

QASSEM SOLEIMANI, TARGETED KILLING OF STATE ACTORS, AND EXECUTIVE ORDER 12,333

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The targeted killing of the Iranian military leader Qassem Soleimani in an American drone strike in January 2020 marked a novel development in the operation of the United States' drone programme; targeting a member of a state's armed forces as opposed to a member of a non-state armed group. Soleimani's killing offers an opportunity to re-examine the scope of Executive Order 12,333, which prohibits employees of the United States Government from committing assassinations. This article applies Executive Order 12,333's "assassination ban" to the Soleimani strike. The assassination ban's scope varies depending on whether it is applied in a wartime or peacetime context. This article concludes from the surrounding factual and legal context that the strike should be analysed according to the peacetime definition of assassination, which necessitates an analysis of the strike's compliance with the jus ad bellum, the legal framework applicable to uses of interstate force. It finds that the strike's non-compliance with the jus ad bellum, in addition to its likely political motive create a strong argument that the strike would constitute a prohibited assassination under the terms of the Executive Order, but the legal framework surrounding the Executive Order limits its direct enforceability with respect to presidentially authorised uses of force. It ultimately concludes that, despite the assassination ban's lack of direct enforceability, it nevertheless creates a strong normative counterbalance against an increasing tendency toward expansive uses of extraterritorial force.

I INTRODUCTION

On 3 January 2020, much of the world awoke to find that an American drone strike had killed Qassem Soleimani, a senior Iranian general.¹ Amid an outpouring of reaction from the international

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¹ Department of Defence "Immediate Release: Statement by the Department of Defence" (Press Release, 2 January 2020).

community² and general public,³ many began to question the strike's legality under both domestic and international law.⁴ Unlike previous targets of American drone strikes, Soleimani's status as a senior member of the Iranian armed forces sparked a political and legal debate on whether the strike constituted an unlawful assassination.⁵ One aspect of the legal debate concerned the United States' longstanding assassination ban: through Executive Order 12,333, issued in 1981, persons employed by or acting on behalf of the United States Government are prohibited from engaging, or conspiring to engage in, assassination.⁶

This article aims to investigate whether the strike contravened Executive Order 12,333's assassination ban. Its scope is confined to the Order and will not address other domestic legal constraints on extraterritorial targeted killings.⁷ I will begin by setting out the legal and factual background to the strike. After determining that the legality of the Soleimani strike should be assessed according to the peacetime definition of assassination, it will conclude that the strike's non-compliance with the *jus ad bellum* creates a reasonable inference that it was a politically motivated assassination, but shortcomings in the legal framework prevent a decisive conclusion. Finally, the article will close by arguing that, despite its inability to offer conclusive determinations, the assassination ban nevertheless provides an important normative and political counterweight to excessive recourse to interstate force.

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- 2 Colin Dwyer "How the World is Reacting to the US Assassination of Iran's Qassem Soleimani" (3 January 2020) NPR <www.npr.org>; and Neil Vigdor "Killing of Iranian Commander Is Met with Criticism and Tough Talk" *The New York Times* (online ed, New York, 2 January 2020).
 - 3 Cody Combs "'World War III' trends globally after Qassem Suleimani's assassination" *The National* (online ed, Abu Dhabi, 3 January 2020).
 - 4 Scott R Anderson "Did the President Have the Domestic Legal Authority to Kill Qassem Soleimani?" (3 January 2020) Lawfare <www.lawfareblog.com>; and Rebecca Ingber "If there was no 'imminent' attack from Iran, killing Soleimani was illegal" *The Washington Post* (online ed, Washington DC, 16 January 2020). For a general overview of the different international legal regimes around the use of drones, see Christof Heyns *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions* UN Doc A/68/382 (13 September 2013) at [102]–[118].
 - 5 On the political debate around whether to call the strike an assassination, see Michael Scherer "Killing of Iranian Commander exposes Democratic divide over America's role in the world" *The Washington Post* (online ed, Washington DC, 4 January 2020); Brendan Morrow "How Bernie Sanders' response to the Soleimani strike stands out" (3 January 2020) *The Week* <www.theweek.com>; and Elizabeth Jensen "'Killing' or 'Assassination?'" (7 January 2020) NPR <www.npr.org>.
 - 6 Executive Order 12333, 3 CFR 200, § 2.11 at 213 (1981).
 - 7 See generally William C Banks and Peter Raven-Hansen "Targeted Killing and Assassination: The US Legal Framework" (2003) 37 *U Rich L Rev* 667.

II THE LEGAL FRAMEWORK

A Background

Executive prohibitions on assassination date back to a 1976 Executive Order issued by President Gerald Ford, which stipulated that "[n]o employee of the United States Government shall engage in, or conspire to engage in, political assassination."⁸ The Order was issued in response to the findings of the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities, commonly known as the Church Committee after its chair. The Church Committee investigated examples of Central Intelligence Agency (CIA) involvement in plots to assassinate heads of state and political leaders, including the Democratic Republic of the Congo's Patrice Lumumba and the Dominican Republic's Rafael Trujillo.⁹ Particular public attention was given to unsuccessful attempts against Cuba's Fidel Castro,¹⁰ and evidence of American involvement in the 1973 Chilean coup d'état.¹¹ The Committee recommended a statutory ban on assassinations.¹²

By issuing an executive order, President Ford responded to strong public pressure to proscribe assassinations, while retaining greater executive latitude over the scope and interpretation of the ban than if assassinations had been statutorily prohibited.¹³ This is because while an executive order made pursuant to the president's constitutional or statutory powers is "to be accorded the force and effect given to a statute",¹⁴ presidents possess a broad authority to revoke, modify or supersede executive

8 Executive Order 11905, 3 CFR 90, § 2(g) at 100 (1977).

9 *Alleged Assassination Plots Involving Foreign Leaders: An Interim Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities* (United States Senate, Report No 94-465, 20 November 1975) [Church Committee Interim Report]. Lumumba was the Democratic Republic of the Congo's first post-independence Prime Minister, perceived by the United States as overly pro-Soviet; while Trujillo was the Dominican Republic's long-serving authoritarian president, who was initially supported by the United States until increasing instability in his rule led to fears of a popular revolt akin to the Cuban Revolution: see Odd Arne Westad *The Cold War: A World History* (Penguin Books, London, 2018) at 282–283; and Lindsey A O'Rourke *Covert Regime Change: America's Secret Cold War* (Cornell University Press, Ithaca and London, 2018) at ch 8.

10 Mark Vincent Vlastic "Cloak and Dagger Diplomacy: The US and Assassination" (2000) 1 *Georget J Int Aff* 95 at 99.

11 Church Committee Interim Report, above n 9, at 239–257; and O'Rourke, above n 9, at 64–65.

12 Church Committee Interim Report, above n 9, at 282–285.

13 Howard A Wachtel "Targeting Osama Bin Laden: Examining the Legality of Assassination as a Tool of US Foreign Policy" (2005) 55 *Duke LJ* 677 at 697–698.

14 *Farkas v Texas Instruments Inc* 375 F 2d 629 (5th Cir 1967) at 632; and Kevin M Stack "The Statutory President" (2005) 90 *Iowa L Rev* 539 at 548. See also Boyd M Johnson III "Executive Order 12,333: The Permissibility of an American Assassination of a Foreign Leader" (1992) 25 *Cornell Intl LJ* 401 at 403; and Erica Newland "Executive Orders in Court" (2015) 124 *Yale LJ* 2026 at 2030–2031, both noting that Executive Order 12,333 has this force and effect.

orders at any time.¹⁵ Moreover, actions by executive branch officials that violate an executive order concerned with internal regulation of the executive branch do not create a right to judicial enforcement through a private civil action.¹⁶

The original Executive Order was superseded in 1978 by President Carter, who omitted "political" from "political assassination" and extended its scope to include persons "acting on behalf of the United States Government".¹⁷ The final iteration of the assassination ban was issued by President Reagan, reading: "No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination."¹⁸ The Executive Order fails to define "assassination," creating significant contestation around its scope.¹⁹

B Assassination in International Law

Conceptually, assassination must be differentiated from targeted killing. Targeted killing refers to:²⁰

... the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law ... against a specific individual who is not in the physical custody of the perpetrator.

A targeted killing is not inherently unlawful, so long as it complies with the relevant legal frameworks of International Human Rights Law (IHRL), International Humanitarian Law (IHL) and the law on the use of interstate force (*jus ad bellum*).²¹ Conversely, an assassination is definitionally illegal.²²

15 Daniel P Gitterman *Calling the Shots: The President, Executive Orders, and Public Policy* (Brookings Institution Press, Washington DC, 2017) at 5; Stack, above n 14, at 548 and 553; and Vivian S Chu and Todd Garvey *Executive Orders: Issuance, Modification, and Revocation* (Congressional Research Service, RS20846, 16 April 2014) at 7–8.

16 Newland, above n 14, at 2076–2078; Stack, above n 14, at 552. See also *Meyer v Bush* 981 F 2d 1288 (DC Cir 1993) at 1296; and *Utah Assn of Counties v Bush* 316 F Supp 2d 1172 (D Utah 2004) at 1200.

17 Executive Order 12036, 3 CFR 112, § 2-305 at 129 (1979).

18 Executive Order 12333, 3 CFR 200, § 2.11 at 213 (1982).

19 Wachtel, above n 13, at 701. See also Johnson, above n 14, at 402; and Thomas C Wingfield "Taking Aim at Regime Elites: Assassination, Tyrannicide, and the Clancy Doctrine" (1998) 22 Md J Intl L & Trade 287 at 306.

20 Philip Alston *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Addendum – Study on targeted killings* UN Doc A/HRC/14/24/Add.6 (28 May 2010) at [1].

21 At [10].

22 At [10].

Assassination is best conceptualised as a specifically illegal subset of targeted killing, characterised by its political motivation and lack of nexus with ongoing hostilities.²³

Assassination is prohibited by IHL, the legal framework applicable to armed conflicts.²⁴ Under IHL, killing a combatant "treacherously" constitutes assassination.²⁵ This prohibition is longstanding: present in the writings of early theorists,²⁶ it was included in early codifications of IHL, such as the 1863 Lieber Code.²⁷ Treachery, and the related concept of perfidy,²⁸ remain prohibited by the 1907 Hague Regulations;²⁹ as noted in mid- and late-twentieth-century military manuals.³⁰ Indicators of a "treacherous" assassination include the discarding of military uniforms in order to approach a pre-selected target and the killing of a combatant "behind the line of battle."³¹ As with perfidy, the prohibition's ambit is limited, and the use of "stealth or trickery" is not inherently unlawful.³² Thus, the 1943 targeted killing of Japanese Admiral Isoroku Yamamoto, carried out by American military planes above the contested Solomon Islands was not treacherous,³³ whereas the killing of the Nazi official Reinhard Heydrich by non-uniformed soldiers of the Czechoslovak Government-in-exile in

23 Sascha-Dominik Bachmann "Targeted Killings: Contemporary Challenges, Risks and Opportunities" (2013) 18 JC & SL 259 at 267–269.

24 Louise Doswald-Beck "The right to life in armed conflict: does international humanitarian law provide all the answers?" (2006) 88 Int Rev Red Cross 881 at 901.

25 Patricia Zengel "Assassination and the Law of Armed Conflict" (1991) 134 Mil L Rev 123 at 131; and Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law, Volume I: Rules* (International Committee of the Red Cross and Cambridge University Press, Cambridge, 2009) at 225–226.

26 Zengel, above n 25, at 127.

27 Vlasic, above n 10, at 100.

28 Doswald-Beck, above n 24, at 901; and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1125 UNTS 3 (opened for signature 8 June 1977, entered into force 7 December 1978) [Additional Protocol I], art 37.

29 Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land 1 Bevans 631 (opened for signature 18 October 1907, entered into force 26 January 1910), art 23(b). The Hague Regulations constitute customary international law: Michael N Schmitt "State-Sponsored Assassination in International and Domestic Law" (1992) 17 Yale J Intl L 609 at 630.

30 Nils Melzer *Targeted Killing in International Law* (Oxford University Press, New York, 2008) at 49; and Michael Ashkouri "Has United States Foreign Policy towards Libya, Iraq and Serbia Violated Executive Order 12333: Prohibition on Assassination?" (2001) 7 New Eng Intl & Comp L Ann 155 at 159.

31 Melzer, above n 30, at 49.

32 Schmitt, above n 29, at 617.

33 Zengel, above n 25, at 137.

occupied Prague may have violated the prohibition.³⁴ The concept of "lines of battle" are less relevant in modern armed conflicts, diminishing the application of the prohibition on treachery.³⁵ Today, it is often treated synonymously with the rule against perfidy.³⁶

Assassination is, therefore, context-specific: in an armed conflict context, it takes on the definition of a treacherous killing.³⁷ The historical background to the original executive order prohibiting assassination, concerned with "peacetime efforts by United States intelligence agency officials",³⁸ makes it unlikely the ban is intended to simply restate the narrow IHL prohibition on treachery. A United States judicial decision, *Letelier v Republic of Chile*, concerning the peacetime murder of a Chilean dissident in the United States on orders of the Chilean Government confirmed that assassination "is clearly contrary to the precepts of humanity as recognised in both national and international law."³⁹ However, the Court did not outline the exact scope of the international legal prohibition of assassinations.

C Interpreting Executive Order 12,333

The clearest explanation of the ban's scope is a 1989 memorandum by W Hays Parks of the Office of the Judge Advocate General of the Army.⁴⁰ The *Parks Memorandum*, as it is often known, defines assassination in two ways based on a strict wartime/peacetime dichotomy:

- (1) In *wartime*, assassination is defined narrowly to refer to the killing of an enemy combatant treacherously, referring to art 23(b) of the 1907 Hague Regulations.⁴¹ In this context, the assassination ban is a limited exception to the general principle that, during armed conflicts,

34 Gary D Solis *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press, Cambridge, 2010) at 424; Ashkouri, above n 30, at 161; and LC Green *The Contemporary Law of Armed Conflict* (Manchester University Press, Manchester, 1994) at 137–138. Contrast Zengel, above n 25, at 138.

35 Doswald-Beck, above n 24, at 902.

36 See for example *Manual of Armed Forces Law: DM 69, Volume 4* (2nd ed, New Zealand Defence Force, 2017) at [8.9.5]. In its modern form, perfidy requires a deception relating to a legally protected status under IHL, for instance, by disguising oneself as a civilian or feigning surrender in order to capture or kill an adversary: Additional Protocol I, above n 28, art 37.

37 Gary Solis "Targeted Killing and the Law of Armed Conflict" (2007) 60(2) *Naval War Coll Rev* 127 at 129.

38 Zengel, above n 25, at 145.

39 *Letelier v Republic of Chile* 488 F Supp 665 (DC 1980) at 673. See also Schmitt, above n 29, at 623–624; and *Liu v Republic of China* 892 F 2d 1419 (9th Cir 1989).

40 W Hays Parks "Memorandum of Law: Executive Order 12333 and Assassination" (1989) 12 *Army Law* 4 [*Parks Memorandum*] at 8.

41 At 5.

"enemy combatants are legitimate targets at all times".⁴² The Memorandum reaffirms that treachery requires an element of abuse of trust, and "does not preclude acts of violence involving the element of surprise."⁴³

- (2) In *peacetime*, assassination refers to "the murder of a private individual or public figure for political purposes".⁴⁴ Noting this would constitute a prohibited use of force against the territorial integrity or political independence of another state,⁴⁵ assassination would, therefore, be unlawful under international law even in Executive Order 12,333's absence.⁴⁶ The Memorandum reaffirms the inherent right of self-defence possessed by all states.⁴⁷ Specifically, the Memorandum states self-defence against an actual armed attack, "pre-emptive self-defence against an imminent use of force" and self-defence against continuing threats are not assassinations.⁴⁸

The Memorandum incorporates two international law frameworks when determining whether an act violates the ban: IHL where the act is in a "wartime" context; and *jus ad bellum* for "peacetime" acts.

The *Parks Memorandum* remains the primary public aid to interpreting Executive Order 12,333; further Department of Justice opinions on the ban's scope remain classified.⁴⁹ Notably, the *Parks Memorandum* does not specifically refer to intelligence operatives and affirms the ban's applicability in armed conflicts. The ban should, therefore, not be narrowly construed to only apply to action by intelligence agents.⁵⁰ Limiting the ban's application in this manner would produce arbitrary results in the context of targeted killing by drones, where the CIA and Army operate parallel programmes.⁵¹ This is particularly true in light of growing convergence between the two, as "military and CIA

42 At 5.

43 At 5.

44 At 4. See also Elizabeth B Bazan *Assassination Ban and EO 12333: A Brief Summary* (Congressional Research Service, RS21037, 4 January 2002) at 2.

45 Charter of the United Nations, art 2(4).

46 *Parks Memorandum*, above n 40, at 4.

47 Charter of the United Nations, art 51.

48 *Parks Memorandum*, above n 40, at 7.

49 Schmitt, above n 29, at 672 and 679; and Matthew Spurlock "The Assassination Ban and Targeted Killings" (5 November 2015) Just Security <www.justsecurity.org>.

50 Contrast Zengel above n 25, at 148; Bazan, above n 44, at 3; and Wachtel, above n 13, at 694.

51 Ryan J Vogel "Drone Warfare and the Law of Armed Conflict" (2010) 39 *Denv J Intl L & Poly* 101 at 135–136.

personnel generally work together quite closely when planning and engaging in drone strikes or raids."⁵²

American state practice indicates reticence to admit to targeting heads of state or senior officials. Following the 1986 bombing of Libyan leader Muammar Gaddafi's compound, President Reagan and Administration officials strongly denied any intent to target Gaddafi specifically, despite the circumstances of the attack and anonymous statements to the press indicating such intent.⁵³ Immediately prior to the First Gulf War, Air Force Chief of Staff Michael Dugan was fired after stating that in the event of war, Saddam Hussein would likely be directly targeted.⁵⁴ Explaining the dismissal, then-Defence Secretary Dick Cheney stated Dugan's comments may have endorsed violating the assassination ban.⁵⁵ This firing occurred despite the fact that Saddam Hussein, as commander-in-chief of the Iraqi military, would be lawfully targetable in an armed conflict.⁵⁶ This indicates the assassination ban possesses a clearly *normative* component, in addition to its legal dimensions.⁵⁷

III FACTUAL CONTEXT

Determining whether the killing of Qassem Soleimani constitutes an unlawful assassination requires an understanding of the surrounding factual context, the chronology of events leading up to the strike and the legal justifications advanced to support it. This part will briefly set out all three.

A Who was Qassem Soleimani?

Since 1998, Qassem Soleimani commanded the Quds Force, the special forces branch of the Iranian Revolutionary Guard Corps (IRGC) tasked with the pursuit of Iran's interests abroad.⁵⁸ The IRGC, alongside Iran's regular military, is a state organ whose existence is provided for in the Iranian

52 Rosa Brooks *How Everything Became War and the Military Became Everything: Tales from the Pentagon* (Simon & Schuster, New York, 2016) at 118 and 122.

53 Bert Brandenburg "The Legality of Assassination as an Aspect of Foreign Policy" (1987) 27 *Va J Intl L* 655 at 690–693. See also Banks and Raven-Hansen, above n 7, at 726.

54 Schmitt, above n 29, at 611.

55 Johnson, above n 14, at 401; and Eric Schmitt "Confrontation in the Gulf; Air Force Chief is Dismissed for Remarks on Gulf Plan; Cheney Cites Bad Judgment" *The New York Times* (New York City, 18 September 1990) at A1.

56 Solis, above n 37, at 128.

57 Andris Banka and Adam Quinn "Killing Norms Softly: US Targeted Killing, Quasi-secrecy and the Assassination Ban" (2018) 27 *Security Studies* 665 at 666; and Ward Thomas "Norms and Security: The Case of International Assassination" (2000) 25 *International Security* 105 at 106.

58 Ali Soufan "Qassem Soleimani and Iran's Unique Regional Strategy" (2018) 11(10) *CTC Sentinel* 1 at 1–2.

Constitution and whose head is appointed by the country's Supreme Leader.⁵⁹ The IRGC's activities far outstrip Iran's regular army in executing foreign and defence policy, notably through Quds Force-led coordination with various Iran-aligned armed groups in the region.⁶⁰ In his capacity as Quds Force commander, Soleimani, a Major-General, was instrumental in managing Iran's external affairs – supporting the Assad Government in Syria,⁶¹ and participating in the process of forming a government in Iraq after elections in 2010.⁶² His influence in Iranian foreign policy led one analyst to characterise him as "Iran's real foreign minister".⁶³ Soleimani was also a well-known public figure: opinion polling showed him as one of the most popular figures in Iran and was regularly the subject of speculation around mounting a presidential campaign.⁶⁴

B Events Preceding the Strike

United States-Iran relations, historically poor since the 1979 Revolution, further deteriorated following the United States' withdrawal from the 2015 Joint Comprehensive Plan of Action and the implementation of a "maximum pressure" campaign against Iran by the United States under the Trump Administration.⁶⁵ This included designating the IRGC a foreign terrorist organisation in April 2019, the first time such a step had been taken against a state's military forces.⁶⁶

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- 59 HE Chehabi and Asghar Schirazi "The Islamic Republic of Iran" (2012) 5 *J Persianate Stud* 175 at 184 and 192; and Wilfried Buchta *Who Rules Iran? The Structure of Power in the Islamic Republic* (Washington Institute for Near East Policy and Konrad Adenauer Stiftung, Washington DC, 2000) at 67–69.
- 60 Behbod Negahban "Who Makes Iran's Foreign Policy? The Revolutionary Guard and Factional Politics in the Formulation of Iranian Foreign Policy" (2017) 12 *Yale J Intl Aff* 33 at 34.
- 61 Kim Ghattas *Black Wave: Saudi Arabia, Iran and the Rivalry that Unravelling the Middle East* (Wildfire, London, 2020) at 284. Soleimani has been sanctioned by the United Nations Security Council for providing weapons to pro-Iran armed groups: SC Res 1747 (2007), at 5.
- 62 Negahban, above n 60, at 39.
- 63 Michael Crowley, Falih Hassan and Eric Schmitt "US Strike in Iraq Kills Qassem Suleimani, Commander of Iranian Forces" *The New York Times* (online ed, New York, 7 January 2020). See also Ghattas, above n 61, at 303.
- 64 Soufan, above n 58, at 10; and Arash Karami "Will Iran's most popular general enter politics?" (14 June 2016) Al-Monitor <www.al-monitor.org>.
- 65 Clayton Thomas *US Killing of Qassem Soleimani: Frequently Asked Questions* (Congressional Research Service, R46148, 13 January 2020) at 1. For a detailed sketch of Iran-US relations following the Islamic Revolution, see Maziar Behrooz "Iran after Revolution (1979-2009)" in Touraj Daryaei (ed) *The Oxford Handbook of Iranian History* (Oxford University Press, Oxford, 2012) 365.
- 66 US Department of State "Designation of the Islamic Revolutionary Guard Corps: Fact Sheet" (Press Release, 8 April 2019).

On 27 December 2019 Kata'ib Hezbollah, an Iran-aligned Iraqi Shia militia,⁶⁷ attacked a military base near Kirkuk in Iraq. Several American and Iraqi soldiers were wounded, and one American contractor was killed.⁶⁸ Two days later, in response, the United States carried out a series of airstrikes against Kata'ib Hezbollah on the territory of Iraq and Syria, killing at least 20.⁶⁹ On New Year's Eve, in response to the airstrikes, Kata'ib Hezbollah supporters began protesting outside the American Embassy in Baghdad, later attempting to storm it.⁷⁰ Public statements by Trump Administration officials blamed Iran for the protests,⁷¹ including a tweet by the President warning that Iran would be "held fully responsible" for "orchestrating an attack on the US Embassy in Iraq".⁷²

C The Strike

Shortly after midnight on 3 January 2020, Soleimani arrived at Baghdad International Airport, where he was met by Abu Mahdi al-Muhandis, second-in-command of the Popular Mobilization Forces (PMF).⁷³ The PMF are an umbrella organisation of Iraqi Shia militia; Kata'ib Hezbollah, also commanded by al-Muhandis, is a component group.⁷⁴ The strike took place at roughly 1 am local time, hitting two cars as they were leaving the airport.⁷⁵ The strike, directed by President Trump,⁷⁶ killed at least 10 people: in addition to Soleimani and al-Muhandis, four members each of the PMF and IRGC were killed.⁷⁷

67 Kata'ib Hezbollah has been a designated foreign terrorist organisation since 2009: "Foreign Terrorist Organizations" US Department of State <www.state.gov>. See also Thomas, above n 65, at 7.

68 Elena Moore and Roberta Rampton "Timeline: How the US Came to Strike and Kill a Top Iranian General" (4 January 2020) NPR <www.npr.org>.

69 "US Drone Strike in Iraq Kills Iranian Military Leader Qasem Soleimani" (2020) 114 AJIL 313 [AJIL Contemporary Practice] at 313.

70 Moore and Rampton, above n 68.

71 Thomas, above n 65 at 1; and AJIL Contemporary Practice, above n 69, at 313.

72 Donald J Trump (@realDonaldTrump) "Iran killed an American contractor, wounding many" <<https://twitter.com/realDonaldTrump/status/1211981022084128768>>.

73 Suadad al-Salhy "Tracked, targeted, killed: Qassem Soleimani's final hours" (4 January 2020) Middle East Eye <www.middleeasteye.net>.

74 "Qasem Soleimani: US kills top Iranian general in Baghdad air strike" (3 January 2020) BBC News <www.bbc.com>; and Khaled Yacoub Oweis "Iraqi militia hit by US plays crucial role for Iran in Syria" *The National* (online ed, Abu Dhabi, 31 December 2019).

75 Ken Dilanian and Courtney Kube "Airport informants, overhead drones: How the US killed Soleimani" (11 January 2020) NBC News <www.nbcnews.com>.

76 Department of Defence, above n 1.

77 Agnes Callamard *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (Advanced Unedited Version)* UN Doc A/HRC/44/38 (29 June 2020) at [97].

D Claimed Legal Justifications

1 International law

The Trump Administration argued the strike complied with international law, using two distinct self-defence arguments. It initially characterised the operation as rooted in imminent self-defence. In his first public remarks after the strike, President Trump stated "Soleimani was plotting imminent and sinister attacks on American diplomats and military personnel", and further claimed Soleimani had been plotting bombing attacks on four American embassies.⁷⁸ However, statements from the Department of Defence adopted broader language than that of an imminent attack, stating Soleimani "was actively developing plans" to attack American personnel and that the strike "was aimed at deterring future Iranian attack plans".⁷⁹

The United States reported its use of force in self-defence to the United Nations Security Council, in accordance with its legal obligation to do so under the United Nations Charter.⁸⁰ In its "article 51 letter", the United States omitted any reference to imminent self-defence, instead claiming the strike was undertaken "in response to an escalating series of armed attacks" committed by Iran.⁸¹ The following incidents were characterised as armed attacks: a threat against the USS *Boxer* in July 2019; the downing of an unmanned drone over the Strait of Hormuz in June 2019;⁸² Iranian "attacks on commercial vessels ... that threaten freedom of navigation and the security of international commerce"; missile attacks on Saudi Arabia; and the actions of Kata'ib Hezbollah and other "Quds Force-backed militia" in attacking American military bases and the American Embassy in Baghdad.⁸³

78 AJIL Contemporary Practice, above n 69, at 315.

79 Department of Defence, above n 1.

80 Charter of the United Nations, art 51.

81 *Letter dated 8 January 2020 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council* UN Doc S/2020/20 (9 January 2020) [US Article 51 Letter] at 1. It is generally accepted in principle that an accumulation of events may collectively constitute an armed attack justifying defensive force: see *Islamic Republic of Iran v United States of America* [2003] ICJ Rep 161 [*Oil Platforms*] at 191–192; and Monica Hakimi and Jacob Katz Cogan "The Two Codes on the Use of Force" (2016) 27 EJIL 257 at 271–272.

82 See "US-Iran Tensions: Timeline of events leading to Soleimani killing" (9 January 2020) Al Jazeera <www.aljazeera.com>.

83 US Article 51 Letter, above n 81. See also Adil Ahmad Haque "US Legal Defense of the Soleimani Strike at the United Nations: A Critical Assessment" (10 January 2020) Just Security <www.justsecurity.org>; and Anne Gearan and Colby Izkowitz "White House memo on Soleimani strike makes no mention of imminent threat" *The Washington Post* (online ed, Washington DC, 14 February 2020).

2 *Domestic law*

The Trump Administration argued the strike was permissible under domestic law. Drawing on the self-defence arguments discussed above, it emphasised the President's authority to "direct the use of military force to protect the Nation from an attack or threat of imminent attack without congressional authorisation."⁸⁴ This authority is often invoked for uses of force not explicitly authorised by Congress, for example, after a series of airstrikes against Syrian chemical weapons facilities in 2018.⁸⁵ No Administration statements appear to address Executive Order 12,333 directly.

The Administration further relied on the 2002 Authorisation for Use of Military Force (AUMF) in which Congress authorised force against Iraq prior to the 2003 invasion. In line with prior practice, the Administration endorsed a broad reading of the AUMF that permits force against any threats to American security located on Iraqi territory.⁸⁶ The Administration provided Congress with a report outlining the legal authority for the strike in line with a statutory obligation to do so.⁸⁷ Contrary to usual practice, the report was entirely classified.⁸⁸

IV WHAT FRAMEWORK GOVERNS THE SOLEIMANI STRIKE?

Considering the *Parks Memorandum's* clear wartime/peacetime dichotomy,⁸⁹ this part analyses the context surrounding the Soleimani strike to determine whether its compliance with Executive Order 12,333 should be assessed on a wartime or peacetime basis.

A Importance of Framework Selection

The question of what legal framework applies to a targeted killing is often contested for two reasons. First, international law suffers from the "lack of a metalegal framework – a legal framework that determines which legal framework applies",⁹⁰ making it often difficult to practically determine

84 *Notice on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* (14 February 2020) [Section 1264 Notice] at 1; and United States Constitution, art II, § 2, cl 1. See also Harold J Krent *Presidential Powers* (New York University Press, New York, 2005) at 113.

85 Steven A Engel *April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities: Memorandum Opinion for the Counsel to the President* (Office of Legal Counsel, 31 May 2018) at 3–6.

86 Section 1264 Notice, above n 84, at 1–2. See also Christopher Zambakari "Executive Powers and the Targeted Killing of Gen Qassem Soleimani" (18 March 2020) GPPR <www.gppreview.com>.

87 War Powers Resolution 50 USC § 1543(a)(1).

88 John B Bellinger III "Does the US Strike on Soleimani Break Legal Norms?" (6 January 2020) Council on Foreign Relations <www.cfr.org>.

89 See pt II.C above.

90 Jens David Ohlin "Acting as a Sovereign versus Acting as a Belligerent" in Jens David Ohlin (ed) *Theoretical Boundaries of Armed Conflict and Human Rights* (Cambridge University Press, New York, 2016) 118 at 119.

whether IHL, IHRL, or the *jus ad bellum* is most appropriate.⁹¹ Extraterritorial drone strikes and the legal justifications advanced for their use, in particular, have seen "a highly problematic blurring and expansion of the boundaries of the applicable legal frameworks".⁹²

Secondly, the choice of framework is often determinative: differing levels of permissiveness of lethal force mean that the determination of whether a drone strike is governed by IHL or IHRL⁹³ will often determine the strike's legality.⁹⁴

This is similarly true when determining whether to apply Executive Order 12,333's "peacetime" or "wartime" rubric: in the latter, the Soleimani strike will almost certainly not constitute assassination. The "prohibition on treachery does not require attackers to meet their victim face to face,"⁹⁵ and there is nothing inherent in the use of drones that renders their use unlawful or perfidious *per se*, so long as core IHL principles such as military necessity and distinction are complied with in their use.⁹⁶ A drone strike carried out against a legitimate military target in an armed conflict, though a surprise attack, would not be a treacherous/perfidious killing as it "[does] not seek to deceive adversaries with regard to duties or obligations under the law of war"; for instance by feigning surrender or disguising oneself as a civilian.⁹⁷

While framework selection when assessing the overall legality of a drone strike requires assessment of three potential legal regimes, Executive Order 12,333 considers only two: IHL in "wartime"; and *jus ad bellum* in "peacetime."⁹⁸ It must be borne in mind that the two are independent frameworks: an extraterritorial use of force that complies with the *jus ad bellum* may nevertheless breach a rule of IHL or vice versa.⁹⁹

91 Helen Duffy "Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication" in Ziv Bohrer, Janina Dill and Helen Duffy (eds) *Law Applicable to Armed Conflict* (Cambridge University Press, Cambridge, 2020) 15 at 29–32.

92 Alston, above n 20, at [3].

93 Or perhaps more accurately, whether the scope of the right to life under IHRL is to be determined using IHL as the relevant *lex specialis*: see *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 at 240.

94 Ohlin, above n 90, at 119.

95 Schmitt, above n 29, at 634.

96 See Alston, above n 20, at [29]–[30].

97 Sean Watts "Law-of-War Perfidy" (2014) 219 *Mil L Rev* 106 at 161.

98 *Parks Memorandum*, above n 40.

99 Keiichiro Okimoto "The Relationship between *Jus Ad Bellum* and *Jus In Bello*" in Marc Weller (ed) *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, Oxford, 2015) 1209 at 1214.

B Novel Factual Circumstances

Targeted killings carried out by drone are not rare. However, academic commentary – in line with state practice – has focused on targeted killing of members of non-state armed groups, generally in non-international armed conflicts (NIACs).¹⁰⁰ The primary judicial examination of the legality of targeted killings comes from the Israeli Supreme Court in *Public Committee Against Torture in Israel v Government of Israel (Targeted Killings case)*. While the Court assessed the legality of Israel's targeted killing policies in an international armed conflict (IAC), the persons targeted were considered civilians directly participating in hostilities rather than members of a state military;¹⁰¹ limiting the applicability of its analysis to the Soleimani strike.

The Soleimani strike is unique, marking "the first time the US had used [drones] to kill another country's senior military commander on foreign soil."¹⁰² Successive administrations have traditionally asserted the legality of drone strikes using two arguments, both of which concern targeting non-state armed groups. The first justification argued for the existence of a "global NIAC" in which members of armed terrorist groups are lawfully targetable combatants,¹⁰³ whose killing is not precluded by the assassination ban.¹⁰⁴ Later, the primary argument became that the United States, in addition to being party to a NIAC against Al-Qaeda and associated groups, is committing lawful acts of self-defence against members of armed groups on the territory of states that are unwilling or unable to combat the threat.¹⁰⁵ These justifications are not readily applicable with regard to Soleimani, as a senior member of a state's armed forces.

100 See Melzer, above n 30, at 56; and Noam Lubell and Nathan Derejko "A Global Battlefield: Drones and the Geographic Scope of Armed Conflict" (2013) 11 J Intl Crim Just 65 at 68ff.

101 *Public Committee against Torture in Israel v Government of Israel* HCJ 769/02, 13 December 2006 at [18] and [31].

102 Helen Warrell "From Desert Storm to Soleimani: how US drone warfare has evolved" *The Financial Times* (online ed, London, 9 January 2020). See also Callamard, above n 77, at [5]; and Elad D Gil "Institutional Choice and Targeted Killing: A Comparative Perspective" (2020) 94 Tul L Rev 711 at 734.

103 Milena Sterio "The United States' Use of Drones in the War on Terror: The (Il)legality of Targeted Killings under International Law" (2012) 45 Case W Res J Intl L 197 at 201.

104 Gabriella Blum and Philip Heymann "Law and Policy of Targeted Killing" (2010) 1 Harv Natl Sec J 145 at 150–155. For critique of the concept of "Global NIAC" see Callamard, above n 77, at [56]–[59]; and Duffy, above n 91, at 37. Compare John Yoo "Assassination or Targeted Killings After 9/11" (2011) 56 NY L Sch L Rev 57 at 63ff.

105 Harold Hongju Koh, US Department of State Legal Advisor "The Obama Administration and International Law" (Address to the American Society of International Law Annual Meeting, Washington DC, 25 March 2010); Craig Martin "Going Medieval: Targeted Killing, Self-Defense and the *Jus ad Bellum* Regime" in Claire Finkelstein, Jens David Ohlin and Andrew Altman (eds) *Targeted Killings: Law and Morality in an Asymmetrical World* (Oxford University Press, Oxford, 2012) 223 at 233; and Sterio, above n 103, at 202.

C *The "Wartime" Rubric and IHL*

This section discusses the potential applicability of the "wartime" framework, meaning Soleimani's killing could only constitute an assassination if the strike were undertaken treacherously.

1 *Pre-existing IAC*

The clearest justification for applying the wartime framework would be if, at the time of the strike, Iran and the United States were engaged in an IAC. Unlike a NIAC, whose existence is subject to thresholds around intensity of violence and non-state armed group organisation,¹⁰⁶ an IAC exists wherever there is a "difference arising between two States and leading to the intervention of armed forces", irrespective of duration or intensity.¹⁰⁷ The absence of an intensity threshold means that "even minor skirmishes" and any "unconsented-to military operations by one State in the territory of another State" may trigger an IAC.¹⁰⁸ This is rooted in a desire to ensure the greatest possible applicability of IHL protections and prevent potential gaps in the law.¹⁰⁹

Some have argued that prior exchanges between the United States and Iran mean the two were already engaged in an IAC,¹¹⁰ rendering the killing of Soleimani little more than the lawful targeting of an enemy combatant.¹¹¹ On this view, the international and domestic reaction to the strike, rather than reflecting a change to the underlying *legal* situation, is simply:¹¹²

shock ... result[ing] from the fact that both sides have thus far been engaging in comparatively low-intensity, often indirect, strikes in an attempt to avoid acknowledging the existence of a 'war'.

However, there is little evidence that the United States and Iran were engaged in a pre-existing IAC. The existence of an armed conflict is based on "verifiable facts in accordance with objective

106 *Prosecutor v Tadic (Jurisdiction)* ICTY Appeals Chamber IT-94-1, 2 October 1995 at [70]; and Alston, above n 20, at [51]–[52].

107 Common Article 2 to the Geneva Conventions of 1949; and Alston, above n 20, at [51].

108 Knut Dörman and others (eds) *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* (International Committee of the Red Cross and Cambridge University Press, Cambridge, 2016) at [237].

109 At [239]ff. See also Marco Sassòli *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar, Cheltenham, 2019) at 170. Contrast Laurie R Blank "Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat" (2010) 39 Ga J Intl & Comp L 1 at 29–30.

110 See pt III.D.1 above for the prior incidents described as "armed attacks" by the United States. See also US Article 51 Letter, above n 81.

111 Elliot Winter "The Death of Qassem Soleimani and the Law of Armed Conflict" (6 January 2020) Jurist <www.jurist.org>. See also Scott A Hodges "The Killing of Qassem Soleimani: Assassination or Lawful Military Strike?" (29 October 2020) The Air Force JAG Corps Reporter <www.reporter.dodlive.mil>.

112 Winter, above n 111.

criteria".¹¹³ While there is no central body that issues authoritative determinations as to the existence of an armed conflict, statements by the International Committee of the Red Cross, the United Nations, regional organisations and international tribunals are regularly considered.¹¹⁴ It is revealing that prior to the strike:¹¹⁵

... [N]o State, expert commentator or expert body, such as the International Committee of the Red Cross, had identified the escalation of the conflict between the U.S. and Iran as amounting to an international armed conflict.

For the rocket attack near Kirkuk and the attempted storming of the American embassy¹¹⁶ to create a United States-Iran IAC, Kata'ib Hezbollah's actions would need to be attributable to Iran.¹¹⁷ This requires evidence that Kata'ib Hezbollah was under the "overall control"¹¹⁸ of Iran, or Iran had "effective control" over Kata'ib Hezbollah.¹¹⁹ No evidence to that effect has been advanced;¹²⁰ the United States' legal position on the relevant incidents appears to be that they were carried out by "Iran-supported" and "Quds Force-backed" militia.¹²¹ Supporting or backing a non-state armed group through provision of funds and arms, and even "the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself" to attribute an armed group's acts to its supporting state.¹²²

113 Sylvain Vité "Typology of armed conflicts in international humanitarian law: legal concepts and actual situations" (2009) 91 Int Rev Red Cross 69 at 72.

114 See Dörman and others, above n 108, at [214].

115 Agnes Callamard "The Targeted Killing of General Soleimani: Its Lawfulness and Why It Matters" (8 January 2020) Just Security <www.justsecurity.org>. See also Callamard, above n 77, at [115].

116 See Moore and Rampton, above n 68.

117 Sassòli, above n 109, at [6.13].

118 *Prosecutor v Tadic (Judgment)* ICTY Appeals Chamber IT-94-1-A, 15 July 1999 at 49ff.

119 *Military and Paramilitary Activities against Nicaragua (Nicaragua v United States) (Merits)* [1986] ICJ Rep 14 [*Nicaragua* case] at 64–65. For the differences between the "overall control" and "effective control" standards, see Antonio Cassese "The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia" (2007) 18 EJIL 649.

120 But see Ghattas, above n 61, at 303–304.

121 US Article 51 Letter, above n 81, at 1. See also Oona Hathaway "Bolton's Stated Predicate for War with Iran Doesn't Work" (31 May 2019) Just Security <www.justsecurity.org>; and Ryan Goodman "White House '1264 Notice' and Novel Legal Claims for Military Action Against Iran" (14 February 2020) Just Security <www.justsecurity.org>.

122 *Nicaragua* case, above n 119, at 64; and *Prosecutor v Tadic (Judgment)*, above n 118, at 56 and 58–59.

2 IHL and first strikes

An alternative argument also favours the wartime rubric. It contends that even if Kata'ib Hezbollah's actions cannot be attributed to Iran – such that there is no pre-existing IAC between Iran and the United States – Soleimani's killing is the "first strike" that creates an IAC, with the first strike itself governed by IHL.¹²³ IHL, it is argued, regulates first strikes because disapplication of IHL creates an anomalous situation where the perpetrator of the first strike may be punished under the targeted state's domestic law for lawful acts of war, whereas subsequent participants in the ensuing IAC would be entitled to combatant immunity.¹²⁴

Drawing on the imminent self-defence justifications put forward by the White House,¹²⁵ it is further argued that the *invocation* of imminent self-defence creates an IAC and thereby precludes consideration of the strike using the peacetime definition of assassination:¹²⁶

... if a state reasonably determines that military action is necessary to intercept or preempt an imminent armed attack, that military action indicates the existence of an armed conflict. Thus, [IHL] rules govern the tactical execution of military action to achieve that self-defence objective, including who and what qualifies as a lawful object of attack.

On this reasoning, Soleimani's status as a legitimate military target under IHL precludes classification of the strike as an assassination, regardless of whether the strike complied with the *jus ad bellum*.¹²⁷

However, IHL's applicability to first strikes does not necessarily indicate the Soleimani strike should be assessed under Executive Order 12,333's wartime rubric. The issue of IHL's applicability to first strikes concerns whether IHL applies *as opposed to IHRL*,¹²⁸ whereas interpreting the assassination ban requires consideration of whether the situation best fits a framework built around either IHL or the *jus ad bellum*.¹²⁹ Debate about IHL or IHRL's suitability in governing the

123 Eliav Lieblich "Targeted Killing of General Soleimani: Why the Laws of War Should Apply, and Why it Matters" (13 January 2020) Just Security <www.justsecurity.org>. Contrast Callamard, above n 77, at [134]; and Pouria Askary and Katayoun Hosseinejad "Taking Territory of a Third State Seriously: Beginning of IAC and the Strike Against Major General Soleimani (Part I)" (24 January 2020) Opinio Juris <www.opiniojuris.org>.

124 Lieblich, above n 123; and Alonso Gurmendi "Raising Questions on Targeted Killings as First Strikes in IACs" (9 January 2020) Opinio Juris <www.opiniojuris.org>.

125 See pt III.D.1 above.

126 Geoffrey S Corn and Chris Jenks "Soleimani and the Tactical Execution of Strategic Self-Defence" (24 January 2020) Lawfare <www.lawfareblog.com>.

127 Corn and Jenks, above n 126.

128 Gurmendi, above n 124. See also Callamard, above n 77, at [41]–[44].

129 See pt II.C above; and *Parks Memorandum*, above n 40.

operationalisation of first strikes does not affect the general principle that, when not in a pre-existing armed conflict, "the first use of military force is regulated under the *jus ad bellum*."¹³⁰

This argument similarly sidesteps the role of the *jus ad bellum* in proscribing assassinations under domestic law. Identifying IHL as the appropriate framework for the execution of imminent self-defence,¹³¹ a position supported by American military manuals,¹³² should not automatically preclude consideration of Executive Order 12,333 using the peacetime *jus ad bellum*-centred framework. The United States' position on what constitutes an "imminent threat" is often unclear,¹³³ at times adopting a position of permissive force against temporally remote threats that receives "very limited support" from the international community.¹³⁴ Allowing a claim of imminent self-defence to automatically narrow the definition of assassination to the killing of a combatant by treachery could potentially permit the targeting of senior military leaders – or in some cases, heads of state¹³⁵ – absent a pre-existing armed conflict, on the basis of the mere *invocation* of imminent self-defence without assessing *jus ad bellum* compliance.

3 Concerns about blanket application of IHL

Some scholars doubt IHL's suitability in regulating targeted killing by drones outside of active hostilities – that is, the specific geographic area where ongoing military operations are taking place.¹³⁶ Directing force against a pre-selected individual, generally on the basis of guilt rather than combatant status, appears analogous to law enforcement (governed by IHRL) rather than conventional belligerency and IHL.¹³⁷ Similarly, "the fact that operations take place outside of a defined battlefield ... make the war paradigm at best a proximate, but by no means a perfect, fit."¹³⁸ This reticence to

130 Mary Ellen O'Connell "The Killing of Soleimani and International Law" (6 January 2020) EJIL Talk <www.ejiltalk.org>. See also Martin, above n 105, at 232; and Laurie R Blank "Irreconcilable Differences: The Thresholds for Armed Attack and International Armed Conflict" (2020) 96 Notre Dame L Rev 249 at 269.

131 Corn and Jenks, above n 126.

132 Ryan Goodman "The Laws of War in the Age of Terror" (2018–2019) 28 J Transnatl L & Poly 1 at 13. See also William H Boothby and Wolff Heintschel von Heinegg *The Law of War: A Detailed Assessment of the US Department of Defence Law of War Manual* (Cambridge University Press, Cambridge, 2018) at 49.

133 Human Rights Committee *Concluding observations on the fourth periodic report of the United States of America* UN Doc CCPR/C/USA/CO/4 (23 April 2014) at [9].

134 International Law Association Committee on the Use of Force *Final Report on Aggression and the Use of Force* (International Law Association, 2018) at 13.

135 See Solis, above n 37, at 128.

136 See Melzer, above n 30, at 275–276.

137 Blum and Heymann, above n 104, at 148; and Gill, above n 102, at 727.

138 At 156.

automatically apply IHL when determining a drone strike's legality is shared by Melzer, who argues that, even between parties to an ongoing armed conflict, "targeted killings carried out for purposes other than the conduct of hostilities ... are governed by the normative paradigm of law enforcement."¹³⁹ It appears similarly arguable that IHL may be inapt when assessing the pre-selected targeting of a senior military leader, geographically removed from any active hostilities between the two states concerned, on the territory of a third state. As Chachko notes, the process by which the United States Government authorises an extraterritorial targeted killing is often "an administrative decision made through an interagency process, much like many other decisions pertaining to individuals the administrative state makes on a regular basis";¹⁴⁰ far removed from the original battlefield context of many substantive rules of IHL.

D Factors Favouring the Jus ad Bellum

The following factors favour applying the "peacetime" rubric, which assesses the strike's *jus ad bellum* compliance in determining whether it constitutes an assassination.¹⁴¹ The logical corollary of the absence of clear evidence of a pre-existing United States-Iran IAC is the increasing suitability of the peacetime framework.

Even assuming the existence of a pre-existing United States-Iran IAC, it must be remembered that the strike took place on Iraqi territory. The geographic scope of an IAC is the entirety of the territory of the state parties to the conflict.¹⁴² An unconsented use of force on the territory of another state, even where forces unaffiliated with the territorial state are targeted, violates the sovereignty of the territorial state. As Horowitz explains:¹⁴³

When a state uses extraterritorial force anew, it must do so through the authority of the UN Security Council, [or the] doctrine of self-defence Whether a state is in an armed conflict is therefore not in and of itself sufficient to determine if a state can use lethal force against an enemy.

A *jus ad bellum* analysis better accords with the centrality of the prohibition on the use of force, "a cornerstone of the United Nations Charter."¹⁴⁴ Concern for sovereignty is a particularly appropriate guiding principle in this case: the PMF, whose deputy leader was killed in the strike, is integrated into

139 Melzer, above n 30, at 395.

140 Elena Chachko "Administrative National Security" (2020) 108 Geo LJ 1063 at 1085.

141 *Parks Memorandum*, above n 40, at 7.

142 *Prosecutor v Tadic (Jurisdiction)*, above n 106, at [70]; and Sassòli, above n 109, at 187.

143 Jonathan Horowitz "Ending the Global War: The Power of Human Rights in a Time of Unrestrained Armed Conflict" in Jens David Ohlin (ed) *Theoretical Boundaries of Armed Conflict and Human Rights* (Cambridge University Press, New York, 2016) 157 at 163–164.

144 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168 at 223.

the Iraqi armed forces and formally linked to the Iraqi Prime Minister;¹⁴⁵ Soleimani may have been in Baghdad on the Prime Minister's invitation,¹⁴⁶ and Iraq protested the "serious violation" of its sovereignty to the Security Council following the strike.¹⁴⁷ While there is a body of opinion that art 2(4) of the UN Charter may not categorically apply to "minimal" uses of extraterritorial force,¹⁴⁸ for these reasons it seems clear the use of force at issue in this article would rise above any potential *de minimis* threshold.

State practice indicates that the existence of an armed conflict does not entitle a state to disregard *jus ad bellum* considerations when engaging in targeted killings on the territory of third states. For example, Israel's targeted killing of Palestine Liberation Organization strategist Abu Jihad in Tunis during the first Intifada was condemned by the Security Council as "aggression ... against the sovereignty and territorial integrity of Tunisia in flagrant violation of the Charter of the United Nations".¹⁴⁹

Centring the *jus ad bellum* when considering targeted killing by drone avoids overly expansive applications of IHL. Failing to consider the territorial state's sovereignty when force is used against members of a party to an IAC on a third state could, akin to a "Global NIAC", see the widespread importation of IHL rules, and its greater permissiveness with respect to incidental civilian casualties, on the territory of uninvolved states.¹⁵⁰ The *jus ad bellum* avoids this by placing geographic and temporal constraints on where force may be lawfully used in self-defence.¹⁵¹

At present, there is "considerable clarity regarding IHL's spatial application boundaries" in an IAC:¹⁵² namely, the territory of the state parties to the conflict but not the territory of uninvolved

145 Oweis, above n 74; Goodman, above n 121; and Thanassis Cambanis and others *Hybrid Actors: Armed Groups and State Fragmentation in the Middle East* (Century Foundation, New York, 2019) at 29.

146 Callamard, above n 77, at [98]. See also Joyce Karam "Pompeo: Qassem Suleimani was not on diplomatic mission when killed" *The National* (online ed, Abu Dhabi, 7 January 2020).

147 *Identical letters dated 6 January 2020 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council* UN Doc 2/2020/15 (6 January 2020) [Iraq UN Letter] at 1.

148 See generally Tom Ruys "The Meaning of 'Force' and the Boundaries of the *Jus ad Bellum*: Are 'Minimal' Uses of Force Excluded from UN Charter Article 2(4)?" (2014) 108 AJIL 159.

149 SC Res 611 (1988), art 1. See also Melzer, above n 30, at 27–28; and Schmitt, above n 29, at 626–627.

150 Sagnik Das "The Doctrinal Decay of Jus ad Bellum" (2020) 2 NLUD J Legal Stud 89 at 103. See also by analogy Ohlin, above n 90, at 159.

151 See Mary Ellen O'Connell "Combatants and the Combat Zone" (2009) 43 U Rich L Rev 845 at 861–862.

152 Ziv Bohrer "Divisions over Distinctions in Wartime International Law" in Ziv Bohrer, Janina Dill and Helen Duffy (eds) *Law Applicable to Armed Conflict* (Cambridge University Press, Cambridge, 2020) 106 at 111.

states.¹⁵³ Ensuring uses of force on the territory of third states remain subject to a fresh *jus ad bellum* analysis safeguards this clarity.

V ***DID THE SOLEIMANI STRIKE COMPLY WITH THE JUS AD BELLUM?***

Having determined that the peacetime framework is more appropriate, we now move to an analysis of the strike's *jus ad bellum* compliance.

Consent of the territorial state is an exception to the prohibition on the use of force. However, in light of the centrality of the prohibition, consent should be seen as a narrow exception and is not to be implied or read broadly in scope.¹⁵⁴ This is intended to prevent wide-ranging uses of force predicated on consent that is equivocal or given by institutions that lack the legitimacy to offer valid consent.¹⁵⁵ While Iraq had consented to the American uses of force on Iraqi territory as part of the armed conflict against Islamic State,¹⁵⁶ forcible acts that exceed the terms of the consent given are unlawful.¹⁵⁷ The lack of Iraqi consent to the Soleimani strike is clearly demonstrated by the state's subsequent protest.¹⁵⁸

In examining the legality of an extraterritorial use of force, the burden of proof rests on the state claiming the right of self-defence to evince facts showing it has suffered or was at imminent risk of suffering an armed attack.¹⁵⁹

Beginning with the imminent self-defence argument, it is important to note that its scope and practical application are often contested.¹⁶⁰ The requirements of imminence, proportionality and necessity mean that "there are very few situations outside the context of active hostilities in which the

153 Bohrer, above n 152, at 111.

154 Christof Heyns and others "The International Law Framework Regulating the Use of Armed Drones" (2016) 65 ICLQ 791 at 799.

155 See generally Max Byrne "Consent and the use of force: an examination of 'intervention by invitation' as a basis for US drone strikes in Pakistan, Somalia and Yemen" (2016) 3 J on Use Force & Intl L 97; Zora Ahmed "Strengthening Standards for Consent: The Case of US Drone Strikes in Pakistan" (2015) 23 Mich St Intl L 459; and Ashley S Deeks "Consent to the Use of Force and International Law Supremacy" (2013) 54 Harv Intl LJ 1 at 11–30.

156 Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council UN Doc S/2014/691 (22 September 2014).

157 *Definition of Aggression* GA Res 3314 (1974), annex, art 3(e).

158 Iraq UN Letter, above n 147.

159 *Oil Platforms*, above n 81, at 189.

160 See Melzer, above n 30, at 52–54.

test for anticipatory self-defence ... would be met."¹⁶¹ To date, no evidence has been advanced to substantiate the claim that Soleimani "was plotting imminent and sinister attacks" against American forces at the time of the strike.¹⁶² Press reports indicate United States Government officials considered the notion of an imminent threat "an illogical leap",¹⁶³ as "intelligence indicated 'a normal Monday in the Middle East' ... and General Suleimani's travels amounted to 'business as usual.'" ¹⁶⁴ Administration officials later walked back the specific claim that Soleimani was in the process of plotting attacks against four American embassies.¹⁶⁵

More detailed self-defence justifications appear in the United States' Article 51 letter.¹⁶⁶ As already discussed, the letter does not provide any evidence that Iran exercises effective control over Kata'ib Hezbollah such that its acts are attributable to Iran.¹⁶⁷ Effective control requires something greater than "assistance to [armed groups] in the form of the provision of weapons or logistical or other support."¹⁶⁸ Thus, the actions of Kata'ib Hezbollah and other "Iran-supported"¹⁶⁹ militia should not be considered when assessing whether the United States suffered an armed attack giving rise to a right to use force against Iran in self-defence.

The other incidents described in the Article 51 letter as an "escalating series of armed attacks"¹⁷⁰ are equally problematic as a basis for the use of force in self-defence. The downing of the US drone in June 2019, in addition to arguably creating a brief, already-concluded, low-intensity IAC,¹⁷¹ is likely too distant in time to found a basis for self-defence:¹⁷²

161 Alston, above n 20, at [86].

162 AJIL Contemporary Practice, above n 69, at 315; and Philip Bump "Trump's collapsing rationalization for the Soleimani strike as 'imminent'" *The Washington Post* (online ed, Washington DC, 13 January 2020).

163 Oona A Hathaway "The Soleimani Strike Defied the US Constitution" (4 January 2020) *The Atlantic* <www.theatlantic.com>.

164 Helene Cooper and others "As Tensions with Iran Escalated, Trump Opted for Most Extreme Measure" *The New York Times* (online ed, New York, 7 January 2020).

165 Valerie Volcovici "Pentagon chief says no specific evidence Iran was plotting to attack four US embassies" (13 January 2020) Reuters <www.reuters.com>.

166 US Article 51 Letter, above n 81.

167 See pt IV.C.1 above.

168 *Nicaragua* case, above n 119, at 104.

169 US Article 51 Letter, above n 81.

170 At 1. See pt III.D.1 above.

171 Callamard, above n 77, at [115].

172 Wachtel, above n 13, at 690; *Nicaragua* case, above n 119, at 122–123.

If a state waits too long before invoking its right to self-defense, its use of force might be considered a reprisal, which is not permitted [under the *jus ad bellum*].

This principle relates to the rule that defensive force be necessary: the less immediate the response, the stronger the inference that the use of force was not necessary.¹⁷³ The attacks on commercial vessels in the Gulf of Oman cannot constitute an armed attack against the United States, as American ships were not targeted, and none of the affected states made requests to the United States that would justify action in collective self-defence.¹⁷⁴ This has previously stopped the United States from invoking collective self-defence when using force against Iran following similar disruptions to Gulf shipping.¹⁷⁵ More generally, while an ongoing series of attacks, or an "accumulation of events" may be considered an armed attack justifying self-defence,¹⁷⁶ the events highlighted in this case appear to be "separate and distinct attacks, not necessarily escalating, that are not related in time or even targets."¹⁷⁷

Even if the United States could be said to be the victim of an armed attack, or that it was under imminent threat of an armed attack, it is unlikely the Soleimani strike would comply with the requirement that defensive force be both necessary,¹⁷⁸ and proportionate, in the sense of using force commensurate to the attack suffered.¹⁷⁹ On the view that the United States suffered an armed attack through the accumulation of events such as the downing of the unmanned drone, and assuming the Kirkuk rocket attack is attributable to Iran,¹⁸⁰ the targeted killing of one of the attacking state's most senior military commanders appears disproportionate: as Callamard notes, "[i]t is hard to imagine that a similar strike against a Western military leader would not be considered as an act of war".¹⁸¹ Conversely, if one accepts the argument that the United States was about to imminently suffer an

173 James A Green "The *ratione temporis* elements of self-defence" (2015) 2 J on Use Force & Intl L 97 at 108–109.

174 Callamard, above n 77, at [154]; *Nicaragua* case, above n 119, at 105.

175 *Oil Platforms*, above n 81, at 186.

176 See Wachtel, above n 13, at 693.

177 Callamard, above n 77, at [152]. See also *Oil Platforms*, above n 81, at 191–192.

178 See Dapo Akande and Thomas Liefländer "Clarifying Necessity, Imminence and Proportionality in the Law of Self-Defence" (2013) 107 AJIL 563 at 564.

179 At 566.

180 And further assuming the attack was in fact carried out by Kata'ib Hezbollah: see Alissa J Rubin "Was US Wrong About Attack That Nearly Started a War With Iran?" *The New York Times* (online ed, New York, 6 February 2020).

181 Callamard, above n 77, at [125]. See also the comments by Gary Solis in Merrit Kennedy and Jackie Northam "Was it Legal for the US to Kill a Top Iranian Military Leader?" (4 January 2020) NPR <www.npr.org>; and by analogy Christopher J Greenwood "International Law and the United States' Air Operation Against Libya" (1987) 89 W Va L Rev 933 at 946–948.

armed attack, it is difficult to argue the killing of Soleimani was necessary, in the sense of being the only means available to prevent the imminent armed attack:¹⁸² as one intelligence analyst noted, "Soleimani was a decision-maker, not an operational asset ... Killing him would be neither necessary nor sufficient to disrupt the operational progression of an imminent plot."¹⁸³

In sum, noting Iraq's lack of consent to the strike, the lack of evidence as to an imminent armed attack, and the difficulty in establishing a series of attacks giving rise to a right on the part of the United States to use force in self-defence, the killing of Qassem Soleimani likely violated the *jus ad bellum*.¹⁸⁴ The likeliest rationale for the strike, acknowledged in various government statements, is that the strike was undertaken for the purpose of deterring Iran from future conduct detrimental to American interests in the region.¹⁸⁵ Extending self-defence to include deterrence in the absence of an actual or imminent armed attack runs counter to the UN Charter's purpose of restricting unilateral uses of force,¹⁸⁶ and risks a return to the outmoded notion of extraterritorial force as a self-help remedy.¹⁸⁷

VI WAS THE STRIKE AN ASSASSINATION?

The fact that the strike violated the *jus ad bellum* does not automatically render the killing an assassination under Executive Order 12,333: it must additionally be "carried out for political purposes".¹⁸⁸ Although determining the motivation for a state act may be difficult, Schmitt proposes two indicia as to whether a peacetime targeted killing constitutes an assassination under Executive Order 12,333: first, the higher placed the subject, the more supportable the inference that the killing

182 Akande and Liefländer, above n 178, at 564–565. See also TD Gill "When Does Self-Defence End?" in Marc Weller (ed) *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, Oxford, 2015) 737 at 744; *Nicaragua* case, above n 119, at 122; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 at 195.

183 Missy Ryan and others "How Trump decided to kill a top Iranian general" *The Washington Post* (online ed, Washington DC, 4 January 2020); and Marko Milanovic "The Soleimani Strike and Self-Defence Against an Imminent Armed Attack" (7 January 2020) EJIL Talk <www.ejiltalk.org>. Contrast Thomas W Oakley "Through the Looking Glass: Re-Imagining Legal and Legitimate Force in the Contemporary Operating Environment" (2020) 26 *SW J Intl L* 289 at 308.

184 Contrast Oakley, above n 183, at 308; and Hodges, above n 111.

185 Callamard, above n 77, at [171]. See for example US Article 51 Letter, above n 81, at 1; and Section 1264 Notice, above n 84, at 2.

186 Oakley, above n 183, at 299.

187 See *Corfu Channel (United Kingdom v People's Republic of Albania) (Merits)* [1949] ICJ Rep 4 at 35.

188 *Parks Memorandum*, above n 40, at 4. See also Schmitt, above n 29, at 675; Bazan, above n 44, at 2; and Vlastic, above n 10, at 98.

was politically motivated.¹⁸⁹ Secondly, Schmitt proposes, in effect, a sliding scale based on the targeted killing's compliance with the *jus ad bellum*:¹⁹⁰

The greater the acceptability of the use of force under international law, the less likely is the use of force to be deemed politically motivated ... On the other hand, however, the less accepted a justification in the world community, the more suspect the operation.

Iranian financing and support for militia groups, though a likely violation of the rule against "intervention in the internal or external affairs of other states",¹⁹¹ in the absence of direct attribution of the acts to Iran, cannot justify the use of defensive force against Iran. The Soleimani strike was directed against a pre-selected senior official responsible for both military strategy and foreign policy implementation,¹⁹² lacked a clear self-defence justification and was intended to provoke a recalibration of Iranian foreign policy in a manner less detrimental to American political-security interests in the region. It appears strongly arguable this constitutes targeted killing for a political motive.

This is supported by media reports on the operationalisation of the strike. The pre-selection of Soleimani as the subject of a targeted killing had been allegedly under consideration for months preceding the strike,¹⁹³ further undermining the claimed self-defence justification and supporting the notion that the killing was instead aimed at forcing a shift in Iranian policy around its support for Iraqi Shia militias. Additionally, statements from officials and political allies indicate President Trump's decision to order the strike was coloured by the domestic political significance of embassy attacks¹⁹⁴ – specifically, a desire to avoid a perception of weakness, based on similar complaints made by the President and several political allies regarding the Obama Administration's handling of the 2012 attack on the American diplomatic compound in Benghazi, Libya. This "Benghazi effect" has been identified as a significant motivating factor to much of the response following the attempted storming of the embassy in Baghdad.¹⁹⁵

189 Schmitt, above n 29, at 675.

190 At 650.

191 *Nicaragua* case, above n 119, at 104.

192 See generally Soufan, above n 58; and Adam Shatz "Too Important to Kill" *The London Review of Books* (online ed, London, 23 January 2020).

193 Carol E Lee and Courtney Kube "Trump authorized Soleimani's killing 7 months ago, with conditions" (13 January 2020) NBC News <www.nbcnews.com>. See also Bob Woodward *Rage* (Simon & Shuster, London, 2020) at 196.

194 Ryan and others, above n 183; Cooper and others, above n 164; and "Lexington: Deep mistrust of Donald Trump complicates his Iran gamble" *The Economist* (online ed, London, 9 January 2020).

195 Laura King "Attack on US Embassy in Baghdad underscores America's polarization – and peril" *The Los Angeles Times* (online ed, Los Angeles, 2 January 2020); Richard N Haass "The Suleimani Assassination and

In sum, the absence of a clear justification for the strike under the *jus ad bellum*, Soleimani's senior position and role within the Iranian military, the pre-selected nature of his targeting, the stated motivation of deterrence in the sense of forcing a shift in Iranian external policy and the potential of an additional domestic political motivation for the strike collectively create a reasonable inference that the strike was politically motivated and contravened Executive Order 12,333's prohibition on assassinations.

This does not conclude the matter. Although it is likely that, on an ordinary construction of the assassination ban's scope, the strike would constitute assassination, we cannot be certain of its applicability. Presidents may discretionarily amend or revoke executive orders,¹⁹⁶ and since Executive Order 12,333 is "effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof",¹⁹⁷ its revocation would not have to be publicly notified.¹⁹⁸ Theoretically, the President could, without review, revoke the assassination ban, order a targeted killing and then reinstate the ban without public notification. The situation is further complicated by the existence of classified interpretations as to the Order's scope and effect.¹⁹⁹ The potential for classified presidential directives narrowing the Order's scope – as were issued by President Reagan in 1986²⁰⁰ – may further affect the ban's applicability to the Soleimani strike. The lack of clear procedural requirements around the issuance and revocation of executive orders, combined with the opaque nature of national security rulemaking, means that "the president may amend, interpret, or suspend the [assassination ban] and do so in a classified manner."²⁰¹ Thus, although likely unlawful under international law, and arguably an assassination under Executive Order 12,333, the ultimate answer remains disappointingly murky.

US Strategic Incoherence" (4 January 2020) Council on Foreign Relations <www.cfr.org>; Wesley Morgan and Daniel Lippman "Trump tries to avoid his own Benghazi" (31 December 2019) Politico <www.politico.com>; and "Why Soleimani's death is personal for Pompeo" (15 January 2020) BBC News <www.bbc.com>.

196 See pt II.A above.

197 44 USC § 1505(a)(1).

198 Johnson, above n 14, at 427; and Jonathan Ulrich "The Gloves Were Never On: Defining the President's Authority to Order Targeted Killing in the War against Terrorism" (2005) 45 Va J Intl L 1029 at 1034.

199 Schmitt, above n 29, at 679.

200 Banka and Quinn, above n 57, at 678; Spurlock, above n 48; and Banks and Raven-Hansen, above n 7, at 726. For the role and effect of national security directives generally, see Phillip J Cooper *By Order of the President: The Use & Abuse of Executive Direct Action* (2nd ed, University Press of Kansas, Lawrence (KS), 2014) at 208ff.

201 James E Baker "Covert Action: United States Law in Substance, Process, and Practice" in Loch K Johnson (ed) *The Oxford Handbook of National Security Intelligence* (Oxford University Press, New York, 2010) 587 at 599.

VII DOES THE ASSASSINATION BAN SERVE A MEANINGFUL PURPOSE?

Considering the limits to Executive Order 12,333's direct enforceability, it is worth investigating the effectiveness of the ban in the absence of permanent reform, such as the replacement of the Executive Order with a congressional statute proscribing assassination.²⁰²

A Critical Perspectives on Executive Order 12,333

Two critical perspectives merit consideration. The first, which can be labelled the "narrow scope" argument, posits that the assassination ban was never intended to proscribe acts understood to be assassination *per se*. Instead, as Zengel states:²⁰³

The true effect of the executive order is neither to restrict in any legally meaningful way the President's ability to direct measures he determines to be necessary to national security, *nor to create any legal impediment to United States action that can be said to constitute assassination*. Instead, the order ensures that authority to direct acts that might be considered assassination rests with the President alone.

This interpretation of Executive Order 12,333 is consistent with the fact that the Order's enforceability can be easily circumvented by presidential directives, in-house interpretation, or covert repeal.²⁰⁴ It also accords with the significance of the Church Committee's concerns over the "plausible denial" doctrine, which undermined accountability, communications and oversight within intelligence agencies such that "assassination plots could have been undertaken without express authorisation".²⁰⁵ A related argument is that, since the conduct the Order prohibits would already be unlawful, either as a treacherous killing in armed conflict or an extraterritorial use of force that contravenes the *jus ad bellum*, it is simply a reiteration of already applicable law: "a friendly, if redundant, reminder that assassination was prohibited [under international law]".²⁰⁶

Furthermore, some argue that, rather than serving a limited purpose of eliminating plausible denial or acting as a redundant statement of extant law, the prohibition on assassination is detrimental to American military interests. Harder argues the ban is detrimental for three reasons: first, assassination's undefined nature creates confusion as to the ban's applicability;²⁰⁷ second, this

202 See Johnson, above n 14, at 433; and Church Committee Interim Report, above n 9, at 282–285.

203 Zengel, above n 25, at 147 (emphasis added). See also Ashkouri, above n 30, at 163; and Wachtel, above n 13, at 700.

204 See above n 196–201 and accompanying text.

205 Church Committee Interim Report, above n 9, at 261.

206 Wachtel, above n 13, at 700. See also Zengel, above n 25, at 123–124; and Tyler J Harder "Time to Repeal the Assassination Ban of Executive Order 12,333: A Small Step in Clarifying Current Law" (2002) 172 *Mil L Rev* 1 at 11.

207 Harder, above n 206, at 23–25 and 28. See also Schmitt, above n 29, at 679.

ambiguity artificially constrains the United States' ability to engage in lawful targeted killings to safeguard American interests. This argument is often advanced with respect to General Dugan's firing during the First Gulf War for comments about the targeting of Saddam Hussein, a lawful combatant in an armed conflict.²⁰⁸ Lastly and relatedly, some argue the unique context of the "Global War on Terror" requires greater permissiveness of targeted killings, as the concept of imminent self-defence is too narrow to adequately meet the threat posed by members of non-state armed groups engaging in covert activity.²⁰⁹ This criticism can be seen in calls by American legislators, in the wake of 9/11, to repeal or override the assassination ban in order to better protect America from threats.²¹⁰

B Normative and Practical Counterbalance

There are cogent counterarguments to these critiques. Contrary to the "narrow scope" approach, others argue that absent any publicly available interpretations or public notification of its repeal, it is justifiable to critique targeted killings that contravene the ban as it is generally understood, or more broadly demonstrate "failure to heed the spirit of the US ban on assassinations".²¹¹

Interpreting the ban to solely preclude assassinations not authorised by the President reads down the context of the Church Committee's findings. While the lack of accountability entailed by the doctrine of plausible denial was a significant concern, the Committee's conclusions went further, stating that independent of practical considerations, "assassination violates moral precepts fundamental to our way of life."²¹² This position reflects the existence of a clear normative trend in moral and political philosophy that assassination represents an illegitimate tool of statecraft.²¹³

The argument that Executive Order 12,333 is intended to abolish plausible denial, but retain the presidential authority to order assassinations, cannot be squared with the related argument that it

208 Harder, above n 206, at 23 and 31; Jeffrey F Addicott "Proposal for a New Executive Order on Assassination" (2003) 37 U Rich L Rev 751 at 772; and Schmitt, above n 29, at 679. Compare Zengel, above n 25, at 153.

209 Yoo, above n 104, at 73. See also Harder, above n 206, at 34–35. For this article, it must be remembered that Soleimani was not a member of a non-state armed group, but a senior member of a state's armed forces: see pt VII.C below.

210 See Addicott, above n 208, at 758; and Banka and Quinn, above n 57, at 681. See also Wachtel, above n 13, at 680. However, lethal force against Osama bin Laden had, in principle, been authorised in the years preceding the attacks: Banks and Raven-Hansen, above n 7, at 726; Solis, above n 37, at 133; and Melzer, above n 30, at 37–38.

211 Brandenburg, above n 53, at 693. See also Ashkouri, above n 30, at 173; International Human Rights and Conflict Resolution Clinic at Stanford Law School and Global Justice Clinic at NYU School of Law *Living Under Drones: Death, Injury and Trauma to Civilians from US Drone Practices in Pakistan* (September 2012) at 121; and Brian Glyn Williams "The CIA's Covert Predator Drone War in Pakistan, 2004–2010: The History of an Assassination Campaign" (2010) 33 *Studies in Conflict & Terrorism* 871 at 873.

212 Church Committee Interim Report, above n 9, at 257. See also Ward Thomas, above n 57, at 106.

213 See Thomas, above n 57, at 111ff.

merely restates applicable international law. For instance, President Eisenhower's question to Director of Central Intelligence Allen Dulles about "getting rid of this guy" was sufficiently vague to preclude the Church Committee from finding Eisenhower ordered the killing of Patrice Lumumba.²¹⁴ However, the presence or absence of plausible denial would not affect the *international* unlawfulness of an American violation of Congolese sovereignty, as acts of state organs, even when acting in excess of their orders, are attributable to the state.²¹⁵

Thus, while it is true that the presidential ability to issue interpretive directions or covertly repeal Executive Order 12,333 may limit its *legal* enforceability, it does not follow that the assassination ban is redundant or should be seen as intended only to eliminate plausible denial. Instead, in line with existing international law, and a longstanding moral aversion to assassination in American political philosophy, Executive Order 12,333 provides a *normative* counterbalance to extensive American involvement in the targeted killing of state officials. Political considerations make its outright repeal difficult, and its continued presence in American political discourse may impose practical constraints on targeted killings.²¹⁶

Similarly, the argument that the assassination ban unnecessarily fetters governmental ability to engage in defensive targeted killings ignores the extent to which the American legal position on permissible uses of force deviates from international consensus. The United States adopts a significantly lower threshold for an "armed attack" allowing recourse to defensive force.²¹⁷ It additionally has endorsed a standard of pre-emptive self-defence that dramatically expands the temporal scope of self-defence beyond imminence as it is generally understood by states,²¹⁸ a position that may be incorrect as a matter of international law. This is coupled with a growing reliance on the armed conflict paradigm in order to sidestep *jus ad bellum* concerns entirely.²¹⁹ It can be argued that what critics identify as an unnecessary fetter that Executive Order 12,333 imposes on policymakers is actually an important normative tool that, at least in the context of targeted killing of state actors,

214 Church Committee Interim Report, above n 9, at 263; and Georges Nzongola-Ntalaja *Patrice Lumumba* (Ohio University Press, Athens (Ohio), 2014) at 119.

215 *Armed Activities on the Territory of the Congo*, above n 144, at 242. See also Sara Kendall "Postcolonial Hauntings and Cold War Continuities: Congolese Sovereignty and the Murder of Patrice Lumumba" in Matthew Craven, Sundhya Pahuja and Gerry Simpson (eds) *International Law and the Cold War* (Cambridge University Press, Cambridge, 2019) 533 at 550–551.

216 Banks and Raven-Hansen, above n 7, at 719–720; and Addicott, above n 208, at 785.

217 See Boothby and Von Heinegg, above n 132, at 28–29.

218 Green, above n 173, at 106–107; and Noam Lubell *Extraterritorial Use of Force Against Non-State Actors* (Oxford University Press, Oxford, 2010) at 60–63.

219 See Adam Entous and Evan Osnos "Last Man Standing: The killing of Qassem Suleimani and the calculus of assassination" *The New Yorker* (New York, 10 February 2020) at 50.

brings United States practice closer to the international consensus on the scope of the right to self-defence.

C Converging IAC/NIAC Legal Rules

The Soleimani killing is historically unique as the first known instance where a state has relied on self-defence when killing a state actor on the territory of a third state.²²⁰ This is indicative of the manner in which legal and policy justifications for the Soleimani strike have overlapped with arguments the United States has previously only raised in the context of targeted killing of non-state actors. Statements by Administration officials emphasise the strike was undertaken after unsuccessfully urging the Iraqi Government to do more to combat threats to the security of American personnel,²²¹ indicating a shift toward application of the "unwilling or unable" standard against *state* actors located on the territory of third states.²²² This can also be seen in the Administration's reliance on the 2002 AUMF as a domestic legal basis for the strike's legality. The AUMF remains "the principal legal foundation" for the use of force against terrorist organisations,²²³ and the Administration's notice outlining the legal framework for the strike uses the terminology of a NIAC, explaining the AUMF permits force against "militias, terrorist groups, or other armed groups in Iraq."²²⁴ It is clear then, that the killing of Soleimani, primarily for his role in supporting non-state armed groups in Iraq, represents a growing conflation between the legal justifications for force against non-state actors and state military officials.²²⁵

Conflating the two standards is problematic: "Global NIAC" theory is heavily criticised for its over-expansive application of IHL rules, permitting lethal force in situations more appropriately governed by IHRL and creating significant uncertainty as to the geographical scope of armed conflict.²²⁶ Expanding its application, or the application of the "unwilling or unable" standard, to cover state actors risks significantly expanding the scope of permissible force against states with

220 Callamard, above n 77, at [60].

221 See "Statement by Secretary of Defence Dr Mark T Esper as Prepared" (Press Release, 2 January 2020).

222 Callamard, above n 77, at [167]–[168]; Das, above n 150, at 102–103. For a general overview of the "unwilling or unable" standard as it is applied with respect to non-state armed groups, see Ashley S Deeks "Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defence" (2012) 52 Va J Intl L 483; and Monica Hakimi "Defensive Force against Non-State Actors: The State of Play" (2015) 91 Intl L Stud Ser US Naval War Col 1 at 12–15.

223 Zambakari, above n 86, citing Curtis A Bradley and Jack L Goldsmith "Obama's AUMF Legacy" (2016) 110 AJIL 628 at 628.

224 Section 1264 Notice, above n 84, at 2.

225 Anthony Dworkin "Soleimani Strike Marks a Novel Shift in Targeted Killing, Dangerous to the Global Order" (7 January 2020) Just Security <www.justsecurity.org>.

226 Ohlin, above n 90, at 159; and Human Rights Committee, above n 133, at [9].

significant retaliatory capability. This risks potentially escalating interstate tensions, while violating the sovereignty of reputedly "unwilling or unable" states.

Historically, a strong political-moral norm appeared to ensure that, even in the absence of legal enforceability, significant restraint governed American use of targeted killing.²²⁷ This norm gradually eroded as against non-state actors after 9/11, creating the large-scale drone warfare apparatus present today.²²⁸ Though restraint appeared to hold with respect to force against state actors, seen in the decisions of prior presidents to refrain from ordering the targeted killing of Soleimani,²²⁹ the strike may represent the first step in the norm's erosion against state actors too. Whether the strike presages an increasing recourse to targeted killing of state actors by the United States may ultimately depend on whether successive administrations consider the spirit of the assassination ban was violated in this instance.

In sum, critique of the Soleimani strike based on Executive Order 12,333 is to be welcomed.²³⁰ Although the ban may lack direct legal enforceability, it nevertheless represents a powerful normative force that shifts American state practice closer into line with other states' consensus positions on the *jus ad bellum*. It additionally may help avoid the creeping conflation of the legal framework applied in targeted killing of non-state actors with uses of force against states.

VIII CONCLUSION

The ability of unmanned drones to engage in targeted killings anywhere on earth is straining the already-troubled rules of conflict classification and legal framework selection. This is mirrored by the difficulty in applying Executive Order 12,333's increasingly outdated wartime/peacetime distinction in defining assassination. Important questions, such as what paradigm ought to govern the killing of a lawful (under IHL) target far from any active hostilities, what safeguards protect the sovereignty of third states and whether IHRL has any role in the determination as to whether a particular targeted killing is an assassination, remain unanswered.

This article has demonstrated that contextual factors point toward the targeted killing of Qassem Soleimani being governed by the "peacetime" rubric, and further that the strike's non-compliance with the *jus ad bellum* and its publicly stated (and privately speculated) motivations support a reasonable inference that the strike constitutes a politically-motivated assassination. Engaging further with the reality that structural shortcomings in the legal framework around assassination — including lack of

227 Banka and Quinn, above n 57, at 676–679.

228 At 680ff; and Christopher Kutz "How Norms Die: Torture and Assassination in American Security Policy" (2014) 28 *Ethics & International Affairs* 425 at 441–442.

229 Shatz, above n 192.

230 Compare Shane Reeves and Winston Williams "Was the Soleimani Killing an Assassination?" (17 January 2020) *Lawfare* <www.lawfareblog.com>.

access to pertinent interpretive information – impair a conclusive analysis as to the strike's legality, this article has shown the assassination ban retains significant normative weight – but this is shifting. Whether the assassination ban continues to practically constrain extraterritorial targeted killings of state actors – or whether the norm withers away, as occurred vis-à-vis non-state actors – will likely depend on the ongoing policy reverberations and legal critique of the Soleimani killing.

In the year since the Soleimani strike, there have been developments both positive and negative in respect of targeted killing of state actors. As a candidate, Joe Biden rejected the argument that the Soleimani killing was justifiable as an act of imminent self-defence;²³¹ he won the presidency on a party platform that pledged to repeal the 2002 AUMF that formed the domestic legal justification for the strike and "replace [it] with a narrow and specific framework."²³² Repeal of the 2002 AUMF and greater congressional oversight of presidential war powers appear to have gained greater bipartisan support in the wake of the Soleimani strike.²³³ Rather than setting a permissive precedent that would allow successive presidents greater latitude to order the targeted killing of state actors, the Soleimani strike may mark a significant departure from the ordinary practice of targeted killings that future presidents are hesitant to re-attempt, becoming an "anticanonical" precedent instead.²³⁴

At the same time, significant issues highlighted by the Soleimani strike continue to make their presence felt. Drone use remains an increasingly important aspect of modern warfare,²³⁵ while targeted killings remain a potentially destabilising tool of statecraft in the Middle East.²³⁶ The ability of IHL and the *jus ad bellum* in their current forms to regulate these issues is uncertain: from a *jus ad bellum* perspective, the self-defence arguments used to justify the Soleimani strike are the latest example of "the legal elasticity and ambiguity afforded by proportionality and necessity" being put under ever-greater strain to justify extraterritorial force.²³⁷ More generally, the lack of expert consensus on the legality of the Soleimani killing – or consensus even on the appropriate framework

231 Paul D Shinkman "Biden: Trump 'Flat-Out Lied' About Soleimani Dangers" (14 January 2020) US News & World Report <www.usnews.com>.

232 Democratic Party 2020 *Democratic Party Platform* (18 August 2020) at 76.

233 Jennifer Scholtes and Connor O'Brien "Adios AUMF? Democrats press Biden for help in revoking old war powers" (21 January 2021) Politico <www.politico.com>.

234 See generally Deborah Pearlstein "The Executive Branch Anticanon" (2020) 89 *Fordham L Rev* 597.

235 Ridvan Bari Urcosta "Drones in the Nagorno-Karabakh" (23 October 2020) *Small Wars Journal* <www.smallwarsjournal.com>; Dan Sabbagh "UK wants new drones in wake of Azerbaijan military success" *The Guardian* (online ed, London, 29 December 2020).

236 "Mohsen Fakhrizadeh: Iran scientist 'killed by remote-controlled weapon'" (30 November 2020) BBC News <www.bbc.co.uk>. See, in a non-international context Chloe Cornish "Hizbollah critic Lokman Slim shot dead in Lebanon" *The Financial Times* (online ed, London, 5 February 2021).

237 Miriam Bak McKenna "The Discourse of Proportionality and the Use of Force: International Law and the Power of Definition" (2020) 89 *Nord J Intl L* 364 at 368.

to assess the strike's legality – highlight the extent to which the application of international law to drone strikes remains a contested space.²³⁸

238 See generally Luca Ferro "Killing Qasem Soleimani: International Lawyers Divided and Conquered" (2021) 53 Case W Res J Intl L (forthcoming).

