed President Trump violated customary international law by engaging in assassination and usurped Congress’ constitutional power to declare war.<sup>3</sup> On January 8,

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<sup>1</sup> CLAYTON THOMAS, CONG. RESEARCH SERV., R46148, U.S. KILLING OF QASEM SOLEIMANI: FREQUENTLY ASKED QUESTIONS 1 (2020).

<sup>2</sup> See Jared Harris, *MQ-9 Reaper Footage: Soleimani’s Last Few Seconds on Earth Were Bright and Loud*, WESTERN J. (Jan. 3, 2020), <https://www.westernjournal.com/mq-9-reaper-footage-soleimani-last-seconds-earth-bright-loud/>.

<sup>3</sup> Tim Lister & Eve Bower, *Growing Doubts on Legality of U.S. Strike that Killed Iranian General*, CNN (Jan. 6, 2020), [https://lite.cnn.com/en/article/h\\_47571e543da6d681cdf6a13df9cbc27](https://lite.cnn.com/en/article/h_47571e543da6d681cdf6a13df9cbc27); Zachary B. Wolf & Veronica Stracqualursi, *The Evolving US Justification for Killing Iran’s Top General*, CNN (Jan. 8, 2020), <https://www.cnn.com/2020/01/07/politics/qasem-soleimani-reasons-justifications/index.html>.

2020, the Islamic Republic of Iran (Iran) conducted a massive military response by launching more than a dozen ballistic missiles against American troops located in two bases in Iraq.<sup>4</sup> In perhaps a fortuitous turn of events for President Trump, a series of events diverted the public's attention from the controversial strike: on January 8, 2020, Iran mistakenly shot down Ukraine International Airlines Flight 752 as it ascended from Tehran's airport, killing all 176 passengers;<sup>5</sup> and on January 9, 2020, the World Health Organization announced that mysterious pneumonia-like infections in Wuhan, China were likely tied to the novel coronavirus-2019 (COVID-19).<sup>6</sup> As global focus turned toward these events, tensions between the United States and Iran eased, which helped the nations avoid a larger military conflict.

The COVID-19 pandemic transitioned from a new and evolving disaster to a more permanent endemic, and tensions between the United States and Iran began to re-escalate. Following the tumultuous 2020 election, President Joe Biden immediately faced reinvigorated threats posed by Iran and its proxies in the Middle East.<sup>7</sup> President Biden also encountered massive security issues following the Taliban's swift takeover of Afghanistan, which was largely unanticipated by the United States and NATO after their hasty withdrawal from the central Asian nation.<sup>8</sup> To assuage the American public's concerns with the deteriorating situation in Afghanistan,

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<sup>4</sup> Courtney Kube & Doha Madani, *Iran Retaliates for Gen. Soleimani's Killing by Firing Missiles at U.S. Forces in Iraq*, NBC NEWS (Jan. 7, 2020), <https://www.nbcnews.com/news/world/u-s-base-iraq-comes-under-attack-missiles-iran-claims-n1112171>.

<sup>5</sup> Ryan Pickrell, *Iran Says a String of Colossal Failures Caused its Troops to Shoot Down a Passenger Jet, Killing 176 People*, BUS. INSIDER (Jul. 15, 2020), <https://www.businessinsider.com/iran-shot-down-a-passenger-plane-after-string-of-failures-2020-7?op=1>.

<sup>6</sup> *A Timeline of COVID-19 Developments in 2020*, ACAD. J. MANAGED CARE (Jan. 1, 2020), <https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020>.

<sup>7</sup> See Nick Wadhams & Justin Sink, *Biden Defends Strikes on Iran-Backed Militias, Rebuts Critics*, BLOOMBERG (Jun. 27, 2021), <https://www.bloomberg.com/news/articles/2021-06-27/u-s-hits-iran-backed-militias-with-airstrikes-pentagon-says>.

<sup>8</sup> Joseph Krauss, *Taliban Take Over Afghanistan: What We Know and What's Next*, ABC NEWS (Aug. 17, 2021), <https://abcnews.go.com/International/wireStory/taliban-afghanistan-79496986>.

including the potential re-emergence of al Qaeda, President Biden stated on multiple occasions that “[w]e’ve developed counterterrorism over-the-horizon capability that will keep our eyes firmly fixed on any direct threats to the United States in the region and to act quickly and decisively if needed.”<sup>9</sup> Critics quickly highlighted the many practical issues with implementing over-the-horizon capabilities in a Taliban-controlled Afghanistan and the likelihood of making “tragic mistakes” such as the mistaken killing of ten Afghan civilians during the American retrograde in August 2021.<sup>10</sup>

With President Biden set to utilize over-the-horizon capabilities to counter threats not only emanating from Afghanistan but also from other nations harboring enemies of the United States, it is important he craft a legal theory supporting these interventions. Significant questions about the legality of conducting strikes in countries with which the United States is no longer at war must be addressed. The Soleimani killing affords a useful framework to provide a sufficient answer. As this paper will demonstrate, President Trump’s decision to kill the malignant Iranian general is a proper precedent for countering Iran as well as emerging threats from the recently failed state of Afghanistan. While President Trump’s decision to authorize the killing was appropriate and within his authority, his purported legal justifications were lacking. This paper will provide a more legally sound justification for the Soleimani killing and recommend that the Biden administration rely on this legal reasoning for future operations.

Part One will outline the context leading up to General Soleimani’s death and examine the Trump administration’s legal justifications for the strike. Part Two will identify the Trump administration’s soundest legal justifications, under both domestic and international law, for the strike and dismiss those which do not pass

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<sup>9</sup> Olivier Knox, *The Daily 202: Withdrawal Symptoms: Biden Gambles ‘Over the Horizon’ on Afghanistan*, WASH. POST (Aug. 17, 2021), <https://www.washingtonpost.com/politics/2021/08/17/daily-202-withdrawal-symptoms-biden-gambles-over-horizon-afghanistan/>.

<sup>10</sup> Dylan Stableford & Christopher Wilson, *‘Tragic Mistake’: U.S. Admits Killing 10 Civilians, Including 7 Children, in Kabul Drone Strike*, YAHOO! NEWS (Sep. 17, 2021), <https://news.yahoo.com/us-admits-drone-strike-kabul-afghanistan-killed-10-civilians-children-202430704.html>.

muster. Part Two will further provide other legal justifications which the Trump administration should have cited when supporting its decision to target and kill General Soleimani. Part Three will conclude by applying the Soleimani precedent to potential future scenarios which the Biden administration could encounter by providing hypothetical situations based on real threats emanating from Iraq and Afghanistan.

## II. FACTUAL CONTEXT AND THE TRUMP ADMINISTRATION'S LEGAL JUSTIFICATIONS

General Soleimani was a ruthless foe of the United States, known for his tactical expertise and prowess for killing Americans.<sup>11</sup> Soleimani is attributed with the deaths of over 600 American military personnel during the Iraq War and was responsible for overseeing the design, construction, and implementation of deadly improvised explosive devices.<sup>12</sup> Such devices are highly effective at shredding through military vehicles and personnel, killing or injuring an estimated 1,096 US troops between 2006 and 2011.<sup>13</sup> Soleimani held ties to various terrorist organizations and proxies in the region such as Kata'ib Hezbollah, Asaeb al-Haq in Iraq, and other factions within the Iraqi Popular Mobilization Forces (PMF).<sup>14</sup> Based on his notoriety and success on the battlefield, Soleimani was dubbed a "terrorist

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<sup>11</sup> See Philip Bump, *Why the Administration Claims that Soleimani Killed Hundreds of Americans*, WASH. POST (Jan. 8, 2020), <https://www.washingtonpost.com/politics/2020/01/08/why-administration-claims-that-soleimani-killed-hundreds-americans/>.

<sup>12</sup> Alex Horton, *Soleimani's Legacy: The Gruesome Advanced IED's that Haunted U.S. Troops in Iraq*, WASH. POST (Jan. 3, 2020), <https://www.washingtonpost.com/national-security/2020/01/03/soleimanis-legacy-gruesome-high-tech-ieds-that-haunted-us-troops-iraq/>.

<sup>13</sup> *Id.*

<sup>14</sup> Ranj Alaaldin, *Qassem Soleimani's Fall and the Battle Inside Iraq to Come*, HUDSON INST. (June 25, 2020), <https://www.hudson.org/research/16176-qassem-soleimani-s-fall-and-the-battle-inside-iraq-to-come>; Mohammad Sadat Khansari, *Who was the Vicious Criminal Qassem Soleimani*, NAT'L COUNCIL OF RESISTANCE OF IRAN (Jan. 5, 2020), <https://www.ncr-iran.org/en/news/terrorism-a-fundamentalism/who-was-the-vicious-criminal-qassem-soleimani/>.

mastermind” responsible for “Iran’s malevolent and destabilizing work throughout the entire Middle East.”<sup>15</sup>

#### A. Events Prior to the Strike

The relevant timeline is as follows: tensions between the United States and Iran escalated after the Trump administration announced the United States would withdraw from the multi-national Joint Comprehensive Plan of Action (JCPOA) nuclear deal in May 2018, a measure aimed to reduce the likelihood that Iran could acquire the ability to produce a nuclear weapon.<sup>16</sup> One year later, Iran-backed militias fired a rocket into the Baghdad “Green Zone” causing no injuries or damages.<sup>17</sup> Non-essential U.S. personnel were subsequently evacuated due to heightened threats posed by Iran and its proxies.<sup>18</sup> On June 13, 2019, Secretary of State Mike Pompeo publicly attributed a car bombing of U.S. military personnel in Afghanistan to Iran; four personnel were injured in the attack.<sup>19</sup> On June 20, 2019, Iran shot down a U.S. RQ-4A Global Hawk Unmanned Aerial Vehicle (UAV) as it sortied near the Strait of Hormuz.<sup>20</sup> Iran justified the attack by claiming the UAV illegally entered Iranian airspace, which U.S. Central Command refuted.<sup>21</sup> President Trump initially ordered a strike against three Iranian locations in response but cancelled the order before the DoD could execute it.<sup>22</sup> President Trump instead opted for a cyberattack against the Iranian commercial shipping industry.<sup>23</sup>

On July 18, 2019, the United States downed an Iranian UAV in the Strait of Hormuz, claiming “defensive action.”<sup>24</sup> Iran refuted

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<sup>15</sup> Jessie Yeung, et al., *Iran’s Top General Soleimani Killed in U.S. Strike*, CNN (Jan. 4, 2020), [https://www.cnn.com/middleeast/live-news/baghdad-airport-strike-live-intl-hnk/h\\_d2b47fcfd8852779bfa77973724b1d69](https://www.cnn.com/middleeast/live-news/baghdad-airport-strike-live-intl-hnk/h_d2b47fcfd8852779bfa77973724b1d69).

<sup>16</sup> THOMAS, *supra* note 1.

<sup>17</sup> KENNETH KATZMAN ET AL., CONG. RESEARCH SERV., R45795, U.S.-IRAN CONFLICT AND IMPLICATIONS FOR U.S. POLICY 3 (2020).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 4.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> KATZMAN, *supra* note 17, at 4.

<sup>24</sup> *Id.*

this claim, stating none of its UAVs were shot down.<sup>25</sup> That same month, the International Atomic Energy Agency confirmed that Iran's escalation in nuclear activities breached the Islamic Republic's obligations under the JCPOA.<sup>26</sup> Between July and September 2019, Iran conducted multiple attempted and successful attacks against U.K. tankers in the Persian Gulf and Saudi Arabian energy infrastructure; both the United Kingdom and Saudi Arabia are allies of the United States.<sup>27</sup> Commenting on these escalations, President Trump said he sought to avoid military conflict with Iran and proceeded to place economic sanctions on various Iranian governmental and economic entities as a measured response.<sup>28</sup>

In an apparent escalation of hostilities, U.S. officials and media reported Iran was supplying its allies with short-range missiles in Iraq in early December 2019.<sup>29</sup> A few weeks later, Iraqi facilities housing U.S. forces faced a series of indirect fire attacks.<sup>30</sup> Following these attacks, Secretary Pompeo stated that Iranian attacks against U.S. personnel, allies, or interests would trigger "a decisive U.S. response."<sup>31</sup> Former Secretary of Defense Mark Esper also urged Iraqi Prime Minister Adel Abd Al Mahdi to "take proactive actions . . . to get [Iranian aggression in Iraq] under control."<sup>32</sup>

Tensions between Iran and the United States intensified when the Iranian-backed terrorist organization Kata'ib Hezbollah killed a U.S. contractor and wounded four U.S. service members in a rocket strike against a base near Kirkuk, Iraq on December 27, 2019.<sup>33</sup> The United States responded two days later by conducting air strikes against five Kata'ib Hezbollah locations in Iraq and Syria, killing or injuring dozens of fighters.<sup>34</sup> Abu Mahdi al Muhandis, head of Kata'ib

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<sup>25</sup> *Id.*

<sup>26</sup> THOMAS, *supra* note 1, at 5.

<sup>27</sup> KATZMAN, *supra* note 17, at 4-6.

<sup>28</sup> *Id.* at 6.

<sup>29</sup> *Id.* at 8.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> KATZMAN, *supra* note 17, at 8.

<sup>34</sup> *Id.*



Hezbollah and a leader of the PMF, publicly declared the United States would face “a very tough response” in Iraq.<sup>35</sup> Additionally, many Iraqi government leaders decried the U.S. airstrikes, claiming they violated Iraq’s sovereignty.<sup>36</sup> At the peak of the crisis, supporters of Kata’ib Hezbollah and members of other Iranian-backed Iraqi proxies easily penetrated the perimeter of the Green Zone in Baghdad and proceeded to attack the U.S. Embassy on December 31, 2019.<sup>37</sup> The militants successfully entered embassy grounds and set fire to several exterior buildings, triggering memories of when Iranian revolutionaries overran the U.S. Embassy in Tehran in 1979.<sup>38</sup> In the aftermath of the attack, President Trump tweeted that Iran was responsible for the attack and would “be held fully responsible for lives lost, or damage incurred, at any [U.S.] facilities. They will pay a very BIG PRICE!”<sup>39</sup>

#### B. The Soleimani Strike and Iranian Retaliation

President Trump expeditiously honored his threats in the early morning of January 3, 2020, when the U.S. military conducted a surprise UAV strike on General Soleimani’s car at Baghdad International Airport.<sup>40</sup> The strike proved deadly, killing seven people including General Soleimani, Abu Mahdi al Muhandis, and other PMF members.<sup>41</sup> General Soleimani was officially in Iraq to participate in meetings with Iraqi political and proxy leaders to discuss political issues and counter-Islamic State operations.<sup>42</sup> However, shortly after

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<sup>35</sup> *Id.* at 8-9.

<sup>36</sup> *Id.* at 9.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> KATZMAN, *supra* note 17, at 9.

<sup>40</sup> *Id.*

<sup>41</sup> Lyse Doucet, *Qasem Soleimani: US Kills Top Iranian General in Baghdad Air Strike*, BBC NEWS (Jan. 3, 2020), <https://www.bbc.com/news/world-middle-east-50979463>.

<sup>42</sup> Sam Fellman, *Why Iran’s Qasem Soleimani was on a Not-So-Secret Trip to Iraq When He was Assassinated*, BUS. INSIDER (Jan. 6, 2020), <https://www.businessinsider.com/what-qassem-soleimani-was-doing-in-iraq-before-assassination-2020-1?op=1>.

the airstrike, reports began to surface that Soleimani's visit to Iraq included a secret mission to plan attacks against American troops.<sup>43</sup>

Immediately after the airstrike, Iran's Foreign Minister Javād Zarif tweeted: "The US' act of international terrorism, targeting & assassinating General Soleimani—THE most effective force fighting Daesh (ISIS), Al Nusrah, Al Qaeda, et al—is extremely dangerous and a foolish escalation. The US bears responsibility for all consequences of its rogue adventurism."<sup>44</sup> Iraqi Prime Minister Adel Abd Al Mahdi described the killing as an "assassination" and a "massive breach of [Iraq's] sovereignty."<sup>45</sup> Some members of Congress voiced similar sentiments, including U.S. Senator Chris Murphy who posited "Soleimani was an enemy of the United States. That's not a question. The question is this – as reports suggest, did America just assassinate, without any congressional authorization, the second most powerful person in Iran, knowingly setting off a potential massive regional war?"<sup>46</sup>

On January 7, 2020, Iran launched close to twenty ballistic missiles at U.S. military personnel located at bases in Erbil and al-Asad Air Base, Iraq.<sup>47</sup> Coined "Operation Martyr Soleimani," the missile strike was "the largest ballistic missile strike ever against Americans" and resulted in over 100 cases of traumatic brain injury among U.S.

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<sup>43</sup> *Id.*

<sup>44</sup> *Qassem Soleimani: Timeline of Events Following Iranian General's Assassination*, DEUTSCHE WELLE, <https://www.dw.com/en/qassem-soleimani-timeline-of-events-following-iranian-generals-assassination/a-51910195> (last visited Nov. 26, 2022).

<sup>45</sup> *Iraqi PM Says US Killing of Iranian Commander will "Light the Fuse" of War*, AL ARABIA NEWS (May 20, 2020), <https://english.alarabiya.net/News/middle-east/2020/01/03/Iraqi-PM-condemns-US-assassination-of-Iran-s-Soleimani-al-Muhandis->.

<sup>46</sup> Jessica McBride, *Joe Biden on Qasem Soleimani's Death: 'Stick of Dynamite'*, HEAVY (Jan. 2, 2020), <https://heavy.com/news/2020/01/joe-biden-qasem-soleimani-obama/>.

<sup>47</sup> Press Release, U.S. Dep't Def., DOD Statement on Iranian Ballistic Missile Attacks in Iraq (Jan. 7, 2020), <https://www.defense.gov/News/Releases/Release/Article/2052103/dod-statement-on-iranian-ballistic-missile-attacks-in-iraq/>; *50 U.S. Military Members Diagnosed with Brain Injury after Iran Missile Attacks*, UPI (Jan. 28, 2020), [https://www.upi.com/Top\\_News/US/2020/01/28/50-US-military-members-diagnosed-with-brain-injury-after-Iran-missile-attacks/3781580258822/](https://www.upi.com/Top_News/US/2020/01/28/50-US-military-members-diagnosed-with-brain-injury-after-Iran-missile-attacks/3781580258822/).

troops, with twenty-eight receiving Purple Hearts.<sup>48</sup> U.S. military leaders praised intelligence reports and a quick evacuation of the installations as the reason why the attack did not result in any U.S. deaths or destruction of aircraft or major equipment.<sup>49</sup> After assessing the damage, President Trump tweeted “All is well!” and “So far, so good.”<sup>50</sup> During a follow-on televised address, President Trump relayed that no U.S. personnel were killed in the strikes and that Iran appeared to be “standing down.”<sup>51</sup> Following this message, the United States imposed additional financial sanctions on Iran but continued to de-escalate militarily.<sup>52</sup> The United States and the rest of the global community then shifted their focus to the rapidly emerging COVID-19 pandemic, overshadowing the dangerous situation in Iraq.

Tensions began to rise again shortly after the Biden administration entered the White House. After multiple rocket attacks against U.S. interests in Iraq in early 2021, President Biden authorized air strikes against Iranian-backed proxies in Syria such as Kata’ib Hezbollah, killing more than twenty militants.<sup>53</sup> Iran’s continued support of Kata’ib Hezbollah complicates President Biden’s strategy for Iraq, especially as the United States aims to transition to a purely advisory role.<sup>54</sup> President Biden’s decision space for the Middle East and Central Asia writ large became further complicated by the August 2021 implosion of the Afghan government and corresponding Taliban

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<sup>48</sup> 50 U.S. Military Members Diagnosed with Brain Injury, *supra* note 47; David Martin, *Inside the Attack that Almost Sent the U.S. to War with Iran*, CBS NEWS (Feb. 28, 2021), <https://www.cbsnews.com/news/iran-missile-strike-al-asad-airbase-60-minutes-2021-02-28/>.

<sup>49</sup> Martin, *supra* note 48.

<sup>50</sup> Phil Helsel, ‘All is Well!’ Trump Tweets after Iran Targets U.S. Forces in Missile Attack in Iraq, NBC NEWS (Jan. 7, 2020), <https://www.nbcnews.com/politics/donald-trump/trump-tweets-all-well-after-iranian-missile-attack-targeting-u-n1112211>.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Dan De Luce, et al., *Biden Orders Airstrikes in Syria, Retaliating against Iran-Backed Militias*, NBC NEWS (Feb. 25, 2021), <https://www.nbcnews.com/news/us-news/biden-airstrikes-syria-retaliating-against-iran-backed-militias-n1258912>.

<sup>54</sup> Media Note, U.S. Dep’t of State, Off. of the Spokesperson, Joint Statement on the U.S.-Iraq Strategic Dialogue (July 26, 2021), <https://www.state.gov/joint-statement-on-the-u-s-iraq-strategic-dialogue-2/>.

takeover and may require more U.S. engagement than President Biden originally anticipated or desired. Although President Biden's focus has shifted to the Russian war of aggression in Ukraine, he will still need to remain engaged with counterterrorism and counter-insurgency activities in the Middle East and surrounding regions.

### C. The Trump Administration's Legal Justifications for the Strike

General Soleimani's death caused an immediate uproar among scholars, politicians, and activists alike. In the days following the Soleimani strike, accusations of an assassination, illegal killings, and constitutional violations were plentiful.<sup>55</sup> Yet, the efficacy of those claims is suspect given the legal justification for the strike and the extensive precedent for similar counterattacks authorized by prior U.S. Presidents.

When assessing the legality of President Trump's decision to kill General Soleimani, it is important to conduct both domestic and international law analyses. It is easy to conflate or confuse these analyses because of their many similarities in requirements. Therefore, carefully distinguishing the analyses is crucial. This section will briefly outline and review the Trump administration's justifications for killing General Soleimani from both a domestic and international law perspective. The Trump administration's arguments under domestic and international law consistently feature two major themes: (1) defensive action and deterrence and (2) a measured response to prior and future attacks. Later sections will scrutinize these justifications and determine which should be adopted by the Biden administration for scenarios when the United States may choose to counter future acts of aggression.

#### 1. Justifications under Domestic Law

For a military action to be legal under domestic law, the President must authorize the attack pursuant to an existing statutory or constitutional authority. As outlined below, the Trump

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<sup>55</sup> See, e.g., Tim Lister & Eve Bower, *Growing Doubts on Legality of US Strike that Killed Iranian General*, CNN (Jan. 6, 2020), [https://lite.cnn.com/en/article/h\\_47571e543da6d681cdff6a13df9cbc27](https://lite.cnn.com/en/article/h_47571e543da6d681cdff6a13df9cbc27).

administration argued the Soleimani strike was authorized by the Authorization of Use of Military Force Against Iraq Resolution of 2002 (hereinafter 2002 AUMF) and that Congress was appropriately notified under the War Powers Resolution of 1973. The Trump administration also argued the strike was conducted in accordance with Article II of the U.S. Constitution, namely the Commander in Chief powers.<sup>56</sup>

In a public statement dated January 2, 2020, the DoD announced the targeted killing of General Soleimani.<sup>57</sup> The announcement provided specific justifications as to why the Trump administration authorized the strike. The entire statement reads:

At the direction of the President, the U.S. military has taken decisive defensive action to protect U.S. personnel abroad by killing Qasem Soleimani, the head of the Islamic Revolutionary Guard Corps-Quds Force, a U.S.-designated Foreign Terrorist Organization.

General Soleimani was actively developing plans to attack American diplomats and service members in Iraq and throughout the region. General Soleimani and his Quds Force were responsible for the deaths of hundreds of American and coalition service members and the wounding of thousands more. He had orchestrated attacks on coalition bases in Iraq over the last several months – including the attack on December 27th – culminating in the death and wounding of additional American and Iraqi personnel.

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<sup>56</sup> Maggie Haberman & Catie Edmondson, *White House Congress of Suleimani Strike Under War Powers Act*, N.Y. TIMES (Jan. 6, 2020), <https://www.nytimes.com/2020/01/04/us/politics/white-house-war-powers-resolution.html>.

<sup>57</sup> Press Release, U.S. Dep't of Def., Statement by the Department of Defense (Jan. 2, 2020), <https://www.defense.gov/Newsroom/Releases/Release/Article/2049534/statement-by-the-department-of-defense/source/GovDelivery/>.

General Soleimani also approved the attacks on the U.S. Embassy in Baghdad that took place this week.

This strike was aimed at deterring future Iranian attack plans. The United States will continue to take all necessary action to protect our people and our interests wherever they are around the world.<sup>58</sup>

Several days later, the Trump administration submitted a formal War Powers Resolution notification to Congress.<sup>59</sup> War Powers Resolution notifications are typically made available to the public, but the Soleimani notice contained classified information and could not be released.<sup>60</sup>

Trump administration officials supported the strike during public addresses, briefings, and interviews. For instance, National Security Advisor Robert O'Brien stated the strike was "aimed at disrupting ongoing attacks that were being planned by Soleimani, and deterring future Iranian attacks, through their proxies or the IRGC Quds Force directly, against Americans."<sup>61</sup> He further declared President Trump held the "constitutional authorities as commander in chief to defend our nation" and cited the 2002 AUMF as statutory authorization.<sup>62</sup>

## 2. Justifications under International Law

The Trump administration also justified the Soleimani strike under international law. From a procedural standpoint, administration officials stated the U.S. government properly notified the strike to the United Nations in accordance with the U.N. Charter. In terms of substantive international law, U.S. officials argued that the DoD

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<sup>58</sup> *Id.*

<sup>59</sup> Haberman, *supra* note 56.

<sup>60</sup> *Id.*

<sup>61</sup> Zachary B. Wolf & Veronica Stracqualursi, *The Evolving US Justification for Killing Iran's Top General*, CNN (Jan. 8, 2020, 6:28 AM), <https://www.cnn.com/2020/01/07/politics/qasem-soleimani-reasons-justifications/index.html>.

<sup>62</sup> Haberman, *supra* note 56.

conducted the strike following customary international norms for self-defense.

As a signatory to the U.N. Charter, the United States agrees to “settle [its] international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”<sup>63</sup> The United States also agrees to “refrain in [its] international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>64</sup> As such, the United States agrees to pursue peaceful settlement of disputes with other nations and to avoid military confrontations when possible. That said, the U.N. Charter does not bar the United States from protecting itself from ongoing or future armed attacks. The United Nations officially acknowledges and recognizes each nation’s inherent right to self-defense.<sup>65</sup> U.N. Charter Article 51 provides that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”<sup>66</sup> The United States understands that self-defense derives from each nation’s inherent rights under the existing international structures and norms, as formalized under customary international law.<sup>67</sup> The U.N. Charter memorializes this inherent right but does not create it.<sup>68</sup> Under customary international law, a state may defend itself from an ongoing attack or preemptively defend itself against an imminent attack by an aggressor.<sup>69</sup> The latter instance, known as anticipatory self-defense, is the source of much controversy.<sup>70</sup>

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<sup>63</sup> U.N. Charter art. 2, ¶ 3.

<sup>64</sup> *Id.* at art. 2, ¶ 4.

<sup>65</sup> *Id.* at art. 51.

<sup>66</sup> *Id.*

<sup>67</sup> See Nicole Deller & John Burroughs, *Jus ad Bellum: Law Regulating Resort to Force*, AM. BAR ASS’N (Jan. 1, 2003), <https://tinyurl.com/mubtzjna>.

<sup>68</sup> *Id.*

<sup>69</sup> See *British-American Diplomacy: The Caroline Case*, in TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA (Hunter Miller ed., 1934), [https://avalon.law.yale.edu/19th\\_century/br-1842d.asp](https://avalon.law.yale.edu/19th_century/br-1842d.asp).

<sup>70</sup> Deller, *supra* note 67.

The United States must notify the United Nations each time it exercises its right to self-defense against an armed attack.<sup>71</sup> On January 8, 2020, the United States met this obligation when Ambassador Kelly Craft, former U.S. Permanent Representative to the United Nations, submitted an Article 51 report to the U.N. Security Council justifying the Soleimani killing.<sup>72</sup> Ambassador Craft explained that Soleimani's killing was:

[I]n response to an escalating series of armed attacks in recent months by the Islamic Republic of Iran and Iran-supported militias on U.S. forces and interests in the Middle East region, in order to deter the Islamic Republic of Iran from conducting or supporting further attacks against the United States or U.S. interests, and to degrade the Islamic Republic of Iran and [IRGC] Quds Force-supported militias' ability to conduct attacks.

Ambassador Craft cited multiple instances of Iranian aggression, beginning in July 2019 and culminating in the December 2019 attacks that killed a U.S. contractor and the storming of the U.S. Embassy in Baghdad.<sup>73</sup> The letter also highlighted the January 7, 2020 ballistic missile strikes launched from Iran against U.S. forces in Iraq.<sup>74</sup>

Regarding the merits of his decision to kill General Soleimani, President Trump publicly justified the Soleimani strike by alluding to notions of anticipatory self-defense. President Trump stated Soleimani and Abu Mahdi al Muhandis "weren't [in Iraq] to go to a nice resort someplace in Baghdad. They were there to discuss bad business, and we saved a lot of lives by terminating [Soleimani's] life."<sup>75</sup> President Trump also claimed that "[his administration] took action to stop a

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<sup>71</sup> U.N. Charter art. 51.

<sup>72</sup> Letter from Ambassador Kelly Craft, U.S. Permanent Rep., to Ambassador Dang Dinh Quy, President of the U.N. Sec. Council (Jan. 8, 2020) (on file with United Nations Digital Library).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Wolf, *supra* note 61.



war. [They] did not take action to start a war.”<sup>76</sup> Trump officials took great care to cite the defensive nature of the attacks and the intent to deter future aggression in accordance with the international standards and precedents of self-defense.<sup>77</sup> Most importantly, executive branch officials claimed Soleimani was orchestrating and planning “imminent attacks” against U.S. interests and personnel in Iraq.<sup>78</sup>

One can infer from the Trump administration’s focus on defending against imminent future armed attacks that President Trump approved the strike under the theory of anticipatory self-defense. For example, former Secretary of State Mike Pompeo tweeted that the Soleimani strike was conducted “in response to imminent threats to American lives.”<sup>79</sup> Secretary Pompeo continued to emphasize the imminence of the threat when stating “[w]e want the world to understand that there was, in fact, an imminent attack taking place . . . the American people should know that this was an intelligence-based assessment that drove [the decision to conduct the strike].”<sup>80</sup> General Mark Milley, Chairman of the Joint Chiefs of Staff, described the potential timeline for future attacks as within “days and maybe weeks” and argued that the administration “would be culpably negligent” by not approving the strike.<sup>81</sup> Furthermore, General Milley described the existing intelligence as “compelling,” “imminent,” and “very, very clear in scale.”<sup>82</sup>

Additionally, more than a year after Operation Martyr Soleimani, former U.S. Central Command (Centcom) Commander General Frank McKenzie acknowledged that he and his department “saw intelligence reports where Qasem Soleimani was moving various attack streams forward against [U.S.] forces in Iraq, against [the U.S.] embassy and against other bases there.”<sup>83</sup> He further speculated that attacks were set to occur “perhaps in hours, perhaps in days, probably

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<sup>76</sup> *Id.*

<sup>77</sup> *See* Statement by the Dep’t of Defense, *supra* note 57.

<sup>78</sup> *See* Wolf, *supra* note 61.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Martin, *supra* note 48.

not weeks” and believed “the risk of not acting in this case outweighed the risk of acting.”<sup>84</sup> Customary international law restricts a nation’s ability to conduct preemptive strikes against an enemy to situations where an enemy attack is “imminent.”<sup>85</sup> In this circumstance, the DoD and the State Department publicly voiced their belief that an Iranian attack against the United States in Iraq was essentially a foregone conclusion, albeit by referencing classified intelligence reports.<sup>86</sup>

It is worth mentioning that the DoD conducted the Soleimani strike in accordance with the Law of Armed Conflict (LOAC).<sup>87</sup> Scholars debate whether the LOAC or International Human Rights Law (IHRL) should govern military activities conducted during situations that fall short of war.<sup>88</sup> IHRL, which is based on criminal law concepts, prefers arresting suspects and is more restrictive as to when and how states may target and kill suspected violent actors.<sup>89</sup> As outlined by Agnes Callamard, former U.N. Special Rapporteur on Extra-Judicial summary or arbitrary Executions, “the intentional killing of an individual [by a state] would be unlawful under [IHRL],” with few exceptions (i.e. the death penalty).<sup>90</sup> In order for a state’s

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<sup>84</sup> *Id.*

<sup>85</sup> See Leo Van den Hole, *Anticipatory Self-Defence Under International Law*, 19 AM. U. INT’L L. REV. 69, 97-98, 104 (2003).

<sup>86</sup> Wolf, *supra* note 61.

<sup>87</sup> “LOAC” is often perceived as synonymous with International Humanitarian Law (IHL), a term more often used by international organizations to describe the Laws of War. See *What is International Humanitarian Law?*, ADVISORY SERV. ON INT’L HUMANITARIAN L. (Jul. 2004), <https://tinyurl.com/33ndxvwd>. This paper utilizes the term “LOAC” based on the DoD’s preference for the term. See LTC RYAN DOWDY, ET AL., LAW OF ARMED CONFLICT DESKBOOK 8 (U.S. Army, 5th ed. 2015).

<sup>88</sup> See, e.g., Afsheen John Radsan & Richard Murphy, *The Evolution of Law and Policy for CIA Targeted Killing*, 5 J. NAT’L SEC. LAW AND POL’Y 339, at 446-48 (2012).

<sup>89</sup> See KENNETH ANDERSON, TARGETED KILLING IN U.S. COUNTERTERRORISM STRATEGY AND LAW 13, 16 (Brookings Inst. 2009).

<sup>90</sup> Agnes Callamard, *The Targeted Killing of General Soleimani: Its Lawfulness and Why It Matters*, JUST SEC. (Jan. 8, 2020), <https://www.justsecurity.org/67949/the-targeted-killing-of-general-soleimani-its-lawfulness-and-why-it-matters/>. Many human rights organizations challenge the efficacy of the death penalty under international law. See, e.g., *Death Penalty*, AMNESTY INT’L, <https://www.amnesty.org/en/what-we-do/death-penalty/> (last visited Nov. 26, 2022) (stating “The death

intentional killing to be legal under IHRL, the state bears the burden of demonstrating the suspect poses “an imminent threat to the lives of others and that, in order to protect those lives, there was no other option but to use lethal force against him.”<sup>91</sup> Though intentional killings governed by the LOAC must also aim to thwart imminent threats, the term “imminence” under IHRL requires a high burden of proof to ensure states do not resort to killing suspects during peacetime.<sup>92</sup> In contrast, the LOAC affords the state more flexibility to target and kill combatants engaged in active hostilities.<sup>93</sup> In such situations, states are permitted to use deadly force against combatants without due process procedures normally required during criminal proceedings.<sup>94</sup> The United States does not accept IHRL’s extraterritorial application or its application to armed conflicts.<sup>95</sup> Instead, the United States “compl[ies] with the LOAC during all operations, whether international armed conflict[s], non-international armed conflict[s], or situations short of armed conflict.”<sup>96</sup> This contradicts the United Nations’ stance as outlined in the International Covenant on Civil and Political Rights.<sup>97</sup> Nevertheless, for the purposes of analyzing the legality of the Soleimani strike, this inquiry will apply the LOAC standards, in line with U.S. jurisprudence.

### 3. Reprisals

Any inquiry into the death of General Soleimani must examine the multiple instances in which President Trump and his administration made statements of retribution when referring to and justifying the killing. For example, on January 3, 2020, the same day President Trump stated, “We took action last night to stop a war,” he

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penalty is the ultimate, cruel, inhuman and degrading punishment. Amnesty opposes the death penalty in all cases without exception – regardless of who is accused, the nature or circumstances of the crime, guilt or innocent or method of execution.”)

<sup>91</sup> *Id.*

<sup>92</sup> See *International Humanitarian Law and International Human Rights Law: Similarities and Differences*, ADVISORY SERV. ON INT’L HUMANITARIAN L. (Jan. 2003), <https://tinyurl.com/56y87sbc>.

<sup>93</sup> See *id.*

<sup>94</sup> See *id.*

<sup>95</sup> See ANDERSON, *supra* note 89, at 13-14.

<sup>96</sup> DOWDY, *supra* note 87, at 8.

<sup>97</sup> See ANDERSON, *supra* note 89, at 13, 16.

also emphasized that “[General Soleimani] should’ve been killed years ago” because “[he] has killed or badly wounded thousands of Americans over an extended period of time.”<sup>98</sup> During interviews following Soleimani’s death, President Trump maintained that “[Soleimani’s killing] should have been done for the last 15 to 20 years” and asserted that “President Bush should have taken him out.”<sup>99</sup> Secretary of Defense Esper echoed similar sentiments, informing CNN that “[General Soleimani] is no innocent man” but rather “a terrorist leader of a terrorist organization” whose “time was due.”<sup>100</sup>

These comments stressed General Soleimani’s role in maiming and killing scores of U.S. personnel. These comments possess a retributive and vengeful tone, an almost moral defense of the air strike. One could interpret these statements as indicating that President Trump authorized Soleimani’s death as an act of reprisal. Under international law, a reprisal is a “prima facie unlawful measure[] taken by one State against another in response to a prior violation and for the purpose of coercing that State to observe the laws in force.”<sup>101</sup> While the retaliatory action is typically illegal, reprisals offer legal defenses for these measures when conducted during times of armed conflict or hostilities.<sup>102</sup> The Trump administration’s focus on serving justice to General Soleimani for past evils and wrongdoings could indicate the air strike was an act of reprisal. Since reprisals are generally frowned upon under customary international law,<sup>103</sup> the legality of engaging in reprisal in this context will be assessed.

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<sup>98</sup> Wolf, *supra* note 61.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Shane Darcy, *The Evolution of the Law of Belligerence Reprisals*, 175 MIL. L. REV. 184, 185 (2003).

<sup>102</sup> *Id.* at 186 (defining Belligerent Reprisals as “intentional violations of a given rule of the [LOAC], committed by a Party to the conflict with the aim of inducing the authorities of the adverse party to discontinue a policy of violation of the same or another rule of that body of law”; and Armed Reprisals as “measures of force, falling short of war, taken by one State against another in response to a prior violation of international law by the latter”). Belligerent Reprisals are *jus in bello* tactics that occur when parties are engaged in an armed conflict, while Armed Reprisals occur in peacetime and are a tactic of *jus ad bellum*. See *id.*

<sup>103</sup> *Id.*

### III. THE SOLEIMANI CONSTRUCT – THE COMPLETE AND ACCURATE LEGAL JUSTIFICATIONS

With the Trump administration’s statements and legal justifications for the Soleimani strike now understood, further examination will reveal that certain aspects of President Trump’s arguments are convincing while others do not pass muster. In addition, the Trump administration failed to utilize more appropriate legal arguments in support of the air strike.

The Trump administration did not assassinate General Soleimani under domestic or international law; he was lawfully killed under the legal construct of a targeted killing. The killing was appropriate because the United States was in an armed conflict with Iran and its proxies in Iraq as part of an “imperfect war,” as acknowledged under international law,<sup>104</sup> from at least May 2019 into early 2020. The United States could not claim that the strike was an act of anticipatory self-defense, as explained below. However, the United States did not need to rely on an anticipatory self-defense argument because it was already engaged in hostilities with Iran and its proxies. Instead, the United States was permitted to conduct a counterattack, as long as it fit within the bounds of the ongoing imperfect war.

Under domestic law, the Trump administration could not rely on the 2002 AUMF because it did not authorize hostilities against General Soleimani, the Quds Force, Kata’ib Hezbollah, or other relevant Iranian proxies. However, President Trump held a constitutional right as Commander in Chief to target and kill General Soleimani because he posed a direct threat to U.S. interests and personnel in Iraq. Finally, President Trump correctly notified Congress under the War Powers Resolution even though the notification occurred after the strike.<sup>105</sup> Although such notifications are not

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<sup>104</sup> See *Imperfect War*, BLACK’S LAW DICTIONARY 1816 (10th ed. 2014) (defining “imperfect war” as “an intercountry war limited in terms of places, person, and things). See also *Bas v. Tingey*, 4 U.S. 37, 40 (1800).

<sup>105</sup> MATTHEW C. WEED, CONG. RESEARCH SERV., R42699, THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICE 10, 18, 35, 69 (2019).

uncommon,<sup>106</sup> President Trump should have released an unclassified version of his notification to Congress to increase transparency.

The strike also adhered to international law requirements outlined in the U.N. Charter and found in customary international law. General Soleimani and Iranian proxies attacked the United States in violation of the U.N. Charter and customary international law. The United States legally defended itself when choosing to strike Kata'ib Hezbollah outfits in Iraq and Syria in the summer 2019 and continued to legally defend itself by targeting and killing General Soleimani in early 2020. The United States also did not violate customary international law by failing to obtain Iraq's consent before conducting the strike. As outlined below, under international law a defending nation may conduct a counterattack against an enemy who is operating from within a third country when the third country fails to meaningfully thwart the initial attack.<sup>107</sup> Iraq demonstrated for at least half a year that it could not or would not protect U.S. assets and personnel legally operating in Iraq from Iranian aggression. Lastly, any reliance upon a theory of reprisal as justification for Soleimani's killing is unnecessary. Reprisals under international law should be used only when no other legal theory justifies an attack. The Trump administration had additional legal avenues available for killing General Soleimani and therefore did not need to rely on a theory of reprisal.

#### A. Targeted Killing, Not Assassination

Before delving into the Trump administration's domestic and international law justifications for killing General Soleimani, a more fundamental question must be answered: did the U.S. government assassinate Soleimani? While media reports liberally described the Soleimani strike as an "assassination," a more thorough review of the term paints a different picture.<sup>108</sup> Only a new and expansive interpretation of the term "assassination" could lead to the

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<sup>106</sup> *See id.*

<sup>107</sup> *See British-American Diplomacy: The Caroline Case*, *supra* note 69.

<sup>108</sup> *See e.g., Thousands March in Baghdad on Soleimani Assassination Anniversary*, AL JAZEERA (Jan. 3, 2021), <https://www.aljazeera.com/news/2021/1/3/baghdad-procession-marks-anniversary-of-iran-generals-death>.

determination that the United States assassinated the Iranian general. Instead, the Soleimani strike is correctly understood as a targeted killing. The difference between an assassination and a targeted killing is key, as assassinations are illegal under both international law and U.S. legal practice, while targeted killings are legal during times of hostilities or armed conflict.

### 1. Assassination

The term “assassination” conjures images of political strife, black operations during times of national upheaval, and illicit deals featuring executioners lurking in the darkness. Prominent examples of assassinations in U.S. history include the murders of President Abraham Lincoln,<sup>109</sup> Reverend Martin Luther King Jr.,<sup>110</sup> and journalist James Foley.<sup>111</sup> These three examples help demonstrate the broad spectrum of types of assassinations. John Wilkes Booth’s murder of a sitting U.S. president at the closure of America’s bloodiest war was clearly an assassination. James Earl Ray’s murder of the leader of the civil rights movement at the precipice of racial tensions in the United States is also a clear case of assassination. The Islamic State’s beheading of journalist James Foley during ISIS’s horrid rise to power is a closer case, but nevertheless an assassination because of its political motivations. How are these murders different from the killing of an Iranian general traveling in Iraq for a supposed diplomatic mission? A clear definition and proper scoping of “assassination” provides the answer.

Assassination is neither defined nor banned in U.S. law.<sup>112</sup> When searching historical precedent and congressional reports for a definition, it becomes apparent that assassination is best understood as

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<sup>109</sup> See *Assassination of President Abraham Lincoln*, LIB. OF CONG., <https://www.loc.gov/collections/abraham-lincoln-papers/articles-and-essays/assassination-of-president-abraham-lincoln/> (last visited Nov. 26, 2022).

<sup>110</sup> *Id.*

<sup>111</sup> See Chelsea J. Carter, *Video Shows ISIS Beheading U.S. Journalist James Foley*, CNN (Aug. 20, 2014), <https://www.cnn.com/2014/08/19/world/meast/isis-james-foley/index.html>.

<sup>112</sup> See Matthew Spurlock, *The Assassination Ban and Targeted Killings*, JUST SEC. (Nov. 5, 2015), <https://www.justsecurity.org/27407/assassination-ban-targeted-killings/>.

an intentional killing of an important noncombatant for political reasons.<sup>113</sup> In particular, Congress has determined that assassinations occur when the assailant has political motivations for the killing.<sup>114</sup> In the wake of the Watergate scandal and fears of intelligence agency overreach, Congress conducted an inquiry into various covert activities which followed the conclusion of World War II.<sup>115</sup> Named after its chairman Senator Frank Church, the Church Committee investigated covert activities ranging from controversial surveillance operations to attempted assassinations of foreign political leaders.<sup>116</sup> The Church Committee issued fourteen reports on its findings, the most relevant to this inquiry being “Alleged Assassination Plots Involving Foreign Leaders.”<sup>117</sup> This Senate interim report reviewed alleged assassination operations against five foreign leaders across three continents, spanning the presidencies of Dwight Eisenhower, John F. Kennedy, Lyndon Johnson, and Richard Nixon.<sup>118</sup> The Church Committee concluded that the U.S. government attempted to assassinate two

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<sup>113</sup> See INTERIM S. REP. NO. 94-465, at 283-84 (1975) (explaining that assassinations occur when individuals are killed “because of their political views, actions or statements,” but implying that intentionally killing foreign leaders during wartime is not assassination); *Assassination*, BLACK’S LAW DICTIONARY 137 (10th ed. 2014) (defining assassination as “The act of deliberately killing someone, esp. a public figure, usu. for hire or for political reasons; specif., the murder of an important person.”). *C.f.* TAMAR MEISELS & JEREMY WALDRON, DEBATING TARGETED KILLING: COUNTER-TERRORISM OR EXTRAJUDICIAL EXECUTION? 201 (Christopher H. Wellman, 2020) (arguing that targeted killings and assassinations are one and the same). See also Jonathan Masters, *Targeted Killings*, COUNCIL ON FOREIGN REL. (May 23, 2013, 8:00 AM), <https://www.cfr.org/backgroundunder/targeted-killings> (explaining the U.N. Special Report on Targeted Killing defines assassination as “premeditated acts of lethal force by states in peace or during armed conflict to eliminate specific individuals outside their custody.”).

<sup>114</sup> See INTERIM S. REP. NO. 94-465, at 283-84 (1975).

<sup>115</sup> See Thomas Young, *40 Years Ago, Church Committee Investigated Americans Spying on Americans*, BROOKINGS INST. (May 6, 2015), <https://www.brookings.edu/blog/brookings-now/2015/05/06/40-years-ago-church-committee-investigated-americans-spying-on-americans/>.

<sup>116</sup> See *id.*

<sup>117</sup> INTERIM S. REP. NO. 94-465 (1975).

<sup>118</sup> *Id.*



foreign leaders and supported coups against three foreign leaders that were likely to have resulted in assassination.<sup>119</sup>

Throughout the report, the Church Committee described assassination as “coldblooded, targeted, intentional, killing of an individual foreign leader.”<sup>120</sup> The Committee further concluded that “targeted assassinations instigated by the United States must be prohibited,” but clarified that the United States could target and kill a foreign leader if he posed “imminent danger to the United States.”<sup>121</sup> In concluding the report, the Church Committee recommended a “flat ban” on assassination and conspiracy to assassinate.<sup>122</sup> The Committee provided a draft statute banning assassinations of “foreign official[s]” including those who “belong to an insurgent force, unrecognized government, or a political party.”<sup>123</sup> The Committee narrowed the scope of its assassination definition by explaining that the statute should apply to conspiring, attempting, or killing foreign officials “[based on] their *political* views, actions, or statements.”<sup>124</sup> The draft statute provided an implied exception to the ban: “*absent a declaration of war or introduction of U.S. Armed Forces pursuant to the War Powers Resolution, [killing foreign officials] on account of their political views would be a criminal offense.*”<sup>125</sup> The proposed statute appeared to implicitly permit the killing of foreign officials during times of declared war or when the President authorized the deployment of forces in accordance with the War Powers Resolution.

Although the draft statute never became law, it shed light on Congress’ understanding of the scope of assassination. The Church Committee expressly determined that killing foreign leaders of nations or non-governmental organizations based on their political views was murder and illegal under U.S. law. The Church Committee also explained that U.S. officials could kill foreign leaders if they posed an

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<sup>119</sup> *Id.* at 255-56.

<sup>120</sup> *Id.* at 6.

<sup>121</sup> *Id.* at 258.

<sup>122</sup> *Id.* at 281.

<sup>123</sup> INTERIM S. REP. NO. 94-465, 283 (1975).

<sup>124</sup> *Id.* at 283 (emphasis added).

<sup>125</sup> *Id.* at 284 (emphasis added).

imminent threat to the United States when conducted pursuant to a declaration of war or presentation of forces consistent with the War Powers Resolution.<sup>126</sup>

Shortly after the Church Committee released its findings, President Gerald Ford issued Executive Order (E.O.) 11,905, the precursor to E.O. 12,333, which provided that “[no] employee of the United States Government shall engage in, or conspire to engage in, *political* assassination.”<sup>127</sup> The current assassination ban found in E.O. 12,333, originally issued by President Ronald Reagan, removed the qualifier “political” from “assassination” without explanation.<sup>128</sup> Absent further context one could speculate President Reagan’s deletion of “political” expanded the scope of the assassination ban to prohibit all killings conducted outside of war or hostilities. Under this interpretation, all intentional killings of specifically targeted foreign leaders or other high-profile persons for any purpose could be banned if executed outside of a congressionally declared war or authorized presentation of forces into hostilities. However, the Office of the Judge Advocate General of the Army clarified the ban’s parameters in a legal memorandum known as the Parks Memorandum.<sup>129</sup> The memorandum, which is named after its author Colonel W. Hays Parks and features the subject line “Executive Order 12,333 and Assassination,” explains that assassination generally “involves murder of a targeted individual for political purposes.”<sup>130</sup> Victims of assassination could include both political leaders and private persons “if [the killing] is carried out for political purposes” but “does not preclude acts of violence involving the element of surprise.”<sup>131</sup> In other words, Colonel Parks explained that intentional killings of specific targets are deemed to be assassinations based on the surrounding context of the killing. Assassinations can occur during

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<sup>126</sup> *Id.* at 258.

<sup>127</sup> See Spurlock, *supra* note 112 (emphasis added).

<sup>128</sup> Exec. Order No. 12,333, 3 C.F.R. § 2.11 (1981).

<sup>129</sup> *Memorandum of Law: Executive Order 12333 and Assassination*, THE ARMY LAW. (Dec. 1989), <https://sites.duke.edu/lawfire/files/2019/01/ParksMemo1989.pdf>.

<sup>130</sup> *Id.* at 4.

<sup>131</sup> *Id.* at 4-5.

peacetime, conventional war/international armed conflicts, or counterinsurgencies if the target is killed for political purposes.

According to Colonel Parks, assassinations of U.S. persons during peacetime were easy to identify since all U.S. citizens are “entitled to immunity from intentional acts of violence by citizens, agents, or military forces of another nature.”<sup>132</sup> He explained that killings which occur during peacetime are not assassinations if conducted in self-defense, and provided various supporting examples of when the United States conducted lethal military operations during times of peace in self-defense.<sup>133</sup> He further stated that peacetime military killings conducted in a third country are not assassinations if “[the third party] nation has failed to discharge its international responsibilities in protecting U.S. citizens from acts of violence originating in or launched from its sovereign territory, or has been culpable in aiding and abetting international activities.”<sup>134</sup> Colonel Parks concluded that killing individuals “whose peacetime actions constitute a direct threat to U.S. citizens or national security” is legitimate self-defense and not assassination.<sup>135</sup>

Identifying assassinations during a conventional war or international armed conflict was a more difficult task for Colonel Parks because “[c]ombatants are liable to attack at any time or place, regardless of their activity when attacked.”<sup>136</sup> What matters more is the status of the person targeted and the level of hostilities at the time of the killing.<sup>137</sup> During conventional warfare or international armed conflict, assassinations occur when a participant engages in “outlawry of an enemy, putting a price upon an enemy’s head, [or] offers a reward for an enemy ‘dead or alive.’”<sup>138</sup> In summation, these international law violations constitute “treacherous” warfare, as provided in Article 23(b) of the Annex to the 1907 Hague IV Convention.<sup>139</sup> Colonel

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 7.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Memorandum of Law: Executive Order 12333*, *supra* note 129, at 5.

<sup>137</sup> *See id.*

<sup>138</sup> *Id.* at 5 (quoting U.S. Army Field Manual 27-10, para. 31 (1956)).

<sup>139</sup> *Id.*

Parks noted that treachery remains an undefined term but does not include surprise attacks or attacks behind enemy lines.<sup>140</sup>

Counterinsurgency creates even greater problems for identifying assassinations because guerilla soldiers do not wear uniforms but instead blend into the civilian populace to conduct asymmetric warfare.<sup>141</sup> Colonel Parks noted the heated debates surrounding the Vietnam War and targeting guerillas but determined that “[a]s with conventional war . . . ultimately the issue is settled along policy rather than legal lines.”<sup>142</sup> Perhaps a frustrating response to a difficult question, Colonel Parks’ conclusion highlights his nuanced and practical approach toward assassination during conflicts short of conventional war.

The political and security circumstances surrounding General Soleimani’s death were extremely complex and present a difficult task when analyzing whether the United States committed an assassination. For example, General Soleimani was undoubtedly a foreign official but was also a designated terrorist for more than a decade and continuously led and supported terrorist organizations in killing American troops in Iraq.<sup>143</sup> Leading up to the Soleimani’s demise, Iranian-backed militias downed a U.S. UAV, attacked and killed U.S. personnel in Iraq, and helped orchestrate the storming of the U.S. Embassy in Baghdad.<sup>144</sup> Additionally, when the United States killed General Soleimani, Congress never passed a declaration of war against Iran, the IRGC, or the Quds Force.<sup>145</sup> The 2002 AUMF was in place, but its purpose was to enforce a myriad of U.N. resolutions against Saddam Hussein and

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 6.

<sup>142</sup> *Id.* at 7.

<sup>143</sup> See Gen. Stanley McChrystal, Ret., *Iran’s Deadly Puppet Master*, FOREIGN POL’Y, <https://foreignpolicy.com/gt-essay/irans-deadly-puppet-master-qassem-sul-eimani/> (last visited Nov. 25, 2022); Press Release, U.S. Dep’t Treasury, Treasury Sanctions Five Individuals Tied to Iranian Plot to Assassinate the Saudi Arabian Ambassador to the United States (Oct. 11, 2011), <https://www.treasury.gov/press-center/press-releases/pages/tg1320.aspx>.

<sup>144</sup> See KATZMAN, *supra* note 17, at 4-9.

<sup>145</sup> See Merrit Kennedy & Jackie Northam, *Was it Legal for the U.S. to Kill a Top Iranian Military Leader?*, NPR (Jan. 4, 2020), <https://www.npr.org/2020/01/04/793412105/was-it-legal-for-the-u-s-to-kill-a-top-iranian-military-leader>.

his Ba'athist regime, curb Iraq's supposed weapons of mass destruction programs, and diminish its purported safe harboring of al Qaeda and other Sunni terrorist organizations.<sup>146</sup> Soleimani's death also occurred during a period of extremely tense political relations between the United States and Iran over the latter's uranium enrichment activities and significant meddling in Iraqi internal affairs.<sup>147</sup> With this context in mind, the Trump administration's killing of General Soleimani cannot be deemed an assassination because Soleimani was an enemy combatant during a period in which Iran levied an undeclared armed conflict against the United States.

For decades, General Soleimani actively participated in operations against the United States in Iraq. He helped terrorist organizations such as Kata'ib Hezbollah utilize improvised explosive devices, rocket attacks, and guerilla warfare to kill Americans.<sup>148</sup> General Soleimani led proxy forces to attack and kill Americans in Iraq throughout 2019 and helped plan the attack on the U.S. Embassy in Baghdad.<sup>149</sup> Based on Soleimani's extensive resumé of waging war against the United States, it was reasonable for U.S. officials to perceive Soleimani as a continued threat, especially with intelligence reports concluding that he was actively plotting additional imminent attacks.<sup>150</sup> From a national security standpoint, General Soleimani threatened U.S. efforts to both create a stable security situation in Iraq and to counter ISIS and other terrorist organizations.<sup>151</sup> U.S. interests at the time of the strike also included supporting the Iraqi government in

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<sup>146</sup> See Authorization for Use of Military Force against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1499 (2002).

<sup>147</sup> Thomas, *supra* note 1, at 5; see Alissa J. Rubin & Falih Hassan, *Iraq Protestors Burn Down Consulate in Night of Anger*, N.Y. TIMES (Nov. 27, 2019), <https://www.nytimes.com/2019/11/27/world/middleeast/iraqi-protest-najaf-iran-burn.html>.

<sup>148</sup> See CLAY WILSON, CONG. RESEARCH SERV., RS22330, IMPROVISED EXPLOSIVE DEVICES (IEDS) IN IRAQ AND AFGHANISTAN: EFFECTS AND COUNTERMEASURES 3 (2007).

<sup>149</sup> See Martin, *supra* note 48.

<sup>150</sup> *Id.*

<sup>151</sup> See Joanne Stocker, *US-Led Coalition Pauses Training of Iraqi Forces, ISIS Operations over Force Protection Concerns*, DEF. POST (Jan. 5, 2020), <https://www.thedefensepost.com/2020/01/05/us-coalition-pauses-training-iraqi-security-forces-isis/>.

spite of Iranian proxies' attempts to destabilize the country.<sup>152</sup> Far from a politically-motivated strike, the Trump administration's decision to target and kill General Soleimani aimed to achieve legitimate military objectives in furtherance of U.S. national security interests in Iraq.

Critics described the strike as a “reckless gamble,”<sup>153</sup> which could “put[] the entire world at risk.”<sup>154</sup> At the time of this writing, the Soleimani killing did not result in a world war, expansive armed conflict in Iraq, or a U.S. invasion of Iran. Shortly after Soleimani's death the United States prepared for Iran's massive Operation Martyr Soleimani ballistic missile strike on January 7, 2020 and was extremely fortunate to avoid massive casualties.<sup>155</sup> Yet, even had Iran's retaliatory strike resulted in significant loss of life, the Trump administration was still legally justified in killing General Soleimani. Viewing the Soleimani strike as a “reckless” gamble or too risky is not a legal argument supporting the claim that the United States assassinated General Soleimani. Soleimani posed a direct threat to U.S. personnel and national security interests during an ongoing armed conflict, and the United States had a legal right to neutralize that threat by a surprise attack.<sup>156</sup>

As explained in the Parks Memorandum, the United States may still violate the ban on assassination during an armed conflict if it kills an enemy combatant by means of treacherous warfare.<sup>157</sup> However, it is obvious the Soleimani strike was not a form of treachery. The United States did not kill Soleimani for his political beliefs or for posing a political threat against the United States. The United States also did not

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<sup>152</sup> See Shelly Kittleson, *Iraq's New Prime Minister Wants to Control the Iran-Backed Militias. It Won't Be Easy*, FOREIGN POL'Y (Aug. 7, 2020), <https://foreignpolicy.com/2020/08/07/iraqs-needs-control-iran-backed-militias/>.

<sup>153</sup> Peter Bergen, *Trump's Decision to Kill Soleimani Is Beginning to Look Like a Reckless Gamble*, CNN (Jan. 6, 2020), <https://www.cnn.com/2020/01/06/opinions/trump-soleimani-decision-reckless-opinion-bergen/index.html>.

<sup>154</sup> See Allan Smith, *Democrats Demand Answers on Soleimani Killing: 'This Is Not a Game'*, NBC NEWS (Jan. 5, 2020), <https://www.nbcnews.com/politics/national-security/democrats-demand-answers-soleimani-killing-not-game-n1110591>.

<sup>155</sup> Martin, *supra* note 48.

<sup>156</sup> See Section III.C.2. *infra*. for analysis of the armed conflict between Iran and the United States.

<sup>157</sup> See *Memorandum of Law: Executive Order 12333*, *supra* note 129, at 5.

put a price on his head or treat him like an outlaw. The Trump administration decided to kill Soleimani because he posed an ongoing and significant threat against the United States in Iraq. Additionally, the United States conducted a successful surprise attack, which is not a form of treachery.<sup>158</sup> While critics may view the Soleimani strike as unpopular or reckless, it cannot seriously be considered an assassination.

## 2. Targeted Killing

Although the United States did not assassinate General Soleimani, the Soleimani strike must meet the principles of the LOAC to be considered a legal killing. The United States traditionally attacks and kills opposition forces without intent to kill a particular or named person.<sup>159</sup> Conventional strikes are typically anonymous, intending to eliminate the threat posed by collective enemy forces.<sup>160</sup> The Soleimani killing was not a conventional strike, however. President Trump targeted the Iranian general with the premeditated intent to kill him. This form of premeditated killing is known as “targeted killing.” Though not defined in U.S. or international law, targeted killings are generally understood to be “the intentional, direct targeting of a person with lethal force intended to cause his death . . . frequently and without particular controversy [] as part of overt, open armed conflict.”<sup>161</sup> The key difference between an assassination and a targeting killing is the

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<sup>158</sup> See *id.*

<sup>159</sup> This convention has changed over time with the advent of counterterrorism operations in the War on Terror. Since 9/11, the United States has often targeted specific terrorist leaders. See Melina Sterio, *The United States’ Use of Drones in The War on Terror: The (Il)legality of Targeted Killings under International Law*, 45 CASE W. L. J. INT’L LAW 197, 198-200 (2012). However, the convention remains largely intact for armed conflicts with nation-states. As discussed in Section C.2.iv., *infra.*, General Soleimani should be treated as an Iranian official and not a terrorist leader for the purposes of the targeted killing. And as demonstrated below, his targeted killing is still legal, even if not the norm for operations against another nation-state.

<sup>160</sup> See MEISELS, *supra* note 113, at 209.

<sup>161</sup> See ANDERSON, *supra* note 89, at 9-10 (also explaining that targeted killings can sometimes occur as part of a police operation).

intent—assassinations intend to kill a person for political reasons while targeted killings intend to achieve a military objective.

The United States has previously conducted targeted killings of specific individuals to eliminate the continued threat they posed during an armed conflict.<sup>162</sup> The most famous instance occurred in 1943 when the United States targeted and killed Japanese Admiral Isoroku Yamamoto, the mastermind behind the surprise Pearl Harbor attack.<sup>163</sup> With the War on Terror came an escalation in the use of targeted killings against specific al Qaeda and Taliban operatives in Afghanistan, Pakistan, and the surrounding region. Such tactics proved useful in killing al Qaeda and Taliban leaders,<sup>164</sup> but also led to significant controversies. One such controversy pertains to the role of intelligence officers in conducting targeted killings as covert operations.<sup>165</sup> Another focuses on whether the United States may target and kill operatives in a country that has not permitted the United States to conduct strikes within its borders.<sup>166</sup> Despite the many concerns and objections raised against targeted killings, the Bush, Obama, Trump, and now Biden administrations have all approved targeted killing operations against terrorist operatives.<sup>167</sup>

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<sup>162</sup> *Id.*

<sup>163</sup> See William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 UNIV. OF RICHMOND L. REV. 667, 690 (2003).

<sup>164</sup> See Bill Roggio, *FDD's Al Qaeda and Taliban Leaders Killed in US Airstrikes Since 2004*, LONG WAR J. (Aug. 7, 2009), [https://www.longwarjournal.org/archives/2009/08/al\\_qaeda\\_and\\_taliban.php](https://www.longwarjournal.org/archives/2009/08/al_qaeda_and_taliban.php).

<sup>165</sup> See Radsan, *supra* note 88, at 339, 442.

<sup>166</sup> See, e.g., Benjamin Wittes, *Implied Consent in Drone Strikes, Congressional Briefings, Dorms Rooms, and Property Disputes*, LAWFARE (Sep. 28, 2012), <https://www.lawfareblog.com/implied-consent-drone-strikes-congressional-briefings-dorm-rooms-and-property-disputes> (commenting on whether Pakistan truly consents to U.S. drone strikes within its territory).

<sup>167</sup> See Micah Zenko, *Targeted Killings and America's 'Kill Lists'*, COUNCIL ON FOREIGN REL. (Oct. 6, 2011), <https://www.cfr.org/blog/targeted-killings-and-american-kill-lists> (describing President Bush and President Obama's notorious "kill lists"); Adil Ahmad Haque, *Targeted Killing Under Trump: Law, Policy, and Legal Risk*, JUST SEC. (Feb. 10, 2017), <https://www.justsecurity.org/37636/targeted-killing-trump-law-policy-legal-risk/> (outlining President Trump's changes to the Rules of



The United States consistently justifies its targeted killings under legal criteria that are consistent with U.S. and customary international law.<sup>168</sup> From a domestic law perspective, the United States targets and kills terrorists or other individuals pursuant to specific statutory or constitutional authority. During the War on Terror, the Bush, Obama, and Trump administrations relied on the 2001 AUMF to target and kill members of al Qaeda, the Taliban, and their affiliates in a multitude of countries.<sup>169</sup> They all also relied on the 2002 AUMF when targeting and killing al Qaeda, ISIS, and other terrorist organizations in Iraq.<sup>170</sup> From a constitutional law standpoint, all three administrations relied on the Article II Commander in Chief powers, which require, *inter alia*, that the President protect the United States against violent aggressors.<sup>171</sup> From a customary international law perspective, the United States relies on the principle of self-defense when authorizing targeted killings against those who pose an imminent and continuing threat to the United States.<sup>172</sup> The U.S. government emphasizes that targeted killings conform with the principles of *jus in*

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Engagement against ISIS); Robert Plummer & Matt Murphy, *Ayman al-Zawahiri. Al-Qaeda Leader Killed in US Drone Strike*, BBC NEWS (Aug. 2, 2022), <https://www.bbc.com/news/world-asia-62387167> (describing President Biden’s approval to conduct a “precision strike” against Ayman al Zawahiri, the mastermind behind the 9/11 attacks).

<sup>168</sup> See Masters, *supra* note 113.

<sup>169</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (granting the president the authority to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided [the September 11<sup>th</sup> attacks], or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons”).

<sup>170</sup> See Charlie Savage, *Obama Sees Iraq Resolution as a Legal Basis for Airstrikes, Official Says*, N.Y. TIMES (Sep. 12, 2014), <https://www.nytimes.com/2014/09/13/world/americas/obama-sees-iraq-resolution-as-a-legal-basis-for-airstrikes-official-says.html>; Robert Windrem, *Air Campaign Against ISIS to Target Leaders and Seized U.S. Weapons*, NBC NEWS (Sep. 12, 2014), <https://www.nbcnews.com/storyline/isis-terror/air-campaign-against-isis-target-leaders-seized-u-s-weapons-n200861>.

<sup>171</sup> See DEP’T OF JUST., 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 2 (2011); Micah Zenko, *How the Obama Administration Justifies Targeted Killings*, COUNCIL ON FOREIGN REL. (July 5, 2012), <https://www.cfr.org/blog/how-obama-administration-justifies-targeted-killings>; Haberman, *supra* note 56.

<sup>172</sup> See *id.*

*bello*, which regulate “the conduct of parties engaged in an armed conflict.”<sup>173</sup> *Jus in bello* includes the principles of proportionality, discrimination, and humanity in targeting enemy combatants in order to reduce civilian casualties and conduct war as humanely as possible.<sup>174</sup>

Three important criticisms of targeted killings warrant further examination. First, critics argue that targeted killings are illegal because the government hunts down and kills a named individual without his ability to prove his innocence, resulting in an extrajudicial execution.<sup>175</sup> Second, critics argue that targeted killings are conducted secretly and may cause an underreporting of civilian casualties.<sup>176</sup> And lastly, critics claim targeted killings make it easier for nations to initiate hostilities, which could lead to a plethora of armed conflicts.<sup>177</sup>

In response to the first concern, it is incorrect to assert that the Soleimani strike was extrajudicial. When facing a serious threat from an enemy combatant, the United States is permitted to target and kill such aggressors without providing notice to the targets, but the killing must comply with the international law principles of *jus in bello*.<sup>178</sup> For example, the Obama administration defended its use of targeted killings when it escalated the number of UAV strikes against terrorist operatives around the globe.<sup>179</sup> For example, former Department of State Legal Advisor Harold Koh defended President Obama’s decision to hunt down and kill specific terrorists when he explained that the United States did not have an obligation under international law to

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<sup>173</sup> See *What are Jus ad Bellum and Jus in Bello?*, INT’L COMM. OF THE RED CROSS (Jan. 22, 2015), <https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0>.

<sup>174</sup> See ANDERSON, *supra* note 89, at 28.

<sup>175</sup> MEISELS, *supra* note 113, at 188-89, 209.

<sup>176</sup> See Radsan, *supra* note 88, at 339, 491.

<sup>177</sup> See JEREMY RABKIN & JOHN YOO, *STRIKING POWER: HOW CYBER, ROBOTS, AND SPACE WEAPONS CHANGE THE RULES FOR WAR* 144 (Encounter Books 2017).

<sup>178</sup> See Section III.C.1. *infra*. for a more in-depth analysis of the *jus in bello* principles applied to the Soleimani strike.

<sup>179</sup> See generally Pardiss Kebriaei, *The Distance Between Principle and Practice in the Obama Administration’s Targeted Killing Program: A Response to Jeb Johnson*, 31 YALE LAW & POL’Y REV. 151 (2012).

“provide targets with legal process before the state may use lethal force.”<sup>180</sup> He further stated that the Obama administration “implemented [*jus in bello* restrictions] rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with all applicable law.”<sup>181</sup> This legal position remained consistent during the Trump administration when authorizing the targeted killing of General Soleimani. Under the Obama administration’s precedent, President Trump had no legal obligation to provide General Soleimani with any notice that the United States planned to kill him. Instead, the United States conducted a surprise attack to increase the odds of killing him, a tactic well within the bounds of *jus in bello*. It is fair to question the legitimacy of the intelligence cited and the specific procedures utilized by the Trump administration when deciding to kill Soleimani. Secrecy inevitably leads to doubt and skepticism. However, no U.S. President is required to publicize sources and methods used in intelligence collection or military secrets regarding sensitive military operations.<sup>182</sup> The rule did not change for the Soleimani strike.

The second concern regarding the potential underreporting of civilian casualties does not seriously challenge the legality of the Soleimani strike. The Soleimani strike was conducted using a precision air strike targeting Soleimani’s vehicle while it drove on an empty service road in the early morning. Under these circumstances, it was highly unlikely the U.S. military risked accidentally killing civilians and subsequently failing to report their deaths. There were likely few, if any, civilians in the area of Soleimani’s vehicle when the air strike occurred. As stated by Koh, the United States uses “robust procedures” to identify lawful targets and kill them.<sup>183</sup> It is difficult to determine whether the Trump administration deviated from the same procedures based on the situational circumstances at the airport before

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<sup>180</sup> See Zenko, *supra* note 171 (quoting statements made during the March 25, 2010 annual meeting of the American Society of International Law).

<sup>181</sup> See *id.*

<sup>182</sup> See STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 146 (Wolters Kluwer, 5th ed. 2011) (outlining the State Secrets Privilege).

<sup>183</sup> See Zenko, *supra* note 171.

the strike and the corresponding result.<sup>184</sup> However, it appears the risk of killing civilians was low, and, as of this writing, there are no reports of a Trump administration collateral damage cover-up.

Finally, the claim that targeted killings can lead to more armed conflicts is not a legal concern and can be countered by evidence that targeted killings may reduce the likelihood of more large-scale wars.<sup>185</sup> For example, John Yoo and Jeremy Rabkin argue that UAVs increase precision in strikes and reduce destruction and unnecessary death, resulting in overall de-escalation and intensity in war.<sup>186</sup> Reasonable minds may differ when assessing whether targeted killings may or may not reduce devastation in and proliferation of war.<sup>187</sup> However, such forecasting holds no legal bearing on the Soleimani strike, especially since the strike did not lead to a larger conventional war between Iran and the United States.<sup>188</sup>

General Soleimani's killing is best understood as a targeted killing, not an assassination. The United States intentionally targeted Soleimani for the purpose of killing him, as evidenced by the statements, official notifications, and explanations of President Trump

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<sup>184</sup> President Trump received much criticism for changing Obama-era regulations pertaining to drone strike approvals. See Tal Axelrod, *Biden Administration Disclosures Trump Rules for Strikes Outside War Zones*, THE HILL (May 1, 2021), <https://thehill.com/policy/defense/551321-biden-administration-releases-trump-rules-for-operations-outside-war-zones/>. One can assume the Trump administration used different procedures from those under the Obama administration. However, it is unlikely the Trump administration deviated from *jus in bello* principles, as evidenced by the lack of any civilian casualties.

<sup>185</sup> See RABKIN, *supra* note 177.

<sup>186</sup> See *id.* at 147.

<sup>187</sup> See ANDERSON, *supra* note 89, at 8.

<sup>188</sup> It is important to re-emphasize that the United States was extremely fortunate to avoid significant casualties during Operation Martyr Soleimani. The Trump administration's strategy may have changed if U.S. troops suffered more than traumatic brain injuries. Additionally, Iran is suspected of plotting assassination attempts against U.S. ambassadors and other leading officials in response to the Soleimani strike. See Celine Castranuovo, *Iran Pledges Retaliation for All Involved in Soleimani's Death*, THE HILL (Sep. 19, 2020), <https://tinyurl.com/5n9xneye>. The Biden administration's stance vis-à-vis Iran may change if Iranian forces or intelligence operatives kill a U.S. official.

and members of his cabinet.<sup>189</sup> But the intentionality of the killing is not indicative of an assassination because the Trump administration aimed to achieve a military objective, not a political one. With this fact now established, the inquiry must now focus on whether the targeted killing was conducted in compliance with both domestic law and international law.

## B. Legality under Domestic Law

From a domestic law standpoint, the Trump administration justified the Soleimani strike under the 2002 AUMF, the War Powers Resolution, and the Article II Commander in Chief powers.<sup>190</sup> As demonstrated below, the administration was incorrect in relying on the 2002 AUMF, but correctly relied on Commander in Chief powers while adhering to long-standing precedents for the War Powers Resolution, thus rendering the killing legal under U.S. law.

### 1. 2002 Authorization for Use of Military Force

The Trump administration's theory that the 2002 AUMF served as a legal basis for killing General Soleimani is tenuous at best, albeit unoriginal. President Obama relied on the 2002 AUMF when targeting and killing ISIS fighters in Iraq three years after he declared the Iraq War complete in 2011.<sup>191</sup> To be clear, the Obama administration cited the 2002 AUMF as an alternative legal jurisdiction, relying predominantly on Article II powers and the 2001 AUMF when targeting and killing ISIS in Iraq.<sup>192</sup> President Obama also asked Congress to pass a new AUMF specific to fighting ISIS in Iraq and Syria, which would have repealed the 2002 AUMF.<sup>193</sup> That said,

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<sup>189</sup> See, e.g., Statement by the Department of Defense, *supra* note 57.

<sup>190</sup> See Haberman, *supra* note 56.

<sup>191</sup> See E-mail from Unnamed Senior Obama Administration Official to the N.Y. Times (Sep. 12, 2014), <https://www.documentcloud.org/documents/1301198-is-war-powers-theory-background-statement.html>; The Obama White House, *President Obama on Ending War in Iraq*, YOUTUBE (Oct. 11, 2011), <https://www.youtube.com/watch?v=G9Z7tdukQuo>.

<sup>192</sup> See *id.*

<sup>193</sup> Joint Resolution to Authorize the Limited Use of the United States Armed Forces against the Islamic State of Iraq and the Levant, S.J. Res. 47, 113th Cong. § 7 (2014).

President Obama's use of the 2002 AUMF as an alternative justification for strikes against ISIS proved to be quite controversial.

Critics of both the Soleimani strike and the fight against ISIS highlight Congress' intent in passing the 2002 AUMF, which expressly aims to eliminate the threats posed by then President Saddam Hussein.<sup>194</sup> The law itself is best construed as authorizing the use of military forces against the Saddam-led Iraqi government, not as a long-standing counterterrorism authority. The 2002 AUMF provides the President with the authority to use force in Iraq to curb the "Iraqi regime's" violations of international law and U.N. Security Council resolutions, harboring of international terrorists, and supposed cultivation of weapons of mass destruction.<sup>195</sup>

When examining the text of the 2002 AUMF, Congress authorized the President to "use the Armed Forces of the United States as he determines to be necessary and appropriate in order to: (1) defend the national security of the United States against the continuing threat posed *by* Iraq; and (2) enforce all relevant *United Nations Security Council resolutions* regarding Iraq." (emphasis added).<sup>196</sup> Congress did not choose to authorize the use of force to counter threats *emanating from within* Iraq, or to counter threats posed *by terrorist organizations in Iraq*. Congress authorized the President to use the military to protect the United States from the threat posed *by* Iraq, which one logically understands to be the government of Iraq led by Saddam Hussein and his Ba'ath Party. Additionally, Congress authorized the President's use of the military to enforce U.N. resolutions already in place in 2002.<sup>197</sup> These resolutions, outlined in the AUMF's preamble, aimed to stop Iraq's aggression against Kuwait, suppression of its people and others,

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<sup>194</sup> See Wells Bennett, *Congressional Intent, the 2002 AUMF, and ISIS*, LAWFARE (Jun. 13, 2014, 3:32 PM), <https://www.lawfareblog.com/congressional-intent-2002-aumf-and-isis>.

<sup>195</sup> See *generally* Authorization for Use of Military Force against Iraq Resolution, *supra* note 146.

<sup>196</sup> See *id.* at § 3(a).

<sup>197</sup> *C.f.* WEED, *supra* note 105, at 41-42 (arguing that "[the 2002 AUMF] appears to incorporate resolutions concerning Iraq that may be adopted by the Security Council in the future as well as those already adopted").

and its pursuit of weapons of mass destruction.<sup>198</sup> It is a stretch to read this authorization as justifying the use of force against members of ISIS, which did not exist in 2002, or the Iranian military, which is never mentioned in the law.<sup>199</sup>

The 2002 AUMF's Preamble does provide a series of statements outlining the threat of international terrorism in the wake of the 9/11 attacks.<sup>200</sup> The Preamble cites Congress' belief that members of al Qaeda were residing in Iraq in 2002 and noted Saddam Hussein would potentially transfer weapons of mass destruction to international terrorist organizations.<sup>201</sup> However, the specific authorization of use of force granted to the President is limited to countering the Iraqi government, not terrorists or other unfriendly nations such as Iran.<sup>202</sup>

Relying on the 2002 AUMF's Preamble to justify military strikes against ISIS in 2014 or killing an Iranian general in 2020 is problematic, especially since the Iraq War formally ended in 2011.<sup>203</sup> Upon concluding military operations in Iraq, President Obama explained that the relationship between the United States and Iraq would be "moving into a new phase of the relationship, . . . [a] normal relationship between sovereign nations; an equal partnership based on mutual interests and mutual respect."<sup>204</sup> The Obama administration sought to continue existing security relationships with Iraq by strengthening the Iraqi military and security forces.<sup>205</sup> However, operations conducted after the Iraq War's official conclusion were intended to be of a mutual relationship between the two countries during peacetime. Once military operations ceased, it is difficult to argue the 2002 AUMF remained a viable legal justification for military

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<sup>198</sup> See Authorization for Use of Military Force against Iraq Resolution, *supra* note 146, at Preamble; see also Bennett, *supra* note 194.

<sup>199</sup> See ALI SOUFAN, ANATOMY OF TERROR: FROM THE DEATH OF BIN LADEN TO THE RISE OF THE ISLAMIC STATE 210 (2017).

<sup>200</sup> See Authorization for Use of Military Force against Iraq Resolution, *supra* note 146, at Preamble.

<sup>201</sup> See *id.*

<sup>202</sup> See *id.*

<sup>203</sup> See *President Obama on Ending War in Iraq*, *supra* note 191.

<sup>204</sup> See *id.*

<sup>205</sup> See *id.*

operations against a new enemy three years later. By 2011, President Obama determined the armed conflict between the United States and Iraq was over, revealing his belief that the objectives of all U.N. Security Council resolutions referenced in the 2002 AUMF were achieved. Although Congress never repealed the law, it takes significant legal somersaults to argue that Congress intended for the President to conduct military operations against new enemies in Iraq years after the war officially concluded. President Obama's 2014 interpretation of the 2002 AUMF was a convenient way to justify strikes against new terrorist organizations surfacing from within Iraq and provided a beneficial shield for Congress to avoid debating a new authorization permitting counterterrorism operations in Iraq. Yet, convenience is not a just cause for creating or relying on poor legal arguments. Both Congress and the President have an obligation to openly debate issues of waging war against new enemies, even when inconvenient.

Following in the Obama administration's footsteps, President Trump justified the killing of General Soleimani, in part, on the authorities provided in the 2002 AUMF.<sup>206</sup> However, in comparison to President Obama's battle with ISIS, President Trump placed a greater, yet tenuous, emphasis on the 2002 AUMF in validating the Soleimani strike.<sup>207</sup> General Soleimani was killed almost nine years after President Obama declared the conclusion of the Iraq War. If the 2002 AUMF did not authorize President Obama to kill ISIS members in Iraq in 2011, many of whom were Iraqis themselves, President Trump assuredly could not rely on the law to kill an Iranian general in 2020. Additionally, the express authorization in the 2002 AUMF was to protect the United States against the "continuing threat" posed by Iraq as it existed in 2002. Saddam Hussein and his Ba'athist government fell from power in 2003.<sup>208</sup> Between 2003 and 2011, the United States

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<sup>206</sup> See Haberman, *supra* note 56.

<sup>207</sup> See Letter from Barack Obama, U.S. President, to the Cong. of the U.S. (Feb. 11, 2015), <https://i2.cdn.turner.com/cnn/2015/images/02/11/2015aumf.2.11.15.msg.rel.pdf> (stating "[a]lthough existing statutes provide me with the authority I need to take these actions [against ISIS], I have repeatedly expressed my commitment to working with Congress to pass a bipartisan [AUMF]").

<sup>208</sup> See *Timeline: Iraq War*, BBC NEWS (Jul. 5, 2016), <https://www.bbc.com/news/magazine-36702957>.



conducted military operations against Iraqi insurgents and foreign terrorists in Iraq.<sup>209</sup> When military operations ended, the United States could no longer reasonably rely on the 2002 AUMF for future combat operations. Instead, the United States committed to pursuing peacetime operations and training to ensure Iraq's security.<sup>210</sup> The Trump administration was opportunistic and incorrect in citing the 2002 AUMF as providing legal authority to target and kill General Soleimani.

President Trump should have avoided the temptation of using the 2002 AUMF precedent when justifying the strike. Instead, the former President should have relied on his Commander in Chief powers to authorize the killing of General Soleimani. Before analyzing the scope of the Commander in Chief powers provided by the U.S. Constitution, the inquiry will turn to the War Powers Resolution and its attempt to restrict the executive branch's ability to conduct unilateral military operations.

## 2. The War Powers Resolution

Passed and enacted into law over President Nixon's veto, the War Powers Resolution seeks to limit the executive branch's use of military force absent congressional approval and oversight.<sup>211</sup> Specifically, the War Powers Resolution aims to:

[I]nsure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.<sup>212</sup>

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<sup>209</sup> See *The Iraq War: 2003-2011*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/timeline/iraq-war> (last visited Nov. 26, 2022).

<sup>210</sup> See *President Obama on Ending War in Iraq*, *supra* note 191.

<sup>211</sup> See WEED, *supra* note 105, at Summary.

<sup>212</sup> See War Powers Resolution, 50 U.S.C. § 1541(a) (2021).

Relevant to the Soleimani inquiry, the President's constitutional powers stipulate that he may only enter U.S. armed forces "into hostilities or situations where imminent involvement in hostilities is clearly indicated by the circumstances [and] are exercised only pursuant to – (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by [an] attack upon the United States, its territories . . . , or its armed forces."<sup>213</sup> The law requires that the President shall in "every possible instance [] consult with Congress before introducing [] forces into hostilities."<sup>214</sup> Under the War Powers Resolution, hostilities or imminent hostilities are assessed and foreseen by the specific circumstances of the situation.<sup>215</sup>

The War Powers Resolution requires the President to submit, "within 48 hours," a report "to the Speaker of the House of Representatives and [] the President pro tempore of the Senate" including "(A) the circumstances necessitating the introduction of the United States Armed Forces; (B) the constitutional and legislative authority under which such introduction took place; and (C) the estimated scope and duration of the hostilities or involvement," unless already authorized by a declaration of war.<sup>216</sup> The War Powers Resolution further constrains executive authority by requiring the President, "[w]ithin sixty calendar days after a report is submitted," to:

Terminate any use of [armed forces] with respect to which such report was submitted unless Congress (1) has declared war or has enacted a specific authorization for such use of [U.S. armed forces], (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States.<sup>217</sup>

The President may extend this sixty-day period to ninety-days if he "determines and certifies to the Congress in writing that an unavoidable military necessity respecting the safety of the [U.S.] Armed Forces requires the continued use of such armed forces in the course

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<sup>213</sup> *See id.* at § 1541(c).

<sup>214</sup> *See id.* at § 1542.

<sup>215</sup> *See id.*

<sup>216</sup> *See id.* at § 1543(a).

<sup>217</sup> *See id.* at § 1544(b).

of bringing about a prompt removal of such forces.”<sup>218</sup> Lastly, the War Powers Resolution affords Congress the authority to instruct the President to “remove” forces from hostilities if “Congress so directs by concurrent resolution” when “United States Armed Forces are engaged in hostilities . . . without a declaration of war or specific statutory authorization.”<sup>219</sup> To avoid potential constitutional issues with respect to legislative vetoes, Congress is likely to consider and review any proposed joint resolution or bill instructing the President to remove forces from hostilities or imminent hostilities in accordance with priority procedures found under the International Security and Arms Export Control Act of 1976, as amended.<sup>220</sup>

Since its inception, the War Powers Resolution has stirred extensive debate over the legislative and executive branches’ limits and shared responsibilities in warfare. For example, every President since 1973 has determined that the War Powers Resolution unconstitutionally infringes on the executive branch’s war powers.<sup>221</sup> In particular, all presidents since Richard Nixon have rejected the law’s definition and restrictions on the Commander in Chief powers.<sup>222</sup>

The War Powers Resolution’s requirement to consult Congress before sending troops into hostilities has proved to be a point of contention since the law’s inception. Multiple presidents have failed to consult Congress before sending U.S. forces into hostilities or situations of imminent hostilities. For example, President George H.W. Bush did not consult Congress before sending 14,000 troops to Panama to augment a force of 13,000 already deployed there in order to neutralize the threat posed by General Manuel Noriega and restore democracy in the country.<sup>223</sup> Other examples include President Carter’s

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<sup>218</sup> *Id.*

<sup>219</sup> *See id.* at § 1544(c).

<sup>220</sup> The Supreme Court’s ruling that the Immigration and Nationality Act’s legislative veto was unconstitutional creates potential issues for congressional attempts to require the president to remove forces via a concurrent resolution. *See WEED, supra* note 105, at 7-8.

<sup>221</sup> *See id.* at 6.

<sup>222</sup> *See id.* at 7. An examination of the Commander in Chief powers occurs in Section III.B.3 *infra*.

<sup>223</sup> *See id.* at 18.

attempt to rescue hostages in Iran using military forces,<sup>224</sup> President Clinton's enforcement of a U.N.-sanctioned embargo against Haiti,<sup>225</sup> and President H.W. Bush's buildup of forces immediately prior to the Gulf War.<sup>226</sup> In these instances, each President justified his decision to avoid consultation with Congress on the need for complete secrecy, as well as the practical need to rapidly make decisions within the time constraints of authorizing military actions.<sup>227</sup> President Trump himself previously chose not to consult Congress before launching missile attacks against Syria in response to President Bashar al Assad's use of chemical weapons against civilians.<sup>228</sup>

In line with the myriad of examples spanning the past fifty years, President Trump did not consult Congress before approving the Soleimani strike, although he did brief Senator Lindsey Graham beforehand.<sup>229</sup> President Trump explained that he did not brief Congress to avoid potential leaks of information, which would have likely jeopardized the mission's success.<sup>230</sup> He further explained that his administration "had to make a decision" and did not have "time to call up [Speaker of the House Nancy Pelosi]," insinuating she would leak the information to the public for political reasons.<sup>231</sup> Such statements, though combative, political, and made during an extremely contentious re-election campaign, demonstrate President Trump's belief, one held by many presidents before him, that the mission's secrecy was of the utmost importance. President Trump's explanation

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<sup>224</sup> See *id.* at 10, 69.

<sup>225</sup> See *id.* at 35.

<sup>226</sup> See *id.* at 71.

<sup>227</sup> See *id.* at 10, 71.

<sup>228</sup> See Charlie Savage, *Was Trump's Syria Strike Illegal? Explaining Presidential War Powers*, N.Y. TIMES (Apr. 7, 2017), <https://www.nytimes.com/2017/04/07/us/politics/military-force-presidential-power.html>.

<sup>229</sup> See Andrew Feinberg, *Trump Slammed for Failing to Tell Congress of Soleimani Strike: This Was Put in the Constitution for a Reason*, INDEPENDENT (Jan. 3, 2020), <https://www.independent.co.uk/news/world/americas/us-politics/trump-iran-us-war-soleimani-attack-congress-pelosi-schiff-al-baghdadi-a9269786.html>.

<sup>230</sup> See Erin Coates, *Trump on Why He Didn't Tell Congress About Soleimani Attack: They Would've Leaked It*, THE WESTERN J. (Jan. 10, 2020, 10:30 AM), <https://www.westernjournal.com/trump-didnt-tell-congress-soleimani-attack-wouldve-leaked/>.

<sup>231</sup> See *id.*

also implies he authorized the strike expeditiously, likely to take advantage of intelligence confirming Soleimani's location at Baghdad International Airport.<sup>232</sup> President Trump's reasons for avoiding Congress before the Soleimani strike are consistent with that of prior Presidents, who were equally faced with contentious and pressing political situations. The frequency with which the executive branch has avoided a congressional dialogue before introducing forces into combat warrants congressional scrutiny. Congress should identify ways to incentivize Presidents to meet with Congress, especially during periods of extreme political polarization.<sup>233</sup> For example, Congress should pursue ways to assuage fears that information will be leaked to the public before operations occur through use of classified briefings. But President Trump acted in accordance with longstanding presidential practice. Any criticism of his interpretation of the War Powers Resolution must be attributed to the incentives and perspectives of the executive branch and not a unique or idiosyncratic deviation from common legal norms.

President Trump did adhere to the War Powers Resolution's requirement to notify Congress within forty-eight hours of presenting forces into hostilities or imminent hostilities. On January 4, 2020, President Trump submitted a formal War Powers Resolution notification to Congress.<sup>234</sup> Lawmakers described the notification as "highly unusual" because it contained only classified information and thus could not be provided to the public.<sup>235</sup> While Trump administration officials, such as National Security Advisor O'Brien, publicly outlined the general legal underpinnings of the strike, the notification could not be scrutinized in an open forum.<sup>236</sup> President Trump fulfilled his legal obligations to notify Congress; however, in terms of transparency, the Trump administration failed to inform the public of their reasoning about a military action that many reasonably feared would lead to all-out war with Iran. Operations with major implications necessarily warrant a public review and open debate. Instead of choosing secrecy, President Trump should have provided

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<sup>232</sup> *See id.*

<sup>233</sup> *See* WEED, *supra* note 105, at 66-67.

<sup>234</sup> *See* Haberman, *supra* note 56.

<sup>235</sup> *See id.*

<sup>236</sup> *See id.*

an unclassified version of the notification to Congress while attaching a classified annex or briefing with more specific details to members with a need to know.

The War Powers Resolution's sixty day limitation on the use of force has also created divisions between the legislative and executive branches. All Presidents since Richard Nixon have interpreted the sixty-day limitation in a manner favorable to their military force decisions.<sup>237</sup> For example, in 2011, President Obama maintained a military "no-fly zone" over Libya and conducted air strikes against Libyan forces well past the sixty-day time limitation.<sup>238</sup> On day eighty-six of the operation, the Obama administration released an unclassified memorandum arguing that President Obama's Commander in Chief powers and the nature of the operations negated the sixty-day limitations.<sup>239</sup> In another example, the Obama administration notified Congress of three air strikes against ISIS fighters in Iraq separately, implying that the sixty-day time limitation would restart after each notification.<sup>240</sup> This interpretation of the sixty-day limitation is suspect because the air strikes were part of a larger, cohesive military operation against ISIS in Iraq.<sup>241</sup> However, Congress did not require the Obama administration to provide further legal justification, leaving the question open for debate.<sup>242</sup>

For the Soleimani strike, the sixty-day limitation did not pose any issues. Several days after President Trump ordered the strike, Iran launched a massive ballistic missile strike against U.S. personnel and assets in Iraq. Despite the massiveness of the attack, President Trump declared "All is well!" and began to de-escalate.<sup>243</sup> The Trump administration also reportedly attempted to downplay the extent of the injuries of the survivors of the attack, revealing President Trump's

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<sup>237</sup> See WEED, *supra* note 105, at 6.

<sup>238</sup> See *id.* at 43.

<sup>239</sup> See *id.*

<sup>240</sup> See *id.* at 47.

<sup>241</sup> See *id.*

<sup>242</sup> See *id.*

<sup>243</sup> See Helsel, *supra* note 50.

desire to avoid further hostilities.<sup>244</sup> Hostilities eventually abated well before the sixty days had lapsed. Though the Soleimani strike did not result in a breach of the War Powers Resolution's sixty-day limitations, it is fair to speculate that President Trump would have construed the law in his favor, in line with every President since Nixon.

Finally, it is important to note Congress passed a bipartisan resolution directing President Trump to “terminate the use of U.S. forces for hostilities [with Iran].”<sup>245</sup> President Trump vetoed the resolution, claiming Congress attempted to inappropriately limit his constitutional authority to use military force.<sup>246</sup> Congress' resolution denotes both the seriousness of the Soleimani killing and its political ramifications for the United States. It also reflects the continued constitutional debate between the executive and legislative branches regarding their war powers. President Biden should take note of Congress' stance on the Soleimani strike and begin to release unclassified explanations of how his administration will conduct targeted killings in the future. President Biden recently signed a classified policy on use of UAVs to conduct targeted killings but few specific details have emerged as of this writing.<sup>247</sup> To avoid similar issues stemming from President Obama and President Trump's classified targeted killing policies, the Biden administration should release an unclassified outline of the legal criteria that will be used in future precision strikes. President Biden should also pursue means to consult Congress, before engaging in similar operations. Simultaneously, Congress must take steps to avoid leaking sensitive information to the public. Lastly, it is unlikely that Congress will change the War Powers Resolution to unencumber the Commander in Chief powers, leaving the status quo unfortunately intact.

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<sup>244</sup> See Julian Borger, *Trump Tried to Play Down US Injuries in Attack by Iran, Says Ex-Official*, THE GUARDIAN (Sep. 9, 2021), <https://www.theguardian.com/us-news/2021/sep/09/trump-white-house-tried-to-play-down-us-injuries-in-iran-attack-suleimani-former-official>.

<sup>245</sup> See KATZMAN, *supra* note 17, at 18.

<sup>246</sup> See *id.* at 18-19.

<sup>247</sup> See Katie Bo Lillis, *Biden Finalizes New Rules for US Drone Strikes*, CNN (Oct. 7, 2022), <https://edition.cnn.com/2022/10/07/politics/drone-strikes-count-erterrorism-white-house-biden-new-rules/index.html>.

### 3. Commander in Chief Powers

In addition to the 2002 AUMF and the War Powers Resolution, the Trump administration justified the Soleimani killing as falling within the executive branch’s Commander in Chief powers.<sup>248</sup> Article II of the U.S. Constitution outlines the President “shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into the actual Service of the United States.”<sup>249</sup> This executive branch function is controversial in the context of the constitutional separation of powers doctrine.<sup>250</sup> The U.S. Constitution provides Congress with the power to “declare War.”<sup>251</sup> However, since the earliest days of the new American republic, Congress’ power to declare war was meant to be “construed strictly,” without inhibiting the executive branch’s more general powers.<sup>252</sup> As eloquently explained by former Chief Justice John Marshall, then member of the House of Representatives, the President of the United States “is the sole organ of the nation in its external relations, and its sole representative with foreign nations,” and “[h]e holds and directs the force of the nation.”<sup>253</sup> The Senate Foreign Relations Committee has agreed with this interpretation of the Commander in Chief powers when deliberating over the scope of the U.N. Charter: “the President has well-established powers and obligations to use our forces without specific approval of Congress.”<sup>254</sup> Examples of various Presidents entering troops into conflict absent a

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<sup>248</sup> See Haberman, *supra* note 56.

<sup>249</sup> U.S. CONST. art. II, § 2.

<sup>250</sup> See *Intro. 7.2 Separation of Powers Under the Constitution*, CONST. ANNOTATED, [https://constitution.congress.gov/browse/essay/intro-2-2-2/ALDE\\_00000031/](https://constitution.congress.gov/browse/essay/intro-2-2-2/ALDE_00000031/) (last visited Nov. 13, 2022).

<sup>251</sup> U.S. CONST. art. I, § 8, cl. 11.

<sup>252</sup> See Robert F. Turner, *Covert War and the Constitution: A Response*, 17 J. NAT’L SEC. L. & POL’Y 409, 411 (2012) (quoting Alexander Hamilton in *Federalist Papers* 39, 40, and 42, “The general doctrine . . . of our constitution is, that the EXECUTIVE POWER of the Nation is vested in the President, subject only to the *exceptions* and *qu[a]lifications* which are expressed in the instrument . . . It deserves to be remarked, that as the participation of the senate . . . to declare war [is the] exception[] out of the general “Executive Power” vested in the President, [it is] to be construed strictly . . .”).

<sup>253</sup> See *id.* at 412.

<sup>254</sup> See *id.* at 420.



declaration of war or express statutory approval include President Lincoln's blockade of southern ports at the nascent stages of the Civil War, President Truman's introduction of forces into Korea, and President Reagan's invasion of Grenada.<sup>255</sup> Former Supreme Court Justice Robert Grier, when writing in support of President Lincoln's use of force against the Confederacy's treasonous rebellion, explained:

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be 'unilateral.' Lord Stowell (1 Dodson, 247) observes, 'It is not the less a war on that account, for war may exist without a declaration on either side. It is so laid down by the best writers of the law of nations. A declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other.'<sup>256</sup>

In the context of targeted killings, the Obama administration has cited the Commander in Chief powers when killing members of al Qaeda and other terrorist organizations across the globe. For example, Attorney General Eric Holder explained that "[t]he Constitution empowers the President to protect the nation from any imminent threat of violent attack" posed by al Qaeda.<sup>257</sup> Additionally, C.I.A. General Counsel, during the Obama administration, Stephen Preston explained that lethal covert actions are "authorized by the President in the exercise of his powers under Article II of the U.S. Constitution . . . to protect the country from an imminent threat of violent attack."<sup>258</sup> As evidenced by these statements, the Obama administration believed that counterterrorism strikes, including targeted killings, were legal

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<sup>255</sup> See *ArtII.S2.C1.1.2 Commander in Chief*, CONST. ANNOTATED, [https://constitution.congress.gov/browse/essay/artII-S2-C1-1-1/ALDE\\_00013463/](https://constitution.congress.gov/browse/essay/artII-S2-C1-1-1/ALDE_00013463/) (last visited Nov. 26, 2022).

<sup>256</sup> See *id.* (citing *The Prize Cases* (67 U.S. 635, 668 (1863) (quoting Grier, J))).

<sup>257</sup> See Zenko, *supra* note 171 (quoting remarks at Northwestern University School of Law on March 5, 2012).

<sup>258</sup> See *id.* (quoting remarks at Harvard Law School on April 10, 2021).

under the Commander in Chief powers, whether conducted as military or covert operations.<sup>259</sup>

In lockstep with the Obama administration, President Trump justified General Soleimani's killing under his Article II powers. As Commander in Chief, President Trump argued that he held the authority and responsibility to protect Americans and U.S. interests from Iranian-orchestrated attacks occurring throughout 2019 and into early 2020.<sup>260</sup> President Trump's Article II powers afforded him various options to conduct military operations in self-defense.<sup>261</sup> One available course of action was to target and kill General Soleimani, the man responsible for planning many recent attacks against Americans in Iraq and who was believed to be concocting new ones in the imminent future.

Based on a proper understanding of the Commander in Chief powers, the Trump administration conducted the Soleimani strike well within existing constitutional authorities. Between 2019 and 2020, General Soleimani, the IRGC Quds Force, and various Iranian proxies attacked U.S. military personnel and assets in Iraq. The United States responded by defending itself through targeted air strikes in Syria. When Iran escalated the nature of its attacks in late 2019, the Trump administration, in accordance with longstanding notions of executive power, responded by killing General Soleimani. President Trump, as the sole organ of foreign affairs and military authority in the United States, made a legal decision to eliminate Soleimani, who posed an active military threat to the United States in Iraq. With many historical examples serving as legal precedents, President Trump did not need to wait for a congressional declaration, war, or separate congressional

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<sup>259</sup> Targeted killings conducted by the military during times of war fall under different legal authorities when compared with those conducted by intelligence agencies as covert operations. See Banks, *supra* note 163, at 677, 726-29.

<sup>260</sup> See Zenko, *supra* note 171 (referring to CIA General Counsel Stephen Preston's remarks at Harvard Law School on April 10, 2021).

<sup>261</sup> See generally *ArtII.S2.C1.1.2 Commander in Chief*, *supra* note 255; see also Turner, *supra* note 254, at 419 (explaining U.S. Presidents have sent military forces into hostilities on more than 200 occasions).

authorization to kill this enemy combatant. He already held the authority as Commander in Chief to direct the U.S. military to do so.

To clarify, the Trump administration would likely need to seek a new congressional authorization to engage in a total war against Iran (e.g., to conduct strikes in Iran).<sup>262</sup> But President Trump did not pursue a wider-scale conflict. Instead, he chose to de-escalate, notwithstanding Iran's massive retaliatory Operation Martyr Soleimani. President Trump fulfilled his obligations to protect the United States from Iranian aggression in Iraq as Commander in Chief. Authorizing the Soleimani strike directly adhered to Justice Grier's declaration that the President "is bound to accept the challenge without waiting for any special legislative authority."<sup>263</sup> Iran conducted armed attacks against the United States, and the Trump administration responded by targeting and killing General Soleimani.

### C. Legality under International Law

With the domestic law analysis now complete, General Soleimani's killing must be analyzed from an international law standpoint. International law is comprised of the practices and actions accepted by states as legally binding (collectively known as customary international law), as well as rules and obligations defined in multilateral treaties such as the U.N. Charter.<sup>264</sup> There is no consensus among nations as to the extent and scope of many customary international principles, and those principles are thus left open to interpretation. For example, the United States perceives its obligations under customary international law differently from many other nations with respect to the treatment of non-state actors engaged in

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<sup>262</sup> See Section III.C. *infra*.

<sup>263</sup> See *ArtII.S2.C1.1.2 Commander in Chief*, *supra* note 255 (citing *The Prize Cases* (67 U.S. (2 Bl.) 635 (1863) (quoting Grier, J))).

<sup>264</sup> See *Understanding International Law*, U.N. (2011), <https://tinyurl.com/586jfe59>; *Customary International Law*, INT'L COMM. RED CROSS (Oct. 29, 2010), <https://www.icrc.org/en/document/customary-international-humanitarian-law-0>; *Customary International Law*, BLACK'S LAW DICTIONARY 941 (10th ed. 2014).

hostilities.<sup>265</sup> In short, the United States conforms to the norms provided by or memorialized in international treaties signed by the President and ratified by Congress, while adhering to customary international law principles as interpreted by the United States.<sup>266</sup>

Regarding the scope and definition of targeted killings, the United States complies with *jus in bello* restrictions to warfare.<sup>267</sup> Such restrictions are rooted in the concept that nations are expected to conduct war in a manner that protects its participants and victims.<sup>268</sup> The United States also adheres to the international law principle of *jus ad bellum* or “the right to wage war.”<sup>269</sup> The United States abides by *jus ad bellum* principles as outlined in U.N. Charter Article 2, which provides that “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>270</sup> However, *jus ad bellum* recognizes each nation’s inherent right to self-defense.<sup>271</sup> *Jus ad bellum* should not be confused with *jus in bello*, as the former governs when the United States may enter into an armed conflict while the latter governs how to conduct war once it has already begun.<sup>272</sup>

### 1. Legality under *Jus in Bello*

When assessing the Soleimani strike against the *jus in bello* principles, it is important to first establish that General Soleimani was an enemy combatant. Under international law, nations are generally only permitted to target and kill enemy combatants during an armed

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<sup>265</sup> See, e.g., RABKIN, *supra* note 177, at 10 (explaining the United States rejected Advanced Protocol I of the Geneva Conventions because of its incorporation of customary international law principles that elevate the status of non-state actors, offering them greater protections in times of war).

<sup>266</sup> See Radsan, *supra* note 88, at 446-47.

<sup>267</sup> See DOWDY, *supra* note 87, at 28.

<sup>268</sup> See DYCUS, *supra* note 182, at 236.

<sup>269</sup> See *id.* at 211.

<sup>270</sup> U.N. Charter art. 2.

<sup>271</sup> See *id.* at art. 51.

<sup>272</sup> *What is International Humanitarian Law?*, *supra* note 87.

conflict or hostilities.<sup>273</sup> Defining the term “enemy combatant” has caused much debate, especially in the context of the War on Terror.<sup>274</sup> Enemy combatants are best understood as “those persons who have the right under international law to participate directly in armed conflict during hostilities,” including “all members of the regularly organized armed forces of a party to the conflict, as well as irregular forces who [fulfil the conditions for being considered armed forces].”<sup>275</sup> Enemy combatants are further categorized into lawful and unlawful enemy combatants.<sup>276</sup> According to the U.S. Manual for Military Commissions, “member[s] of the regular forces of a State party engaged in hostilities against the United States” are categorized as lawful enemy combatants.<sup>277</sup> Based on Soleimani’s official membership in the Iranian military and the ongoing hostilities between Iran and the United States, it is clear Soleimani was a lawful enemy combatant. Soleimani was a general in the Iranian military and head of the IRGC and Quds Force, which are official institutions in the Iranian military.<sup>278</sup> As explained, Iran engaged in hostilities against the United States by leveraging the IRGC and Quds Forces to orchestrate, plan, and participate in attacks against U.S. personnel and equipment in

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<sup>273</sup> See generally *International Law on the Bombing of Civilians*, DANNEN.COM (Oct. 2, 2017), <http://www.dannen.com/decision/int-law.html#a> (providing excerpts from The Hague Conventions, Geneva Conventions, and other authoritative international law sources regarding prohibitions on killing unarmed civilians during armed conflict).

<sup>274</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (stating “There is some debate as to the proper scope of this term [enemy combatant] . . .”).

<sup>275</sup> See *United States of America: Practice Relating to Rule 3. Definition of Combatants*, INT’L COMM. RED CROSS, [https://ihl-databases.icrc.org/customary-ihl/eng/doc/index/v2\\_cou\\_us\\_rule3](https://ihl-databases.icrc.org/customary-ihl/eng/doc/index/v2_cou_us_rule3) (last visited Nov. 26, 2022) (quoting the U.S. Navy Handbook (1995)).

<sup>276</sup> See *id.*

<sup>277</sup> The definition further includes “a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or [] a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.” See *id.*

<sup>278</sup> Press Release, U.S. Dep’t of Def., Iran Military Power Report Statement (Nov. 19, 2019), <https://www.defense.gov/News/Releases/Release/Article/2021009/iran-military-power-report-statement/>.

Iraq.<sup>279</sup> Soleimani himself led various Iranian-backed terror groups and military proxies responsible for attacks against the United States in Iraq.<sup>280</sup> He also had a long history of killing U.S. forces in Iraq, including the attacks between June and December 2019.<sup>281</sup> Furthermore, U.S. intelligence reports confirmed General Soleimani was plotting imminent attacks against the United States leading up to January 3, 2020.<sup>282</sup> For these reasons, General Soleimani can be viewed as a lawful enemy combatant engaged in ongoing hostilities against the United States.

When targeting and killing lawful enemy combatants, the United States must adhere to the *jus in bello* principles of distinction, proportionality, and humanity. Distinction refers to selecting and targeting military combatants instead of protected categories of people such as civilians.<sup>283</sup> Proportionality aims to decrease, but not eliminate, collateral damage during a military operation.<sup>284</sup> And humanity aims to reduce or eliminate unnecessary suffering that may result from military action.<sup>285</sup> Upon reviewing the circumstances of the Soleimani strike, it is apparent the Trump administration acted in alignment with the *jus in bello* restrictions.

Under the distinction principle the United States must take great care to only target enemy combatants while actively avoiding civilians, their property, and cultural sites.<sup>286</sup> The DoD adhered to this principle by targeting Soleimani's vehicle while it travelled an empty road at the Baghdad International Airport. The DoD did not attempt to launch missiles at Soleimani later in the day when he was scheduled to meet with politicians and other civilian leaders in a more urban setting. The timing and location of the air strike clearly demonstrate

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<sup>279</sup> See McChrystal, *supra* note 143.

<sup>280</sup> See *id.*; see also Press Release, Treasury Sanctions Five Individuals Tied to Iranian Plot to Assassinate the Saudi Arabian Ambassador to the United States (Oct. 11, 2011), <https://www.treasury.gov/press-center/press-releases/pages/tg1320.aspx>.

<sup>281</sup> See Wolf, *supra* note 3.

<sup>282</sup> See *id.*

<sup>283</sup> See DOWDY, *supra* note 87, at 148.

<sup>284</sup> See *id.* at 147.

<sup>285</sup> See *id.* at 149.

<sup>286</sup> See *id.* at 147.

the level of care the DoD took to avoid any collateral damage or targeting of innocent civilians. For these reasons it is evident the United States fulfilled its obligations under the principle of distinction.

The Soleimani strike was also proportional. Under *jus in bello* the United States must ensure it reduces the likelihood of collateral damage in excess of the military objective.<sup>287</sup> The Soleimani strike only resulted in the deaths of enemy combatants. Soleimani, PMF commander, Abu Mahdi al Muhandis, Kata'ib Hezbollah leader, and five other PMF members perished in the air strike.<sup>288</sup> As noted earlier, Kata'ib Hezbollah is a terrorist organization that actively wages war against the United States. Factions of the PMF also fit this description based on their storming of the U.S. Embassy in Baghdad on December 31, 2019.<sup>289</sup> Therefore, members of Kata'ib Hezbollah and aggressor factions of the PMF are also best understood as enemy combatants.<sup>290</sup> Additionally, the timing of the strike reduced the likelihood of civilian deaths. Again, the strike occurred in the early morning hours on an access road, and no civilians were killed.<sup>291</sup> The Soleimani strike

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<sup>287</sup> See *id.*

<sup>288</sup> See Lyse Doucet, *Qasem Soleimani: US Kills Top Iranian General in Baghdad Air Strike*, BBC NEWS (Jan. 3, 2020), <https://www.bbc.com/news/world-middle-east-50979463>.

<sup>289</sup> See KATZMAN, *supra* note 17, at 9; see also JESSA ROSE DURY-AGRI ET AL., IRAQI SECURITY FORCES AND POPULAR MOBILIZATION FORCES: ORDERS OF BATTLE 8 (Inst. for the Study of War 2017).

<sup>290</sup> Kata'ib Hezbollah members are best understood as unlawful enemy combatants because they are members of a terrorist/paramilitary organization, not any nation's regular forces. The PMF poses a separate challenge because they are a federation of various sub-groups, including Kata'ib Hezbollah, and are sponsored by the Iraqi government originally to combat ISIS. See *Kata'ib Hezbollah*, STANFORD CENTER FOR INT'L SEC. AND COOPERATION (last visited Nov. 13, 2022), [https://cisac.fsi.stanford.edu/mappingmilitants/profiles/kataib-hezbollah#text\\_block\\_24071](https://cisac.fsi.stanford.edu/mappingmilitants/profiles/kataib-hezbollah#text_block_24071); Michael Knight, *How the U.S. Government Should Think about Iraq's Popular Mobilization Forces*, WASH. INST. (May 9, 2019), <https://www.washingtoninstitute.org/policy-analysis/how-us-government-should-think-about-iraqs-popular-mobilization-forces>.

<sup>291</sup> See Chris Pleasance & Keith Griffith, *How Qasem Soleimani Was 'Torn to Shreds' by a US Missile and His Body Had to Be Identified by His RING: Pentagon Drone Launched Four Rockets at Car Carrying Iranian General After He Arrived from Syria to Meet Ringleaders of Embassy*, DAILY MAIL (Jan. 3, 2020, 3:18 PM), <https://www.dailymail.co.uk/news/article-7847795/How-airstrike-Iranian-general-unfolded-Baghdad.html>.

warranted some amount of risk of civilian casualties due to its significant military objective. The Trump administration aimed to eliminate arguably the single largest threat to U.S. personnel and interests in the region with a history of successfully killing Americans and planning imminent attacks against the United States. Yet, under the principle of proportionality, the United States must aim to reduce, not eliminate, the likelihood of collateral damage. As evidenced by the timing and the result of the Soleimani strike, the DoD fulfilled this obligation by avoiding any civilian casualties through expert planning and precision.

Lastly, the United States met the requirements of the humanity principle when killing Soleimani. The United States must avoid using weapons or tactics that will result in unnecessary suffering of military targets.<sup>292</sup> It is highly unlikely General Soleimani, Commander al Muhandis, or the other PMF members who died in the strike suffered in a manner inconsistent with the humanity principle. None were tortured, subjected to biological or chemical weapons, or otherwise killed using illegal weaponry. All were killed instantaneously when several missiles obliterated Soleimani's vehicle. Missile strikes that cause immediate death are legal weapons under the LOAC. Therefore, the Soleimani strike did not violate the humanity principle.

## 2. Legality under *Jus ad Bellum* – Anticipatory Self-Defense or Counterattack?

With the *jus in bello* analysis now complete, the inquiry must now turn to the law of *jus ad bellum*, which governs when nations are permitted to enter into armed conflict. International law only allows a state to engage in armed conflict to defend itself against illegal aggression.<sup>293</sup> The nation must ensure its armed response is both necessary and proportional to the actions of the aggressor.<sup>294</sup> Necessity and proportionality under *jus ad bellum* are assessed using different criteria than *jus in bello*'s necessity and proportionality principles. In the

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<sup>292</sup> See DOWDY, *supra* note 87, at 149.

<sup>293</sup> See U.N. Charter art. 51.

<sup>294</sup> See MICHAEL N. SCHMITT & JELENA PEJIC, CHAPTER 2: RESPONDING TO TRANSNATIONAL TERRORISM UNDER THE *JUS AD BELLUM*: A NORMATIVE FRAMEWORK 63 (Asser Press 2012).



*jus ad bellum* context, necessity requires a nation to demonstrate that it must resort to force to achieve a peaceful resolution to a conflict.<sup>295</sup> Proportionality under *jus ad bellum* restricts the scope, magnitude, and duration of force that is reasonably necessary to counter an attack.<sup>296</sup>

The United States understands that self-defense under international law takes three forms: (1) self-defense “[a]gainst an actual use of force, or hostile act; (2) [p]re-emptive self[-]defense against an imminent use of force; and (3) [s]elf[-]defense against a continuing threat.”<sup>297</sup> Of the three categories, pre-emptive self-defense is the most controversial. Pre-emptive self-defense, also known as anticipatory self-defense, describes when a nation attacks an aggressor to thwart the aggressor’s initial, planned attack before it can occur.<sup>298</sup> Under pre-emptive self-defense, the best defense is a good offense. In such instances, *jus ad bellum* requires the defending nation to demonstrate that the aggressor’s attack was imminent, requiring a preliminary strike for self-defense purposes.<sup>299</sup> Anticipatory self-defense, if used properly, affords nations the opportunity to prevent a belligerent’s impending act of war.<sup>300</sup>

Anticipatory self-defense was most famously outlined in a series of letters exchanged between the United States and Great Britain in 1837, known as the *Caroline Case*.<sup>301</sup> The United States and Great Britain engaged in correspondence after the British navy repelled several American aggressors who had entered Canadian waters to harass British ships already in the region to quell a Canadian rebellion.<sup>302</sup> The British navy crossed into U.S. territory and burned the aggressors’ ships, eliminating their ability to conduct future attacks. Daniel Webster, U.S. Secretary of State at the time, agreed that, under international law, nations held the inherent right to anticipatorily

<sup>295</sup> See DOWDY, *supra* note 87, at 35.

<sup>296</sup> See *id.*

<sup>297</sup> See *Memorandum of Law: Executive Order 12333*, *supra* note 129, at 7-8.

<sup>298</sup> See Van den Hole, *supra* note 85, at 97.

<sup>299</sup> See *id.*

<sup>300</sup> See Maj. Megan C. Mallone & Capt. Christine E. Seibert, *Are We There Yet? Applying the Legal Framework of Anticipatory Self-Defense to the Democratic People’s Republic of Korea*, THE REPORTER 1, 3 (2018).

<sup>301</sup> See *British-American Diplomacy: The Caroline Case*, *supra* note 69.

<sup>302</sup> See *id.*

defend themselves as long as they could demonstrate “a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”<sup>303</sup> However, Secretary Webster saw no legal justification for violating U.S. sovereignty when the United States already declared neutrality for the situation between Great Britain and Canada.<sup>304</sup> In response to Secretary Webster’s letters, British Foreign Secretary Lord Ashburton agreed with Webster’s general understanding of anticipatory self-defense but expanded its scope to permit a defending nation to enter into another’s territory when “a strong overpowering necessity may arise . . . strictly confined within the narrowest limits imposed by that necessity.”<sup>305</sup>

Anticipatory self-defense has evolved with the advent of the War on Terror. In particular, the notion of imminence has changed to include countering threats posed by terrorist organizations which continuously plot and execute surprise attacks against civilians, government officials, and military personnel. In conducting strikes against terrorists across the globe, the United States relies on an expanded understanding of “imminent threat.” Imminence in the context of terrorism is better understood to describe “a continuing terrorist campaign[,] entitling the state to an extended period of self-defense.”<sup>306</sup> Imminence does not mean immediate; it describes the continuing threats posed by terrorists and irregular forces that can ostensibly strike anywhere, at any time.<sup>307</sup>

Less controversial is the notion of self-defense against an ongoing armed attack. Under these situations, nations are entitled to defend themselves when belligerent armed attacks or hostilities are continuous.<sup>308</sup> This theory of self-defense becomes problematic when it is doubtful that an aggressor’s actions constitute an armed attack or hostility. Protocol I of the Geneva Conventions offers some clarification in defining an “attack” as “[an] act[] of violence against the

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<sup>303</sup> *See id.*

<sup>304</sup> *See id.*

<sup>305</sup> *See id.*

<sup>306</sup> *See* SCHMITT, *supra* note 294, at 66.

<sup>307</sup> *See id.* at 63-67.

<sup>308</sup> ELIZABETH WILMSHURST, PRINCIPLES OF INTERNATIONAL LAW ON THE USE OF FORCE BY STATES IN SELF-DEFENSE 4-5 (Chatham House 2005).

adversary, whether in offense or defense.”<sup>309</sup> Attacks are easier to identify during a conventional war since they are often instances of violence initiated by armed forces throughout the course of the ongoing conflict. Terrorist attacks are more complicated because they can occur sparsely and outside of a traditional battlefield. The term “hostilities” is harder still to identify since they do not necessarily feature kinetic action.<sup>310</sup>

The Trump administration appears to have based its decision to kill General Soleimani on the theory of anticipatory self-defense. DoD and State Department officials, as well as the President himself, noted that Soleimani was planning “imminent attacks” against U.S. personnel and materiel.<sup>311</sup> Emphasizing the immediacy of future attacks points directly to anticipatory self-defense. The Trump administration sought to demonstrate that the United States had to kill General Soleimani to stop imminent attacks before they arise.<sup>312</sup> The Trump administration also implicitly argued that the Soleimani strike met the War on Terror’s expanded definition of “imminence” under anticipatory self-defense by emphasizing Soleimani’s terrorist designation and the ongoing threat he posed in Iraq.

The Trump administration was misguided in justifying Soleimani’s killing under a theory of anticipatory self-defense. The anticipatory self-defense construct requires the United States to demonstrate its use of military force was necessary to preemptively stop an imminent armed attack before it could occur.<sup>313</sup> However, at the time of General Soleimani’s killing, Iran was already conducting multiple armed attacks against the United States through IRGC leaders and its proxies. Instead of claiming the Soleimani strike was an act of

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<sup>309</sup> See Christof Heyns et al., *The Definition of an “Attack” under the Law of Armed Conflict*, ARTICLES WAR (Nov. 3, 2020), <https://lieber.westpoint.edu/definition-attack-law-of-armed-conflict-protection/>.

<sup>310</sup> See ANDERSON, *supra* note 89, 11.

<sup>311</sup> See Wolf, *supra* note 3.

<sup>312</sup> See Adam Taylor, *The Key Word in U.S. Justifications for the Killing of Iranian General: ‘Imminent’*, THE WASH. POST (Jan. 5, 2020, 10:17 AM), <https://www.washingtonpost.com/world/2020/01/05/key-word-us-justifications-killing-iranian-general-imminent/>.

<sup>313</sup> See Van den Hole, *supra* note 85, at 95-98.

anticipatory self-defense, the Trump administration had sufficient justification to defend the strike as self-defense against an ongoing armed attack. Iranian attacks against the United States should not be viewed as isolated incidents. As a comparison, the Obama administration's view that individual attacks, like air strikes against ISIS operatives, should be viewed as separate occurrences is incorrect. Instead, Iran's continuous attacks throughout the latter months of 2019 are best understood as part of a cohesive, ongoing military campaign against the United States in Iraq. In killing General Soleimani, President Trump did not attempt to stop a first, or even second, isolated armed attack from occurring. In actuality, Soleimani's killing was a self-defense measure made during an ongoing international armed conflict.

One cannot view the attacks conducted by Keta'ib Hezbollah, the PMF, and others between mid- to late-2019 as anything but *actual use of force* during one continuous armed conflict. The frequency with which Iranian-backed proxies attacked U.S. personnel and interests in Iraq reveals that Iran actively engaged in continued military operations against the United States.<sup>314</sup> The dramatic escalation and lethality of Iranian attacks conducted in late 2019 demonstrate that Iran and the United States were engaged in a limited form of international armed conflict known as "imperfect war." Under international law, an "imperfect war" occurs when "hostilities [] subsist between two nations more confined in . . . nature and extent; [] limited as to places, persons, and things."<sup>315</sup> During an imperfect war, the limited location, duration, and number of participants do not impede a nation's legal right to counter-attack in self-defense. A nation may use military force to defend itself during an imperfect war as long as its countermeasures are restrained and within the bounds of the conflict's limitations.<sup>316</sup> The

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<sup>314</sup> C.f. Ellie Cumberbatch, *An Assessment of the Lawfulness of the Killing of Qassem Soleimani by the United States and of the Iranian Response under Jus ad Bellum*, EDINBURGH STUDENT L. REV. (2021), <https://www.eslr.ed.ac.uk/2021/04/01/an-assessment-of-the-lawfulness-of-the-killing-of-qassem-soleimani-by-the-united-states-and-of-the-iranian-response-under-jus-ad-bellum/> (arguing the tit-for-tat exchanges between the United States and Iranian proxies cannot be viewed as an "accumulation of events" resulting in an armed conflict).

<sup>315</sup> See *Bas v. Tingey*, 4 U.S. 37, 40 (1800).

<sup>316</sup> See *id.* at 40-41.

defending nation is not restricted to tit-for-tat exchanges but may wage war against the aggressor in a manner similar to any other international armed conflict.<sup>317</sup> As applied to the Soleimani strike, the United States was in an imperfect war with Iran, and therefore was justified in killing General Soleimani as part of its war effort.<sup>318</sup>

Lastly, the United States did not violate international law by killing Soleimani in Baghdad without the Iraqi government's consent. Critics of the killing claimed the United States violated Iraq's sovereignty.<sup>319</sup> However, as explained in the *Caroline Case*, customary international law permits a nation to defend itself against aggressors located inside another country when the host country is unable or unwilling to stop the hostilities.<sup>320</sup> This principle is not limited to anticipatory self-defense. As explained by the International Court of Justice, nations have a duty under "well-recognized principles" of international law to "not allow knowingly its territory to be used for acts contrary to the rights of others."<sup>321</sup> It is clear the government of Iraq knew General Soleimani and Iranian proxies planned and conducted operations against U.S. personnel from within Iraq; Soleimani's role in attacks against the United States was widely reported. Defense Secretary Esper noted this fact and went so far as to warn Prime Minister Al Mahdi to "take proactive actions . . . to get [the situation] under control," implying the United States could resort to kinetic actions if the security situation failed to improve.<sup>322</sup> Yet, Iraq failed to stop General Soleimani and his forces from attacking U.S. personnel in the region. Since Iraq was unwilling or unable to stop attacks emanating from within its borders and the United States requested help on multiple occasions, the Trump administration could legally target and kill General Soleimani in Iraq.

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<sup>317</sup> See Lt Col Scott A. Hodges, *The Killing of Qassem Soleimani: Assassination or Lawful Military Strike?*, THE REPORTER 1, 4 (2020).

<sup>318</sup> See *id.* at 2-4.

<sup>319</sup> See, e.g., Callamard, *supra* note 90.

<sup>320</sup> See *British-American Diplomacy: The Caroline Case*, *supra* note 69.

<sup>321</sup> See SCHMITT, *supra* note 294, at 70.

<sup>322</sup> See KATZMAN, *supra* note 17, at 8.

### 3. Reprisal

The Trump administration's rhetoric surrounding the Soleimani strike raises the question of whether Soleimani was killed as an act of reprisal. Reprisals are best understood by virtue of example. In the wake of the daring Navy SEAL raid that killed Osama bin Laden in Abbottabad, Pakistan, President Obama announced to the world that "justice ha[d] been done."<sup>323</sup> Echoing this sentiment, White House Press Secretary Jay Carney relayed to the media that "[t]he fact of the matter is this was somebody who was deserving of the justice that he received, and Americans and people around the world are glad that he is gone."<sup>324</sup> These statements reveal that the Obama administration, among many others, believed the main culprit behind the September 11, 2001 terror attacks deserved to die. More interestingly, the statements allude to the United States' intent to kill bin Laden as a form of revenge.

Reprisals are a form of retaliation made by a nation in response to a belligerent's prior unlawful armed attack and aim to deter future ones by bringing the belligerent back into compliance with international law.<sup>325</sup> They are "a breach of [the LOAC], which would otherwise be unlawful but in exceptional cases [are] considered lawful as enforcement measure[s] in response to a previous breach [] by the enemy, with the purpose of terminating the enemy's violation."<sup>326</sup> Reprisals often involve violence motivated by revenge, which is generally illegal under the LOAC.<sup>327</sup> However, an underlying motivation of revenge does not always indicate that a nation's armed response is a reprisal or otherwise illegal. For example, an armed response may constitute a legal reprisal if the belligerent originally

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<sup>323</sup> Macon Phillips, *Osama Bin Laden Dead*, THE WHITE HOUSE (May 2, 2011, 12:16 AM), <https://obamawhitehouse.archives.gov/blog/2011/05/02/osama-bin-laden-dead>.

<sup>324</sup> Press Brief, White House Press Secretary Jay Carney Discussing Bin Laden Raid (May 4, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/05/04/press-briefing-press-secretary-jay-carney-542011>.

<sup>325</sup> See Darcy, *supra* note 101, at 187.

<sup>326</sup> *Reprisals*, INT'L CONFERENCE OF THE RED CROSS, <https://casebook.icrc.org/glossary/reprisals> (last visited Nov. 13, 2022).

<sup>327</sup> See Darcy, *supra* note 101, at 191.

violated the LOAC and the lethal force aims to “bring[] about the cessation of the unlawful conduct.”<sup>328</sup>

Although tempting, describing the aforementioned bin Laden killing as a reprisal is problematic for a few reasons. The Obama administration described bin Laden’s death in terms of retribution and possibly indicated an intent of revenge, but it remains clear bin Laden continued to serve as an active threat to the United States. At the time of his death, bin Laden was still the official head of al Qaeda and helped plan future attacks against the United States and its allies.<sup>329</sup> The operation to kill or capture bin Laden was as much an act of active self-defense as it was an attempt to right a prior egregious violation of the LOAC. While the Obama administration’s political rhetoric may have alluded to an intent to retaliate or avenge, bin Laden’s continued and ongoing military threat negated a claim of reprisal. The Abbottabad raid’s objective was to remove a dangerous terrorist leader from the battlefield dead or alive, not necessarily to retaliate on behalf of those Americans who perished in the 9/11 attacks or attempt to force al Qaeda back into compliance with the LOAC or wider international law.

Before comparing the bin Laden killing with the Soleimani strike, a few major distinguishing factors between the two situations are worth mentioning. First, the Obama administration stated the bin Laden raid was not a targeted killing because the United States was prepared to capture bin Laden.<sup>330</sup> U.S. Navy SEALs killed bin Laden only after a firefight ensued.<sup>331</sup> In contrast, the Trump administration made no attempt to capture Soleimani. There is no question the Soleimani strike was a targeted killing.<sup>332</sup> Second, bin Laden was killed more than ten years after September 11, 2001, while General Soleimani was killed within a week of Iranian proxy attacks against U.S. personnel

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<sup>328</sup> *See id.*

<sup>329</sup> *See Secrets of the Squalid Lair: Bin Laden WAS Still Directing Al Qaeda Terror Attacks up until His Death, Claims U.S.*, DAILY MAIL (May 8, 2011, 1:17 PM), <https://www.dailymail.co.uk/news/article-1384596/Osama-bin-Laden-directing-al-Qaeda-operations-right-death.html>.

<sup>330</sup> *See Phillips, supra* note 323.

<sup>331</sup> *See id.*

<sup>332</sup> *See Haberman, supra* note 56.

near Kirkuk and the U.S. Embassy in Baghdad. Soleimani arguably posed a more imminent threat to the United States in early January 2020 than bin Laden did in May 2011.

With these differences in mind, the bin Laden example helps clarify that the Soleimani killing was not a reprisal but an active measure of self-defense during an international armed conflict. Similar to the bin Laden raid, the United States assessed that General Soleimani posed an active threat against U.S. interests. Both continued to pose an active threat to the United States and were allegedly planning near-term attacks on Americans. Soleimani's future attacks likely posed a more imminent threat than bin Laden's did at the time of their deaths as evidenced by the escalatory nature of the Iranian conflict. Based on Soleimani's continued threat to the United States during the course of an imperfect war with Iran, the Soleimani strike was not a breach of LOAC and was not intended to retaliate or otherwise seek vengeance for prior wrongdoings. Therefore, the strike was not a reprisal.

#### 4. General Soleimani: Terrorist or State Actor?

Under international law, armed conflicts may occur between two nations or between a state and non-state actors.<sup>333</sup> When a nation is engaged in armed conflict with a non-state actor, known as a non-international armed conflict, "members of the organized armed group [i.e. the non-state actor] who have a continuous combat function may be targeted even when they are not so participating."<sup>334</sup> For example, during the War on Terror, the United States targeted and killed members of al Qaeda and ISIS on and off the battlefield. The United States views terrorists as retaining their "continuous combat function" even while off the battlefield because terrorists often target civilian and other non-military locations.<sup>335</sup> The United States has also targeted Iranian proxies in Iraq because they are members of terrorist and

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<sup>333</sup> See *Hamdan v. Rumsfeld*, 548 U.S. 557, 630-31 (2006) (representing the war against al-Qaeda as a non-international armed conflict under international law).

<sup>334</sup> See Michael N. Schmitt & Eric W. Widmar, "On Target": *Precision and Balance in the Contemporary Law of Targeting*, 7 J. NAT'L SEC. LAW & POL'Y 379, 386 (2014).

<sup>335</sup> See MEISELS, *supra* note 113, at 39-46.



insurgency non-state actors.<sup>336</sup> In contrast, when the United States fights conventional wars against nation-states, targets must typically be members of the opposing nation's military.<sup>337</sup>

General Soleimani poses an interesting conundrum. He was an official military leader of Iran's armed forces, but was also a designated terrorist and commanded terrorist organizations and proxy militias. Trump administration officials publicly described Soleimani as both a known terrorist and an Iranian official acting on behalf of the Islamic Republic.<sup>338</sup> In seeking the best of both worlds, the Trump administration muddied the waters by declaring that the United States killed Soleimani, an Iranian general and terrorist leader.

General Soleimani was a chimera, half Iranian official and half commander of terror groups and irregular militia forces. General Soleimani furthered Iran's foreign policy while simultaneously supporting strategic initiatives of non-state actors, whose goals were not always aligned with Iran's national objectives.<sup>339</sup> At the time of his death, General Soleimani was a designated terrorist who led the IRGC, an official Iranian military organization and U.S.-designated Foreign Terrorist Organization.<sup>340</sup>

The LOAC generally permits nations to target and kill members of irregular forces, militias, and armed insurgent groups during non-international armed conflicts.<sup>341</sup> Such forces are viewed as analogous to a belligerent nation's regular forces engaged in an

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<sup>336</sup> See, e.g., Julian E. Barnes, *U.S. Launches Airstrikes on Iranian-Backed Forces in Iraq and Syria*, N.Y. TIMES (Jun. 28, 2021), <https://www.nytimes.com/2019/12/29/world/middleeast/us-airstrikes-iran-iraq-syria.html>.

<sup>337</sup> See IHL Database: Rule 3: Definition of Combatants, INT'L COMM. RED CROSS, [https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1\\_rul\\_rule3](https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule3) (last visited July 21, 2022).

<sup>338</sup> See Statement by the Department of Defense, *supra* note 57; Wolf, *supra* note 3.

<sup>339</sup> See Alaaldin, *supra* note 14; see generally Michael Knights, *The Evolution of Iran's Special Groups in Iraq* 3 CTC SENTINEL 1 (2010).

<sup>340</sup> See *Foreign Terrorist Organizations*, U.S. DEP'T STATE, <https://www.state.gov/foreign-terrorist-organizations/> (last visited Nov. 26, 2022).

<sup>341</sup> See Schmitt & Widmar, *supra* note 334, at 391.

international armed conflict.<sup>342</sup> Thus, from a practical standpoint, the Soleimani strike posed no major issues regardless of whether the Trump administration targeted Soleimani as an Iranian leader engaged in an international armed conflict or a commander of irregular and terrorist forces during a non-international armed conflict. Nevertheless, when attempting to craft a coherent policy for future strikes against Iranian military leaders, it is necessary to clarify Soleimani's status. Based on the evidence, the United States killed an Iranian state actor. As established above, Iran levied an international armed conflict in the form of an imperfect war against the United States. General Soleimani planned, led, and helped execute Iran's war against the United States throughout 2019, in furtherance of Iran's foreign policy objectives. As head of the IRGC and Quds Force, Soleimani shaped and executed Iranian foreign policy by battling both the United States and Iraqi governments.<sup>343</sup> Soleimani's control of proxies and terrorists in Iraq should not distort the reality that he operated on behalf of Iran. Iran's use of irregular forces to wage war is nothing new; Iran is notorious for utilizing terrorist and other armed groups to control military and political factions within various nations in the Middle East.<sup>344</sup> Its strategy—using proxy forces and terrorists to mask the nature of its war against the United States—should not confuse the issue. Soleimani is appropriately categorized as a state actor (i.e. lawful enemy combatant) who worked closely with non-state terrorist organizations (i.e. unlawful enemy combatants) on behalf of a belligerent nation.

U.S. policy toward Iran and Iranian officials further complicates the issue. In designating General Soleimani as a terrorist, President Obama helped confuse Soleimani's true role in Iran's war against the United States. President Trump continued this flawed policy stance by citing Soleimani's terrorist status when defending the strike. Examining the purpose of terrorist designations provides some clarification. Terrorist designations grant U.S. officials a range of useful tools against persons who commit terrorist acts, such as freezing their

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<sup>342</sup> *See id.*

<sup>343</sup> *See* Ali Soufan, *Qassem Soleimani and Iran's Unique Regional Strategy*, 11 CTC SENTINEL 1, 1-2, 4 (2018).

<sup>344</sup> *See* KENNETH KATZMAN, CONG. RESEARCH SERV., R44017, IRAN'S FOREIGN AND DEFENSE POLICIES 3-5 (2021).

assets.<sup>345</sup> When the Obama administration designated Soleimani as a terrorist in 2011, the Department of Treasury froze his assets and prohibited U.S. persons from engaging in transactions with him.<sup>346</sup> However, a terrorist designation in this context should not serve as the underlying reason for targeting and killing a state actor who operates on behalf of his nation's foreign affairs activities.

The Trump administration should have avoided the temptation of citing Soleimani's terrorist designation when defending the Soleimani strike. Doing so would have allowed the DoD to more easily defend the Soleimani strike under long-standing international law standards for counterattacks against belligerent nations. The Trump administration could have more convincingly justified its defensive actions against Iran to Congress and the U.N. Security Council. In terms of transparency and separation of powers issues, explaining that Soleimani was killed as an Iranian state actor would have clearly informed Congress and the American people that Iran was waging an imperfect war against the United States. This honest assessment of the conflict would have afforded Congress the ability to engage in a public debate on any possible legislative decisions like declaring war or passing a new AUMF. Instead, using Soleimani's terrorist designation as support for the Soleimani strike created additional confusion and skepticism within the United States and throughout the international community. To avoid such issues in the future, the United States should describe the conflict accurately instead of overextending the terrorist designation.<sup>347</sup> This strategy will increase

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<sup>345</sup> See *Terrorism Designation FAQs*, U.S. DEP'T STATE (Feb 27, 2018), <https://2017-2021.state.gov/terrorism-designations-faqs/index.html>.

<sup>346</sup> Press Release, Treasury Sanctions Five Individuals Tied to Iranian Plot to Assassinate the Saudi Arabian Ambassador to the United States (Oct. 11, 2011), <https://home.treasury.gov/news/press-releases/tg1320>.

<sup>347</sup> See, e.g., Phil Stewart, et al., *U.S. to Designate Elite Iranian Forces as Terrorist Organization*, REUTERS (Apr. 5, 2019, 6:02 PM), <https://www.reuters.com/article/us-usa-iran-idUSKCN1RH2I4> (describing concerns with designating the IRGC as a Foreign Terrorist Organization and how similar concerns could arise with designating state actors as terrorists during future conflicts).

transparency while avoiding the creation of legal standards for a new breed of quasi-terrorist state actors.

#### IV. THE SOLEIMANI PRECEDENT APPLIED

With the legality of General Soleimani's killing analyzed and settled, its precedent can serve a useful purpose for President Biden as he navigates the numerous threats and challenges posed by Iran as well as the Taliban in Afghanistan. The security landscape has dramatically changed since early 2020 given the implosion of the Afghan government and the United States' shifting role in Iraq to an advisory and security cooperation-focused mission. The legal framework for the Soleimani strike outlined above (the Soleimani Precedent) can provide the Biden administration with helpful parameters for future targeted killings.

##### A. Countering Iran and Its Proxies in Iraq

Since the early days of the Biden administration, Iran has escalated its violence against the United States in Iraq. For example, Iran has used its proxies to target and kill Americans operating in the country.<sup>348</sup> Iran has also directed its aggression at the Iraqi government. For instance, Iranian-backed militias attempted to assassinate newly-elected Prime Minister Mustafa al-Kadhimi with a "suicide drone" in November 2021.<sup>349</sup> Given Iran's escalation of operations against the United States and the Iraqi government, the Biden administration has authorized several counterattacks aimed to stop ongoing hostilities while deterring future aggression.<sup>350</sup>

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<sup>348</sup> See Tom Rogan, *Biden Administration Fails Iran Attack Test*, WASH. EXAMINER (Feb. 16, 2021, 2:55 PM), <https://www.msn.com/en-us/news/world/biden-administration-fails-iran-s-attack-test/ar-BB1dJQxD>.

<sup>349</sup> See Kim Ghattas, *Iran Feels Cornered by the Biden Administration*, THE ATLANTIC (Dec. 1, 2021), <https://www.theatlantic.com/international/archive/2021/12/iran-us-biden-middle-east/620857/>.

<sup>350</sup> See Matt Seyler & William Mansell, *Biden Orders Airstrikes on Iran-Backed Militias Near Iraq-Syria Border in Response to UAV Attacks*, ABC NEWS (Jun. 27, 2021,

If the situation continues to unravel in Iraq, the Biden administration must provide clear messaging about the legality of future counterattacks to Congress, U.S. allies, and the American people. Enter the Soleimani Precedent. Under the legal framework outlined above, the Biden administration should affirm that Iran is actively waging an imperfect war against the United States from within Iraq and parts of Syria. If the United States discovers that an Iranian general, say Soleimani's replacement Brigadier General Esmail Ghaani,<sup>351</sup> is orchestrating attacks against U.S. personnel and interests in Iraq, the Biden administration should expressly state that it may legally target and kill him under both domestic and international law. If the U.S. military or intelligence community gathers information that General Ghaani or other Iranian generals are coordinating and leading attacks against the United States in Iraq, the Biden administration may kill them pursuant to presidential Commander in Chief powers under domestic law. Under international law, the Biden administration may defend the United States by targeting and killing Iranian military officials under a theory of self-defense against actual use of force during an imperfect war. Such targeted killings must be conducted in accordance with *jus in bello*.

President Biden should not rely on the 2002 AUMF when authorizing targeted killing operations against Iranian generals or proxy forces for the same reasons outlined above. To date, the Biden administration has not cited the 2002 AUMF when authorizing air strikes against Iranian proxies, which is a promising first step.<sup>352</sup> More importantly, President Biden endorsed legislation to repeal the 2002 AUMF.<sup>353</sup> President Biden should be even more proactive by

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8:01 PM), <https://abcnews.go.com/International/biden-orders-airstrikes-iran-backed-militias-iraq-syria/story?id=78526157>.

<sup>351</sup> See Kyle Perisic, *Iran Announces Replacement for Top General Killed in US Airstrike*, AM. MILITARY NEWS (Jan. 3, 2020), <https://americanmilitarynews.com/2020/01/iran-announces-replacement-for-top-general-killed-in-us-airstrike/>.

<sup>352</sup> See John Haltiwanger, *Biden Faces Blowback from Progressives over Airstrikes against Iran-Backed Militias on Iraq-Syria Border*, BUS. INSIDER (Jun. 28, 2021, 11:37 AM), <https://www.businessinsider.com/progressives-criticize-biden-airstrikes-against-iran-backed-militias-2021-6>.

<sup>353</sup> See *id.*

specifically informing Congress that he will never rely on the 2002 AUMF for future counterattacks against Iran and its proxies in Iraq. Such clarification will place limitations on the misuse of the now defunct law for his administration and future ones, irrespective of whether Congress repeals it. President Biden should also learn from President Trump's mistake of failing to declassify intelligence revealing an Iranian target's intent and imminent attack plan against U.S. interest in Iraq. Congress justifiably voiced concern with the Soleimani strike because of a lack of transparency. President Biden could obviate this issue by providing Congress with unclassified reports after any targeted killing of Iranian military officials. The Biden administration is not legally required to provide such information but improving transparency with Congress is of the utmost importance during times of a polarizing armed conflict.<sup>354</sup>

Finally, although recognizing the existence of the international armed conflict with Iran poses major political issues for the Biden administration, especially in light of President Biden's call for ending "forever wars,"<sup>355</sup> honesty is vitally important for success. With no domestic statute in place authorizing continued military operations against Iran, or for that matter in Iraq, the Biden administration should seek congressional action to authorize proactive military responses against Iran and its proxies. The Biden administration should ask Congress for bipartisan support in passing an AUMF which authorizes the use of limited force against Iran and its proxies in Iraq, purely for defensive purposes, over a specified period of time (e.g., for as long as the United States conducts advisory operations in support of the Iraqi military), subject to mandatory re-authorization. The AUMF could also require periodic, unclassified or classified reports of military operations to ensure the executive branch is operating within the bounds of the AUMF. While President Biden may continue to rely on his Article II powers when countering Iranian aggression, a new AUMF would

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<sup>354</sup> See DYCUS, *supra* note 182.

<sup>355</sup> See Asma Khalid, *Biden Pledged to End the Forever Wars, but He Might Just Be Shrinking Them*, NPR (Sept. 8, 2021, 5:00 AM), <https://www.npr.org/2021/09/08/1034140589/afghanistan-biden-pledge-to-end-forever-wars>.

strengthen the legality of his actions in Iraq while also clearly delineating legislative checks and balances.

## B. Targeting the Taliban in Afghanistan

With the fall of the Afghan government and military in August 2021 came an array of major national security concerns for the United States. President Biden has broadcasted his intention to continue the fight against terrorist organizations such as al Qaeda and ISIS-Khorasan in Afghanistan when they pose a direct threat to the United States.<sup>356</sup> He demonstrated his commitment to that promise when he authorized the targeted killing of Ayman al Zawahiri in Kabul in August 2022.<sup>357</sup> From a domestic law perspective, it is unclear whether the 2001 AUMF will continue to provide President Biden with the legal authority to target and kill Taliban and terrorist operatives now that the war in Afghanistan is officially over. To overcome future issues of domestic legal authority in killing terrorist operatives in Afghanistan, President Biden can rely on existing counterterrorism laws and precedent, as well as the Commander in Chief powers. Depending on the specific terrorist target, President Biden may still be able to rely on the 2001 AUMF as authorization for future targeted killings.<sup>358</sup> The al Zawahiri killing is a prime example—Congress certainly intended to

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<sup>356</sup> See Statement Release, President Biden, End of the War in Afghanistan (Aug. 31, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/31/remarks-by-president-biden-on-the-end-of-the-war-in-afghanistan/>; Statement Release, President Biden, Update on the Evacuation Mission from Kabul (Aug. 28, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/28/statement-by-president-joe-biden-on-the-evacuation-mission-in-kabul/>.

<sup>357</sup> See Mohamed Mokhtar Qandil, *The Killing of al-Zawahiri: Repercussions for the Taliban*, WASH. INST. (Aug. 16, 2022), <https://www.washingtoninstitute.org/policy-analysis/killing-al-zawahiri-repercussions-taliban>.

<sup>358</sup> Ayman al-Zawahiri and Saif al-Adel, two members of al Qaeda who played significant roles in the September 11, 2001 attacks and subsequent terrorist operations, remain at large. See *Most Wanted Terrorists*, FBI, [https://www.fbi.gov/wanted/wanted\\_terrorists](https://www.fbi.gov/wanted/wanted_terrorists) (last visited July 21, 2022). The 2001 AUMF assuredly provides the authority to kill these individuals. See Authorization for Use of Military Force, *supra* note 147.

provide the President with the authority to kill al Zawahiri, the architect of the 9/11 attacks, when it passed the 2001 AUMF.<sup>359</sup>

A more difficult challenge for the Biden administration in Afghanistan is to determine whether it may combat the Taliban in Afghanistan now that the United States has officially ended military operations in the country. As of this writing, the Taliban is no longer engaged in an armed conflict with the United States. After the full withdrawal of American troops from the country, the Taliban is no longer focused on fighting Americans. In fact, the Taliban began refraining from attacking Americans in 2020 as part of the Trump administration's promise to withdraw troops from Afghanistan by mid-2021.<sup>360</sup> In future operations against the Taliban, the Biden administration must deem that specific Taliban operatives either posed an imminent threat to the United States or were actively attacking U.S. personnel. With the Taliban's push for international recognition, the battle against ISIS-Khorasan, and the challenge of navigating Afghanistan's total economic collapse, it is highly unlikely many Taliban leaders will seek to risk a renewed, open military conflict with the United States.

The Soleimani Precedent may prove useful in justifying targeted killings against any Taliban leaders actively engaged in hostilities against the United States. President Biden should proactively define when the Soleimani Precedent would apply to Taliban leaders who partner with al Qaeda or other terrorist organizations in planning attacks against the United States. Under domestic law, the same interpretation of the Commander in Chief powers would apply to combating Taliban operatives who plan or engage in attacks against the United States. Such situations may still be likely since President Biden has pledged to continue the fight against terrorism emanating

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<sup>359</sup> C.f. Ben Saul, *The Unlawful Killing of Ayman al-Zawahiri*, LAWFARE (Aug. 17, 2022), <https://www.lawfareblog.com/unlawful-us-killing-ayman-al-zawahiri> (arguing the al Zawahiri was illegal under international law).

<sup>360</sup> See Steve Coll & Adam Entous, *The Secret History of the U.S. Diplomatic Failure in Afghanistan*, THE NEW YORKER (Dec. 10, 2021), [https://www.newyorker.com/magazine/2021/12/20/the-secret-history-of-the-us-diplomatic-failure-in-afghanistan?utm\\_source=pocket-newtab](https://www.newyorker.com/magazine/2021/12/20/the-secret-history-of-the-us-diplomatic-failure-in-afghanistan?utm_source=pocket-newtab).



from Afghanistan.<sup>361</sup> International law would also permit President Biden to target and kill Taliban leaders who help plan and execute armed attacks against the United States. The Biden administration would need to ensure that targeted killings adhere to *jus in bello* principles, but this should not pose a major issue since the U.S. military actively adheres to the principles of distinction, proportionality, and humanity. In terms of state sovereignty, the Biden administration would have sufficient reason to conduct air strikes in Afghanistan against Taliban aggressors. The United States does not recognize the Taliban as the legitimate government of Afghanistan, so any claims of violating Afghanistan's sovereignty made by the Taliban should not be entertained. The Taliban should also not be trusted or relied upon for identifying and stopping Taliban (or for that matter, al Qaeda or ISIS-Khorasan) attacks against the United States. The Biden administration can instead adopt a policy of conducting targeted killings in Afghanistan without any concern of violating its sovereignty. Thus, it would be nonsensical for the Biden administration to entertain pleas made by the Taliban to halt air strikes against its own members who are planning or engaging in attacks against U.S. personnel and interests.

A real-world example helps demonstrate how the Soleimani Precedent could apply today. The Haqqani Network, a designated terrorist organization and quasi-faction of the Taliban,<sup>362</sup> has played a significant role in al Qaeda's rise and continued war against the United States.<sup>363</sup> Sirajuddin Haqqani, one of the Haqqani Network's leaders and a significant terrorist operative, was recently appointed as the Taliban government's Acting Minister of Interior.<sup>364</sup> As al Qaeda

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<sup>361</sup> See Tore Hamming & Colin P. Clarke, *Over-the-Horizon Is Far below Standard*, FOREIGN POL'Y (Jan. 5, 2022), <https://foreignpolicy.com/2022/01/05/over-the-horizon-biden-afghanistan-counter-terrorism/>.

<sup>362</sup> *Terrorist Groups: Haqqani Network*, NAT'L COUNTERTERRORISM CTR., [https://www.dni.gov/nctc/groups/haqqani\\_network.html](https://www.dni.gov/nctc/groups/haqqani_network.html) (last visited Nov. 26, 2022); *Haqqani Network: Overview*, COUNTER EXTREMISM PROJECT, <https://www.counterextremism.com/threat/haqqani-network> (last visited July 21, 2022).

<sup>363</sup> See Don Rassler & Vahid Brown, *The Haqqani Network and al-Qaeda*, FOREIGN POL'Y (Jul. 19, 2011), <https://foreignpolicy.com/2011/07/19/the-haqqani-network-and-al-qaeda/>.

<sup>364</sup> See Peter Bergen, *He's on the FBI's Most Wanted List and is Now a Key Member of the Taliban's New Government*, CNN (Sep. 9, 2021), <https://edition.cnn.com/2021/09/09/opinions/haqqani-taliban-government-afghanistan-bergen/index.html>.

continues to wage war against the United States, it is safe to assume Haqqani supports al Qaeda's war against the United States and may also be an active, albeit secret, participant in their efforts. Haqqani's new role in the Taliban regime creates an interesting scenario for potential future targeted killing operations against Taliban officials. The Biden administration should embrace the Soleimani Precedent and maintain the option to target and kill Haqqani or other Haqqani Network officials who help al Qaeda actively plan attacks against the United States. The Biden administration should consciously work with Congress and executive branch organizations to determine whether the 2001 AUMF is still in force against the Haqqani Network and under which scenarios. In doing so, the U.S. government will be well-prepared for potential future air strikes in Afghanistan against this quasi-terrorist, Taliban-affiliated organization.

As of the time of this writing, the situations in Iran and Afghanistan continue to spiral toward disaster. The oppressive Iranian regime faces the most significant resistance it has encountered since seizing power in 1979.<sup>365</sup> Calls for human rights and equality for all Iranians currently preoccupy Iranian leaders who seek to maintain their iron grip on society. In Afghanistan, a country-wide famine plagues innocent civilians while a regrouping anti-Taliban resistance remains present.<sup>366</sup> Despite these challenges, or possibly because of them, the Iranian government and factions of the Taliban could view these tumultuous times as an opportunity to attack the United States and its interests.<sup>367</sup> The Biden administration should be prepared for future

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<sup>365</sup> See Alex Hardie & Atay Alam, *As Many as 14,000 Arrested in Iran over Last Six Weeks, United Nations Says*, CNN (Nov. 3, 2022), <https://edition.cnn.com/2022/11/03/middleeast/iran-protests-arrests-united-nations-intl/index.html>.

<sup>366</sup> See *With Famine Looming Over Afghanistan, Millions Struggle for Every Meal*, NBC NEWS (Dec. 30, 2021), <https://www.nbcnews.com/news/world/famine-looms-afghanistan-leaving-millions-hungry-rcna10400>; Lynne O'Donnell, *The Afghan Resistance Is Still Fighting*, FOREIGN POL'Y (May 12, 2022), <https://foreignpolicy.com/2022/05/12/afghanistan-resistance-taliban-clashes/>.

<sup>367</sup> See, e.g., Dan De Luce, *Iran Plotted to Kidnap or Kill at Least 10 People in the U.K., British Domestic Spy Chief Says*, NBC NEWS (Nov. 16, 2022), <https://www.nbcnews.com/news/world/iran-plotted-kidnap-kill-people-uk-british-spy-chief-says-rcna57572> (explaining how Iran is suspected of targeting and killing British nationals or people in the U.K., which demonstrates Iran's willingness

altercations with such malign actors. By proactively and publicly outlining his acceptance of the Soleimani Precedent, President Biden can ensure that American interests in the Middle East will continue to be protected by all legal uses of force at his disposal.

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to target American allies, and possibly Americans, during times of internal strife); Joshua T. White, *Nonstate Threats in the Taliban's Afghanistan*, BROOKINGS INST. (Feb. 1, 2022), <https://www.brookings.edu/blog/order-from-chaos/2022/02/01/non-state-threats-in-the-talibans-afghanistan/> (outlining the Haqqani Network's role in supporting terrorist organizations that actively seek to target the United States).