

RECENT DEVELOPMENTS

The Justifiability of the Targeted Killing of a Terrorist/State Actor in International Law

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I. INTRODUCTION

On January 2, 2020, the United States carried out a targeted killing via drone of Iran’s General Qasem Soleimani near Baghdad International

Airport.¹ A targeted killing is the “intentional, premeditated and deliberate use of lethal force, by States . . . acting under colour of law . . . against a specific individual who is not in the physical custody of the perpetrator.”² This type of targeted killing is one among many others that the United States has employed in order to eliminate a terrorist suspect claimed to be posing a threat to American personnel and interests abroad.³ The United States and other countries have used targeted killings mainly to eliminate non-State actors suspected of terrorist activities.⁴ However, many States and international organizations have called into question the legality of the United States killing Soleimani due to the fact he was a government official of Iran.⁵ The targeted killing of Soleimani is unique in that the target was both an Iranian government official and a U.S. designated terrorist.⁶

Recent developments in international law have justified States exercising their right to self-defense against non-State terrorist groups.⁷

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1. *Qasem Soleimani: US Kills Top Iranian General in Baghdad Airstrike*, BBC (Jan. 3, 2020), <https://www.bbc.com/news/world-middle-east-50979463> [hereinafter BBC Report].

2. Philip Alston (Special Rapporteur on extrajudicial, summary, or arbitrary executions), *Study on Targeted Killings*, Addendum to the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Human Rights Council, Fourteenth Session, ¶ 1, U.N. Doc. A/HRC/14/24/Add. 6 (May 28, 2010); Although there is not a single officially accepted definition of the term “targeted killing” in international law, this is the definition that has been employed by the Special Rapporteur in assessing the legality of targeted killings and includes the essential elements that other definitions of targeted killing generally include.

3. Nicholas Rostow, *Targeted Killing of Terrorists*, 74 JOINT FORCES Q., 3d Quarter 2014, 98, https://ndupress.ndu.edu/Portals/68/Documents/jfq/jfq-74/jfq-74_98-101_Rostow.pdf.

4. *Id.*

5. See Agnes Callamard (Special Rapporteur on extrajudicial, summary, or arbitrary executions), *Extrajudicial, Summary or Arbitrary Executions*, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Advance Unedited Version Human Rights Council, Forty-fourth Session, U.N. Doc. A/HRC/44/38 (June 29, 2020) [hereinafter Special Rapporteur Report]; Fred Pleitgen, *Exclusive: Iran’s Response to US Will Be Military--Khamenei’s Advisor*, CNN (Jan. 5, 2020), <https://www.cnn.com/2020/01/05/middleeast/iran-soleimani-khamenei-adviser-intl/index.html>; Merrit Kennedy and Jackie Northam, *Was It Legal for the US 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>.

6. Statement on the Designation of the Islamic Revolutionary Guard Corps as a Foreign Terrorist Organization, 2019 DAILY COMP. PRES. DOC. 212 (Apr. 8, 2019), available at <https://www.govinfo.gov/content/pkg/DCPD-201900212/pdf/DCPD-201900212.pdf> [hereinafter Terrorist Designation].

7. Ben Emmerson (Special Rapporteur on extrajudicial, summary, or arbitrary executions), *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, Human Rights Council, Twenty-ninth Session, ¶ 50, U.N. Doc. A/HRC/29/51 (June 16, 2015) [hereinafter Special Rapporteur Report II].

But “the targeted killing of General Soleimani . . . is the first known incident in which a State invoked self-defense as a justification for an attack against a State actor.”⁸ Moreover, the United States took this action after the “historic step” of designating Iran’s IRGC as a foreign terrorist organization in April 2019.⁹ The legal ramifications of Soleimani’s dual role as a State actor and terrorist on the legality of the United States’ strike remain unclear.¹⁰ The nuances and complexities of international law around the War on Terror raises the question whether the targeted killing of a terrorist suspect who is also a State actor is legally justifiable.

This Article evaluates the implications of the targeted killing of an individual who is a designated terrorist and a State actor through an in-depth analysis of the targeted killing of Qasem Soleimani. Due to the complexity of this issue, consideration of the legality of the targeted killing is done solely under international law. Domestic legal issues and the question of whether this targeted killing constituted an “assassination” are best left to review in a separate analysis. Part I of this Article briefly introduces Qasem Soleimani, his position in Iran, and legal treatment he received by foreign States and international organizations. Part II reviews the legal standard that applies to the targeted killing. A special analysis is conducted about the relationship of international human rights law and international humanitarian law.

Part III evaluates the context in which the targeted killing occurred. Most notably, this section focuses on whether or not the targeted killing occurred in the context of an armed conflict. This section also assesses whether the targeted killing could be viewed as an act of self-defense or within an ongoing armed conflict. Part IV discusses the targeted killing’s adherence to the core international law of war principles. Part V gives further consideration to the fact that the targeted killing occurred in the territory of a third State. Part VI ends with a brief discussion on how or if the targeted killing of Soleimani could be viewed as part of the War on Terror.

8. Special Rapporteur Report, *supra* note 5, at 15 ¶ 60; *see also Country Reports on Terrorism 2019*, U.S. DEP’T OF STATE, BUREAU OF COUNTERTERRORISM, at 3, <https://www.state.gov/reports/country-reports-on-terrorism-2019/> [hereinafter State Dep’t Report].

9. Terrorist Designation, *supra* note 6.

10. Special Rapporteur Report, *supra* note 5, at 25 ¶ 14.

II. WHO WAS QASEM SOLEIMANI?

In analyzing Soleimani's dual nature as a terrorist and State actor, it is important to first outline his position in Iran and the legal treatment he received by foreign States and international organizations. Qasem Soleimani was the leader of the Quds Force, the elite paramilitary and intelligence arm of the Islamic Revolutionary Guard Corps (IRGC).¹¹ The Quds Force has been described by retired General Stanley McChrystal as "an organization roughly analogous to a combination of the CIA and JSOC in the United States."¹² Soleimani was a central figure in Iran and seen as one of the most powerful government officials, second only to Ayatollah Khomeini.¹³ In order to contextualize the importance of Soleimani's position in Iran, Roman Schweizer stated: "To be clear, this is the equivalent of Iran killing the U.S. Chairman of the Joint Chiefs of Staff or the Director of the Central Intelligence Agency and then taking credit for it."¹⁴ Consequently, the targeted killing of Soleimani not only raises many legal concerns, but political ones as well.

The United States designated the IRGC as a Foreign Terrorist Organization (FTO) in April 2019.¹⁵ This was the first time that a terrorist designation had ever been applied to a part of another government.¹⁶ While the United States' designation of the IRGC as an FTO was a "historic step,"

11. Frank Miles, *What is the Quds Force, the Elite Iranian Military Unit?*, FOX NEWS (Jan. 2, 2020), <https://www.foxnews.com/world/what-is-the-quds-force-the-elite-iranian-military-unit>; *See also Iran's Revolutionary Guards*, COUNCIL ON FOREIGN RELATIONS (May 6, 2019), <https://www.cfr.org/background/irans-revolutionary-guards>.

12. Stanley McChrystal, *Iran's Deadly Puppet Master*, FOREIGN POL'Y MAG., Winter 2019, <https://foreignpolicy.com/gt-essay/irans-deadly-puppet-master-qassem-suleimani/>.

13. Natasha Turak, *'The Puppet Master Is Dead': Iranian Gen. Qasem Soleimani's Power, and Why His Death Is Such a Big Deal*, CNBC (Jan. 7, 2020), <https://www.cnbc.com/2020/01/03/who-was-iranian-general-qasem-soleimani-and-why-his-killing-matters.html>; Miles, *supra* note 11; BBC Report, *supra* note 1; Many commentators remark that Soleimani was a unique figure, noting how involved of an orchestrator he was. *See* Kyle Rempfer, *Iran Killed More US Troops in Iraq than Previously Known, Pentagon Says*, MILITARY TIMES (Apr. 4, 2019), <https://www.militarytimes.com/news/your-military/2019/04/04/iran-killed-more-us-troops-in-iraq-than-previously-known-pentagon-says/>.

14. Turak, *supra* note 13; Roman Schweizer is the Managing Director for Aerospace and Defense at the Cowen Washington Research Group; Iran has recently planned to do just this, in threatening to attack Ft. McNair in Washington D.C. with the specific intent to kill U.S. Army General Joseph M. Martin, Vice Chief of Staff. *See* James LaPorta, *Iran Considered 'USS Cole-style Attacks' on Fort McNair in DC and Threatened Top General, Report Says*, USA TODAY (Mar. 21, 2021), <https://www.usatoday.com/story/news/politics/2021/03/21/associated-press-report-iran-considered-attack-fort-mcnair/4793538001/>.

15. Terrorist Designation, *supra* note 6.

16. State Dep't Report, *supra* note 8, at 3.

the Quds Force and Soleimani had long been designated as an FTO and sanctioned by the United States.¹⁷ Soleimani and the Quds Force had also been sanctioned by the United Nations and European Union.¹⁸ As such, Soleimani had long been under global scrutiny. But the question must be asked: “Why kill him now?”¹⁹

III. WHAT IS THE LEGAL STANDARD UNDER WHICH THE TARGETED KILLING OF SOLEIMANI IS ANALYZED?

The first important issue to consider is under what legal regime this incident should be analyzed. The answer as to which legal standard applies in this situation turns on whether there was an “armed conflict” or not.²⁰ If the strike occurred within the context of an armed conflict, then the situation is reviewed against the backdrop of both applicable international humanitarian law (IHL) and international human rights law (IHRL) principles.²¹ If, however, the drone strike occurred outside of an armed conflict, then IHRL alone applies.²²

During a time of armed conflict, international jurisprudence suggests that both IHL and IHRL should be applied. In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice (ICJ) noted that “the protection offered by human rights conventions does not cease in case of armed conflict.”²³ Although it has taken different approaches as to *how*

17. *Id.*; see Proclamation No. 13224, 66 Fed. Reg. 49079, (Sep. 23, 2001); Proclamation No. 13382, 74 Fed. Reg. 29741 (June 23, 2009); Proclamation No. 13572, 82 Fed. Reg. 28215 (June 20, 2017); Miles, *supra* note 11; BBC Report, *supra* note 1; For a further understanding of how this event fits into the broader context of international relations and US-Iranian relations, see *US-Iran Relations: A Brief History*, BBC (Jan. 6, 2020), <https://www.bbc.com/news/world-middle-east-24316661>.

18. S.C. Res. 2231 (2015), at Annex B; S.C. Res. 1747; EU Reg. 611/2011.

19. Kathy Gilsinan, *It Wasn't the Law That Stopped Other Presidents from Killing Soleimani*, THE ATLANTIC (Jan. 4, 2020), <https://www.theatlantic.com/politics/archive/2020/01/why-kill-soleimani-now/604441/>.

20. See Oona A. Hathaway, Rebecca Crootof, Philip Levitz, Haley Nix, William Perdue, Chelsea Purvis, & Julia Spiegel, *Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law*, 96 MINN. L. REV., 1883, 1888 (2012).

21. *Id.*

22. *Id.*

23. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 178 ¶ 106.

IHL and IHRL apply together, the ICJ has established a practice of analyzing actions taken in an armed conflict under both bodies of law.²⁴

In addition to this jurisprudence, international agreements facially exhibit the concurrent application of IHL and IHRL.²⁵ IHRL continues to apply in both times of peace and armed conflict, while IHL applies only during an armed conflict.²⁶ This practice is evidenced by the fact that human rights treaties do not delimit their application temporally to times of armed conflict in the way IHL treaties do.²⁷ The fact that IHRL treaties include derogation clauses for emergency situations demonstrates that a State's obligations continue to apply unless an affirmative step to derogate is taken.²⁸ As such, IHRL continues to apply alongside IHL.

Although IHL and IHRL's concurrent application is a settled matter, the nature of the relationship between the two legal regimes remains ambiguous. International jurisprudence has laid out two possible ways to analyze the relationship of the concurrent application of IHL and IHRL.²⁹

The first possible relationship of IHL and IHRL is that one helps to provide interpretation of the other. In *The Legality of the Threat or Use of Nuclear Weapons*, the ICJ interpreted the relevant IHRL provision, namely Article 6 of the International Covenant of Civil and Political Rights (ICCPR), which prohibits the arbitrary deprivation of life, through the lens

24. See *Id.*; *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 66 (July 8); *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda) 2005 ICJ 168 (Dec. 19).

25. Laura M. Olson, *Practical Challenges of Implementing the Complementarity between International Humanitarian and Human Rights Law - Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict*, 40 CASE WESTERN RESERVE J. INT'L L., 437, 444 (2009).

26. *Id.*

27. *Id.*; See UN General Assembly, International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR].

28. Olson, *supra* note 25, at 444; For example, the ICCPR, American Convention on Human Rights, and European Convention on Human Rights include derogation clauses whereby a State may suspend certain IHRL obligations in an extreme situation. An extreme or emergency situation is defined similarly in these conventions as a "time of public emergency which threatens the life of the nation," a "time of war, public danger, or other emergency that threatens the independence, or security of a State Party," or a "time of war or other public emergency threatening the life of the nation." ICCPR art. 4(1); Organization of American States, American Convention on Human Rights art 27(1), 22 Nov. 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR]; Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms art. 15(1), 4 Nov. 1950, ETS 5 [hereinafter ECHR].

29. Special Rapporteur Report, *supra* note 5, at ¶ 49.

of IHL.³⁰ To understand what constituted an “arbitrary” killing in a wartime context, the ICJ applied IHL as *lex specialis*:

The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict, which is designed to regulate the conduct of hostilities. Thus, whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.³¹

As such, the ICJ used IHL as an interpretive mechanism to understand the scope of the relevant IHRL provision in a wartime context.³² While the concept of using IHL to interpret IHRL is not a clear-cut rule, it is possible that the ICJ’s *Nuclear Weapons* decision may shed light onto how the relationship of IHL and IHRL would play out in the situation at hand as it directly speaks to the question of the relationship of the two bodies of law in regard to arbitrary killing.³³ This case is especially relevant to the matter at hand because if the relationship of IHL and IHRL is understood in an interpretive manner and Soleimani was killed in the context of an armed conflict, then the decision here would be the standard under which the targeted killing is analyzed.³⁴

However, the basic notion that IHL interprets IHRL as *lex specialis* is riddled with problems. Similarly problematic is the United States’ historical position that IHL completely displaces IHRL as *lex specialis* in wartime. These cut and dry positions assume that IHL is the more specific law for every situation in an armed conflict, which may not always ring true.³⁵ The maxim of *lex specialis* can only function so far as it is “clear which rule is the more general rule and which is the more specific [and] cannot be applied without knowing that starting point.”³⁶ Therefore,

30. *Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. at ¶ 25.

31. *Id.*

32. *Id.*

33. *Id.*; Subsequent ICJ decisions go back on the analytical approach used here; however, the Court is not bound by stare decisis, so it is not bound by precedent. Nevertheless, the Court generally decides cases in accordance with previous decisions to facilitate predictability and a consistent interpretation of international law. As such, the ICJ would not likely go back on its subsequent decisions doing away with this interpretation.

34. *Id.*

35. Olson, *supra* note 25, at 447.

36. *Id.*

determining which body of law is *lex specialis* for a specific situation would likely need to be done on a case-by-case basis.³⁷ However, implementing this case-by-case basis approach would likely be difficult and provide inconsistent results. This approach may also undercut the application of IHRL treaties by making it easier for States to argue that more permissive standards claimed to be *lex specialis* override IHRL provisions.

Furthermore, *lex specialis derogat legi generali* is one of many interpretive tools.³⁸ For example, IHRL treaties could be argued to displace IHL rules under *lex posterior derogat legi priori*.³⁹ Thus, the conclusion that IHL interprets IHRL as *lex specialis* does not adequately define the relationship between these two bodies of law.

The second possible relationship of IHL and IHRL is that they both apply on an equal footing. Professor Jordan Paust writes that “treaty-based human rights that are nonderogable . . . have at least a status equal to that of nonderogable laws of war.”⁴⁰ He further notes that IHL and IHRL “can be used to interpret the other, and the laws of war provide no *lex specialis* displacement” to IHRL.⁴¹ Paust states that “[a]cceptance of a contrived displacement of human rights would also be fundamentally inconsistent with a symmetry of rights and obligations that exists in part under each form of law.”⁴² Similarly, the Special Rapporteur advocates that for a drone strike to be lawful, it “must satisfy the legal requirements under *all* applicable international legal regimes,” *jus ad bellum*, *jus in bello*, and international human rights law.⁴³ The Special Rapporteur identifies this equal balancing approach as “systemic integration.”⁴⁴ The Special Rapporteur asserts that these regimes should apply to their full extent concurrently because IHL alone is not a sufficient guide to the use

37. *Id.* “It is not the body of law that should be the focus, but the specific provision and the unique situation in which the provision is applied. Thus, it cannot be presumed in situations where IHL and IHRL both regulate the matter that IHL is always *lex specialis*.”

38. *Id.* at 448.

39. Olson, *supra* note 25, at 448.

40. Jordan J. Paust, *Human Rights on the Battlefield*, 47 GEO. WASH. INT’L L. REV. 3, 509-561, 561 (2015).

41. *Id.* at 525-26.

42. *Id.* at 526.

43. Special Rapporteur Report, *supra* note 5, at p. 9 ¶ 30, Emphasis in original.

44. *Id.* at p. 12, ¶ 44.

of force extraterritorially because it covers only the obligations between States and does not cover the obligations owed to individuals.⁴⁵

Analyzing IHL and IHRL from an equal footing is also supported by the trend of the ICJ's decisions.⁴⁶ In 2005, the Court noted that "both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration."⁴⁷ The ICJ's approach in *Armed Activities on the Territory of the Congo* and *Wall Advisory Opinion* abandoned its analytical approach in its earlier *Nuclear Weapons Advisory Opinion*.⁴⁸ Thus, the ICJ no longer uses one body of law as a means to interpret the other.⁴⁹ IHL and IHRL are now each considered as an equally and independently applicable norm.⁵⁰

Although the current nuances of the relationship between IHL and IHRL is unclear, it is well established that both legal regimes would apply during an armed conflict. It is possible that the ICJ's *Nuclear Weapons Advisory Opinion* may shed light on how the relationship of IHL and IHRL would play out in the situation at hand as it speaks directly to the question of the relationship of IHL and IHRL in regard to arbitrary killing. Nevertheless, the climate of the international community has shifted on this issue and the principle of equal and independent application governing IHL and IHRL's relationship is gaining traction internationally as evidenced by recent ICJ decisions.

IV. WAS THE TARGETED KILLING OF SOLEIMANI DONE IN THE CONTEXT OF AN ARMED CONFLICT?

As the question of what law applies in this situation hinges on the presence of an armed conflict, it is important to review the context in which the targeted killing occurred. The Special Rapporteur identifies four scenarios in which a drone strike can occur: 1) outside of an International

45. *Id.* at p. 9-10, ¶ 31.

46. *See Wall, Advisory Opinion*, 2004 ICJ at ¶ 106; *Dem. Rep. Congo v. Uganda*, 2005 ICJ at ¶ 216.

47. *Dem. Rep. Congo v. Uganda*, 2005 ICJ at ¶ 216.

48. *See Wall, Advisory Opinion*, 2004 ICJ at ¶ 106; *Dem. Rep. Congo v. Uganda*, 2005 ICJ at ¶ 216.

49. *Dem. Rep. Congo v. Uganda*, 2005 ICJ at ¶ 216; *Wall, Advisory Opinion*, 2004 I.C.J. at 106.

50. For further consideration on the joint applicability of IHL and IHRL *see* Noam Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 87 INT'L REV. OF THE RED CROSS no. 860 (Dec. 2005), https://www.icrc.org/en/doc/assets/files/other/irrc_860_lubell.pdf.

Armed Conflict (IAC) or Non-international Armed Conflict (NIAC); 2) in an IAC or NIAC alongside open hostilities; 3) in an IAC or NIAC but distant from the battlefield; and 4) as the first strike potentially triggering an IAC.⁵¹ First and foremost, it is critical to determine whether or not the targeted killing occurred within the context of an armed conflict as this determines if IHL principles apply here.

A. Possibility One: The Targeted Killing of Soleimani Occurred Outside of an IAC or NIAC

The first possible conclusion is that the United States' killing of Soleimani occurred outside of an armed conflict. Assuming that the United States cannot establish that there was an ongoing armed conflict or immediate threat, or that the drone strike constituted a legitimate armed reprisal or valid defense against a pattern of attacks, then the drone strike on Soleimani would be reviewed solely under IHRL.⁵² Thus, the applicable law would be Article 6 of the ICCPR which prohibits the arbitrary killing of individuals.⁵³ In pertinent part, Article 6(1) recognizes the inherent right to life and that "no one shall be arbitrarily deprived of his life."⁵⁴ General Comment 36 notes that "the right to life is not absolute."⁵⁵ The Human Rights Committee (HRC) acknowledges that the requirement that deprivations of life must not be arbitrary "implicitly recognizes that some deprivations of life may be non-arbitrary."⁵⁶ Thus, Article 6 leaves open the possibility that a non-arbitrary killing can still be justified in certain scenarios outside of an armed conflict.⁵⁷

In determining the "arbitrariness" of a killing, the HRC specified that the term "must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law

51. Special Rapporteur Report, *supra* note 5, at p. 11-12 ¶ 41.

52. *Id.* at 11 ¶ 41; Professor Gary D. Solis notes that outside of an IHL context, a targeted killing would be unlawful. See GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 558 (Cambridge University Press, 2d ed., 2016).

53. ICCPR, *supra* note 27, art. 6.

54. *Id.*

55. UN Human Rights Committee, General Comment no. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, Revised Draft Prepared by the Rapporteur, Advance Unedited Version, at ¶ 16, https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf.

56. *Id.*

57. *Id.* at ¶ 18.

as well as elements of reasonableness, necessity, and proportionality.”⁵⁸ States whose counterterrorism measures permit the use of force are still bound by the prohibition against arbitrary deprivation of life.⁵⁹ The Special Rapporteur has noted that “killing in self-defense is allowed as a last resort . . . The United States would have to demonstrate that . . . there was no other choice than to use lethal force.”⁶⁰ Despite the possibility that a killing can be justified under this framework, reviewing targeted killings solely under IHRL makes it difficult to find that they were not arbitrary killings.

However, the United States has historically asserted that its human rights obligations do not apply to its extraterritorial actions.⁶¹ This argument is based upon the jurisdictional clause of the ICCPR, which tasks the parties “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.”⁶² As such, the United States has held the position that this language requires both conditions, that an individual be under its jurisdiction *and* in its territory, be satisfied for these protections to apply.⁶³ This dual requirement position is not generally supported by the majority of international case law.⁶⁴ The HRC has also dispelled this argument in its interpretation of the jurisdictional clause.⁶⁵ General Comment 36 clarifies that a State’s obligations apply to “all persons over whose enjoyment of the right to life it exercises power or effective control.”⁶⁶ The HRC expanded on this statement by noting that this obligation “includes persons located outside any territory effectively controlled by the State, whose

58. *Id.*; see also *Arbitrary Deprivation of Life*, Module 8: Right to Life, Doha Declaration E4J University Module Series: Counter-Terrorism, <https://www.unodc.org/e4j/en/terrorism/module-8/key-issues/arbitrary-deprivation-of-life.html> [hereinafter Doha Declaration Module].

59. Doha Declaration Module, *supra* note 58.

60. Juan Cole, *UN Rapporteur: US Drone Strike Killing Iranian Gen. Soleimani Was Unlawful*, COMMON DREAMS (July 8, 2020), <https://www.commondreams.org/views/2020/07/08/un-special-rapporteur-us-drone-strike-killing-iranian-gen-soleimani-was-unlawful>.

61. See generally Beth van Schaack, *The United States’ Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change*, 90 INT’L L. STUD., U.S. NAVAL WAR COLL., 20 (2014).

62. ICCPR, *supra* note 27, at art. 2.

63. See generally van Schaack, *supra* note 61.

64. See *Wall*, Advisory Opinion, 2004 I.C.J. at ¶¶ 108-109, *Coard and Others v. United States*, Report N. 109/99 - Case 10.951, Inter-American Commission on Human Rights (IACHR), 29 September 1999 at ¶ 37, *Al-Skeini and Others v. the United Kingdom*, European Court of Human Rights, 55721/07, 7 July 2011.

65. General Comment 36, *supra* note 55, at ¶ 63.

66. *Id.*

right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner.”⁶⁷ As such, the HRC asserts that extraterritorial targeted killings fall under the purview of the ICCPR.⁶⁸

Additional human rights agreements that may be applicable to the United States’ actions are the Universal Declaration of Human Rights (UDHR) and the American Declaration of the Rights and Duties of Man, which similarly protect the right to life.⁶⁹ Article 3 of the UDHR states that “everyone has the right to life, liberty and the security of his person.”⁷⁰ The American Declaration includes an almost identical provision in Article 1.⁷¹ At the time of the adoption of these declarations, these documents were not legally binding. However, due to widespread State practice and *opino juris* on the provisions of the UDHR, some of the provisions of the declaration are gaining recognition as customary international law.⁷²

The preamble of the UDHR states that the rights laid out in the document are to be ensured “both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.”⁷³ While the language in the UDHR also attempts to make clear that human rights obligations are to be applied extraterritorially, it is possible the United States might take the position that this language does not apply to its actions abroad. First, only certain provisions of the UDHR have crystallized into customary international law norms.⁷⁴ It is difficult to gauge what provisions of the UDHR may have crystallized into customary

67. *Id.*; see also Shaheed Fatima Q.C., *Targeted Killing and the Right to Life: A Structural Framework*, JUST SECURITY (Feb. 6, 2019), <https://www.justsecurity.org/62485/targeted-killing-life-structural-framework/>.

68. General Comment 36, *supra* note 55, at ¶ 63; Another consideration to take into account in a similar analysis would be whether the State in question derogated from any IHRL treaties to which it is a party. This factor is not relevant in the current analysis as the United States did not derogate from any of its IHRL treaties. Even though ICCPR Article 6 and other right to life provisions are nonderogable, the fact that the State derogated from some articles is a factor that might weigh in its favor.

69. Inter-American Commission on Human Rights, American Declaration of the Rights and Duties of Man, 2 May 1948 [hereinafter American Declaration].

70. UN General Assembly, Universal Declaration of Human Rights, 10 Dec. 1948, at art. 3 [hereinafter UDHR].

71. American Declaration, *supra* note 69, at art. 1.

72. Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L., 287, 335 (1995-6).

73. UDHR, *supra* note 70, at preamble; The American Declaration does not include a jurisdictional clause.

74. Hannum, *supra* note 72, at 340.

international law norms and whether they are applicable here.⁷⁵ In light of this fact, the United States may argue that the UDHR is not controlling law in this scenario.

Second, the United States may also make a similar jurisdictional argument as it does with the ICCPR. The first half of the provision covers people inside the Member States, while the second half covers people in “territories under their jurisdiction.”⁷⁶ If the right to life provision in the UDHR was considered to be customary international law, the United States may still argue that its obligations do not apply extraterritorially because Iraq is not a *territory* under its jurisdiction. This argument may misconstrue the purpose of this clause, as the clause is trying to capture territories outside of the State, but over which the State is exercising control; however, the wording does not state this notion clear enough to ward off this jurisdictional assertion by the United States.

Despite the United States’ traditional objections, it has been commonly accepted that IHRL obligations continue to apply extraterritorially.⁷⁷ As such, the targeted killing of Soleimani would be reviewed under ICCPR Article 6. If the targeted killing of Soleimani was reviewed solely under IHRL, it would likely be found to be a violation of international law.

B. Possibility Two: Targeted Killing of Soleimani Occurred Alongside an IAC or NIAC

As the legal implications change in a time of an armed conflict, it is important to review *jus ad bellum* principles, which dictate when it is legally permissible for a State to resort to force. As a matter of course, international law rarely favors a State’s use of force. The United Nations Charter prohibits member States from engaging in “the threat or use of force against the territorial integrity or political independence of any

75. *Id.* at 335.

76. *Id.*

77. See generally *Wall*, Advisory Opinion, 2004 I.C.J. at ¶ 108-109; *Al-Skeini and Others v. the United Kingdom*, European Court of Human Rights, 55721/07, 7; Joseph Sinchak, *The Extraterritorial Application of Human Rights Treaties: Al-Skeini et al. v. United Kingdom (2011)*, 3 PACE INT’L L. REV. ONLINE COMPANION 416 (2013), <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1037&context=pilronline>; Oona Hathaway et al., *Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?*, 43 ARIZ. ST. L. J. 1 (2011).

state.”⁷⁸ Three narrow exceptions exist to this general prohibition against the use of force: 1) authorization by the UN security council; 2) State consent to attack in its own State; and 3) self-defense against an “armed attack.”⁷⁹

In the matter at hand, the United States has claimed both that the targeted killing of Soleimani occurred as an act of self-defense and/or as part of an ongoing armed conflict.⁸⁰ Under both of these scenarios, it is critical to review the applicable *jus ad bellum* principles.

1. Self-defense

The first possible consideration is that the targeted killing of Soleimani was an act of self-defense. Article 51 of the UN Charter provides that “nothing 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.”⁸¹ While the Charter contains language that suggests an armed attack must be occurring presently in order to trigger the right of self-defense, under the *Caroline* Doctrine, the notion of preemptive self-defense to combat threats that are “instant overwhelming and leaving no choice of means, no moment of deliberation” has been accepted as a legitimate course of action in international jurisprudence and State practice.⁸²

A critical distinction here is that *preemptive* self-defense is permissible, not *preventative* self-defense.⁸³ The legitimacy of a State’s

78. U.N. Charter art. 2(4).

79. Special Rapporteur Report, *supra* note 5, at 13 ¶ 51.

80. See Permanent Rep. of the United States to the UN, Letter Dated 8 Jan. 2020 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, S/2020/20 (Jan. 8, 2020) [hereinafter US Letter to the UN]; U.S. DEPT. OF DEFENSE, STATEMENT BY THE DEPARTMENT OF DEFENSE (Jan. 2, 2020), <https://www.defense.gov/Newsroom/Releases/Release/Article/2049534/statement-by-the-department-of-defense/> [hereinafter DOD Statement]; Remarks on the Killing of Qasem Soleimani, 2020 DAILY COMP. PRES. DOC. 5 (Jan. 3, 2020), available at <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-killing-qasem-soleimani/> [hereinafter President’s Remarks].

81. U.N. Charter art. 51.

82. Letter from Daniel Webster to Lord Ashburton (July 27, 1842) in CORRESPONDENCE BET WEBSTER AND LORD ASHBURN 14 (1842); see Special Rapporteur Report, *supra* note 5, at 13 ¶ 52; Some commentators argue for a more permissive standard for what types of actions justify defensive action by a State based on the French translation of the UN Charter, which uses the words “armed aggression” instead of “armed attack.”

83. There is still debate as to the legality of preemptive self-defense but based on the positivism theory that a State’s actions are lawful unless it agrees to a specific rule, and the difficulty to conclude that there is a customary rule *against* preemptive use of force in self-defense,

pre-attack self-defense depends upon the imminence of the perceived threat. Preventative self-defense measures generally seek to terminate the development of a perceived threat, the belief of which is usually without precise information as to when or where the attack may occur.⁸⁴ The ambiguous nature of these perceived threats does not meet the threshold for imminence as laid out in the *Caroline* doctrine.⁸⁵

In considering the War on Terror, some scholars have argued that the traditional self-defense framework of Article 51 and the *Caroline* Doctrine does not adequately meet the unique challenges of combatting terrorism.⁸⁶ Professor Anthony Clark Arend has argued that the *Caroline* doctrine is better suited to conventional State-State conflicts, due to the fact that “the soon-to-be victim would still be able to mount an effective self-defense if it were required to wait for an armed attack to be imminent.”⁸⁷ He asserts that terrorists, however, use tactics that make it difficult for States to wait until they reach the level of required certainty of imminence to then effectively preemptively deflect the attack.⁸⁸ Thus, Arend advocates that the traditional self-defense framework is insufficient for counterterrorism measures and new standards are needed.⁸⁹

However, Arend holds a minority view. The wide majority of commentators and military personnel agree that IHL already adequately addresses counterterrorism measures. Retired Lieutenant Colonel David Cavaleri has advised that “because the law of war in its current form is more than adequate to face the new GWOT [Global War on Terror] challenges, it does not warrant revision.”⁹⁰ Professor Gary D. Solis also warns that “states need be weary of endorsing quick-fix antiterrorism measures at the expense of tested counterterrorism measures arrived at through years of military effort and by painstaking international

preemptive self-defense remains a viable means of action for a State as long as it adheres to the principles of necessity and proportionality. See Anthony Clark Arend, *International Law and the Preemptive Use of Military Force*, 26 WASH. Q., 89, 92-96 (2003).

84. Alex Potcovaru, *The International Law of Anticipatory Self-Defense and U.S. Options in North Korea*, LAWFARE BLOG (Aug. 8, 2017), <https://www.lawfareblog.com/international-law-anticipatory-self-defense-and-us-options-north-korea>.

85. *Id.*

86. See generally Arend, *supra* note 83.

87. *Id.*

88. *Id.*

89. *Id.*

90. LTC DAVID P. CAVALERI, *THE LAW OF WAR: CAN 20TH-CENTURY STANDARDS APPLY TO THE GLOBAL WAR ON TERRORISM?*, (Fort Leavenworth, KS: Combat Studies Inst. Press, 2005), https://www.armyupress.army.mil/Portals/7/combats-studies-institute/csi-books/cavaleri_law.pdf.

negotiation and agreement. Sometimes, issues asserted to be intractable are already addressed by [the law of armed conflict].”⁹¹ Professor Jordan Paust asserts that

the pretense that “new” forms of social violence exist and that new laws of war are needed might be claimed by some in an effort to avoid responsibility for misinterpretation or misapplication present laws of war, the laws of war do not need to be changed because of September 11th . . . such denials have no legitimate claim to any role during our nation’s responses to terrorism.⁹²

The Special Rapporteur opposes the introduction of more lenient standards. She argues that the War on Terror has led several States to impermissibly attempt to expand the concept of self-defense.⁹³ The Special Rapporteur views these interpretations as “troubling legal distortions.”⁹⁴ She asserts that the trend of distorting IHL over the past 20 years in the name of counterterror has led to “massive violations of humanitarian law.”⁹⁵ Amidst these distortions, the Special Rapporteur states that the targeted killing of Soleimani “is not just a slippery slope. It is a cliff.”⁹⁶

First, the Special Rapporteur identifies a distortion of time.⁹⁷ She contends that the “expansionist interpretation” of States and scholars, who advocate for what is essentially preventative self-defense, warp the notion of imminence.⁹⁸ She argues that under the expansionist view, the notion of imminence is altered so that it “no longer [is] just a temporal criterion” and is inappropriately “read into the principle of necessity.”⁹⁹

91. Solis, *supra* note 52, at 115; Solis provides examples of common legal issues debated in regard to terrorism that are already addressed by IHL in the Geneva conventions. These issues include: treatment of unlawful combatants, violations of the law of war committed by civilians, etc.

92. Jordan J. Paust, *There Is No Need to Revise the Laws of War in Light of September 11th*, ASIL Task Force on Terrorism (2004), www.asil.org/taskforce/paust.pdf.

93. Special Rapporteur Report, *supra* note 5, at 13 ¶ 53.

94. *Id.*

95. *Id.* at ¶ 64.

96. *Id.*

97. *Id.* at ¶ 54.

98. *Id.* at ¶ 55; see Daniel Bethlehem, *Principles Relevant to the Scope of a State’s Rights of Self Defense Against an Imminent or Actual Armed Attack By Nonstate Actors*, 106 AM. J. INT’L L. 1 (2012); Attorney General’s Speech at the International Institute for Strategic Studies: The Modern Law of Self Defense, JUST SECURITY (Jan. 11, 2017), <https://www.justsecurity.org/wp-content/uploads/2017/01/United-Kingdom-Attorney-General-Speech-modern-law-of-self-defense-IISS.pdf>.

99. Special Rapporteur Report, *supra* note 5, at 14 ¶ 54.

Preemptive self-defense, when limited to the strict guidelines of the *Caroline* Doctrine, has been accepted; however, the interpretation of pre-attack self-defense has not been extended to be as permissive as to allow for preventative self-defense.¹⁰⁰ The UN's 2004 High-Level Panel on Threats, Challenges and Change has noted that the "language of [Article 51] is restrictive" but that "according to long established international law, [a threatened State] can take military action as long as the threatened attack is *imminent*, no other means would deflect it and the action is proportionate."¹⁰¹ This interpretation by the UN Panel reasserts the significance of imminence, which, in turn, declines to extend the interpretation of Article 51 to allow for preventative self-defense.¹⁰² It also importantly notes that, whether an act of self-defense is done preemptively or after the attack has occurred, a State's response must adhere to the principles of necessity and proportionality.¹⁰³ This distinction between preventative and preemptive self-defense is crucial to the matter at hand because the United States has been a prominent advocate for a more lenient standard for pre-attack self-defense.¹⁰⁴

Turning to the facts at hand, the United States' initial claim directly following the drone strike was based on self-defense.¹⁰⁵ The Department of Defense (DOD) and President Trump released statements on the killing of Soleimani on January 2 and 3, respectively.¹⁰⁶ Both the DOD and President Trump's remarks included language that hinged their core justification on the notion of self-defense.¹⁰⁷ The DOD stated that it had killed Soleimani in a "decisive defensive action to protect U.S. personnel abroad" because "Soleimani was actively developing plans to attack

100. See Report of the Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶124, U.N. Doc. A/59/2005 (Mar. 21, 2005); "Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened."

101. Rep. of the High-level Panel on Threats, Challenges and Change, ¶188, U.N. Doc. A/59/565 (Dec. 2, 2004).

102. *Id.*

103. *Id.*

104. *U.S. Drone Strike in Iraq Kills Iranian Military Leader Qasem Soleimani*, 114 AM. J INT'L L.: AJIL CONTEMPORARY PRACTICE OF THE UNITED STATES, 313, 314 (Apr. 2020) [hereinafter *Contemporary Practice*].

105. DOD Statement, *supra* note 80; President's Remarks, *supra* note 80.

106. DOD Statement, *supra* note 80; President's Remarks, *supra* note 80.

107. DOD Statement, *supra* note 80; President's Remarks, *supra* note 80.

American diplomats and service members.”¹⁰⁸ President Trump stated that “Soleimani was plotting imminent and sinister attacks on American diplomats and military personnel, but we caught him in the act and terminated him.”¹⁰⁹

However, many commentators have cast doubt as to whether the United States’ self-defense justification passes muster. Professor Mary Ellen O’Connell is critical of the United States’ justifications in killing Soleimani.¹¹⁰ She asserts that the requirements for necessity and proportionality were not met in this instance.¹¹¹ The Special Rapporteur asserts that there is a lack of evidence of an imminent or actual threat.¹¹² She also argues that the planning inherent to a drone strike rebuts the idea that the drone strike could even have been a method of eliminating an imminent threat and was instead a premediated attack.¹¹³ *The New York Times* and other news agencies have also cast doubt as to the imminence of an attack.¹¹⁴ However, other countries have declined to condemn the United States.¹¹⁵ For example, Germany’s Federal Foreign Office indicated that a self-defense claim is plausible, but that more information was required for a legal assessment.¹¹⁶

The United States Department of State has side stepped providing the specific intelligence that led to the decision to kill Soleimani as this would

108. DOD Statement, *supra* note 80; President’s Remarks, *supra* note 80.

109. President’s Remarks, *supra* note 80.

110. Mary Ellen O’Connell, *The Killing of Soleimani and International Law*, EJIL:TALK! (Jan. 6, 2020), <https://www.ejiltalk.org/the-killing-of-soleimani-and-international-law/>.

111. *Id.*

112. Special Rapporteur Report, *supra* note 5, at Annex I ¶ 48.

113. *Id.*

114. Julian E. Barnes et al., *Pressed for Details on the Suleimani Strike, Trump Administration Gives Few*, N.Y. TIMES (Jan. 7, 2020), <https://www.nytimes.com/2020/01/07/us/politics/trump-soleimani.html>.

115. Stefan Talmon & Miriam Heipertz, *The U.S. Killing of Iranian General Qasem Soleimani: of Wrong Trees and Red Herrings, and Why the Killing May Be Lawful After All*, GERMAN PRACTICE IN INTERNATIONAL LAW (Jan. 23, 2020), <https://gpil.jura.uni-bonn.de/2020/01/the-u-s-killing-of-iranian-general-qasem-soleimani-of-wrong-trees-and-red-herrings-and-why-the-killing-may-be-lawful-after-all/>.

116. *Id.*; Israel unreservedly defended the United States’ actions noting its right to self-defense and stating the Soleimani was planning attacks. See Noa Landau et al., *Netanyahu Says Israel Stands with U.S. After Assassination of Iran’s Soleimani*, HAARETZ (Jan. 3, 2020), <https://www.haaretz.com/israel-news/.premium-israel-braces-for-iranian-response-after-u-s-kills-soleimani-1.8350894>; For a summary of other countries’ views, see CLAYTON THOMAS, CONG. RSCH. SERV., R46148, U.S. KILLING OF QASEM SOLEIMANI: FREQUENTLY ASKED QUESTIONS 20 (2020).

“[get] into sources and methods.”¹¹⁷ Instead, State Department officials reassert that there was “extensive and very solid intelligence that [Soleimani was] plotting imminent attacks against the United States” that would have resulted in the deaths of “hundreds of Americans” in the region.¹¹⁸ In an effort to strengthen their self-defense justification without providing specific intelligence, State Department officials posed two questions. First, the State Department officials questioned why Soleimani, who was sanctioned by the UN Security Council and under a UN travel ban, was outside of Iran.¹¹⁹ Secondly, the State Department officials asked why Soleimani would be meeting with Abu Mahdi al-Muhandis, leader of the Popular Mobilization Force (PMF), if not to plan attacks.¹²⁰ Although these are worthwhile considerations, if the United States hopes to legally justify its actions on the notion of self-defense, it needs to supply sufficient information to support the claim that an attack was “imminent.”

i. Self-Defense Against a Pattern of Attacks

An emerging legal standard that might be able to speak to the issue of imminence is the notion of self-defense against a pattern of attacks from non-State groups. Sir Daniel Bethlehem has set forth a number of principles he advocates are relevant factors in analyzing a State’s right to self-defense against imminent or actual attacks by non-State actors.¹²¹ Among these principles, Bethlehem advocates that:

The term “armed attack” includes both discrete attacks and a series of attacks that indicate a *concerted pattern of continuing armed activity*. The distinction between discrete attacks and a series of attacks may be relevant to considerations of the necessity to act in self-defense and the

117. Special Briefing by Senior State Department Officials on the Situation in Iraq (Jan. 3, 2020), available at <https://2017-2021.state.gov/senior-state-department-officials-on-the-situation-in-iraq/index.html> [hereinafter State Dep’t Briefing].

118. *Id.*

119. *Id.*

120. *Id.*; Muhandis was the founder of Kata’ib Hizbollah (a U.S. designated FTO) and a PMF leader who was also killed in the drone strike alongside Soleimani. In justifying the United States’ actions as self-defense, State department officials quoted Muhandis who had stated on December 29th that “the blood of the martyrs and the wounded will not go in vain . . . the response will be harsh for the American forces in Iraq.” State Department officials also noted that “Kata’ib Hizbollah said the attack was the . . . “first lesson” they would teach the United States and that it would be followed by a number of other things” and that the “IRGC Statement said . . . he was in the region planning attacks.”

121. Bethlehem, *supra* note 98, at 6. Sir Daniel Bethlehem is the former Legal Advisor of the UK Foreign & Commonwealth Office.

proportionality of such action . . . An appreciation that a series of attacks, whether imminent or actual, constitutes a concerted pattern of continuing armed activity is warranted in circumstances in which there is a reasonable and objective basis for concluding that those threatening or perpetrating such attacks are acting in concert.¹²²

Thus, under this view, a State may use force against terrorist groups that perpetually carry out attacks against it. Tomas Ruys notes that “[c]ustomary practice is replete with examples where the attacked State has (partially) justified its actions by relying on the need to prevent further attacks—i.e., a scenario not to be confused with the pure pre-emptive or preventive model, where no prior armed attack has occurred whatsoever.”¹²³ As such, the Bethlehem principles pose important considerations in the discussion on the legality of certain counterterrorism measures and the increased frequency of drone strikes against terrorist suspects in recent years.

Under this analytical framework, evidence of a “concerted pattern” of attacks can factor into analysis on the principles of necessity and proportionality.¹²⁴ Thus, this approach loosens the traditional, stricter requirements a State must meet before employing the use of force and marks an expansion in the right to resort to armed force. A major purpose of the UN Charter has been to limit the resort to force and encourage diplomatic discourse.¹²⁵ Whether Bethlehem’s principles constitute a necessary change in order to address new or persisting gaps in the contemporary legal order or a perversion of the law of armed conflict is intensely debated.¹²⁶

However, the notion of self-defense against a concerted pattern of attacks by non-State groups does enjoy some State practice. The Attorney General of Australia has announced Australia’s endorsement of the

122. *Id.* at 6. Emphasis added.

123. Tom Ruys, “*Armed Attack*” and Article 51 of the UN Charter (Cambridge: Cambridge University Press, 2010), <https://www.justsecurity.org/75056/legal-questions-and-some-answers-concerning-the-u-s-military-strike-in-syria/>.

124. Bethlehem, *supra* note 98, at 6.

125. UN Charter at Preamble.

126. See e.g. Dire Tladi, *The Nonconsenting Innocent State: The Problem with Bethlehem’s Principle 12*, 107 AM. J. INT’L L. 570-6 (2013); Elizabeth Wilmhurst & Michael Wood, *Self-Defense Against Nonstate Actors: Reflections on the “Bethlehem Principles”*, 107 AM. J. INT’L L. 390 (2013); Mary Ellen O’Connell, *Dangerous Departures*, 107 AM. J. INT’L L. 380 (2013); Gabor Rona & Raha Wala, *No Thank You to a Radical Rewrite of the Jus ad Bellum*, 107 AM. J. INT’L L. 386 (2013).

Bethlehem principles as viable criteria for resorting to self-defense.¹²⁷ Israel has also acted against the Palestinian Liberation Organization in Tripoli on the basis of a pattern of armed attacks.¹²⁸ Furthermore, the United States' position in the *Oil Platforms* case essentially argues the right to self-defense based on a pattern of continuing attacks.¹²⁹

In the context of targeted killings, the more permissive, expansive notion of an armed attack including a pattern of armed attacks helps to provide a justification of a State's targeting of a terrorist suspect. In addressing the legality of the strike on Soleimani, the United States never expressly relied on the pattern of attack argument.¹³⁰ Although statements by President Trump and the DOD mentioned the history of attacks perpetrated by Iranian-backed militias at the direction of Soleimani, the United States never expressly justified the targeted killing as a self-defense response based on a "concerted pattern of continuing armed activity."¹³¹

The United States' avoidance of arguing outright that the targeted killing was an act of self-defense against a pattern of attacks may be due in part to the moderate level of international acceptance and high threshold of proving that attacks directed by Soleimani constituted a "concerted pattern . . . in which there is a reasonable and objective basis for concluding that those threatening or perpetrating such attacks are acting in concert."¹³² Despite the usual difficulties in proving a pattern of attacks, the United States could argue that the drone strike on Soleimani was an act of self-defense in response to a pattern of attacks. Leading up to the strike on Soleimani, Kata'ib Hizbollah (KH) had carried out several attacks against U.S. interests and personnel in Iraq.¹³³ As KH is a single, organized non-State group, the acts perpetrated by its members are seen as having been done in concert. Thus, according to the Bethlehem principles, the United States must show that it had a "reasonable and objective basis for

127. George Brandis, *The Right of Self-Defence Against Imminent Armed Attack in International Law*, EJIL TALK! (May 25, 2017), <https://www.ejiltalk.org/the-right-of-self-defence-against-imminent-armed-attack-in-international-law/>.

128. Joseph B. Treaster, *Tripoli Is Bitter over Palestinians*, N.Y. TIMES (Nov. 21, 1983), <https://www.nytimes.com/1983/11/21/world/tripoli-is-bitter-over-palestinians.html>.

129. See generally *Oil Platforms* (Islamic Rep. of Iran v. United States of America), Judgement, ICJ Reports 2003, 161.

130. See DOD Statement, *supra* note 80; President's Remarks, *supra* note 80.

131. DOD Statement, *supra* note 80; President's Remarks, *supra* note 80; Bethlehem, *supra* note 98, at 6.

132. Bethlehem, *supra* note 98, at 6.

133. US Letter to the UN, *supra* note 80; Thomas, *supra* note 116, at 1.

concluding” that Soleimani was working in concert with KH.¹³⁴ As Soleimani was a State actor of Iran, the issue then arises as to whether KH’s actions can be attributed to Iran, or if under the Bethlehem principles, a State need only show a “reasonable and objective” basis for believing that KH and Iran were working in tandem.¹³⁵ However, international standards on State responsibility and attribution are controlling and require a much higher threshold for imputing a non-State group’s actions to a State than a “reasonable and objective” basis.¹³⁶ If a State were to rely on such a relaxed standard for imputing a non-State group’s actions to another State, it would likely face international scrutiny.

Nevertheless, if the United States were to make a specific showing of the level of Iran’s support, and by extension Soleimani’s participation, in the pattern of attacks that had taken place in the summer and especially December 2019, then the United States may be able to justify its targeted killing as a means of self-defense against a pattern of attacks.¹³⁷ As there is some State practice and a certain level of acceptance in the international community in the notion of self-defense against a pattern of attacks from non-State groups, this legal concept may help to bolster the United States’ position in arguing the targeted killing of Soleimani was a necessary act of self-defense.

2. Ongoing Armed Conflict

On the other hand, it is also possible that the targeted killing of Soleimani occurred as part of an ongoing armed conflict. Therefore, it is important to review what elements constitute an “armed conflict.” Although there is not one internationally accepted definition, it has been widely accepted that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”¹³⁸ While instances of “armed force between States” is clear, “protracted armed violence” is not so readily discernable.¹³⁹

134. Bethlehem, *supra* note 98, at 6.

135. *Id.*

136. For further discussion on imputation tests, *see infra* Section IV.B.2.

137. US Letter to the UN, *supra* note 80; Thomas, *supra* note 116, at 1.

138. *Prosecutor v. Dusko Tadić*, IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct 2, 1995).

139. *Id.*

Classification of events as an armed conflict is “not without ambiguity and debate” as it is very fact specific.¹⁴⁰

There are multiple theoretical approaches one can take in considering whether an armed conflict was ongoing. One approach is the first-shot doctrine, which advocates that IHL should apply from the moment the use of force begins.¹⁴¹ This position is seemingly supported by the 2016 and 2017 ICRC commentaries on the Geneva Conventions, which note that an IAC arises when a State resorts to armed force against another, notwithstanding the intensity of the hostilities.¹⁴² A contrasting approach requires application of an intensity threshold.¹⁴³ The threshold in this analysis is undefined but requires events beyond an isolated strike.¹⁴⁴ There is a fair amount of endorsement for the minimum threshold approach by States and commentators.¹⁴⁵

Whether the events in the matter at hand are reviewed with the first shot doctrine or with the minimum intensity threshold approach is perhaps too far ahead in the conversation because the crucial determination here is what events are allowed to be read as part of the claimed ongoing armed conflict. This determination is essentially dispositive of a finding of an ongoing armed conflict because the United States mainly hinges its claim of an ongoing armed conflict on its clashes with “Qods Force-backed militia groups in Iraq.”¹⁴⁶ If the actions of these militias can be imputed to Iran, then the only determination left is whether the armed conflict had been ongoing. If the actions of these militia groups cannot be imputed to

140. Special Rapporteur Report, *supra* note 5, at Annex I ¶ 15.

141. *Id.*

142. *See Id.*; International Committee of the Red Cross, Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, at K206 (Dec. 2016); International Committee of the Red Cross, Commentary on the First Geneva Convention: Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, at K223-4 (Dec. 2017).

143. Special Rapporteur Report, *supra* note 5, at Annex I ¶ 16.

144. *Id.*

145. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 (June 27); *see also* Special Rapporteur Report, *supra* note 5, at Annex I ¶ 16.

146. US Letter to the UN, *supra* note 80; Although not mentioned in the United States’ letter to the UN, the United States is also engaged in the use of force against Iranian-backed militias in Syria as well. While this article focuses on the United States’ clashes with Iranian-backed non-State groups in Iraqi territory, it is important to note the wider context in which the United States’ operations take place.

Iran, then the United States' claim of an ongoing armed conflict loses considerable strength from the outset.

There are several standards in international law for imputing third-party actions to States. Two tests for imputation were addressed by the ICJ in *Military and Paramilitary Activities in and Against Nicaragua*.¹⁴⁷ The first approach is the "strict control test," also known as the "agency test." The strict control test is very difficult to prove. It requires a finding of complete "dependence on the one side and control on the other" as to equate the private actors as an organ of the State.¹⁴⁸

The second test established by the ICJ in *Nicaragua v. United States* is the "effective control" test.¹⁴⁹ This test differs from the strict control test in that, here, a State would be held responsible only for the private actors' actions over which the State exercised effective control.¹⁵⁰ Effective control entails "training, arming, equipping, financing and supplying the [private actors] or otherwise encouraging, supporting and aiding military and paramilitary activities in and against [another State.]"¹⁵¹

Another standard for imputation is the "overall control" test outlined in *Prosecutor v. Tadić*.¹⁵² In *Tadić*, the International Criminal Tribunal for the former Yugoslavia (ICTY) applied a less stringent test, which requires only a finding of "overall control" for imputing third-party actions to States.¹⁵³ Under the overall control test, a State is deemed to be legally responsible for the acts of private groups when it "has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group."¹⁵⁴

The *Tadić* test has faced scrutiny since its implementation by the ICTY. In the *Bosnian Genocide* case, the ICJ rejected the overall control test as it found it "unpersuasive."¹⁵⁵ First, the ICJ notes that the initial purpose and context of the ICTY's overall control test was to determine

147. *Nicar. v. U.S.*, 1986 I.C.J. at ¶ 109, 115.

148. *Nicar. v. U.S.*, 1986 I.C.J. at ¶ 109

149. *Id.* at ¶ 115.

150. *Id.*

151. *Id.* at Holding ¶ 3.

152. *Tadić*, IT-94-1-AR72 at ¶ 131.

153. *Id.* at ¶ 120, 131, 137.

154. *Id.* at ¶ 137.

155. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Serb. & Montenegro), Judgement, 2007 I.C.J. Rep. 43, ¶ 404.

whether an armed conflict was of an international character or not.¹⁵⁶ The ICJ contends that “logic does not require the same test to be adopted in resolving the two issues” of the international or non-international status of a conflict and State responsibility.¹⁵⁷ The ICJ also criticizes the *Tadić* test as broadening the scope of State responsibility “well beyond the fundamental principle governing the law of international responsibility.”¹⁵⁸ The reasoning behind the ICJ’s criticism of *Tadić*’s overall control test has been questioned by some commentators.¹⁵⁹ Nonetheless, as any potential case between Iran and the United States would likely come before the ICJ, the effective control test would likely be the standard against which Iran’s support of non-State groups in Iraq would be analyzed.

Based on the facts provided in the United States’ letter to the UN, the United States’ strike on Soleimani was in part a response to “Qods-Force-backed militia groups . . . including Kata’ib Hizballah . . . targeting bases where United States forces in Iraq were located.”¹⁶⁰ In order for those groups’ actions to be imputed to Iran under the effective control test, the evidence must show that Iran was involved in “training, arming, equipping, financing and supplying” KH and other non-State groups “or otherwise encouraging, supporting and aiding” these groups’ actions against the United States’ interests and personnel in Iraq.¹⁶¹

Iran supplies weaponry to its proxy group allies “including specialized anti-tank systems, artillery rockets, mortars, short-range ballistic missiles, and cruise missiles.”¹⁶² Iran has also trained thousands of proxy group fighters at camps in Iran.¹⁶³ State Department officials also

156. *Id.*

157. *Id.* at K405; “the degree and nature of a State’s involvement in an armed conflict on another State’s territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State’s responsibility for a specific act committed in the course of the conflict.”

158. *Id.* at K406.

159. See Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgement on the Genocide in Bosnia*, 18 EUR. J. INT’L L. 649, 651 (2007).

160. US Letter to the UN, *supra* note 74; see also *Notice on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations*, House of Representatives, Foreign Affairs Committee, https://foreignaffairs.house.gov/_cache/files/4/3/4362ca46-3a7d-43e8-a3ec-be0245705722/6E1A0F30F9204E380A7AD0C84EC572EC.doc148.pdf.

161. *Nicar. v. U.S.*, 1986 I.C.J., at Holding ¶ 3.

162. Thomas, *supra* note 116, at 6; see also State Dep’t Report, *supra* note 8, at 250-260.

163. Thomas, *supra* note 116, at 6, internal quotations omitted.

noted that “it will be very difficult for these proxies to be organized on the scale, lethality, and effectiveness that they had under Soleimani” because he was the “major architect . . . a hands-on, down-to-the-details manager.”¹⁶⁴ In order to satisfy that Iran was exercising effective control over KH and other non-State armed groups, the United States would have to provide evidence as to Iran’s alleged direct involvement in the December 2019 attacks in order for the actions of these militia groups to be legally imputed to Iran and therefore strengthen their position of an ongoing armed conflict.

The Special Rapporteur argues that the United States’ letter to the UN only stated that Iran “backed” these proxy groups, which is not enough control for these groups’ actions to be attributed to Iran.¹⁶⁵ However, the language the United States used is not dispositive of a finding of effective or overall control. Considering the information the United States has already provided in regard to the amount of control Iran, and by extension Soleimani, exercised over its proxy groups, it would likely be able to establish not only overall control, but effective control.

Even with the possible imputation of the militia groups’ actions to Iran, the continuity of the claimed ongoing armed conflict would still need to be assessed. Although the DOD and President pinned their core justification for the strike on self-defense, they both made reference to the history of attacks and the heightening tensions and conflicts in the region.¹⁶⁶ In its letter to the UN, the United States outlines the events it argues constituted an ongoing armed conflict in Iraq.¹⁶⁷ In addition to the instances in June and July of 2019, the attacks included a December 27,

164. State Dep’t Briefing, *supra* note 117.

165. Special Rapporteur Report, *supra* note 5, at Annex I ¶ 60; US Letter to the UN, *supra* note 80.

166. DOD Statement, *supra* note 80; President’s Remarks, *supra* note 80; While seemingly hanging its justification on the self-defense claim, the DOD’s initial Statement includes that Soleimani and the Quds force “were responsible for the deaths of hundreds of Americans and coalition service members and the wounding of thousands more.” It also discussed how he had “orchestrated” attacks in Iraq over last several months, including the December 27 attack and had approved the attack on the US Embassy earlier that week. In a similar fashion, President Trump remarked that “for years, the Islamic Revolutionary Guard Corps and its ruthless Quds Force—under Soleimani’s leadership—has targeted, injured, and murdered hundreds of American civilians and servicemen.” President Trump made reference to the “recent attacks on U.S. targets in Iraq,” which included the rocket strikes that killed an American contractor and wounded servicemembers as well as the attack on the US embassy in Baghdad, which he says was done at direction of Soleimani.

167. US Letter to the UN, *supra* note 80.

2019 attack that killed a U.S. Government contractor and injured several U.S. servicemembers.¹⁶⁸ On December 29, 2019, the United States responded to this attack by striking five targets associated with Kata'ib Hizballah.¹⁶⁹ On December 31, 2019, "Kata'ib Hizballah and other Qods-backed militias" then attacked the U.S. Embassy in Baghdad.¹⁷⁰

Although some of these events took place within days of each other, the Special Rapporteur has cast doubt as to the continuity of the claimed ongoing conflict.¹⁷¹ In the Special Rapporteur's view, these events were too disjointed as to constitute an ongoing armed conflict.¹⁷²

On the other hand, several countries have declined to condemn the United States' actions.¹⁷³ In a joint statement, the U.K. Prime Minister, French President, and German Chancellor stated: "We have condemned the recent attacks on coalition forces in Iraq and are gravely concerned by the negative role Iran has played in the region, including through the IRGC and the Al-Qods force under the command of General Soleimani."¹⁷⁴ This statement leaves open the possibility for recognizing an ongoing armed conflict. While the opinions of other States on the United States' strike are politically helpful, they may also be legally helpful.¹⁷⁵

Although the potential armed conflicts arising from the attacks on U.S. vessels and unarmed drones in June and July 2019 would likely be considered to have expired, the actions in the days preceding the strike themselves constituted an ongoing armed conflict. Thus, the targeted killing of Soleimani occurred within an active exchange of fire starting on December 27, 2019.

168. *Id.*; Thomas, *supra* note 116, at 1.

169. US Letter to the UN, *supra* note 80; Thomas, *supra* note 116, at 1.

170. US Letter to the UN, *supra* note 80; Thomas, *supra* note 116, at 1.

171. Special Rapporteur Report, *supra* note 5, at Annex I ¶ 57.

172. *Id.*

173. Talmon & Heipertz, *supra* note 115.

174. *Id.*; UK Prime Minister's Office, Joint Statement from President Macron, Chancellor Merkel, and Prime Minister Johnson on the Situation in Iraq (Jan. 6, 2020), <https://www.gov.uk/government/news/joint-statement-from-president-macron-chancellor-merkel-and-prime-minister-johnson-on-the-situation-in-iraq>.

175. In international law, State practice, through both actions and statements, creates customary international law. Although there is not a pre-existing norm that would benefit the United States in the matter at hand, how States react to this targeted killing may either open or shut the door on similar targeted killings in the future. For further consideration on State opinions: *See* Special Rapporteur Report, *supra* note 5, at 16-18.

V. DID THE TARGETED KILLING OF SOLEIMANI ADHERE TO IHL PRINCIPLES?

If the targeted killing of Soleimani was deemed to be a part of an ongoing armed conflict, then the humanitarian law principles of *jus in bello* would apply in conjunction with IHRL. Under *jus in bello* principles, a targeted killing is lawful if the individual constitutes a legitimate military objective and it complies with the law of war principles on the use of lethal force.¹⁷⁶ The four fundamental law of war principles on the use of lethal force are: 1) the principle of distinction; 2) the principle of proportionality; 3) the principle of necessity; and 4) the principle of unnecessary suffering, also known as humanity.¹⁷⁷

The first IHL principle the targeted killing must not offend is the principle of distinction. The principle of distinction requires parties to the conflict to distinguish “between the civilian population and combatants . . . and accordingly . . . direct their operations only against military objectives.”¹⁷⁸ In the context of targeted killings, Solis notes that drones have a “unique ability” to distinguish between combatants and civilians through their laser aiming capability, which lends to better targeting precision.¹⁷⁹ In the matter at hand, the identified target of the attack was Soleimani. In the event that the United States is in an ongoing armed conflict with proxy groups, whose actions are imputed to Iran, then Soleimani would constitute a legitimate military objective as a senior officer of an opposing force. It is long established that using lethal force against an enemy officer during an armed conflict, despite his distance from the battlefield, is legally permissible.¹⁸⁰ As this drone strike was directed at Soleimani, a senior military officer of an opposing force, the attack adheres to the principle of distinction.

176. Doha Declaration Module, *supra* note 58.

177. Speech by the Attorney General Eric Holder, at Northwestern University School of Law (Mar. 5, 2012), <https://justice.gov/opa/speech/attorney-general-eric-holder-speaks-north-western-university-school-law>.

178. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art 48 (1977) [hereinafter Additional Protocol I].

179. Solis, *supra* note 52, at 551.

180. A prime example of this is the United States’ killing of Japanese General Yamamoto in WWII. *See* Solis, *supra* note 52, at 203-04; State Department officials have likened the strike against Soleimani with the killing of Yamamoto. *See* State Dep’t Briefing, *supra* note 108.

The second principle the targeted killing must also adhere to is the principal of proportionality. Additional Protocol I defines a violation of the principle of proportionality as “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”¹⁸¹ As such, assessment of an action’s adherence to the principle of proportionality requires a balancing between the potential collateral damage and the military advantage.¹⁸² In considering targeted killings via drone, Solis notes that the technological capabilities, including sensors, high-definition cameras, and heat-signature recognition, of drones reduce collateral damage.¹⁸³

In this attack, nine other individuals were killed alongside Soleimani.¹⁸⁴ As stated previously, one of these men was Abu Mahdi al-Muhandis. Al-Muhandis was the senior leader of Kata’ib Hizbollah, the proxy group that was then in an ongoing armed conflict with the United States. Thus, he would constitute a combatant and a lawful target for the United States. Four of these individuals were officers in the IRGC.¹⁸⁵ As members of the Iranian military, these IRGC members would constitute lawful targets based on the same analysis which deems Soleimani a lawful target. The remaining four were Popular Mobilization Force (PMF) officials.¹⁸⁶ The PMF is an Iraqi State-sponsored entity that is known to be comprised of pro-Iranian militias.¹⁸⁷ Without more information of these

181. Additional Protocol I, *supra* note 178, art 51.5(b). Although the United States is not a party to Additional Protocol I, its provisions are largely considered to have crystallized into customary international law.

182. *See also* Prosecutor v. Gali•, IT-98 –29 –T, K58 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

183. Solis, *supra* note 52, at 551; “The accuracy of drone-fired munitions is greater than that of most manned aircraft, and that accuracy allows them to employ munitions with a kinetic energy far less than artillery or close air support require, thus reducing collateral damage.” *Id.* at 550. The Special Rapporteur disagrees with the idea that drones cause minimal collateral damage. *See* Special Rapporteur Report, *supra* note 5, at 6-8.

184. Rikar Hussein & Mehdi Jedinia, *A Look at Key Figures Killed with Qassem Soleimani in US Strike*, VOA NEWS (Jan. 3, 2020), <https://www.voanews.com/extremism-watch/look-key-figures-killed-qassem-soleimani-us-strike>.

185. *Id.*

186. *Id.*

187. The fact that several of those killed alongside Soleimani were members of Kata’ib Hizbollah, a U.S. designated FTO, and/or PMF, an Iraqi State-sponsored entity adds a nuance, which is especially interesting when considering the additional factor that the drone strike occurred on Iraqi territory. For information on PMF, *see* Ranj Alaaldin, *Containing Shiite Militias:*

individuals' possible membership in a specific militia, it is not possible to deem them combatants. Therefore, out of the ten individuals killed in the drone strike, six constituted lawful targets for the United States.

Solis notes that proportionality is generally misunderstood.¹⁸⁸ The key focus here is whether collateral damage is excessive, not extensive.¹⁸⁹ As this attack resulted in relatively few deaths outside of those that constituted a lawful target for the United States, this attack would likely not be considered to have been excessive. In assessing the military advantage of eliminating Soleimani against the deaths of the other individuals killed alongside him, the attack would likely be considered proportionate.

The targeted killing must also satisfy the principle of military necessity. The principle of military necessity permits a State to use "measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible."¹⁹⁰ In considering the concept of military necessity in the context of targeted killings, Solis asks:

Is the planned action indispensable for securing the submission of the enemy? The death of no one person will end terrorism, but would the killing of this particular individual constitute a substantial injury or loss to the terrorist cause, or disrupt terrorist plans? It is not a high hurdle to surmount.¹⁹¹

This statement is especially true in regard to Soleimani as he was considered "the architect" directing the attacks perpetrated by the proxy groups against the United States in the region. Thus, the targeted killing of Soleimani would satisfy the principle of military necessity.

The final core principle to which the targeted killing must adhere is the principle of unnecessary suffering. Additional Protocol I states that "it is prohibited to employ weapons, projectiles and material and methods of

The Battle for Stability in Iraq, BROOKINGS DOHA CENTER POLICY BRIEFING (Dec. 2017), https://www.brookings.edu/wp-content/uploads/2017/12/shiite_militias_iraq_english.pdf.

188. Solis, *supra* note 52, at 300.

189. *Id.*; see Yoram Dinstein, *Discussion: Reasonable Military Commanders and Reasonable Civilians*, 78 INT'L L. STUD. 173, 177 (2002).

190. DEPARTMENT OF THE ARMY FIELD MANUAL FM27-10, THE LAW OF LAND WARFARE, K3.a (Washington, DC: GPO, 1956); see also *United States v. Wilhelm list, et al.* ("the Hostage Case") 1948, XI TWC 1253 – 54 "military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money."

191. Solis, *supra* note 52, at 560.

warfare of a nature to cause superfluous injury or unnecessary suffering.”¹⁹² Solis notes that this principle poses a relatively low threshold for drone attacks to overcome.¹⁹³ In conducting the targeted killing of Soleimani, the United States employed two MQ-9 Reaper drones armed with missiles.¹⁹⁴ Although human rights advocates and other commentators have objections to the use of drones, “combat drones and their weapon systems are lawful weapons.”¹⁹⁵ As such, the targeted killing of Soleimani does not offend the principle of unnecessary suffering. Thus, within the context of an ongoing armed conflict, the targeted killing of Soleimani meets the four core principles of IHL.

A. IHL in an Armed Conflict: Duty to Arrest Rather than Kill?

Another element to the targeted killing that comes up both in IHL and IHRL discussions is whether there was a duty to arrest an individual rather than kill him or her. The ICRC’s *Interpretive Guidance* states that “the . . . force which is permissible against persons [directly participating in hostilities] must not exceed what is actually necessary to accomplish a legitimate military purpose.”¹⁹⁶ Solis argues that the position taken by the ICRC in the *Interpretive Guidance* is not accordant with IHL stating that “there is no legal obligation in IHL to capture rather than kill, or to give an opportunity to surrender before an attack.”¹⁹⁷ Nevertheless, in the context of a targeted killing, Solis notes the “important human rights concern” that the individual must have no reasonable possibility of arrest.¹⁹⁸ In discussing the killing of Soleimani, the lack of a reasonable possibility of arrest was specifically addressed by State Department officials.¹⁹⁹ As

192. Additional Protocol I, *supra* note 178, art 35.2.

193. Solis, *supra* note 52, at 541, 552.

194. *How Did U.S. Drones Find and Target Qassem Soleimani in the First Place?*, TRT WORLD (Jan. 3, 2020), <https://www.trtworld.com/middle-east/how-did-us-drones-find-and-target-qassem-soleimani-in-the-first-place-32697>.

195. See Solis, *supra* note 52, at 551; General arguments against drones are that they can be seen as enemy recruiting tools, the inherent secrecy attached to their use, and the “PlayStation mentality” of drones.

196. INT’L COMM. OF THE RED CROSS & NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 77 (2009).

197. Solis, *supra* note 52, at 583.

198. Solis, *supra* note 52, at 559.

199. State Dep’t Briefing, *supra* note 117.

such, this IHRL consideration does not come into play or delegitimize the strike.

Furthermore, the debate on whether to capture rather than kill is primarily concerned with the killing of civilians partaking in hostilities. Soleimani is a member of the Armed Forces of Iran and does not enjoy the protected status of civilians.²⁰⁰ In determining that the United States was in an ongoing armed conflict with Iran and its proxy groups, Soleimani would be a lawful target as a senior military officer of an opposing force. Moreover, “[t]here is nothing treacherous in singling out an individual enemy combatant (usually, a senior officer) as a target for a lethal attack conducted by combatants distinguishing themselves as such . . . even in an air strike.”²⁰¹ As such, the United States has not violated any duty to capture Soleimani rather than use lethal force.

VI. TERRITORIAL SOVEREIGNTY OF IRAQ

Although the targeted killing adheres to the four core principles of IHL, the fact that Soleimani was killed in the territory of a third State brings on additional complications. As the targeted killing of Soleimani occurred on Iraqi soil, the question then is whether Iraq could constitute the “battlefield” where the ongoing armed conflict was occurring.

As a general matter, IHL “continues to apply in the whole territory of the warring states or, in the case of internal [non-international] armed conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.”²⁰² The International Committee of the Red Cross (ICRC) does not recognize the application of IHL outside of the territories of the parties to a conflict.²⁰³ Not surprisingly, the ICRC also

200. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; After imputing the non-State armed groups’ actions to Iran, the ongoing armed conflict is then a common Article 2 conflict, thus all Geneva Conventions apply making Soleimani a combatant in a common Article 2 conflict. For more information on an individual’s battlefield status, see Solis, *supra* note 52, at 200-255.

201. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 200 (New York: Cambridge University Press, 2004) (discussing the killing of Japanese General Yamamoto in WWII.)

202. Solis, *supra* note 52, at 588; see *Tadic*, IT-94-1-AR72, K70.

203. Doha Declaration, *Categorization of an Armed Conflict*, Module 6: Military/Armed Conflict Approaches to Countering Terrorism, Doha Declaration E4J University Module Series: Counter-Terrorism, <https://www.unodc.org/e4j/en/terrorism/module-6/key-issues/categorization-of-armed-conflict.html> [hereinafter Doha Declaration Module II]; Special Rapporteur Report, *supra* note 5, at Annex I 14.

considers the global targeting of individuals suspected of being associated with non-State armed groups to be inconsistent with the territorial limits of IHL.²⁰⁴ In this instance, the parties to the conflict are the United States and Iran. As such, the fact that the strike occurred on Iraqi territory would arguably preclude the application of IHL.

As stated previously, a State can only resort to armed force in the territory of another State if it is authorized by the UN Security Council, given consent by the State to attack in its territory, or in self-defense.²⁰⁵ As the Security Council did not authorize the U.S. strike, the targeted killing would have to fall under one of the latter two options in order to be justified. However, the United States did not have the consent from the Iraqi Government to carry out the strike in their territory.²⁰⁶ Because the U.S. Government carried out an attack on Iraqi territory without Iraq's consent, this attack could constitute a violation of sovereignty and a potential act of aggression toward Iraq.²⁰⁷

Moreover, the Special Rapporteur argues that, because the targeted killing occurred on the territory of a third State, it cannot be considered an act of self-defense.²⁰⁸ The ICJ has previously determined that self-defense against an armed group in the territory of another State is justifiable only when the actions of the group can be imputed to the host State.²⁰⁹ As the actions of the armed groups in Iraq are arguably imputed to Iran, the United States' actions do not meet this established justification.

Despite this argument, a majority of commentators now assert that imputation to the host-State is no longer necessary.²¹⁰ Theresa Reinold stresses that the ICJ's "restrictive approach is increasingly out of touch

204. *Id.*; Although this statement is aimed at non-State actors, who have traditionally been the individuals designated as terrorists and the targets of targeted killings, this notion would also apply to a State actor suspected of terrorism.

205. Special Rapporteur Report, *supra* note 5, at 13 ¶ 51.

206. Permanent Rep. of Iraq to the UN, Identical Letters Dated 6 January 2020 from the Permanent Representative of Iraq to the United Nations Addressed to the President of the Security Council, S/2020/15 (Jan. 6, 2020); *see also* Contemporary Practice, *supra* note 104, at 317.

207. Special Rapporteur Report, *supra* note 5, ¶ 59; INT'L L. ASS'N, SYDNEY CONFERENCE, FINAL REPORT ON AGGRESSION AND THE USE OF FORCE 16 (2018).

208. Special Rapporteur Report, *supra* note 5, at ¶ 59.

209. *See Wall*, Advisory Opinion, 2004 I.C.J. at 136; *Dem. Rep. Congo v. Uganda*, 2005 ICJ at 168; *see also* Special Rapporteur Report, *supra* note 5, at ¶ 59.

210. TOM RUYLS, "ARMED ATTACK" AND ARTICLE 51 OF THE UN CHARTER 487 (Cambridge: Cambridge University Press, 2010); *see also* Solis, *supra* note 52, at 593.

with State practice.”²¹¹ Laurie R. Blank notes that post 9/11 State practice affords “firm support” for the right to self-defense against non-State actors, even without a connection to a State.²¹² Solis states that “the state practice that does exist, as well as the international law concept of self-defense itself, suggests lawful bases for the exercise of self-defense, including crossing the border into [another country] to pursue nonstate enemy fighters wherever they may shelter in [that country].”²¹³ Therefore, the absence of imputing the proxy groups’ actions to Iraq would not pose a preclusive barrier to the United States’ striking in Iraqi territory.

Furthermore, the United States contends that a State acting in self-defense may use force against a non-State actor in the territory of a second State who does not consent to the use of force if the second State is “unwilling or unable to prevent the actual or imminent threat posed by the non-State actor.”²¹⁴ However, the unable or unwilling standard applies “only in exceptional circumstances in which a State cannot or will not take effective measures to confront a non-State actor that is using its territory as a base for attacks and related operations against other States.”²¹⁵ The unable or unwilling principle has never been invoked by the United States to justify a strike on a State actor.²¹⁶ Professor O’Connell contends that the United States was not authorized to strike and should have consulted with the Iraqi authorities because it is the duty of the Iraqi government to keep U.S. personnel safe from criminal acts in their territory.²¹⁷

However, the United States had previously asked the Iraqi Government to help in defending U.S. personnel in Iraq.²¹⁸ Because the

211. Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post 9/11*, 105-2 AJIL (Apr. 2011) 244, 261.

212. Laurie R. Blank, *International Law and Cyber Threats from Non-State Actors*, 89 INTL L. STUD. (2013), 406, 413, *see also* Solis, *supra* note 52, at 593.

213. Solis, *supra* note 52, at 593.

214. Contemporary Practice, *supra* note 104, at 318; *see also* Brain Egan, Legal Advisor, Dep’t of State, Remarks to the American Society of Int’l Law (2016), <https://2009-2007.state.gov/s/l/releases/remarks/255493.htm> [hereinafter Egan Remarks]; Special Rapporteur Report II, *supra* note 7, at ¶ 50.

215. Egan Remarks, *supra* note 214; The United States has used the unable or unwilling standard to justify other airstrikes, such as ones it took in 2014 against ISIL in Syria. *See* Letter dated Sept. 23, 2014 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014).

216. Contemporary Practice, *supra* note 104, at 318.

217. O’Connell, *supra* note 110.

218. Ryan Browne & Mohammed Tawfeeq, *US Defense Secretary Asks Iraqi PM to Help Prevent Iranian-Linked Attacks on US Troops*, CNN (Dec. 16, 2019), <https://www.cnn.com/2019/12/16/politics/mark-esper-iraq-iran-attacks/index.html>; State department officials said that

United States had previously sought protection from Iraq, the United States may be able to argue that Iraq was unwilling or unable to effectively protect U.S. interests in Iraqi territory.²¹⁹ Pejic asserts that if an attacked State determines that “the host State [in which the attacker shelters] is ‘unwilling or unable’ to deal with the non-State actor threat emanating from its territory . . . [then] the use of force in self-defence would be lawful.”²²⁰ The unable or unwilling justification, although not universally accepted, has garnered widespread international support for targeting non-State actors.²²¹ As such, if the unable or unwilling principle were to apply, then the United States’ self-defense actions may be justified.

Furthermore, it could be argued that Iraq had certain duties to act. Per the 1907 Hague Convention, neutral States during an armed conflict have the duty to intern belligerents in their territory.²²² Moreover, the ICRC notes that “if belligerent forces enter neutral territory and the neutral authority is unable or unwilling to expel or intern them, the adverse party is entitled to undertake their hot pursuit and attack and them there.”²²³ Whether Iraq can truly be classified as a neutral power in this situation is highly debatable; however, even if one were to argue that Iraq is merely a “third-party” to this conflict, it would still have duties as a neutral party.²²⁴

the December 27 attack “was the eleventh attack in two months by Qasem Soleimani and his proxies that he [orchestrated], and so we asked the Iraqi Government to arrest the people who did this, bring them to justice . . .” State Dep’t Briefing, *supra* note 117.

219. Another interesting wrinkle comes from the fact that Soleimani was invited to Iraq. *See* Special Rapporteur *supra* note 5, at ¶ 3 Annex I; Mohammed Tawfeeq & Hira Humayun, *Iraqi Prime Minister Was Scheduled to Meet Soleimani the Morning He Was Killed*, CNN (Jan. 6, 2020), https://www.cnn.com/middleeast/live-news/us-iran-soleimani-tensions-live-intl-01-05-20/h_7c821d1eb7c75ce4b103f0e8020a35e1; Cole, *supra* note 60; Some sources report that this meeting was contrived at the request of President Trump. Steve Sweeney, *Iraqi Prime Minister: Trump Used Diplomatic Cover to Lure Soleimani to His Death*, PEOPLE’S WORLD (Jan. 7, 2020), <https://peoplesworld.org/article/iraqi-prime-minister-trump-used-diplomatic-cover-to-lure-soleimani-to-his-death/>; If the United States and Iraqi governments did “lure” Soleimani to Iraq, then the self-defense justification fails because this strike would not meet the imminence standard as it would have been premeditated.

220. Jelena Pejic, *Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications*, 96/893 INT’L REV. RED CROSS 67, 73 (Spring 2014); *see also* Solis, *supra* note 52, at 597.

221. *See* Elena Chachko & Ashley Deeks, *Which States Support the ‘Unwilling and Unable’ Test?*, LAWFARE (Oct. 10, 2016), <https://www.lawfareblog.com/which-states-support-unwilling-and-unable-test>.

222. Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, (Oct. 18, 1907); INT’L COMM. OF THE RED CROSS, THE LAW OF ARMED CONFLICT: NEUTRALITY (June 2002).

223. INT’L COMM. OF THE RED CROSS, *supra* note 222.

224. *See generally id.*

In this line of thinking, the United States may be able to justify its strike on Soleimani in Iraqi territory as it had previously sought the help of the Iraqi Government in countering strikes against its interests in Iraq. The United States' position is further strengthened especially considering that it could assert the existence of an ongoing pattern of attacks perpetrated Iranian-backed militias.

Moreover, concluding that IHL does not apply in Iraqi territory might fail to recognize the nuances of the situation. The events of the alleged ongoing armed conflict had already been taking place in Iraq. The December 27, 2019 attack by Iran on the U.S. base occurred in the Kirkuk province of Iraq.²²⁵ The United States' return strikes on Kata'ib Hizbollah targets occurred in Iraq and Syria.²²⁶ The subsequent December 31, 2019 attack occurred on the U.S. Embassy in Baghdad.²²⁷ As such, Iraq was the "battlefield" where the alleged ongoing armed conflict was occurring and where IHL should apply.

Although State sovereignty remains the cornerstone for international law and a traditional adherence to the notion of territorial sovereignty might lead to the conclusion that the United States was precluded from conducting a strike on an otherwise legitimate target, the "unwilling or unable" exception and the presence of an ongoing armed conflict in Iraqi territory would likely allow for the United States' attack. Whether the United States or other countries should habitually rely on these exceptions, however, is a worthwhile legal and political consideration.

VII. THE TARGETED KILLING OF SOLEIMANI AND THE WAR ON TERROR

An additional consideration worth noting is how the targeted killing of Soleimani fits into the War on Terror. The United States has taken the

225. Barbara Starr, *US Civilian Contractor Killed in Rocket Attack in Iraq*, CNN (Dec. 27, 2019), <https://www.cnn.com/2019/12/27/politics/iraq-rocket-attack-contractor-killed/index.html>; The Kirkuk province is approximately 170 miles north of Baghdad. This fact may be relevant when considering exactly where the "battlefield" was.

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

227. *US Baghdad Embassy Attacked by Protestors Angry at Air Strikes*, BBC (Dec. 31, 2019), <https://www.bbc.com/news/world-middle-east-50956111>.

position that it is in an ongoing NIAC against terrorism.²²⁸ In its post-9/11 counterterrorism activities, the United States has held the position that being in an “ongoing [NIAC] with the Taliban, Al-Qaeda, and associate forces . . . consequently permits the [United States] to engage in at-will targeting of enemy belligerents.”²²⁹ During the Obama administration, the United States argued that “once a State lawfully resorted to force in self-defense against a particular armed group following an actual or imminent attack by that group, it is not necessary . . . to reassess whether an attack is imminent prior to every subsequent action taken against that group.”²³⁰

Conversely, the ICRC “as the guardian of IHL” has not recognized the existence of a formal War on Terror.²³¹ While there is increasing recognition that Article 51 applies to non-State actors, the ICRC has also never considered non-State groups, such as al-Qaeda, ISIL, and associated groups as being parties to a global NIAC.²³²

Apart from the potential issues the concept of a global NIAC against terrorism raises, the targeted killing of Soleimani cannot truly be viewed as part of an NIAC due to the fact that he is a State actor of Iran.²³³ The Special Rapporteur has argued that the “unusual step” taken by the United States in labeling the IRGC as a terrorist organization may lead the United States to argue that the killing of Soleimani was a part of its global NIAC against al-Qaeda and its affiliates.²³⁴ Although the Special Rapporteur notes that the legal ramifications of the U.S. designation of Soleimani as a terrorist are not fully known, it is not possible to set aside the fact that he was a State actor of Iran.²³⁵

228. John Brennan, *The Efficacy and Ethics of U.S. Counterterrorism Strategy*, THE WILSON CENTER (Apr. 30, 2012), <https://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>.

229. *Legality of Targeted Killing Program under International Law*, LAWFARE BLOG, <https://www.lawfareblog.com/legality-targeted-killing-program-under-international-law>; see also Wells Bennett, *Text of the President’s Speech This Afternoon*, LAWFARE BLOG (May 23, 2013), <https://www.lawfareblog.com/text-presidents-speech-afternoon>; Robert Chesney, *Text of the Attorney General’s National Security Speech*, LAWFARE BLOG (Mar. 5, 2012), <https://www.lawfareblog.com/text-attorney-generals-national-security-speech>; Brennan, *supra* note 170.

230. Egan Remarks, *supra* note 214; see also Special Rapporteur Report, *supra* note 5, at ¶ 55.

231. Doha Declaration Module II, *supra* note 203.

232. *Id.*

233. Special Rapporteur Report, *supra* note 5, at Annex I ¶ 14.

234. *Id.*

235. *Id.*

VIII. CONCLUSION

Although debate on the legality of the targeted killing of Soleimani has largely died down in the United States, it remains an important concern in international law and international relations.²³⁶ Determining the legality of the targeted killing of Soleimani in international law is a complex assessment. If the targeted killing of Soleimani was done outside of an armed conflict and reviewed solely under IHRL, it is likely a violation of international law. If the targeted killing of Soleimani was done as an act of self-defense, the United States may be justified in its actions, particularly considering if this was self-defense against a concerted pattern of attacks. However, as it currently stands, the United States has not proffered enough evidence to support their assertion that an attack was imminent. Without further evidence, the targeted killing of Soleimani could not be legally justified as an act of self-defense.

If the targeted killing of Soleimani occurred as part of an ongoing armed conflict, the targeted killing of Soleimani may be justified. In order to be lawful under this analysis, the United States would have to establish an ongoing armed conflict. Under the established control tests in international law, the United States has a fair chance to argue that the proxy groups' actions in Iraq should be imputed to Iran. If the proxy groups' actions were to be imputed to Iran, then the targeted killing of Soleimani occurred within an ongoing armed conflict beginning December 27, 2019. Although IHL may authorize the killing of an enemy officer, the targeted killing occurred in the territory of a third State. A strike in Iraqi territory without its consent could constitute a violation of Iraq's sovereignty; however, the United States may be able to assert that Iraq was unwilling or unable to address the threats occurring in its territory, thus allowing for the U.S. strike on Iraqi territory.

As the United States and other countries continue to employ targeted killings and drone strikes extraterritorially, legal gaps that exist and were drawn to light in the targeted killing of Soleimani remain crucial considerations in the development of international humanitarian law.

236. Iran recently threatened to bomb Ft. McNair in Washington D.C. with the specific intention of killing General Joseph M. Martin, U.S. Army Vice Chief of Staff in retribution. See LaPorta, *supra* note 14.