NOTE

WHO'S OFF LIMITS? HOW INCONSISTENT INTERPRETATION OF THE IMMINENCE REQUIREMENT UNDER ARTICLE 51 OF THE UN CHARTER AND INEFFECTIVE ACCOUNTABILITY PROTOCOLS EXPAND WHO CAN BE TARGETED AND WHEN UNDER THE UNITED STATES TARGETED KILLING PROGRAM

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ABSTRACT

After 9/11 the United States began to implement a national security policy that employs targeted killings to fight the "War on Terror" and kill suspected terrorists. Starting with the Bush administration and continuing through each US administration, the United States has expanded who can be the object of a targeted killing and when they can be killed. This Note analyzes the legal justifications set forth by the United States for this expansion. This Note specifically addresses the United States' capitalization on the ambiguity of the imminence requirement of Article 51 of the United Nations ("UN") Charter ("Article 51") to broaden the circumstances in which the United States can resort to the use of force in self-defense. Also examined in this Note is the ineffectiveness of US accountability protocols within the targeted drone strike program that have allowed the United States to violate its own interpretation of the distinction principle of international humanitarian law. This Note argues that in order to reduce the prospective of a long-term threat to national security and the increased potential for innocent civilian casualties, the United States should clearly define imminence under Article 51 of the UN Charter and Congress should strengthen accountability measures through legislative action to enhance the options for redress for victims of targeted drone strikes.

I. INTRODUCTION TO THE UNITED STATES TARGETED KILLING PROGRAM

A concept once novel, now embraced. Before the terrorist attacks on September 11, 2001, the United States had never used armed drones[1] in combat to target and kill its enemies.[2] Now, targeted killings and drone warfare have become the core of the

1. Armed drones, also referred to as Armed Unmanned Aerial Vehicles (UAVs) are defined as aircrafts that are designed to operate without a pilot on board. Armed drones are remotely controlled by a human from the ground and are not fully autonomous. *Armed Unmanned Aerial Vehicles*, WEAPONS L. ENCYCLOPEDIA (2021), http://www.weaponslaw.org/weapons/armed-unmanned-aerial-vehicles#:~:text=An%20armed%20drone%20is%20an,sometimes%20thousands%20of%20miles%20away [https://perma.cc/294X-VZNH].

2. *See* Peter Bergen & Jennifer Rowland, *Drone Wars,* 36 WASH. Q. 7, 8 (2013).

"War on Terror."[3] While the Bush administration only engaged in a limited number of drone strikes,[4] the United States has killed up to 16,900 people in drone strikes between 2010 and 2020.[5] The first armed drone strike ever was conducted by the United States in mid-November 2001, killing Mohammed Atef, the military commander of al-Qaeda.[6] In the Obama Administration's most high-profile strike, the United States targeted and killed US citizen Anwar al-Aulaqi in Yemen in September 2011.[7] In the early morning of January 3, 2020, the Trump Administration launched a Reaper drone, targeting and killing prominent Iranian General Qasem Soleimani in Iraq.[8] The escalation in the number of drone strikes conducted and the increasingly high-profile identities of the targets,[9] demonstrates that the United States is bolder than ever in determining who can be the object of a targeted drone strike and when.

Over the past three presidential administrations, the United States has expanded the pool of individuals who can be acceptably targeted and killed in a drone strike. The Trump administration went so far as to target and kill a State-actor[10] without consent of

3. The "War on Terror" is the term used to describe the American military counterterrorism campaign in response to the 9/11 attacks on the United States by al-Qaeda. *See* Richard Jackson, *War on Terrorism*, BRITANNICA (last visited Sept. 19, 2021), https://www.britannica.com/topic/war-on-terrorism [https://perma.cc/BA25-SN62].

4. The Bush administration conducted an estimated fifty drone strikes. Comparatively, the Obama administration authorized 1,878 strikes in his two terms and the Trump administration authorized 2,243 drone strikes in the first two years of his presidency. *See* Bergen & Rowland, *supra* note 2.

5. *See* Sara Toth Stub, *Targeted Killings*, CQ PRESS 1, 4 (Apr. 9, 2021).

6. *See* Bergen & Rowland, *supra* note 2.

7. *See Anwar al-Awlaki Killed in Yemen – As it Happened*, THE GUARDIAN (Sept. 30, 2011), https://www.theguardian.com/world/blog/2011/sep/30/anwar-al-awlaki-yemen-live [https://perma.cc/BQ8L-473D].

8. *See* Mary Ellen O'Connell, *The Illusory Standard of Imminence in the International Law of Self-Defense: The Killing of Qassim Soleimani* at 42 (Feb. 12, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3784820 [https://perma.cc/9ZPB-699M].

9. The United States went from targeting and killing an al-Qaeda commander in a war zone, to targeting and killing a US citizen outside of a war zone, to killing a State-actor in a country with which the United States was not at war without the consent of the State of which the actor represented or the host state where he was killed.

10. Actors are entities that participate in or promote international relations. The two types of actors involved in international relations include State and non-State actors. State actors represent a government, and non-State actors do not. *State and Non-state Actors in International Politics*, UKESSAYS, (July 22, 2021),

the State he represented or the State in which he was killed and with conflicting accounts of the threat he posed.[11] The United States further increased this pool when it mistakenly nominated innocent civilians to the US kill list and authorized drone strikes that misidentified civilians as terrorists.[12] The expansion of when it is an acceptable time to strike and who is an acceptable target of a strike is due to two factors. First, the United States employs a broader concept of imminence not aligned with European and human rights groups,[13] which has increased the number of circumstances by which the United States can employ armed force in self-defense under Article 51 of the United Nations Charter. Second, the United States does not have accountability measures in place that sufficiently ensure that a civilian will not be the object of attack, as is required in order to comply with the principle of distinction in international humanitarian law, resulting in the execution of civilians.

This Note addresses the mechanisms used by the United States to broaden the authorization for when a targeted drone strike can take place, who can be the object of such a strike, the issues that arise from this expansion, and offers recommendations to address these issues. Part II argues that the United States has taken advantage of the ambiguity of the imminence requirement outlined in Article 51 of the UN Charter. Article 51 allows a country to resort to the use of force in self-defense and is an exception to Article 2(4) of the UN Charter's general prohibition on the use of force. The actions of the United States have established a long-term threat to national security, as other nations will imitate the United

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https://www.ukessays.com/essays/politics/nonstate-actors-international-politics-1781.php [https://perma.cc/N7Q2-NPJY].

11. The United States claimed that General Soleimani posed an "imminent threat" because he was planning large-scale attacks on American embassies abroad. However, as discussed in Section II.B.3, Congress was skeptical of the substantiveness of the evidence supporting this claim. *See* discussion *infra* Section II.B.3; *see also* Marko Milanovic, *The Soleimani Strike and Self-Defence Against an Imminent Armed Attack*, EJIL: TALK! (Jan. 7, 2020), https://www.ejiltalk.org/the-soleimani-strike-and-self-defence-against-an-imminent-armed-attack/ [https://perma.cc/NKA2-GKCL].

12. *See* Complaint at 8, Zaidan v. Trump, 317 F. Supp. 3d 8 (D.D.C. 2018) (No. 17-581); *See* Kate Clark, *The Takhar Attack*, AFG. ANALYSTS NETWORK 1 (2011).

13. *See* Natalino Ronzitti, *The Report of the UN High-Level Panel and the Use of Force*, 40 INT'L SPECTATOR 91, 93 (2005); *see also NGO Statement on Reported Changes to U.S. Policy on Use of Armed Drones and Other Lethal Force*, HUM. RTS. FIRST (Mar. 8, 2018), https://www.humanrightsfirst.org/resource/ngo-statement-reported-changes-us-policy-use-armed-drones-and-other-lethal-force [https://perma.cc/YHY3-4XM6].

States in manipulating the imminence requirement to advance their own military objectives. Part III contends that a lack of US accountability within the targeted drone strike program has allowed the United States to violate its own interpretation of the distinction principle of international humanitarian law, thereby increasing the risk that innocent civilians will be nominated for the US kill list and will be the target of a strike. Part IV of this Note proposes solutions to these distinct problems. First, the United States should stabilize its interpretation of Article 51's imminence requirement by adopting one definition of imminence for self-defense analysis. Second, Congress should increase the accountability of US officials involved in targeted killings through legislation that increases the options of redress for victims of targeted drone strikes.

II. A FLUCTUATING IMMINENCE APPLICATION IS DANGEROUS FOREIGN POLICY

The United States has failed to assert a consistent interpretation of imminence under Article 51 of the UN Charter. Therefore, the United States' imminence analysis required for determining whether it can resort to the use of force in self-defense has taken many forms since the inception of targeted drone strikes in 2001. Section II.A discusses the inception of Article 2(4) as well as Article 51 of the UN Charter and its role in monitoring the use of armed force in self-defense. It also explores the addition of an imminence requirement into self-defense analysis. Section II.B addresses how the United States has interpreted the imminence requirement throughout the Bush, Obama, and Trump administrations, and argues that each administration has adopted its own concept of imminence in order to meet military objectives. Section II.C highlights the risks to national security associated with the United States' refusal to define imminence clearly and consistently.

A. Legal Framework for Resorting to the Use of Force in Self-Defense

1. The Principle of Jus ad Bellum

Jus ad bellum dictates the criteria by which it is permissible for States to resort to war or to the use of armed force more generally.[14] It is distinct from *jus in bello*, which governs the use of force within an armed conflict.[15] In drafting the UN Charter after World War II, Member States sought to reduce the frequency of war by restricting States' rights to use force against one another.[16] Article 2(4) of the UN Charter prohibits Member States "from the threat or use of force against the territorial integrity or political independence of any state."[17] Exceptions to Article 2(4) for the use of cross-border force include use (1) with the consent of the host state, (2) pursuant to the authorization of the UN Security Council, or (3) in individual or collective self-defense.[18] Article 51 explicitly authorizes States to resort to force in national self-defense under this third exception.[19] Article 51 states that a nation shall be permitted to act in self-defense "if an armed attack occurs."[20] Taken literally, Article 51's right to self-defense prevents a State from using force until *after* an armed attack is underway.[21] This is the theory most supported by European scholars of international law.[22] The United States, however, regards the right as encompassing the inherent right of self-defense under *customary* international law,[23] which predates the UN Charter, and includes a

14. *What are Jus Ad Bellum and Jus in Bello?*, INT'L COMM. OF THE RED CROSS (Jan. 22, 2015), https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0 [https://perma.cc/7YYZ-DEDL].

15. *See* JENNIFER ELSEA, CONG. RSCH. SERV., RL 75700 LEGAL ISSUES RELATED TO THE LETHAL TARGETING OF U.S. CITIZENS SUSPECTED OF TERRORIST ACTIVITIES 6 (2012).

16. *See id.*

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

18. Monica Hakimi, *The* Jus ad Bellum*'s Regulatory Form*, 112 AM. J. INT'L L. 151, 151 (2018).

19. Lynn E. Davis et al., *Clarifying the Rules for Targeted Killing*, RAND CORP. 3 (Sept. 8, 2016) https://www.rand.org/content/dam/rand/pubs/research_reports/RR1600/RR1610/RAND_RR1610.pdf [https://perma.cc/AH4G-RT6C].

20. U.N. Charter art. 51.

21. *See* ELSEA, *supra* note 15, at 6.

22. *See* Ronzitti, *supra* note 13, at 93.

23. The inherent right of self-defense refers to a State's right to protect its sovereignty through the act of war. War could be either offensive or defensive in nature.

right to anticipatory self-defense if there is an imminent threat of attack.[24]

It is generally accepted by Member States of the United Nations that the inherent right of self-defense under Article 51 allows the use of force in a nonconsenting State if that force meets two conditions: necessity and proportionality.[25] For example, if a host State is willing and able to remove the threat from its territory, the threatened State may not use force in the host nation's territory because it does not meet the necessity

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Offensive war included avenging of a wrong done to the State by another and taking punitive action so that future wrongs would be discouraged. Defensive war was for the protection of the sovereign State against armed force and was equally justified for an individual as it was for the State. Many early scholars considered the right to use war defensively as a right to use defensive force *before* the self-defending State was attacked or injured if it was immediate and necessary. *See* Murray Colin Alder, *The Origin of International Law of the Inherent Right of Self-Defence and Anticipatory Self-Defence*, 2 W. AUSTL. JURIST 107, 111-18 (2011).

24. Anticipatory self-defense allows a State to resort to force if an imminent threat of attack clearly exists, preemptive self-defense permits a use of force on the mere possibility of an attack at some unspecified, future period of time. There are two schools of thought on whether Article 51 grants States the right to anticipatory self-defense. The restrictive school believes that Article 51 does not grant States the right to use self-defense before the attack occurs as stated literally in the text. The expansionist view is that Article 51 has not abrogated the customary "inherent right" of self-defense that exists alongside the Charter which allows a State to act in self-defense before an attack reaches its territory. Expansionist scholars defend their view as being the more logical interpretation of the text due to the increasing speed and destructive potential of modern weaponry. The beginnings of the US adoption of the expansionist view are discussed in relation to the *Caroline* incident in Section II.A.2. *See* O'Connell, *supra* note 8, at 42; JAMES A. GREEN, THE INTERNATIONAL COURT OF JUSTICE AND SELF-DEFENCE IN INTERNATIONAL LAW 97-98 (2009); Patrick Kelly, *Preemptive Self-Defense, Customary International Law, and the Congolese Wars*, E-INT'L RELS. (Sept. 3, 2016), https://www.e-ir.info/2016/09/03/preemptive-self-defense-customary-international-law-and-the-congolese-wars/#:~:text=Essentially%2C%20preemptive%20self%2Ddefense%20refers,a%20non%2Dimminent%20security%20threat.&text=The%20claim%20of%20self%2Ddefense,feature%20of%20international%20law%20however [https://perma.cc/P5DT-WYTE]; V.A.V. Andreias, *Anticipatory Self-Defense in International Law: Legal or Just a Construct for Using Force?*, Self Defence: Anticipatory Self Defense (Feb. 24, 2017), https://arno.uvt.nl/show.cgi?fid=122935 [https://perma.cc/J4X8-HNNB]; TOM RUYS, "ARMED ATTACK" AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 256-57 (Cambridge University Press 2010); *see also* discussion *infra* Section II.A.2.

25. *See* Marty Lederman, *ASIL Speech by State Legal Advisor Egan on International Law and the Use of Force Against ISIL* (Apr. 4, 2016), https://www.justsecurity.org/30377/asil-speech-state-legal-adviser-international-law-basis-for-limits-on-force-isil/ [https://perma.cc/C68L-9M8C]; *See* Adil Ahmad Haque, *Necessity and Proportionality in the Law of War*, *in* CAMBRIDGE HANDBOOK ON JUST WAR 1, 1-8 (Larry May ed. 2016).

requirement.[26] The United States holds that in order to justify the use of force without the consent of a host State, an invading State must make a determination[27] that the potential host State is "unable or unwilling" to remove the threat from its territory itself.[28] "Unable" refers to a lack of military or legal capabilities to eliminate the threat, and "unwilling" refers to a State's refusal to act and address the threat.[29] Applying this standard, in 2014 the United States sent a letter to the UN Security Council justifying military intervention in Syria on the grounds that the Syrian government was unable and unwilling to address terrorist threats and that pursuant to the inherent right of self-defense under Article 51 the United States was authorized to address this threat.[30] The unable and unwilling doctrine is not universally accepted by other nations.[31] On February 24, 2021 Mexico informally arranged a meeting of the UN National Security Council to discuss the issue, and although the differing interpretations of Article 51 left the Charter unaffected,[32] Brazil, China, Mexico, and Sri Lanka

26. *See* Lederman, *supra* note 25.

27. There is not a standardized process for making this determination, but countries customarily send a letter to the UN Security Council once they decide that the host State is unwilling and unable to address the threat. *See* Elena Chako & Ashley Deeks, *Which States Support the "Unwilling and Unable" Test?*, LAWFARE (Oct. 10, 2016, 1:55 PM), https://www.lawfareblog.com/which-states-support-unwilling-and-unable-test [https://perma.cc/E9JY-Z78Q].

28. *See* GEN. COUNS. OF THE DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 1066-67 (2016) [hereinafter DEPARTMENT OF DEFENSE LAW OF WAR MANUAL].

29. *See* Patryk I. Labuda, *The Killing of Soleimani, the Use of Force Against Iraq and Overlooked Jus Ad Bellum Questions*, EJIL: TALK! (Jan. 13, 2020), https://www.ejiltalk.org/the-killing-of-soleimani-the-use-of-force-against-iraq-and-overlooked-ius-ad-bellum-questions/ [https://perma.cc/A26G-89UQ].

30. The Syrian government was either not able or would not eliminate ISIL safe havens used for training, planning, financing, and carrying out attacks. *See* Permanent Rep. of the U.S. to the U.N., Letter dated Sept. 23, 2014 from the Permanent Rep. of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/695l (Sept. 23, 2014), https://www.documentcloud.org/documents/3125705-US-SYRIA-ISIL-9-23-2014.html [https://perma.cc/GGA7-L8BC]. In addition to the United States, the United Kingdom, Germany, Canada, Australia, and Turkey have all written letters to the UN Security Council justifying their determinations to use military force under an "unable or unwilling" theory. Such letters are not asking for permission to act and were written after each nation has made an "unable or unwilling" determination. *See* Chako & Deeks, *supra* note 27.

31. *See* Adil Ahmad Haque, *Self-Defense Against Non-State Actors; All Over the Map*, JUST SEC. (Mar. 24, 2021), https://www.justsecurity.org/75487/self-defense-against-non-state-actors-all-over-the-map/ [https://perma.cc/T5N5-ZGAH].

32. *See id.*

categorically rejected the view that the UN Charter permits States to use armed force in another State's territory to eliminate the threat of a non-State actor without the host State's explicit consent.[33] However, many other States prescribe to the United States' interpretation of the UN Charter,[34] asserting a broad right to use force in self-defense against non-State actors in the territory of another State.[35]

2. The Origin of Imminence in Article 51

"Imminence" is not written into Article 51.[36] However, the concept of imminence has historically been used to determine whether the use of force in self-defense meets the "necessity" prong of the right to self-defense under Article 51.[37] It is nearly universally accepted that the modern conception of imminence in the use of force in self-defense developed following the *Caroline* incident in 1837.[38] In this incident, British troops crossed onto the New York side of the Niagara River and attacked a private American ship called the *Caroline* alleging that the ship was aiding Canadian insurrectionists fighting against British rule.[39] Outraged, Secretary of State Daniel Webster stated that intrusion into the territory of another State on the premise of self-defense is only justified in "cases in which the necessity of that self-defence is instant, overwhelming, and leaving no choice of means and no moment for deliberation."[40] Webster's remarks imply that temporality is relevant to an imminence analysis.[41] Today, however, the United States has long forgone an interpretation of imminence requiring that the threat be instantaneous and has

33. *See id.*

34. Australia, Azerbaijan, Belgium, Denmark, Estonia, the Netherlands, Turkey, and the United Kingdom all endorse the unable or unwilling theory, although distinctions remain among these nations on the conditions under which it may apply. *See id.*

35. *See id.*

36. *See* Mary Ellen O'Connell, *The Killing of Soleimani and International Law*, EJIL: TALK! (Jan. 6, 2020), https://www.ejiltalk.org/the-killing-of-soleimani-and-international-law/ [https://perma.cc/B4VA-22UZ].

37. Lederman, *supra* note 25, at 3.

38. *See* Jeremy Wright, *The Modern Law of Self-Defence*, EJIL: TALK! (Jan. 11, 2017), https://www.ejiltalk.org/the-modern-law-of-self-defence/ [https://perma.cc/V2DC-JHXK].

39. *See* ELSEA, *supra* note 15, at 6.

40. *Id.* at 7.

41. *See* GREEN, *supra* note 24, at 96.

since broadened this definition to allow the use of force in self-defense in anticipation of an imminent attack.[42] For example, in 1986 the United States used anticipatory force when it bombed Libya in a "preemptive strike, directed against the Libyan terrorist infrastructure" as a warning to Colonel Qadhafi to reevaluate his role in exporting terror.[43]

B. Expanding the Imminence Requirement to Meet Military Objectives

1. 9/11 as a Turning Point

After a devastating attack on the nation in 2001, the United States shifted its approach from broadening the concept of imminence to viewing international law as a hindrance to US national security.[44] In the wake of the 9/11 crisis, then-Deputy Assistant Attorney General John Yoo proclaimed in an Office of Legal Counsel ("OLC") memo that the text and structure of the Constitution grant the President, as Commander-in-Chief and the "sole organ" of US foreign relations power, complete authority to use military force abroad.[45] It stated, "[t]he power of the President is at its zenith under the Constitution when the President is directing military operations of the armed forces, because the power of Commander in Chief is assigned solely to the President."[46] Additionally, Yoo argued that the President's authority to resort to military force after emergency situations such as the 9/11 terrorist attacks is supported by past practices of the United States in different but comparable circumstances.[47] The memo claimed that

42. *See* ELSEA, *supra* note 15, at 7.

43. Letter from Ronald Reagan, President of the United States, to Strom Thurmond, Speaker of the House of Representatives and the President Pro Tempore of the Senate, on the United States Air Strike against Libya (Apr. 16, 1986), https://www.reaganlibrary.gov/archives/speech/letter-speaker-house-representatives-and-president-pro-tempore-senate-united-states [https://perma.cc/LPZ9-GE5A].

44. *See* Luca Trenta, *The Obama Administration's Conceptual Change: Imminence and the Legitimation of Targeted Killings*, 3 EUR. J. INT'L SEC. 69, 80 (2017).

45. *See* The President's Const. Auth. to Conduct Mil. Operations Against Terrorists and Nations Supporting Them, 25 Op. O.L.C. 188, 188 (2001).

46. *Id.* at 190.

47 For example, Yoo points out that the United States has employed Armed Forces out of the country over 200 times, and 125 of those instances were done so by a President that was acting without Congressional approval. *See id.* at 190, 201-02.

force can be used "both to retaliate for those attacks and to prevent and deter future assaults" on the United States.[48]

Consistent with Yoo's memo, the Bush administration developed an aggressive strategy to confront terrorist threats abroad.[49] The new approach, titled the 2002 National Security Strategy ("NSS"), focused on the preemption of future attacks that called for self-defense not only against the threat of an imminent attack, but against the mere possibility of an attack at some unspecified, future period in time.[50] The Bush administration applied a significantly broader concept of imminence in its counterterrorism efforts without ever concretely defining the term.[51] In his 2003 State of the Union Speech, President Bush argued that waiting until a threat was imminent to exert force in self-defense was accepting defeat.[52]

This mentality informed the administration's policy on targeted killings.[53] While the Bush administration did not engage in many drone strikes, it also did not set forth a specific legal justification for the strikes it did carry out.[54] The administration maintained that since the United States was at war with al-Qaeda, there were limited geographical or temporal restrictions on its right to use force against the group.[55] In essence, the Bush administration did not redefine imminence from its previous restrictive interpretation under the *Caroline* test, but simply engaged in activity that suggested a significantly broader

48. *See id.* at 214.

49. *See* Trenta, *supra* note 44, at 80.

50. *See* THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002), https://2009-2017.state.gov/documents/organization/63562.pdf [https://perma.cc/P9N7-J93]; GREEN, *supra* note 24, at 99.

51. *See* Trenta, *supra* note 44, at 80.

52. *See id.*

53. *See id.* at 82.

54. *See id.*

55. *See id.* It is significant that al-Qaeda is a non-State actor as opposed to a sovereign nation, because an armed attack by a non-State actor can trigger a State's right to resort to force in self-defense inside of other countries. *See* Michael J. Adams & Ryan Goodman, *Category Mistake: There is no Jus ad Bellum for Use of Force Against Non-State Actors*, JUST SEC. (Dec. 13, 2016), https://www.justsecurity.org/35482/category-mistake-jus-ad-bellum-force-non-state-actors/ [https://perma.cc/B8JR-U43G]; *Contra Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, U.N. (2004), https://www.un.org/unispal/document/auto-insert-178825/ [https://perma.cc/UW8X-R6PH].

definition of imminence. This foreign policy aligned with US military objectives in Iraq at the time.[56] However, even initial supporters of the Iraq war, such as the United Kingdom and Australia, criticized the United States' failure to define imminence in making self-defense determinations under Article 51 both during the war and later, noting that an imminence analysis is essential to making decisions based on a theory of self-defense.[57] In 2004 the UN High-Level Panel[58] produced a report in part addressing the dangers of unilateral force that may emerge from blurring Article 51 in justifying the use of force in self-defense.[59] The report categorically rejected the doctrine of preemptive self-defense exercised by the Bush administration, emphasizing that an attack must be imminent *before* resorting to the use of force in self-defense.[60]

2. Broadening Imminence Under President Obama

The Obama administration applied a concept of imminence narrower than the Bush administration's application but broader than what was permitted under the *Caroline* test, which was a

56. The Bush administration's ground strategy in Iraq relied on calling for an imminence interpretation that allowed the administration to fight terrorists and rogue states through preemptive action without ever clearly defining imminence. *See* Luca Trenta, *Close up, Barack Obama's Counter-Terrorism looks a lot like George W. Bush's*, THE CONVERSATION (Jul. 4, 2014 11:24 AM), https://theconversation.com/close-up-barack-obamas-counter-terrorism-looks-a-lot-like-george-w-bushs-28346 [https://perma.cc/6G3A-2SKU].

57. *See* Trenta, *supra* note 44, at 81.

58. In September 2003, Secretary General Kofi Annan announced to the General Assembly his appointment of a High Level Panel on Threats, Challenges and Change. The sixteen Panel members conducted an in-depth study on global threats and provided an analysis of future challenges to peace and security. *High Level Panel on Threats, Challenges and Change*, GLOB. POL'Y F. (2005), https://archive.globalpolicy.org/component/content/article/226-initiatives/32369-high-level-panel-on-threats-challenges-and-change.html [https://perma.cc/52TQ-GPKY].

59. There is a distinction between employing force unilaterally and the collective authorization of the use of force with Security Council approval. Unilateral force presents a greater threat to international peace and security because States interpret Article 51 differently and deciding to use force without any approval sets a precedent that such action is acceptable and can lead to a greater frequency of resorting to force by other States. *See* Marco Odello, *Commentary on the United Nations' High-Level Panel on Threats, Challenges and Change*, 10 J. CONFLICT & SEC. L. 231, 233, 239-40 (2005).

60. *See* U.N. Secretary General, *Report of the High-level Panel on Threats, Challenges and Change*, ¶ 188, U.N. Doc. A/59/565 (Dec. 2, 2004).

guidepost for pre-9/11 interpretations of Article 51.[61] Anwar al-Aulaqi was an American citizen who had been a successful imam[62] in the United States throughout the 1990s and 2000s. In 2004, he made his way to Yemen, and rising as a leader of al-Qaida, he effectively motivated others to join the terrorist organization and fight against the United States and the West.[63] Al-Aulaqi was placed on the United States government's kill list[64] in April of 2010.[65] His father learned of his son's placement on the list and sued for both injunctive and declaratory relief.[66] The United States District Court for the District of Columbia concluded that he did not have standing to bring suit on his son's behalf and deferred[67] to the government's rationale of national security to support al-Aulaqi's placement on the kill list.[68] On September 30, 2011, al-Aulaqi was killed by a US drone strike, along with Pakistani-American Samir Khan, who produced *Inspire*, an English-language online magazine for al-Qaeda in the Arabian Peninsula ("AQAP") promoting terrorism.[69]

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61. DEP'T OF JUST., WHITE PAPER, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE (2011) [hereinafter DEP'T OF JUST. WHITE PAPER]; *see also* Wright, *supra* note 38.

62. An imam is a Muslim individual who leads worshippers in prayer, and is universally referred to as a leader of Muslim communities. *See* Adam Zeidan, *Imam*, BRITANNICA (last updated Sept. 20, 2019), https://www.britannica.com/topic/imam [https://perma.cc/4VL6-NTLF].

63. *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 8, 12 (D.D.C 2010); *see also* Karen J. Greenberg, *Citizenship in America: A Country's "Priceless Treasure" Under Siege*, THE CENTURY FOUND. (Oct. 24, 2019), https://tcf.org/content/report/citizenship-america-countrys-priceless-treasure-siege/?session=1 [https://perma.cc/YQ8T-GFBE].

64. Also known as the "disposition matrix," the "kill list" is a complex grid of suspected terrorists to be traced and then targeted in drone strikes or captured and interrogated. *See* Ian Comabain, *Obama's Secret Kill List – the Disposition Matrix*, THE GUARDIAN (Jul. 14, 2013, 2:00 PM), https://www.theguardian.com/world/2013/jul/14/obama-secret-kill-list-disposition-matrix [https://perma.cc/UJ9P-HLG7].

65. Melanie J. Foreman, Comment, *When Targeted Killing is Not Permissible: An Evaluation of Targeted Killing Under the Laws of War and Morality*, 15 UNIV. PA. J. CONST. L. 921, 925 (2013).

66. *See* Greenberg, *supra* note 63.

67. The court held, among other reasons, that the plaintiff Nassar al-Aulaqi lacked standing because he did not provide an adequate explanation of why Anwar al-Aulaqi could not have brought the claim himself. The National Security Law Podcast, *Episode 88: A Deep Dive into the Anwar al-Awlaki Case(s)* (Aug. 28, 2018), https://www.nationalsecuritylawpodcast.com/tag/targeted-killing/# [https://perma.cc/5GPU-Q6TX].

68. *See* Greenberg, *supra* note 63.

69. *See Anwar al-Awlaki Killed in Yemen – As it Happened*, *supra* note 7.

In an OLC memorandum authored by David Barron, then-Acting Assistant Attorney General heading the OLC, the United States articulated the legal authorization on which it relied to target and kill al-Aulaqi.[70] The memorandum was explicit that high-level US government officials concluded that al-Aulaqi posed a "continued and imminent threat" to the lives of American citizens, therefore killing him was an act of self-defense sanctioned by Article 51 of the UN Charter.[71] The administration based their conclusion on al-Aulaqi's involvement in both operational and leadership roles in AQAP and continued attempt to plot attacks to kill Americans from Yemen.[72] The killing of al-Aulaqi under a continued and imminent threat standard is significant because it suggested that self-defense may be exercised independent of an armed *attack* by a State and can be applied to a *threat* posed by a non-State actor.[73]

After the killing of al-Aulaqi, the Obama administration committed to its broadened interpretation of imminence. In September of 2011, then-Assistant to the President for Homeland Security and Counterterrorism, John Brennan, argued for a more flexible understanding of imminence[74] due to the modern-day capabilities, techniques, and technological innovations available to terrorist non-State actors.[75] Later, in March of 2012, Attorney General Eric Holder proposed that the current requirement for imminence was more akin to a "window of opportunity" for using force, rather than acting on the perceived immediacy of the threat of an armed attack.[76] In a 2016 speech to the American Society of International Law ("ASIL"), State Department Legal Advisor Brian

70. *See* Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi, Op. O.L.C. 12, 12-41 (2010) [hereinafter Barron Memorandum].

71. *Id.* at 21.

72. *See id.*

73. *See* O'Connell, *supra* note 8.

74. This is alluding to the need to expand the conception of imminence beyond the *Caroline* test applied in more traditional warfare because current threats to national security such as al-Qaida are plotting attacks that are not as easily discernable since they do not wear unforms, carry arms openly, or mass its troops at the borders of the nations they attack. *See* John O. Brennan, Assistant to the President for Homeland Sec. and Counterterrorism, Strengthening Our Security by Adhering to Our Values And Laws, Program on Law and Security (Sept. 16, 2011).

75. *Id.*

76. Eric Holder, U.S. Att'y Gen., Dep't of Just., Speech at Northwestern School of Law (Mar. 5. 2012); ELSEA, *supra* note 15, at 20.

Egan maintained that the United States may exercise its inherent right of self-defense not only in response to armed attacks that have occurred, but also preemptively to address imminent attacks before they occur.[77]

To determine imminence, the speech continued, a variety of factors must be weighed.[78] These factors include:

> [1] the nature and immediacy of the threat; [2] the probability of an attack; [3] whether the anticipated attack is part of a concerted pattern of continuing armed activity; [4] the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action; and [5] the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage.[79]

Moreover, the speech noted the United States' position that the absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude the United States from concluding that an armed attack is imminent for purposes of employing self-defense, provided that there is a reasonable and objective basis for concluding that an armed attack is imminent.[80] Additionally, these remarks reiterated comments made by John Brennan that the United States has "the authority to take action against al-Qa'ida and its associated forces without doing a separate self-defense analysis each time."[81]

Following this view, once a State has lawfully resorted to self-defense against a particular armed group following an imminent threat of armed attack by that group, it is not necessary under *jus ad bellum* to reassess whether an armed attack is imminent prior to every subsequent action taken against that group.[82] In essence, the Obama administration differentiated itself from President Bush's global "War on Terror" where imminence was not defined

77. *See* Brian J. Egan, Legal Advisor, U.S. State Dep't, International Law, Legal Diplomacy, and the Counter-ISIL Campaign, American Society of International Law (Apr. 1, 2016).

78. *Id.*

79. *Id.*

80. *See id.*

81. Brennan, *supra* note 74.

82. *See* Egan, *supra* note 77, at 239.

for strategic purposes[83] by underscoring imminence as a requirement in a self-defense analysis. However, the legal framework set out by the Obama administration was highly aligned with Bush's preemptive self-defense in that no specific evidence of a threat was necessary to resort to the use of force, and that no self-defense analysis was required at all after a determination was made that an imminent attack existed.

3. The Case of Qasem Soleimani: Manipulating Imminence to Achieve Foreign Policy Objectives

The most recent notable application of the United States' broadened imminence interpretation is the targeted killing of the highly influential and revered Iranian General Qasem Soleimani under the Trump administration.[84] The Department of Defense attributed the deaths of hundreds of American and coalition[85] service members to Soleimani and regarded him as an orchestrator of attacks on coalition bases across Iraq, which killed and wounded additional American and Iraqi personnel in the months leading up to his killing.[86] Additionally, according to the Department of Defense, Soleimani approved attacks on the US embassy in Baghdad the week he was killed.[87] On January 3, 2020, Secretary of State Mike Pompeo tweeted that the decision to kill Soleimani was made "in response to imminent threats to American lives."[88] On January 9, 2020 Secretary Pompeo reaffirmed the administration's imminent threat justification on Fox News stating that Soleimani

83. *See* discussion *supra* Section II.B.1.

84. *See* The Inquiry, *Why was Qasem Soleimani killed?*, BBC WORLD SERV. (Jan. 8, 2020) (downloaded using Spotify).

85. Coalitions are temporary multinational understandings that develop in order to complete a specific mission and disband once the task is complete. *See* Patricia A. Weitsman, *Wartime Alliances Versus Coalition Warfare: How Institutional Structure Matters in the Multilateral Prosecution of Wars*, 2 AIR & SPACE POWER J. AFR. & FRANCOPHONIE 29, 31 (2011).

86. *See* Press Release, U.S. Dep't of Def., Statement by the Dep't of Def. (Jan 2, 2020) https://www.defense.gov/Newsroom/Releases/Release/Article/2049534/statement-by-the-department-of-defense/ [https://perma.cc/G3VV-6UBK].

87. *See id.*

88. Secretary Pompeo (@SecPompeo), TWITTER (Jan. 3, 2020, 6:41 AM), https://twitter.com/secpompeo/status/1213062846021558273?lang=en [https://perma.cc/L4QB-AVBR].

was plotting numerous imminent attacks.[89] He conceded, however, that US intelligence does not indicate precisely when or where the attacks are meant to take place.[90] According to the imminence standard stated by the Obama administration, this lack of specific evidence is not preclusive to categorizing the threat as imminent.[91]

It is relevant to evaluate the five factors put forth under the Obama administration for determining imminence in this case. Unfortunately, while the United States has set forth factors for determining imminence, it has not expounded on the metrics used to determine if these factors are satisfied.[92] It is also unclear if these factors were actually used by the Trump administration in its imminence analysis for the killing of Soleimani.[93] Nevertheless, it is useful to discuss these factors because the Trump administration's failure to satisfy them suggests a greater broadening of the imminence requirement beyond the Obama administration's expansion.[94]

The first factor is the nature and immediacy of the threat,[95] which is best analyzed in the context of Soleimani and Iran's history.[96] The "nature" of this threat can be understood through the lens of one United States official, who, just days before the strike that killed Soleimani, reported "a normal Monday in the Middle East" and that Soleimani's travels were "business as usual,"

89. Chris Cameron & Helene Cooper, *The Trump Administration's Fluctuating Explanations for the Suleimani Strike*, N.Y. TIMES (July 9, 2020), https://www.nytimes.com/2020/01/12/us/politics/trump-suleimani-explanations.html [https://perma.cc/KB7C-3K9U].

90. *Id.*

91. *See* Brennan, *supra* note 74.

92. *See* discussion *supra* Section II.B.2.

93. *See* David Welna, *'Imminent' threat – Trump Attack on Iranian General – Is Undefined*, NPR (Jan. 10, 2020, 7:16 PM), https://www.npr.org/2020/01/10/795438264/imminent-threat-trump-justification-of-attack-on-iranian-general-is-undefined [https://perma.cc/53S2-8HER]; Matthew C. Waxman, *Dis Soleimani Pose an Imminent Threat?* COUNCIL ON FOREIGN RELS. (Jan. 15, 2020, 9:00 AM), https://www.cfr.org/in-brief/did-soleimani-pose-imminent-threat [https://perma.cc/L24D-KCDL].

94. *See* discussion *infra* Section II.B.3.

95. *See* Egan, *supra* note 77, at 239.

96. *See* Rebecca Ingber, *If There Was No "imminent" Attack from Iran, Killing Soleimani Was Illegal*, WASH. POST (Jan 15. 2020, 12:19 PM), https://www.washingtonpost.com/outlook/2020/01/15/if-there-was-no-imminent-attack-iran-killing-soleimani-was-illegal/ [https://perma.cc/TND6-C3MW].

in no way signaling an immediate threat.[97] Notably, the official said that Soleimani's attack was not imminent because Ayatollah Ali Khamenei, as the Supreme Leader of Iran, had final authority on approving the general's attack and had not yet done so.[98] This seriously calls into question the "immediacy" of the attack as required by the first factor in the Obama administration's imminence analysis.

The lack of a decision by the Ayatollah also speaks to the second factor in the imminence determination: the probability of an attack.[99] Because Iran had failed to commit to a particular course of action, the probability of an attack was nebulous.[100] While President Trump told reporters that "Soleimani was plotting imminent and sinister attacks on American diplomats and military personnel,"[101] a senior State Department official stated, "[w]hether the specific plots that [Soleimani] has unleashed were so far advanced that they may be able to carry them out, I don't know."[102] While Soleimani was in contact with persons involved in plotting attacks, Congress did not receive convincing evidence that such plots would be carried out.[103]

The Trump administration's presumed argument on the third factor—whether the anticipated attack is part of a concerted pattern of continuing armed activity[104]—also falls short. Soleimani was responsible for the deaths of hundreds of American troops as

97. Helene Cooper et al., *As Tensions with Iran Escalated, Trump Opted for Most Extreme Measure*, N.Y. TIMES (Jan. 4, 2020), https://www.nytimes.com/2020/01/04/us/politics/trump-suleimani.html?campaign_id=60&instance_id=0&segment_id=20060&user_id=285e0687bd79f5610c20b52d37875ff8&regi_id=47276260 [https://perma.cc/J88N-GZJN].

98. *See id.* Iran's Revolutionary Guard Corps is a branch of the Iranian military that was led by Commander Soleimani and reported directly to the Supreme Leader. *See* Miriam Berger, *What is Iran's Revolutionary Guard Corps that Soleimani Helped to Lead?*, WASH. POST (Jan. 4, 2020), https://www.washingtonpost.com/world/2020/01/04/what-is-irans-revolutionary-guard-corps-that-soleimani-helped-lead/ [https://perma.cc/QR97-PTM7]; Milanovic, *supra* note 11.

99. *See* Egan, *supra* note 77, at 239.

100. *See* Milanovic, *supra* note 11.

101. Mark Hosenball, *Trump says Soleimani plotted "imminent" attacks, but critics question just how soon*, REUTERS (Jan. 3, 2020, 5:56 PM), https://www.reuters.com/article/us-iraq-security-blast-intelligence/trump-says-soleimani-plotted-imminent-attacks-but-critics-question-just-how-soon-idUSKBN1Z228N [https://perma.cc/3Q75-Z6L2].

102. *Id.*

103. *Id.*

104. *See* Egan, *supra* note 77, at 5.

they battled Iranian-backed Shia militias in Iraq.[105] Soleimani's involvement in these deaths was evident for many years through both the Bush and Obama administrations.[106] US Ambassador to the United Nations Kelly Craft suggested in a letter to the United Nations that Iran's past actions justified the strike, stating that these actions were in response to an "escalating series of armed attacks" by Iran and Iran-supported militias on US forces.[107] However, Soleimani's past involvement in human rights violations or acts of terror against the United States are not sufficient to make his killing lawful.[108] Ambassador Craft stated in her letter that the United States was responding to a *series* of armed attacks by Iran. The use of the word "series" suggests that each attack was discrete and there was no one continuous armed activity for purposes of satisfying factor three.[109] Although John Brennan suggests that a separate self-defense analysis is not necessary each time the United States would like to use force,[110] such an interpretation is impermissibly broad and contradicts the spirit of Article 51 as an exception to an overall ban on the use of force.[111] The more logical reading of Article 51 is that if one attack is clearly over, then legal analysis must be renewed for subsequent use of force in self-

105. *See* The Daily, *The Killing of General Qassim Suleimani*, N.Y. TIMES (Jan. 6, 2020) (downloaded using Spotify).

106. *Id.*

107. Letter from Ambassador Kelly Craft, U.S. Ambassador to the United Nations, to Ambassador Dang Dinh Quy, President of the United Nations Sec. Council (Jan. 8, 2020) https://www.justsecurity.org/wp-content/uploads/2020/01/united-states-article-51-letter-soleimani.pdf [https://perma.cc/F92D-6M2Y] [hereinafter Letter from Ambassador Kelly Craft].

108. The UN Charter prohibits the use of armed force except to (1) repel an ongoing attack or (2) to halt an imminent armed attack. By stating that the United States was responding to a series of armed attacks, Ambassador Craft was conceding (1) that the United States was not facing one ongoing attack and (2) that there was no attack to halt, since it already occurred. *See* Agnes Callamard, *The Targeted Killing of General Soleimani: Its Lawfulness and Why it Matters*, JUST SEC. (Jan. 8, 2020), https://www.justsecurity.org/67949/the-targeted-killing-of-general-soleimani-its-lawfulness-and-why-it-matters/ [https://perma.cc/6PY3-8HSW]; *See* Adil Ahmad Haque, *U.S. Legal Defense of the Soleimani Strike at the United Nations: A Critical Assessment*, JUST SEC. (Jan. 10, 2020), https://www.justsecurity.org/68008/u-s-legal-defense-of-the-soleimani-strike-at-the-united-nations-a-critical-assessment/ [https://perma.cc/H9TF-TB8N].

109. *See* Haque, *supra* note 108; Egan, *supra* note 77, at 5.

110. *See* Brennan, *supra* note 74.

111. *See* O'Connell, *supra* note 36.

defense.[112] If no further attack is imminent, then there is nothing in which to lawfully defend.[113] Otherwise, responding to the attack is not a matter of self-defense, but rather retaliation,[114] which is unambiguously prohibited by Article 2(4).[115]

Additionally, the Trump administration seemed to consider any use of armed force as equivalent to an "armed attack" for purposes of resorting to force in self-defense under Article 51.[116] This is a broad interpretation of the definition of an "armed attack."[117] For example, the International Court of Justice ("ICJ")[118] distinguishes the "most grave" uses of force from "other less grave forms", in order to determine the status of an armed attack, implying that the gravity of the force is essential to its categorization as an armed attack.[119] Therefore, according to the ICJ interpretation, the shooting down of a US aircraft on June 19, 2019 referenced in the UN letter from Ambassador Craft likely does not amount to an "armed attack" as is claimed.[120] It does not reach the level of gravity necessary to be considered as such, specifically because the aircraft was unmanned and shot down in Iranian airspace.[121]

The fourth factor to consider is the likely scale of the attack and the injury, loss, or damage expected to result therefrom in the

112. *See* Haque, *supra* note 108.

113. *See id.*

114. *See id.*

115. *See* U.N. Charter art. 2(4).

116. *See* Letter from Ambassador Kelly Craft, *supra* note 107; U.N. Charter art. 51.

117. *See* Haque, *supra* note 108.

118. The International Court of Justice is the principal judicial organ of the United Nations. *See The Court,* INT'L CT. JUST., https://www.icj-cij.org/en/court [https://perma.cc/JM2V-G58S] (last visited Sept. 5, 2020).

119. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 195 (June 27); Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. ¶ 51 (Nov. 6).

120. *See* Letter from Ambassador Kelly Craft, *supra* note 107; *See* Haque, *supra* note 108; Rebecca Ingber, *If There was no "imminent" Attack from Iran, Killing Soleimani was Illegal*, WASH. POST (Jan 15. 2020, 12:19 PM), https://www.washingtonpost.com/outlook/2020/01/15/if-there-was-no-imminent-attack-iran-killing-soleimani-was-illegal/ [https://perma.cc/R3KF-P4NY].

121. The *Nicaragua* opinion differentiates an armed attack from other uses of force by highlighting that the sending of armed forces or equivalent of armed forces by a State across international borders into another State is a requisite for an armed attack. Iran was within its own borders and the scale of the attack was such that no life was lost. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 195 (June 27); Haque, *supra* note 108; Ingber, *supra* note 120.

absence of mitigating action.[122] Trump administration officials claimed that Soleimani was engaged in planning an imminent attack that would put US lives at risk.[123] President Trump said in a January 10, 2020 interview that he believed Soleimani was planning "large-scale attacks" on four embassies.[124] Both of these assertions have been disputed.[125] Members of Congress have challenged the evidence presented regarding the risk to US lives and Secretary of Defense Mark Esper contradicted President Trump's claim, stating he never saw any specific evidence that Iran was planning an attack on four American embassies.[126]

The last factor in the Obama administration's imminence analysis is the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage.[127] Here, Soleimani's location of death, Iraq, and position as a military commander of a different sovereign state, Iran, is consequential. Iraq's removal of the threat or US cooperation with Iraq would likely have lessened the injury and collateral damage resulting from the drone strike.[128] Yet the strike against Soleimani took place in Iraqi territory seemingly without the consent of the Iraqi government.[129] While there is information suggesting that in December 2019 the United States requested that Iraq take action against Kata'ib Hezbollah, an Iraqi proxy group,[130] no evidence has

122. *See* Egan, *supra* note 77, at 239.

123. *See* CLAYTON THOMAS, CONG. RSCH. SERV., R46148, U.S KILLING OF QASEM SOLEIMANI: FREQUENTLY ASKED QUESTIONS 2 (2020).

124. *See id.*

125. *See id.*

126. *See id.*; Cameron & Cooper, *supra* note 89.

127. *See* Egan, *supra* note 77, at 239.

128. The strike killed five Iraqi nationals, including the leader and members of Kata'ib Hezbollah. *See* Labuda, *supra* note 29.

129. *See* Milanovic, *supra* note 11.

130. Proxy groups are defined as armed third parties, State or non-State actors that are supported by a State and that engage in hostilities to achieve the supporting State's objectives. Kata'ib Hezbollah is a Shia Iraqi insurgent group that directs a majority of its attacks on US coalition forces in Iraq and receives training, logistical support, and weapons from Iran. *See* Brittany Benowitz & Tommy Ross, *Time to get a Handle on America's Conduct of Proxy Warfare*, LAWFARE (Apr. 9, 2020, 11:21 AM), https://www.lawfareblog.com/time-get-handle-americas-conduct-proxy-warfare [https://perma.cc/YKR2-LJTV]. Ctr. for Int'l Sec. & Coop., *Kata'ib Hezbollah: Overview*, STAN. UNIV. CTR. FOR INT'L SEC. & COOP., https://cisac.fsi.stanford.edu/mappingmilitants/profiles/kataib-hezbollah#text_block_24071 [https://perma.cc/BA8K-UMN5] (last visited Apr. 1, 2021).

been provided that Iraq was consulted on how to alleviate any threats posed to the United States arising from the visit of General Soleimani.[131] Further, no evidence has been produced that the United States did not have time to seek aid from the international community in addressing this alleged threat.[132]

In order to justify the strike without Iraq's consent, the United States would have to prove that it could not have asked the Iraqi government for consent under an "unable or unwilling" standard because of Iraq's collusion with Iran.[133] This theory is not completely unfounded, as Iran's control of Iraqi proxy groups makes it debatable whether the Iraqi government and its leaders could have actually made decisions free from Iranian influence.[134] However, the standard's application in this instance is untenable.[135] First, the unable or unwilling theory is traditionally applied to non-State actors, due to the high-risk political nature of applying it to a State-actor.[136] Soleimani was an Iranian State-actor.[137] The targeting of prominent individuals, such as heads of State, usually classifies as an assassination.[138] However, Soleimani's classification is more opaque because while he was a military officer, he had direct involvement with and was supportive of a non-State terrorist organization.[139] While

131. *See* Agnes Callamard (Special Rapporteur on extrajudicial, summary or arbitrary executions), *Use of Armed Drones for Targeted Killing*, ¶ 82, U.N. Doc. A/HRC/44/38 (Jun. 29, 2020), https://undocs.org/en/A/HRC/44/38 [https://perma.cc/BT2D-G2UU].

132. Although Article 51 does not require a State to wait for the UN Security Council to take measures before invoking the inherent right of self-defense, it is possible consulting the international community would have been an alternate effective measure under factor five to address the purported threat. *See* U.N. Charter art. 51; Callamard, *supra* note 131.

133. *See* Milanovic, *supra* note 11

134. *See* Labuda, *supra* note 29.

135. *See id.*

136. *See id.*

137. Stephanie Nebehay, *U.N. Expert Deems U.S. Drone Strike on Iran's Soleimani an 'Unlawful'* Killing, REUTERS (Jul. 6, 2020, 5:29 PM), https://www.reuters.com/article/us-usa-iran-un-rights/u-n-expert-deems-u-s-drone-strike-on-irans-soleimani-an-unlawful-killing-idUSKBN2472TW [https://perma.cc/QM4J-97UH]; Archit Shukla, *The Killing of General Soleimani – A Blatant Violation of International Law*, JURIST (Apr. 14, 2020, 3:01 PM), https://www.jurist.org/commentary/2020/04/archit-shukla-general-soleimani-international-law/ [https://perma.cc/2Z83-H947].

138. *See* Thomas Byron Hunter, *Targeted Killing: Self-Defense, Preemption, and the War on Terrorism,* 2 J. STRATEGIC SEC., 1, 11 (2009).

139. *See id.* at 4*; See* Peter Knoope, *Soleimani's Death: Can State-Actors Also be Terrorists?,* CLINGENDAEL SPECTATOR (Jan. 8, 2020, 3:58 PM),

Soleimani was a State-actor in Iran, his status as a State-actor in Iraq may be disputed. He was listed as a terrorist (i.e., a non-State actor) in the United States and on a list of "persons, groups and entities subject to application of specific measures to combat terrorism" in the European Union.[140] Nevertheless, Soleimani's quasi-State-actor status significantly increases the political stakes and calls into question the appropriateness of applying an unable and unwilling standard.[141] Second, the fact that a State is not immediately able to terminate terrorist activities within its borders does not sufficiently justify bombing that State's territory without its consent, as was done in this case.[142] Abiding by such a low threshold should be considered an abuse of military action against the will of Iraq, compromising their sovereignty simply because the government was not fighting terrorism within their borders to the satisfaction of US standards.[143]

The Trump administration ultimately distanced itself from its initial imminence determination and justification for the strike on Soleimani.[144] However, the remarks of the President as well as those of high-ranking US military and State officials signifies an application of the broadest imminence interpretation for a targeted killing to date. The Trump administration killed a high-ranking, celebrated State-actor in a sovereign state of which he was not a citizen without consent and without definitive intelligence on when and where an attack would take place or the nature of the attack.

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https://spectator.clingendael.org/en/publication/soleimanis-death-can-state-actors-also-be-terrorists [https://perma.cc/3MEZ-REMF].

140. *See* Hunter, *supra* note 138, at 1.

141. *See* Labuda, *supra* note 29.

142. *See A Plea Against the Abusive Invocation of Self-Defence as a Response to Terrorism*, ULB CTR. INT'L L., http://cdi.ulb.ac.be/wp-content/uploads/2016/06/A-plea-against-the-abusive-invocation-of-self-defence.pdf [https://perma.cc/5GTF-HYYN] (last visited Feb. 24, 2021).

143. *See id.*

144. After multiple claims by Trump officials and President Trump himself that the justification for targeting and killing General Soleimani was the imminent threat he posed to US lives, the official White House Report the Trump administration sent to Congress has no mention of imminence, focusing instead on the President's authority under Article II of the Constitution and the 2002 AUMF to justify the strike. *See* Zachary Cohen & Sam Fossum, *"Imminent threat" Explanation Noticeably Absent in White House Report Justifying Soleimani Strike*, CNN POLITICS (Feb. 14, 2020, 5:24 PM), https://www.cnn.com/2020/02/14/politics/trump-soleimani-strike-legal-justification/index.html [https://perma.cc/6LWC-GHN3].

C. Repercussions of an Inconsistent Imminence Interpretation

The Bush administration failed to define imminence in its drone strike determinations.[145] The Obama administration put forth factors to determine whether a threat is imminent for the use of force in self-defense.[146] The Trump administration seemingly expanded the Obama administration's interpretation of imminence when it targeted and killed General Soleimani without properly weighing the factors the Obama administration put in place. [147]While the Biden administration may very well revert to the Obama administration's protocols for imminence analysis, this is currently unclear.[148] The merits and disadvantages of a broad imminence interpretation are worth serious debate. However, the larger threat to American national security is not the definition of imminence generally, but the inconsistent application of imminence by each administration.

The US response to terrorism influences every other nation's conduct in similar circumstances.[149] Several nations utilize drone strikes and targeted killing in their counterterrorism approach.[150] The number of countries that possess military drones has skyrocketed since 2010, with nearly 100 countries now in possession of the technology.[151] More significantly, it is evident that some of these countries are following the example set by the United States in justifying their use of force.[152] In 2015 the Islamic

145. *See* discussion *supra* Section II.B.1.

146. *See* discussion *supra* Section II.B.2.

147. *See* discussion *supra* Section II.B.3.

148. The Biden administration suspended the Trump Administration's drone policy rules on the first day of office. The administration continues to review both Trump and Obama era policies in a process that was initially supposed to last sixty days but is now expected to last six months. *See* Charlie Savage, *Trump's Secret Rules for Drone Strikes Outside of War Zones are Disclosed*, N.Y. TIMES (May 1, 2021), https://www.nytimes.com/2021/05/01/us/politics/trump-drone-strike-rules.html [https://perma.cc/NRU8-9YRQ].

149. *Frequently Asked Questions About Targeted Killings*, ACLU, https://www.aclu.org/other/frequently-asked-questions-about-targeting-killing [https://perma.cc/5UDK-MEXZ] (last visited Dec. 8, 2020).

150. *See* Trenta, *supra* note 44, at 70.

151. *See* Ryan Pickrell, *Nearly 100 Countries Have military Drones and its Changing the Way the World Prepares For War*, BUS. INSIDER (Sept 27, 2019), https://www.businessinsider.com/world-rethinks-war-as-nearly-100-countries-field-military-drones-2019-9 [https://perma.cc/9DDH-SVBC].

152. *See infra,* footnotes 153-160 and accompanying text; see also Marc Weller, *Permanent Imminence of Armed Attacks: Resolution 2249 (2015) and the Right to Self*

State of Iraq and Syria ("ISIS") bombed a Russian jetliner over the Sinai Desert and attacked a Paris stadium and concert hall.[153] These attacks killed and injured over 824 nationals of Russia, France, and twenty-two other countries.[154] In response to these attacks, the UN Security Council unanimously adopted Resolution 2249,[155] which permitted the use of force against ISIS non-State actors in Syria.[156] The French Security Council Representative who sponsored the resolution voiced that he voted in favor of it because it permitted collective action based on the Article 51 self-defense and imminence provision of the UN Charter.[157] This resolution was more closely aligned with the United States' Article 51 interpretation rather than the ICJ's. While the ICJ has systematically rejected a reading of Article 51 that permitted the use of force against non-State actors unless the attack can be attributed to a territorial State,[158] since 9/11 the United States has relied on self-defense and imminence analysis to address terrorist non-State actors.[159] Additionally, in 2017 the UK Attorney General explicitly adopted the imminence factors that the Obama administration laid out in Brian Egan's 2016 speech.[160]

Despite this influence, the United States has not yet solidified a definition of imminence.[161] Without a defined set of principles to

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Defence Against Designated Terrorist Groups, EJIL: TALK! (Nov. 25, 2015), https://www.ejiltalk.org/permanent-imminence-of-armed-attacks-resolution-2249-2015-and-the-right-to-self-defence-against-designated-terrorist-groups/ [https://perma.cc/J2N8-56PB].

153. Michael P. Scharf, *How the War Against ISIS Changed International Law*, 48 CASE W. RSRV. J. INT'L L. 1, 50 (2016).

154. *Id.*

155. Resolution 2249 determined that ISIS is a "global and unprecedented threat," and that member States of the UN should take "necessary measures" in compliance with international law and the UN Charter to prevent and suppress terrorist acts. *See* S.C. Res. 224, (Nov. 20, 2015); *see also* Scharf, *supra* note 153.

156. *See* Scharf, *supra* note 153, at 51.

157. *See id.* at 50.

158. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgement, 1986 I.C.J Rep. 14, ¶ 191 (June 27); *see also* Oil Platforms (Iran v. U.S.), Judgement, 2003 I.C.J. 161 ¶ 195-96 (Nov. 6); Legal Consequences of the construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J 136 (July 9); Scharf, *supra* note 153, at 40.

159. *See* Barron Memorandum, *supra* note 70, at 21, 27-28 n.36, 40-44.

160. *See* Trenta, *supra* note 44, at 89.

161. This refers to each US administration applying a unique imminence analysis for purposes of resorting to the use of force in self-defense. *See* Trenta, *supra* note 44, at 80; *See also* Egan, *supra* note 77, at 239; Secretary Pompeo (@SecPompeo), TWITTER (Jan. 3,

adhere to in an imminence analysis, the US justification for carrying out drone strikes under Article 51 is practically boundless. At least one scholar posits that if the United States "continue[s] to justify such practices in only the vaguest of terms, we should expect other countries to take them up—and almost certainly in ways we will not find to our liking."[162] This presents a serious risk that self-defense will become an alibi that is systematically used to justify unilateral military operations around the world.[163] If the United States does not adhere to a predetermined standard, other nations may not feel compelled to either. While in most instances States only resort to an imminence analysis under Article 51 due to serious national security threats and not ad hoc power grabs, the United States failure to concretely define imminence invites other nations to likewise interpret Article 51 as they see fit to advance military objectives. This scenario invites not just a short-term risk of reciprocity, but a long-term risk that the United States or its allies will fall victim to an attack that is impossible to predict yet purportedly complying with Article 51.

III. US ACCOUNTABILITY PROCEDURES ARE DEFICIENT TO ENSURE THAT THE US COMPLIES WITH THE DISTINCTION PRINCIPLE OF INTERNATIONAL HUMANITARIAN LAW

While the United States has thorough protocols in place to sustain accountability and aid in compliance of international humanitarian law, these protocols have not been wholly effective in ensuring that civilians are not the object of attack and such protocols have been threatened altogether by the Trump administration. Section III.A introduces the principle of *jus in bello* and the elements within *jus in bello* that must be adhered to by those involved in armed conflict. This Part particularly focuses on the element of distinction in *jus in bello* and the United States'

2020, 6:41 AM), https://twitter.com/secpompeo/status/1213062846021558273?lang=en [https://perma.cc/XN5L-Y6HQ].

162. *See* David Cole, *A Secret License to Kill*, THE N.Y. REV. (Sept. 11, 2011), https://www.nybooks.com/daily/2011/09/19/secret-license-kill/ [https://perma.cc/X56E-QU2D].

163. *See A Plea Against the Abusive Invocation of Self-Defence as a Response to Terrorism*, *supra* note 142.

interpretation of it. Section III.B. argues that the US procedures for nominating individuals to the kill list and properly verifying such targets before they are killed do not ensure that a civilian will not be the object of attack and therefore do not adequately comply with *jus in bello*. This Part also addresses the Trump administration's rollback of protocols put in place by previous administrations to better comply with *jus in bello*.

A. Legal Framework of International Humanitarian Law

1. The Principle of Jus in Bello

Assuming that the United States is engaged in an armed conflict under *jus ad bellum*,[164] the analysis turns to *jus in bello*. *Jus in bello* regulates the conduct of parties engaged in an armed conflict.[165] It is generally accepted by UN Member States that international humanitarian law is synonymous with *jus in bello*, which seeks to minimize suffering in armed conflicts by protecting and assisting all victims of armed conflict.[166] *Jus in bello* requires that any use of violence or military force by a State meet the requirements of distinction, proportionality, humanity, and military necessity.[167] Distinction maintains that civilians may not be the object of an attack.[168] Proportionality prohibits attacks that would cause excessive harm to civilians in relation to the attacking state's military advantage.[169] Humanity requires the consideration of people's security and health in the attack.[170] Military necessity is that which is required in order to achieve the earliest submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.[171]

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164. *Jus ad bellum* refers to the conditions under which States may resort to war or to the use of armed force in general. *See What are Jus ad Bellum and Jus in Bello?*, *supra* note 14.

165. *See id.*

166. *Id.*

167. INTERNATIONAL HUMAN RIGHTS AND CONFLICT RESOLUTION CLINIC OF STANFORD LAW SCHOOL & GLOBAL JUSTICE CLINIC AT NEW YORK UNIVERSITY SCHOOL OF LAW, LIVING UNDER DRONES: DEATH, INJURY, AND TRAUMA TO CIVILIANS FROM US DRONE PRACTICES IN PAKISTAN 112 (2012).

168. Davis et al., *supra* note 19, at 7.

169. *Id.*

170. *Id.*

171. Nils Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, INT'L COMM. OF THE RED CROSS (2009),

Jus in bello dictates that there are two ways to be classified as a legal target of war.[172] One way is through direct participation in hostilities.[173] The other way is to be a combatant.[174] Combatants are individuals who are either members of the armed forces of a state party to the conflict or part of an armed group under responsible command, wearing fixed, distinctive insignia, carrying their arms openly, and conducting their operations in accordance with the laws and customs of war.[175] Lawful combatants can legally kill or be killed by other lawful combatants.[176] Alternatively, a civilian farmer who arms himself and fights would, for example, be directly participating in hostilities and become a legitimate target for the duration of that specific act.[177] The International Committee of the Red Cross ("ICRC")[178] interprets the concept to only include activities that resemble those of a fighter, or conduct that directly supports combat,[179] and excludes more distant acts, such as providing financial support, advocacy, or other non-combat aid.[180] The United States, however, leaves open for discretion whether a

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https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf [https://perma.cc/R48J-8YQ9].

172. *See* Vivek Sehrawat, *Legal Status of Drones Under LOAC and International Law*, 5 PENN STATE J. L. & INT'L AFF., 165, 194 (2017).

173. *See id.*

174. Civilian non-combatants are never legal targets of war. *See id.*

175. Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949 (providing the definition).

176. *See* Mike Dryfus, *My Fellow Americans, We Are Going to Kill You: The Legality of Targeting and Killing U.S. Citizens Abroad*, 65, VAND. L. REV. 249, 261 (2012); Geneva Conventions Common Article 3, AP I, art. 52(1)-(2); AP I, art. 50(1).

177. *See* Clark, *supra* note 12, at 10; *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* 996 (Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009), https://www.icrc.org/en/doc/assets/files/other/irrc-872-reports-documents.pdf [https://perma.cc/2Q68-W9FC].

178. The International Committee of the Red Cross is a neutral, independent organization with a mandate stemming from the Geneva Conventions of 1949 and their Additional Protocols to ensure humanitarian protection and assistance for victims of war and armed violence and promotes respect for international humanitarian law. *Who We Are*, INT'L COMM. OF THE RED CROSS, https://www.icrc.org/en/who-we-are [https://perma.cc/E64D-L6D6].

179. *See* Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Study on Targeted Killings*, 3, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) https://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf [https://perma.cc/5A88-ZRU4].

180. Such conduct includes political advocacy, supplying food or shelter, or economic support and propaganda. *See id.*

specific war-sustaining act is interpreted as directly participating in hostilities based on the context of the situation.[181]

2. The Element of Distinction in Targeted Killings

Distinction is the cornerstone of international humanitarian law.[182] Under the principle of distinction, all involved in the armed conflict must distinguish between combatants and civilian non-combatants.[183] Terrorists are not lawful combatants pursuant to the Geneva Conventions because they do not belong to a nation-state and do not engage in operations in conformity with the laws of war.[184] Therefore, it may be argued that terrorists are civilian non-combatants unless they are directly taking part in hostilities.[185] *Jus in bello* forbids targeted drone strikes against civilian non-combatants.[186]

The United States Supreme Court has affirmed that terrorists engaging in military action may be classified as combatants, albeit unlawful combatants.[187] Pursuant to *jus in bello*, the US government asserts that terrorists as combatants, can be targeted and killed by lawful combatants when not directly taking part in hostilities.[188] The United States is presented with two distinction issues when making targeting decisions. The first issue is distinguishing between terrorist fighters and civilian non-combatants for purposes of adding an individual to the kill list.[189] The second issue is that, once on the kill list, whether an individual

181. *See* DEPARTMENT OF DEFENSE LAW OF WAR MANUAL, *supra* note 28, at ¶ 5.8.3.

182. Antoine Bouvier et al., *Principle of Distinction*, ICRC, https://casebook.icrc.org/law/principle-distinction [https://perma.cc/PM7X-C4FB].

183. *See id.*

184. The definition of combatant derives from the Geneva Convention's conditions for being considered a prisoner of war which require that combatants are either members of the armed forces of a Party to the conflict or members of an organized group placed under the command of those forces that have a fixed distinctive sign, carry their arms openly, and conduct their operations in accordance with the laws and customs of war. Geneva Convention Relative to the Treatment of Prisoners of War art. 4(A)(1)-(2), Aug. 12, 1949.

185. *See* discussion *supra* Section III.A.1.

186. *See* Davis et al., *supra* note 19, at 7.

187. *See* Ex Parte Quirin, 317 U.S. 1, 30-35 (1942).

188. *See* Barron Memorandum, *supra* note 70, at 20; *See* Foreman, *supra* note 65, at 930.

189. *See* Davis et al., *supra* note 19, at 5.

can be verified as a legitimate target immediately before he is killed.[190]

B. US Distinction Protocols Fail to Ensure Compliance with Jus in Bello

1. Addition to the Kill List: A Flawed Approach

President Obama created a Presidential Policy Guidance ("PPG") addressing US interpretations of international law and employment of the targeted killing program.[191] The PPG was not binding law.[192] The Obama administration held the view that the United States is in an armed conflict with al-Qaeda and its associates that cuts across national borders and that military action pursuant to this cross-border armed conflict is authorized by the 2001 Authorization for the Use of Military Force ("AUMF").[193] The PPG allowed for the President to authorize the use of force outside of areas of active hostilities.[194] The PPG dictates who can be added to the US kill list and provides a window into the United States' interpretation of compliance with the element of distinction in *jus in bello*.[195] The policy requires that "an individual whose identity is known" must pose a "continuing, imminent threat" to US persons to be added to the kill list.[196] Adding an operational leader of a terrorist organization to the kill list is relatively straightforward.[197] There is likely direct evidence of recurring combatant activity and the individual can be properly

190. *See id.*; *See* Sehrawat, *supra* note 172, at 186.

191. *See* EXEC. OFFICE OF THE PRESIDENT, PROCEDURES FOR APPROVING DIRECT ACTION AGAINST TERRORIST TARGETS LOCATED OUTSIDE OF THE UNITED STATES AND AREAS OF ACTIVE HOSTILITIES (2013), https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download [https://perma.cc/Y5M7-SLCS] [hereinafter Obama PPG Manual].

192. *See id.*

193. *See* Brennan, *supra* note 74; Following the 9/11 terrorist attacks on the United States, Congress authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons . . . to prevent any future acts of international terrorism against the United States." Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001).

194. *See* Obama PPG Manual, *supra* note 191.

195. *See id.*

196. *See id.* at 11.

197. *See* Gregory McNeal, *Kill-Lists and Network Analysis*, LAWFARE (Feb. 25, 2013 4:46 PM), https://www.lawfareblog.com/kill-lists-and-network-analysis [https://perma.cc/T77M-CJZV].

identified as part of a terrorist organization.[198] Often, however, the threat level of a particular terrorist affiliate is blurred, their identity unconfirmed, and an assessment must be determined from the intelligence available.[199] In enacting the PPG requirements that a high-value terrorist is present, that the target has been accurately identified, and that noncombatants will not be injured,[200] it appears the Obama Administration was attempting to make a distinction between known hostile combatants and foot soldiers who participate in a singular hostile attack but whose continuous combatant function is more difficult to verify.[201] The latter may not classify as an unlawful combatant and may only be targeted when directly engaging in hostilities.[202]

Both the military and the Central Intelligence Agency ("CIA") conduct targeted killings.[203] While there are differences, the method and approval process for conducting targeted killings and nomination to the kill lists overlap across these departments.[204] The PPG demonstrates an extensive interagency review process for determining approved targets for killing.[205] A nominating agency first prepares a profile for each nominated target to be reviewed for legality in taking lethal action.[206] Next, the National Counterterrorism Center ("NCTC") prepares an assessment of each nomination.[207] The National Security Staff ("NSS") then convenes a meeting of the Restricted Counterterrorism Security Group ("RCSG")[208] to further review the proposed target and compile a

198. *See* Davis et al., *supra* note 19, at 5.

199. Davis et al., *supra* note 19, at 5.

200. *See* Rita Siemon, *Introductory Note to Presidential Policy Guidance: Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities*, 56 INT'L L. MATERIALS 1209, 1210 (2017).

201. *See* Gregory S. McNeal, *Targeted Killing and Accountability*, 102 GEO. L.J. 681, 708 (2014); Davis et al., *supra* note 19, at 5.

202. Davis et al., *supra* note 19, at 5.

203. *See* Phillip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT'L SEC. J. 283, 284 (2011).

204. *See* McNeal, *supra* note 201, at 703-04.

205. *See* Obama PPG Manual, *supra* note 191, at 11-18.

206. *See id*. at 11.

207. *See id.* at 12.

208. *See id*. The Restricted Counterterrorism Security Group is chaired by the NSS Senior Director for Counterterrorism and includes various departments and agencies such as the Department of State, the Department of the Treasury, the Department of Defense, the Department of Justice, the Department of Homeland Security, CIA Joint Chiefs of Staff, and the NCTC. *See id.* at 8 n.6.

nomination package for review by the National Security Council Deputies Committee.[209] The Deputies Committee then makes a recommendation for lethal action to the Principal of the nominating agency.[210] After all the Principals of the nominating agency unanimously agree that lethal action should be taken, and the President is notified, the nominating agency may authorize lethal action.[211]

The process for compiling the kill list during the Obama administration was complex and time intensive, usually involving dozens of analysts from different agencies.[212] Additionally, it included intelligence analysis from experts across both military and civilian agencies and bureaucratic analysis that covered topics ranging from whether or not an individual was a terrorist to the long-term impacts of killing that individual.[213] The Obama administration has maintained that this rigorous review process assures accountability,[214] however, this method has not proven to be fully effective.

To identify potential terrorists for nomination to the kill list, the United States tracks metadata (electronic patterns of an individual's communications, writings, social media postings and travel) through a program called SKYNET and cellphone tracking

209. The National Security Deputies Committee serves as the senior sub-Cabinet interagency forum for consideration of and, where appropriate, decision-making on policy issues that affect the national security interests of the United States. Regular attendees include the Deputy Secretary of State, the Deputy Secretary of the Treasury, the Deputy Secretary of Defense, the Deputy Attorney General, the Deputy Secretary of Energy, the Deputy Secretary of Homeland Security, the Deputy Director of the Office of Management and Budget, the Deputy Director of National Intelligence, the Vice Chairman of the Joint Chiefs of Staff, the Deputy Director of the Central Intelligence Agency, the Deputy National Security Advisor, the Deputy National Security Advisor for Strategy, the Deputy Homeland Security Advisor, the Deputy Assistant to the President and National Security Advisor to the Vice President, and the Administrator of the United States Agency for International Development. *See* National Security Presidential Memorandum on the Organization of the National Security Council, the Homeland Security Council and Subcommittees (Apr. 4, 2017), https://www.govinfo.gov/content/pkg/FR-2017-04-06/pdf/2017-07064.pdf [https://perma.cc/G9KZ-WF9S]. *See* Obama PPG Manual, *supra* note 191, at 13-14.

210. *See* Obama PPG Manual, *supra* note 191, at 13.

211. *See id.* at 14.

212. *See* McNeal, *supra* note 201, at 708.

213. *See id.* at 708-09.

214. *See* John O. Brennan, Assistant to the President for Homeland Sec. and Counterterrorism, Address at the Wilson Center, The Ethics and Efficacy of the President's Counterterrorism Strategy (Apr. 30, 2012).

instead of human-collected intelligence.[215] These tactics came to light after Edward Snowden leaked top-secret documents from the National Security Agency ("NSA").[216] This leak contained a PowerPoint presentation from 2012 wherein the United States erroneously listed a prominent Syrian Al Jazeera journalist named Ahmad Muffaq Zaidan as a member of al-Qaeda and the Muslim Brotherhood.[217] While the US government had categorized Zaidan as a terrorist before SKYNET produced his name, he was used as an example to demonstrate the power of SKYNET to correctly identify terrorist targets.[218] Zaidan has fervently denied any affiliations with terrorist groups.[219] As a journalist, he covered armed Islamic groups for over a decade and reported their pronouncements and activities publicly.[220] He interviewed Osama Bin Laden in person many times and his reporting on the 9/11 engineer has been lauded.[221] Zaidan's work as a journalist engaged in reporting and commentary on the Middle East, terrorism, and the "War on Terror" requires him to have frequent communications with sources who have connections with terrorists and their associates.[222] It also results in his social media accounts containing words and phrases associated with terrorism.[223] Additionally, his work demands that he travel

215. *See* Clive Stafford Smith, *Kill Lists: Barack Obama's Blind Spot,* AL JAZEERA (Nov. 22, 2020), https://www.aljazeera.com/opinions/2020/11/22/kill-lists-barack-obamas-blind-spot [https://perma.cc/52MN-3Z96]; Complaint, *supra* note 12, at 9; D. Parvaz, Journalists Allege Threat of Drone Execution by US, AL JAZEERA (Apr. 2, 2017), https://www.aljazeera.com/news/2017/4/2/journalists-allege-threat-of-drone-execution-by-us [https://perma.cc/E3EF-HR9J].

216. *See* Paul Szoldra, *This is Everything Edward Snowden Revealed in One Year of Unprecedented Top-Secret Leaks*, BUS. INSIDER (Sep. 16, 2016, 8:00 AM), https://www.businessinsider.com/snowden-leaks-timeline-2016-9 [https://perma.cc/8CYL-NSUH].

217. *See* Cora Currier et al., *U.S Government Designated Prominent Al Jazeera Journalist as "Member of Al Qaida"*, THE INTERCEPT (May 8, 2015, 6:27 AM), https://theintercept.com/2015/05/08/u-s-government-designated-prominent-al-jazeera-journalist-al-qaeda-member-put-watch-list/ [https://perma.cc/ZLQ9-WG8N].

218. *See id.*

219. *See* Ahmed Zaidan, *Al Jazeera's A. Zaidan: I Am a Journalist Not a Terrorist*, AL JAZEERA (May 15, 2015), https://www.aljazeera.com/opinions/2015/5/15/al-jazeeras-a-zaidan-i-am-a-journalist-not-terrorist/ [https://perma.cc/BGX4-MLGD].

220. *See id.*

221. *See id.*; *see also* Complaint, *supra* note 12, at 8.

222. *Id.*

223. *See id.*

extensively in countries and regions in which terrorist organizations are active.[224]

After the leaked NSA documents seemed to confirm that government metadata analysis by SKYNET caused Zaidan to be added to the US kill list, he filed a lawsuit that was subsequently dismissed.[225] The court held that because Zaidan's name was only published on SKYNET's list of potential terrorists, Zaidan would need to put forth proof that it is plausible that everyone on SKYNET's list is also on the kill list, of which he had no evidence beyond speculation.[226] Therefore, the court held that he lacked injury for Article III standing.[227]

Thus, despite this extensive inter-agency review process, the United States incorrectly identified a journalist as a potential terrorist threat using metadata analysis.[228] Whether or not the SKYNET list coincides with the kill list, a system which misidentifies civilians through a "guilty by association" mechanism is inherently flawed.[229] This increases the likelihood that innocent civilians will be an object of attack, therefore violating the principles of *jus in bello*.[230]

2. The United States has a Verification Problem

There are two types of target verification. First, after a terrorist is added to the kill list, there must be assurance that the targeted strike is properly carried out. For example, before the drone operator initiates a strike, she must reasonably ensure[231] that the targeted individual in that moment is indeed a legitimate

224. *Id.*

225. *See* Zaidan v. Trump, 317 F. Supp. 3d 8, 8 (D.D.C 2018).

226. *See id.* at 12.

227. *See id.*

228. Former Director of the NSA and CIA Michael Hayden states that the United States "kill[s] people based on metadata." Ryan Goodman, *Video Clip of Former Director of NSA and CIA: "We Kill People Based on Metadata"*, JUST SEC. (May 12, 2014), https://www.justsecurity.org/10318/video-clip-director-nsa-cia-we-kill-people-based-metadata/ [https://perma.cc/KLG3-5KLR].

229. *See* Grégoire Chamayou, Theory of the Drone 3: Killing Grounds, GEOGRAPHICAL IMAGINATIONS (Jul. 29, 2013), https://geographicalimaginations.com/tag/pattern-of-life-analysis/ [https://perma.cc/56DM-4PFP].

230. *See id.*

231. Certainty is not required. *See* McNeal, *supra* note 201, at 734-35; *See* Obama PPG Manual, *supra* note 191, at 15.

target on the kill list.[232] The second type of verification is referred to as a signature strike. A signature strike occurs when the identities of targets are not known ahead of time, but their behavior fits a certain pattern that leads the observers to believe that they are involved in a terrorist organization.[233] While signature strikes present accountability issues of their own, they are not targeted killings and are therefore beyond the scope of this Note.[234]

As to the first type, verification requires finding, fixing, and tracking the target.[235] Such an endeavor entails a considerable collaborative effort across military and civilian agencies.[236] Finding a target requires intelligence collection activities wherein individuals are placed into three categories: those distinctly taking part in hostilities, those who are clearly civilians, and those who display some characteristics of a legitimate target, but more analysis must be conducted.[237] To fix the target, reconnaissance and surveillance capabilities are employed to collect pattern of life information[238] that will be used to determine the probable future location of the target.[239] Tracking the target involves collecting information about the target's life patterns such as overnight locations, daily routes, visitations, and trustworthy associates.[240] Lastly, both military and CIA drone strikes require reassessment before engaging in the operation.[241] The target must be identified, and, in the case of a military strike, a commander must be informed of the assumptions and uncertainties inherent in the information provided.[242]

The United States relies on pattern of life data when making targeting decisions.[243] Pattern of life analysis can be helpful in

232. *See* McNeal, *supra* note 201, at 734.

233. Scott Englund, *What's Wrong with "Signature Strikes",* 21ST CENTURY GLOB, DYNAMICS, (Dec. 28, 2016), https://globalejournal.org/global-e/december-2016/whats-wrong-signature-strikes [https://perma.cc/Q8CF-LLBD].

234. *See id.*

235. *See* McNeal, *supra* note 201, at 734.

236. *See id.* at 736.

237. *See id.* at 735.

238. *See infra* notes 250-54.

239. *See id.*

240. *See id.*

241. *See id.* at 737.

242. *See id.* at 736.

243. *See id.* at 717.

targeting individuals who are not identified operational leaders, but who are vital to an organization's terrorist operations through the strategic role they play in the larger terrorist network.[244] However, pattern of life analysis should not be a unilateral greenlight for target verification given its major flaw of failing to capture the full story.[245] Data is collected through image-streams that are too imprecise to allow for clear interpretation, and supplementing them with equally inconclusive evidence like telephone contacts[246] only compounds the data's unreliability.[247]

An example of pattern of life analysis gone wrong and noncompliance with distinction principles occurred in 2010 under the Obama administration.[248] The United States planned to target and kill Muhammad Amin, a senior commander of the Taliban operating in Takhar, Afghanistan.[249] The US Special Forces unit tracked Amin's phone calls and believed that a SIM card corresponding with one of the numbers Amin had been calling in Kabul was passed to Amin and that he began to self-identify as "Zabet Amanullah."[250] This led intelligence officials to conclude Zabet Amanullah was Amin's alias.[251] However, Amanullah was not an alias, but the name of a living person.[252]

244. *See* Jutta Weber, *Keep Adding. On Kill Lists, Drone Warfare and the Politics of Databases*, 34 ENV'T AND PLAN. D: SOC'Y AND SPACE 1, 7 (2015).

245. *See* Chamayou, *supra* note 229.

246. The NSA locates drone targets by analyzing the activity of the SIM card, rather than the actual content of the calls. Jeremy Scahill & Glenn Greenwald, *The NSA's Secret Role in the U.S. Assassination Program,* THE INTERCEPT (Feb. 10, 2014, 12:03 AM), https://theintercept.com/2014/02/10/the-nsas-secret-role/ [https://perma.cc/T3UJ-QSSC].

247. *See* Chamayou, *supra* note 229.

248. *See* Clark, *supra* note 12, at 2.

249. *See id.* at 2.

250. *See id.* at 12, 12 n.47, 13 (Kate Clark interviewed with senior officials of the US Special Forces unit involved in the operation who briefed her on the attack and provided the opportunity over two extended interviews and follow up questions. The interviews took place in December 2010 and March 2011).

251. *See id.* at 12-13.

252. *See id.*

Amanullah fought for the Taliban while they ruled in Afghanistan[253] but stopped fighting in 2001.[254] Since then, he had been living quietly and openly as a civilian in Kabul.[255] Evidence shows that he had occasional contact with the Taliban, which is not automatically suspicious in Afghanistan, a country where power is frequently shifting and it is a survival tactic to ingratiate oneself with those who may soon govern the nation.[256] In 2010, Amanullah travelled to Tekhar to campaign for his nephew who was standing in the parliamentary elections.[257] On September 2, 2010, on the misguided belief that they were targeting and killing Muhammad Amin, the US Special Forces bombed Amanullah's election campaign convoy, killing him.[258] An investigation later determined that the United States had failed to cross-check their intelligence regarding the telephone contacts, build up a profile on Amin or Amanullah, gather any human intelligence or make the most basic inquiries into a target that the United States had been tracking for months.[259] After Amanullah's death, the United States maintained that they had indeed killed the senior Taliban commander Muhammad Amin and that the technical evidence relied on was irrefutable.[260] However, the real Muhammad Amin was located alive and interviewed in Pakistan, proving this was not the case.[261] Severe intelligence failures like this call into question the legitimacy of John Brennan's assertions that a "rigorous" review process was in place to target and kill terrorist threats during the Obama administration.[262]

253. The Taliban emerged in the early 1990s as a group of guerilla fighters who resisted Soviet occupation of Afghanistan from 1979-1989. By September 1996, the Taliban seized Kabul. From then until the US invasion in 2001 that overthrew the regime, the Taliban controlled about 90 percent of Afghanistan. *See* Lindsay Maizland, *The Taliban in Afghanistan*, COUNCIL ON FOREIGN RELS. (Mar. 15, 2021, 12:00 PM), https://www.cfr.org/backgrounder/taliban-afghanistan [https://perma.cc/3Q2H-Z8VJ]; Clark, *supra* note 12, at 2.

254. *See* Clark, *supra* note 12, at 2.

255. *See id.*

256. *See id.*

257. *See id.*

258. *See id.*

259. *See id.* at 25-26.

260. *See id.* at 13; *Frontline: Kill/Capture* (PBS television broadcast May 10, 2011).

261. *See id.* at 17.

262. *See* Brennan, *supra* note 214.

3. The Trump Administration's Erosion of Distinction Protocols

While the Trump administration preserved much of the PPG, its replacement policy, Principles, Standards and Procedures ("PSP") significantly departed from the PPG in two key areas. First, the policy scraped the "continuing, imminent threat" requisite.[263] Second, the PSP relaxed much of the high-level vetting taking place to authorize a drone strike, presenting serious verification concerns.[264] To the first point, lowering the bar from high-level militants to foot-soldier jihadis increases the probability that the principle of distinction outlined in *jus in bello* will not be satisfied when carrying out a strike. This is because international humanitarian law dictates that only combatants may be the object of an attack.[265] A high-profile terrorist leader known to the US government is an identifiable combatant; but an individual with no confirmed identity who is not part of a terrorist organization but has participated in attenuated hostile activity may not rise to the level of combatant, and therefore his killing can be considered an attack on a civilian.[266]

To the second point, identifying a terrorist combatant for purposes of distinction requires a large collection of intelligence to be gathered through the combined effort of both civilian and military agencies.[267] President Trump's relaxing of the inter-agency review process at the highest levels of government as well as his removal of the President from the decision-making process for kill list nomination granted significantly more discretion to agencies that subsequently increased the number of drone strikes conducted.[268] A failure to vigorously vet targets nominated to the kill list increases the potential that the United States will target and kill non-combatant civilians.

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263. *See* Luke Hartig, *Trump's New Drone Strike Policy: What's Different? Why it Matters*, JUST SEC. (Sept. 22, 2017), https://www.justsecurity.org/45227/trumps-drone-strike-policy-different-matters/ [https://perma.cc/5Q8Y-NY8E].

264. *See* Charlie Savage & Eric Schmitt, *Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids*, N.Y. TIMES (Sept. 21, 2017), https://www.nytimes.com/2017/09/21/us/politics/trump-drone-strikes-commando-raids-rules.html [https://perma.cc/6WEV-KBMA].

265. Davis et al., *supra* note 19, at 7.

266. *See* discussion *supra* Section III.A.1.

267. *See* McNeal, *supra* note 201, at 736.

268. *See* Elena Chachko, *Administrative National Security*, 108 GEO. L.J. 1063, 1085 (2020).

IV. RECOMMENDATIONS FOR THE UNITED STATES

The United States' hesitance to clearly define imminence and its unsuccessful implementation of accountability practices has expanded the circumstances under which someone may be the object of a targeted drone strike and who can be the target of such a strike, threatening US national security and endangering the lives of innocent civilians. Unpredictable invocation of Article 51 by the United States in its military operations raises the risk that other nations will likewise appeal to Article 51 whenever it is convenient to advance their military and foreign policy objectives.[269] This will destabilize international expectations of when the use of armed force is legally acceptable.[270] The United States has also failed to safeguard innocent civilians from being the object of attack through its insufficient accountability measures.[271] Section IV.A recommends that the United States clearly define its interpretation of Article 51 by adopting the Chatham principles which both consider the evolving nature of terrorist threats without dispensing the spirit of Article 51 as an exception to a prohibition on the use of force. Section IV.B advocates that in order to ensure greater accountability by the government, the United States should pursue legislative action that would increase the avenues by which victims of unlawful targeted killings may seek redress.

A. Stabilizing the US Interpretation of the Imminence Requirement

Imminence is not a standard, rather it is a concept that must be implemented via a standard.[272] As discussed in Section II.A.2, the term "imminent" is not present in Article 51 of the UN Charter.[273] This suggests that either Article 51 has developed a new meaning through a process of interpretation, or that a new rule of customary international law has emerged to supersede Article 51.[274] It is clear that over time an imminence requirement has been

269. *See* discussion *supra* Section II.C.
270. *See* discussion *supra* Section II.C.
271. *See* discussion *supra* Section III.B.
272. O'Connell, *supra* note 8, at 51.
273. *See supra* Section II.A.2; U.N. Charter art. 51.
274. O'Connell, *supra* note 8, at 7.

read into Article 51 and has been utilized by States to resort to force in self-defense before an armed attack occurs.

The current interpretation of the text of Article 51, which allows for the "inherent right of individual or collective self-defense *if an armed attack occurs*" presents many issues.[275] This interpretation's "imminent threat" standard does not neatly correspond with the text of Article 51 which refrains from using wording that authorizes use of force in anticipation of an armed attack.[276] The broadening of the interpretation of imminence threatens to erode the concept of imminence altogether by allowing States to circumvent the prohibition on the use of force in Article 2(4).

There are three different paths that the United States can take moving forward. First, the United States can continue to expand the concept of imminence as it sees fit to carry out its national security objectives. Currently, the United States interprets Article 51 to allow for anticipatory self-defense in the context of an imminent threat by non-state actors.[277] However, as discussed, recent targeted killings suggest that strikes are being conducted preemptively, only on the mere possibility of an attack at some unspecified, future period of time.[278] On the other end of the spectrum, the second option is to begin the process of reverting to the textualist interpretation of Article 51, phasing out the application of imminence as a justification for the use of force, and only resorting to force after an armed attack has occurred by a State-actor. Lastly, the United States can strike a balance between its legitimate counterterrorism objectives and its adherence to international law by resorting to force only in relation to an imminent and ongoing armed attack by both State and non-State actors. Weighing all three of these options, option three presents the most feasible solution that both complies with international law and considers the reality that terrorism presents for the United States.

275. *See* U.N. Charter art. 51.
276. O'Connell, *supra* note 8, at 7.
277. DEP'T OF JUST. WHITE PAPER, *supra* note 61.
278. *See* Helene Cooper et al., *supra* note 97.

This third option is an articulation of the Chatham principles.[279] The principles provide that (1) the law on self-defense encompasses more than the right to use force in response to an ongoing attack and (2) force may be used in self-defense only in relation to an "armed attack" whether imminent or ongoing.[280] In this context, "imminent attack" is described as one in which there is "no practical alternative to the proposed use of force that is likely to be effective in ending or averting the attack."[281] The text of Article 51 requires that an armed attack is underway, and the Chatham principles comply with this requirement. [282] The Obama and Trump administrations disposed of the requirement of an armed attack, pulling the word "imminence" from the Chatham Principles and converting the standard to one of an imminent threat.[283] The Department of Justice under the Obama administration went so far as to say that there need not be clear evidence of a specific attack on a US person or interests in the immediate future to warrant the use of force in self-defense.[284] This can hardly be characterized as a requirement at all, and disregards the text of Article 51 and the purpose of its enactment.[285] Moreover, this solution proposes an imminence

279. Chatham House is an independent international affairs think tank with a history dating back to the First World War that provides analysis on key issues that defined the twentieth century. Some impactful projects undertaken by the institute include helping to develop financial stability after the Second World War, providing a platform for African leaders during decolonization, and assisting nations in combatting climate change. *See About Us*, CHATHAM HOUSE, https://www.chathamhouse.org/about-us [https://perma.cc/CY75-U54Y] (last visited Apr. 9, 2021); *Our History*, CHATHAM HOUSE, https://www.chathamhouse.org/about-us/our-history [https://perma.cc/4V9F-C6W4] (last visited Sept.. 24, 2021).

280. *See* Elizabeth Wilmshurst, *Principles of International Law on the Use of Force by States in Self-Defense*, CHATHAM HOUSE 1, 4-5 (Oct. 1, 2005), https://www.chathamhouse.org/2005/10/principles-international-law-use-force-states-self-defence [https://perma.cc/Z7ZK-X4UA].

281. *See id.*

282. Many scholars interpret Article 51's language of "if an armed attack occurs" as the right to intercept an attack in progress. This is because the "occurs" can mean "has occurred" just as much as it can mean "is occurring." O'Connell, *supra* note 8, at 41.

283. *See* DEP'T OF JUST. WHITE PAPER, *supra* note 61; *see also* Stephen W. Preston, Gen. Couns. Dep't Defense, Annual Meeting of the American Society of International Law: The Legal Framework for the United States' Use of Military Force Since 9/11 (Apr. 10, 2015).

284. *See* DEP'T OF JUST. WHITE PAPER, *supra* note 61; *See* Preston, *supra* note 283.

285. During the development process of Article 2(4), a UN delegate clarified that Article 2(4) was to be interpreted "in the broadest terms an absolute all-inclusive prohibition" to ensure there were no loopholes. *See* Edward Gordon, *Article 2(4) in Historical* Context, 10 Yale L.J. 271, 276 (1985).

interpretation broader than the text of Article 51, in that it does not require that a State wait to resort to force in self-defense until after an armed attack has occurred, but not so broad as to allow an invocation of Article 51 without an imminent or ongoing attack that leaves a State with no practical alternatives.

The Chatham principles leave room for an imminence interpretation that acknowledges the danger of terrorism today. The Chatham House approach permits governments to determine what counts as "no practical alternative . . . that is likely to be effective."[286] Therefore, it maintains the spirit of Article 51 that imminence is a temporal requirement which requires the United States to produce evidence that there is at least an attack being planned. However, it leaves up for interpretation the evidence necessary for determining "practical alternatives."

B. Establishing Accountability Through Legislative Action

1. The Judiciary is Not Suited to Set a Scheme for Providing Redress to Victims

Under the Obama administration the Executive Branch attempted to increase accountability by publishing the PPG[287] and assuring Americans that rigorous review of admittance to the kill list and authorization of drone strikes was being conducted at the highest levels of government.[288] Yet, innocent civilians are still being targeted.[289] The most realistic option to enact change in the sphere of accountability would be for Congress to act.

It is worth discussing why Congress, rather than the judiciary, is better suited for this role. Most national security issues cannot be challenged through coercive measures such as injunctive,

286. O'Connell, *supra* note 8, at 42.

287. *See* Off. of the Press Sec'y, *Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities*, OBAMA WHITEHOUSE ARCHIVES (May 23, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism [https://perma.cc/K8X2-46LA].

288. *See* Brennan, *supra* note 214; President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013).

289. *See* Zaidan, 317 F. Supp. at 14; *see also* Clark, *supra* note 12.

habeas corpus, or Administrative Procedure Act ("APA") claims,[290] and thus are brought through a claim for damages.[291] In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, the Court authorized "an implied cause of action to remedy a constitutional violation" through a suit for money damages against the responsible federal official(s).[292] For some time, *Bivens* was seen to serve many vital needs, such as vindicating the Constitution, providing compensation and redress for wrongs, maintaining the rule of law, and deterring federal government violation of the Constitution.[293] Some scholars have suggested that a *Bivens* claim is a plausible mode of redress for family members of those killed unlawfully through the US targeted killing program, and establishes civil liability for officials whose conduct in approving or carrying out the strike violated the Constitution.[294]

However, the Supreme Court has repeatedly rejected a *Bivens* approach to national security claims on separation of power grounds.[295] After 9/11 the courts were inundated with suits for money damages against US officials,[296] but the Federal Courts of Appeals unanimously held that *Bivens* suits involving sensitive national security or foreign relations issues were inappropriate.[297] This was nearly solidified in *Ziglar v. Abbasi* and in *Hernandez v. Mesa* where the Court held that national security policy is the realm of Congress and the President, and that judicial intervention to hold an officer personally liable while acting in a national security capacity would create over-deterrence in that officer's abilities to

290. For example, tortious action must be conducted pursuant to official policy, and represent final agency action to be challenged under the Administrative Procedure Act. Additionally, if there is no detention, a writ of habeas corpus is inaccessible. Lastly, if the challenged government wrong is no longer occurring and is unlikely to reoccur (such as a targeted killing on an individual), injunction cannot be sought. *See* Andrew Kent, *Redressing National Security Torts in the Post-Bivens Era in* JUDGING NATIONAL SECURITY: THE EVOLVING JUDICIAL ROLE IN NATIONAL SECURITY CASES (forthcoming 2020/2021) (manuscript at 1) (on file with author).

291. *See id.*

292. Ziglar v. Abbasi, 137 S. Ct. 1843, 1855 (2017); *See* Kent, *supra* note 290 (manuscript at 2).

293. *See* Kent, *supra* note 290 (manuscript at 4-5).

294. *See* Jameel Jaffar, *Judicial Review of Targeted Killings*, HARV. L. REV. F. (Apr. 9, 2013), https://harvardlawreview.org/2013/04/judicial-review-of-targeted-killings/ [https://perma.cc/V96N-AG6W].

295. *See* Kent, *supra* note 290 (manuscript at 2).

296. *See id.*

297. *See id.*

carry out their functions.[298] Accordingly, it seems that the courts have passed the onus of accountability for targeted killings onto Congress and the President.

2. Congress Should Amend Standing Legislation

Creating a system of redress for victims of national security violations will be most effective through legislative action. One option would be for Congress to expand the Torture Victims Protection Act ("TVPA").[299] The TVPA gives rights to US citizens and non-US citizens to bring claims in US courts for torture and extrajudicial killing committed in foreign countries.[300] TVPA suits can be filed against individuals acting in their official capacity for any *foreign nation*.[301] Presently, US government actors can never be sued under this statute.[302] However, Congress can amend the TVPA to allow civil suits to be brought against individuals acting in their official capacity for the United States.

The TVPA was enacted to implement certain aspects of the international Convention Against Torture, a non-self-executing treaty[303] to which the United States is a party.[304] The Convention obligates state parties to adopt measures to ensure that those committing torture and extrajudicial killings are held legally accountable for their acts.[305] The Senate committee report outlined the need for the TVPA, stating that "[o]fficial torture and summary execution violate standards accepted by virtually every nation," and while "[t]his universal consensus condemning these practices has assumed the status of customary international law," many nations still tolerate and employ such acts.[306] In order to fully capture the purpose and spirit of the Convention Against Torture,

298. *Id.* (manuscript at 9-10).
299. *Id.* (manuscript at 13).
300. Torture Victims Protections Act, 28 U.S.C. § 1350.
301. *Id.*
302. *See* Kent, *supra* note 290 (manuscript at 13).
303. A self-executing treaty is one that may be directly applied in the courts, whereas a non-self-executing treaty is one that requires legislative implementation before it may be applied by the courts (and other domestic law-applying officials). Carlos Vasquez, Professor, Georgetown University, The Distinction Between Self-Executing and Non-Self-Executing Treaties in International Law (May 10, 2018).
304. STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 198 (Wolters Kluwer eds., 6th ed. 2016).
305. S. REP. NO. 102-249, at 3 (1991).
306. *Id.*

the United States should have created a cause of action for torture and extrajudicial killing by individuals acting in capacity of the US government.[307] There is no explanation as to why this was not done. Doing so would only serve to promote the intent of the TVPA, which is to hold perpetrators of torture and extrajudicial killings legally accountable.[308]

Another option for Congress to provide redress for victims of targeted killings by the US government would be to add a civil provision to the War Crimes Act of 1996 ("WCA").[309] The WCA criminalizes "grave breaches" of international humanitarian law as laid out in Common Article 3 of the 1949 Geneva Conventions.[310] "Grave breaches" include torture, rape, and murder, among other specified violations.[311] Congress specifically ratified the WCA in order to adhere to the Geneva Convention's requirement that parties to the Convention impose effective penal sanctions on persons who commit a "grave breach" of those Conventions.[312] The Act applies regardless of whether the offense occurs inside or outside the United States.[313]

The United States Supreme Court has ruled that the United States is in a non-international armed conflict with al-Qaeda and its associated forces, and that this armed conflict is governed by international humanitarian law.[314] The WCA exists to penalize violators of international humanitarian law, and therefore, a civil remedy under the WCA could help victims of targeted killings by US personnel pursuant to this armed conflict.[315] The United States has never prosecuted anyone under the WCA, however, and therefore its scope remains untested.[316]

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307. *See* Kent, *supra* note 290 (manuscript at 13).

308. *See* S. REP. NO. 102-249, at 3 (1991); *See* Kent, *supra* note 290 (manuscript at 13).

309. *See* Kent, *supra* note 290 (manuscript at 14).

310. 18 U.S.C. § 2441.

311. *See* MICHAEL JOHN GARCIA, CONG. RSCH. SERV., RL 733662 THE WAR CRIMES ACT: CURRENT ISSUES 6 (2009).

312. *See id.* at 1.

313. *See id.*

314. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 628-631 (2006).

315. *See* Kent, *supra* note 290 (manuscript at 14).

316. Oona Hathaway et al., *The US, the War on Yemen, and the War Crimes Act – Part I*, JUST SEC. (Apr. 2, 2018), https://www.justsecurity.org/54444/us-war-yemen-war-crimes-act/ [https://perma.cc/97L2-NSM3].

3. A Rulemaking Solution to Increasing Accountability

Another way to help solve the problem of accountability as it relates to the United States' interpretation of international law for purposes of implementing targeted killings, is for the Department of State ("DOS") to promulgate a rule clearly defining the requirements and restrictions international humanitarian law places on the exercise of targeted killings. Then, the DOS could make violators of that rule civilly liable. The DOS is the United States' leading authority on foreign policy and therefore has the expertise, the resources, and the influence to implement a rule solidifying the bounds in which the United States can act. This solution would require Congress to pass a statute delegating rulemaking authority to the DOS on the issue.

The Supreme Court has held that Congress can delegate authority to administrative agencies to pass regulations that have the force of law as long as the legislature lays out an intelligible principle to which administrators can conform.[317] Congress may pass a statute that specifically directs an agency to accomplish a particular problem or solve a certain goal.[318] Rules relating to military and foreign affairs, such as this proposed solution, are exempt from formal notice and comment rulemaking procedures[319] under the Administrative Procedure Act[320] and can be directly implemented through publication to the Federal Register.[321]

One issue with this proposed solution is that since the rule would not have to go through formal rulemaking or notice and

317. *See* Whitman v. Am. Trucking Ass'n, Inc., 531 U.S. 457, 474-476 (2001); LINDA D. JELLUM, MASTERING LEGISLATION, REGULATION, AND STATUTORY INTERPRETATION 355-56 (Carolina Academic Press eds., 3rd ed. 2020).

318. OFFICE OF THE FEDERAL REGISTER, A GUIDE TO THE RULEMAKING PROCESS 2 (2011), https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf [https://perma.cc/6D8K-9ADS].

319. There are three different processes by which agencies can promulgate rules. The first is formal rulemaking, which requires a hearing with trial-like procedures. The second is notice and comment rulemaking, which requires an agency to publish notice of its proposed rule in the Federal Register and to solicit and respond to comments from the public and others about the proposed rule. The last process is publication rulemaking, which allows direct publication of a rule to the Federal Register. *See* JELLUM, *supra* note 317, at 356-58.

320. The Administrative Procedure Act governs the process in which administrative agencies construct and promulgate regulations. 5 U.S.C. § 551.

321. *See* 5 U.S.C. § 553(a).

comment, there is less process involved with publishing it, and therefore less process involved in amending or repealing it.[322] Accordingly, its enactment and enforcement may rest on the political inclinations of changing administrations. Although the rule may not have to undergo notice and comment to be repealed, it may, however, find a haven in the APA's prohibition against agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[323] The "arbitrary and capricious" standard requires that an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[324] The APA's arbitrary and capricious standard applies both when an agency issues a rule and when it rescinds an earlier rule.[325] The Supreme Court has held that agencies must supply a "reasoned analysis" when it changes course by rescinding a rule.[326] The agency must explain the change from its prior regulatory approach, address prior factual findings that contradict those underlying the new policy, and consider "serious reliance interests" that are affected by a change in policy.[327] Therefore, repealing a finalized rule by the DOS would still require a level of review, safeguarding it from instantaneous repeal.

V. CONCLUSION

Following the 9/11 terrorist attacks, the United States has proliferated its use of targeted drone strikes to combat terrorism, expanding the circumstances under which a targeted drone strike may be conducted as well as the pool of individuals it deems eligible to be the object of a targeted drone attack. This proliferation is due to US maneuvering of the imminence requirement under Article 51 and a lack of effective accountability measures for targeted drone strikes. Both mechanisms present distinct legal issues with national security ramifications.

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322. *See* 16 C.F.R. § 1.15 (2012).

323. 5 U.S.C. § 706(2)(A).

324. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983).

325. *See* DANIEL J. SHEFFNER & KATE R. BOWERS, CONG. RSCH. SERV., LSB 10566 RESPONSES TO MIDNIGHT RULEMAKING: LEGAL ISSUES 4 (2021).

326. Motor Vehicle Mfrs. Ass'n, 463 U.S. at 42 (1983).

327. *See* SHEFFNER & BOWERS, *supra* note 325, at 2120.

First, each US administration since 2001 has modified the concept of imminence to fit its military and foreign policy objectives. Inconsistency in application of the imminence requirement by the United States has cleared the way for other nations to similarly manipulate the requirement to fit their goals, creating an international atmosphere of unpredictability in the use of force in self-defense. To help solve this problem, the United States should stabilize its imminence interpretation by considering both its counterterrorism goals and adherence to international law, and resort to force only in relation to an imminent and ongoing armed attack by a State or non-State actor.

Second, US government officials are not being held accountable for violations of international humanitarian law. The lack of accountability for US officials is both a cause and a product of innocent civilians being nominated to the kill list and in some instances, actually killed when the United States fails to verify its targets. In order to increase accountability amongst those nominating and authorizing targeted killings, the United States should call on Congress to amend and implement legislation for victims to seek redress. With advances in technology that increase the risk of terrorism, and the advantages of the targeting killing program in addressing this increased risk,[328] the employment of targeted killings to fight terrorism is likely here to stay.[329] As a

328. The use of drones in executing targeting killings saves American lives. Because drones contain no human operators onboard, operators can engage in warfare from the safety of a military confine, alleviating the need to deploy soldiers into dangerous and politically sensitive areas. *See* Nathan R. Fields, Advantages and Challenges of Unmanned Aerial Vehicle Autonomy in the Postheroic Age at 25 (May 2012) (M.A thesis, James Madison University) (on file with James Madison University).

329. While this Note does not analyze the Biden administration's targeted drone strike policies, it is relevant to consider that the Biden administration had hoped to release an official updated drone policy for strikes in countries where the US is not at war by the twentieth anniversary of the 9/11 attacks. Its expected approach was to reimplement the Obama era policy of high-level interagency vetting while maintaining part of the Trump administration blueprint that allows commanders greater latitude in the field to carry out strikes in countries like Somalia and Afghanistan. Just after President Biden took office, the administration released a policy directive that all drone strikes away from battlefield zones needed White House approval before an official policy went into place in September 2021. However, military commanders have already proven that they can sidestep existing rules regarding the execution of drone strikes outside of conventional battle zones. The military's Africa Command carried out three drone strikes against the al-Qaida militant group Al-Shabab in Somalia in late July and early August without White House approval, invoking the rule's "self-defense" exception. And while the Biden administration claims to be taking an approach that would provide greater safety to civilians than Trump's PSP, ten

global leader, the United States must reevaluate its approach to targeted killings and act to ensure its compliance with international law in its operations going forward.

civilians, eight of them children, were killed in a strike in Afghanistan on August 29, 2021, that was conducted to thwart a purported planned attack by the Islamic State. Given the recent turbulence in Afghanistan, the administration has not met its September 2021 deadline, and their initial plans to better adhere to international humanitarian law and increase mechanisms of accountability are in flux. *See* Charlie Savage, *Afghanistan Collapse and Strikes in Somalia Raise Snags for Drone Warfare Rules*, N.Y. TIMES (Aug. 28, 2021), https://www.nytimes.com/2021/08/28/us/politics/biden-drones.html [https://perma.cc/5MU7-HHSQ]; Susannah George, *10 Civilians Killed in US Drone Strike in Kabul, Family Says*, WASH. POST (Aug. 30, 2021), https://www.washingtonpost.com/world/2021/08/30/drone-civilians-islamic-state/ [https://perma.cc/LQ4B-LJDE].