

# Information Lawfare: Messaging and the Moral High Ground

Jill I. Goldenziel\*

*The U.S. legal system is known as the envy of the world. Yet law as an instrument of national power has been woefully understudied. Traditional academic frameworks for studying the instruments of national power do not consider the full potential of law to be used as a weapon of war between states, a concept known as “Lawfare.” Meanwhile, U.S. adversaries understand that law can be a potent weapon, both to achieve concrete military objectives and to win battles in the information domain, and have wielded it against the United States. As war escalates in the information realm, information lawfare will be a critical piece of any participant’s strategy. Through a case study of the United States’ strike that killed Iranian Major General Soleimani in January 2020, this article demonstrates how information lawfare can be used, and why the United States must develop its offensive and defensive lawfare capabilities.*

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## INTRODUCTION

The U.S. legal system is known as the envy of the world. Yet law as an instrument of national power has been woefully underutilized. Law has tremendous potential to be used as a weapon of war between states, a concept known as

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\* Professor of International Law and International Relations, Marine Corps University-Command and Staff College. Dean’s Visiting Scholar, Georgetown University Law Center. Thank you to Laurie Blank, Colonel Thomas Gordon (USMC) (Ret.), Michael Pine, and students in my 2020 Lawfare and Information Operations Elective for helpful conversations. A version of this article won a prize in the 2020 Air Force Judge Advocate General School National Security Law Writing Competition. This article draws from two blog posts written by the author shortly after the Soleimani strike: Jill Goldenziel, *Analyzing the Legality of the Soleimani Strike*, BALKANIZATION, (Jan. 7, 2020), <https://perma.cc/UR6P-YJ3X>; Jill Goldenziel, *Iran and the Rhetoric of International Law*, BALKANIZATION (Jan. 10, 2020), <https://perma.cc/8JDU-ZT3M>. My views do not necessarily represent those of Marine Corps University, the Department of Defense, or any other arm of the U.S. Government. © 2021, Jill I. Goldenziel.

“Lawfare.” Meanwhile, U.S. adversaries understand that law can be a potent weapon, both to achieve concrete military objectives and to win battles in the information domain, and have wielded it against the United States.

A new endless war has already begun in the information realm. As it escalates, the United States must position itself to fight using its entire arsenal. To do so, the United States must develop its offensive and defensive lawfare capabilities. Information lawfare will be critical to the entire spectrum of competition with other nations, including armed conflict, because of its power to win hearts and minds and justify the legitimacy of a nation’s actions. As a first step, the United States must develop an understanding of how lawfare can enhance its national power. A complete discussion of the United States’ lawfare capabilities lies far beyond the scope of this essay; I have developed the concept more fully elsewhere.<sup>1</sup> This essay will focus specifically on the type of lawfare that I call “information lawfare.”

This essay will proceed in four parts. First, I will define information lawfare and explain why it is critical to military operations against U.S. adversaries. Then I will discuss the case study of information lawfare surrounding the United States’ killing of Iranian Major General Qassem Soleimani in January of 2020. The United States lost the information lawfare battle surrounding Soleimani’s death, as commentators both within and outside of the United States quickly portrayed the killing as illegal under domestic and international law. Iran seized the moment to paint the United States’ actions as illegal and its own response as law-abiding, with little pushback from the United States. The essay will conclude by discussing how the United States could have used information lawfare to better manage the fallout from the Soleimani strike. It will then discuss how the United States can better develop its information lawfare capabilities.

## I. WHAT IS INFORMATION LAWFARE?

In the United States, the precise definition of lawfare has been contested. Although the 2017 National Security Strategy expresses concern with U.S. adversaries’ use of the legal domain, the term “lawfare” does not appear in U.S. military doctrine or official publications, even though the concept features prominently in the United Kingdom’s and NATO’s.<sup>2</sup> In the academic literature,

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1. Jill Goldenziel, *Law as a Battlefield: The U.S., China, and Global Escalation of Lawfare*, 106 CORNELL L. REV. 1085 (2021) (forthcoming, 2021).

2. MULTI-DOMAIN INTEGRATION, DEVELOPMENT, CONCEPTS AND DOCTRINE CENTRE, UK MINISTRY OF DEFENCE (2020), <https://perma.cc/CG83-G2DX>; THE INTEGRATED OPERATING CONCEPT 2025, UK MINISTRY OF DEFENCE (2020), <https://perma.cc/V288-Q3SA>; NATO primarily refers to lawfare as “Legal Operations.” See Major General Barre R. Seguin, Deputy Chief of Staff, SHAPE, The Use of Legal Operations in a Context of Hybrid Threats and Strategic Competition, Keynote Address at the Foundation for Defense of Democracies’ Symposium: Waging and Defending Against Lawfare, in Major General Charlie Dunlap, *A Warfighter’s Perspective on “Lawfare” in an Era of Hybrid Threats and Strategic Competition*, Lawfare (Mar. 13, 2020), <https://perma.cc/2L45-EPPR>; see also Rodrigo Vázquez Benítez, *Legal Operations: The Use of Law as an Instrument of Power in the Context of Hybrid Threats and Strategic Competition*, NATO LEGAL GAZETTE, Oct. 2020, at 139. The Office of the Legal

then-Colonel Charles Dunlap first defined the term in 2001 as “a method of warfare where law is used as a means of realizing a military objective.”<sup>3</sup> The term has primarily been used by Dunlap and subsequent commentators to refer to “battlefield-exploitation lawfare,”<sup>4</sup> also known as “compliance-leverage disparity lawfare.”<sup>5</sup> This type of lawfare is defined as exploitation of a country’s compliance with the law of armed conflict (LoAC). For example, the Islamic State, Hamas, and other violent non-state actors have employed human shields in facilities used for military purposes and launched attacks from religious sites.<sup>6</sup> These adversaries know that the United States and its coalition partners are unlikely to attack these sites so as to avoid harming civilians, civilian objects, and cultural property, in accordance with LoAC.<sup>7</sup>

This narrow definition of lawfare, however, does not capture the sophisticated ways in which states employ lawfare today.<sup>8</sup> China, for example, defined lawfare as a major part of its military strategy as early as 1999, and seeks to use it to undermine the United States’ legitimacy and hegemony in the international realm.<sup>9</sup> Lawfare is one of China’s “Three Warfares,” along with media or public opinion warfare, and psychological warfare.<sup>10</sup> China’s strategy is to use these three warfares complementarily, both domestically and internationally, to win the narrative of competition in peacetime and wartime, to weaken the enemy’s will

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Advisor at NATO’s Supreme Headquarters Allied Powers Europe (SHAPE), one of NATO’s strategic commands, has personnel working on lawfare.

3. Charles J. Dunlap, Jr., Colonel, USAF, *Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts* 4 (Nov. 29, 2001) (transcript available at <https://perma.cc/6DNE-6PXE>).

4. This term was coined by Professor Laurie Blank when she was a visiting speaker in my Lawfare and Information Operations Elective at Marine Corps University-Command and Staff College in January 2020.

5. ORDE F. KITTRIE, *LAWFARE: LAW AS A WEAPON OF WAR* 11 (2016).

6. *Id.* at 284-92; Jared Malsin, ‘They Just Took Us.’ *Mosul Civilians on Being Used as Human Shields by ISIS*, *TIME* (Mar. 30, 2017, 5:10 AM), <https://perma.cc/WSU6-AYYB>; Terri Moon Cronk, *DOD Spokesman: ISIS Deliberately Misuses Mosques*, *DEP’T OF DEF.* (Oct. 23, 2018), <https://perma.cc/2FWR-VYLV>.

7. *See, e.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, S. TREATY DOC. 106-1, 249 U.N.T.S. 216.

8. *DEP’T OF DEF., SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA: SHARPENING THE AMERICAN MILITARY’S COMPETITIVE EDGE* 2 (2018) (“China and Russia are now undermining the international order from within the system by exploiting its benefits while simultaneously undercutting its principles and ‘rules of the road.’”).

9. KITTRIE, *supra* note 5, at 162-63 (“Additional conceptual context for the PRC’s use of legal warfare is provided by a treatise titled *Unrestricted Warfare*, which was written by two PLA colonels . . . and published by the PLA in 1999. The treatise suggests various tactics—including legal warfare—that developing countries, in particular China, could use to compensate for their military inferiority vis-à-vis the United States.”).

10. For more discussion on how the Three Warfares can be used complementarily, see Goldenziel, *supra* note 1 at 1092-94.

to fight while bolstering its own, and to win hearts and minds.<sup>11</sup> Chinese lawfare, in particular, is designed to gain “legal principle superiority” over an adversary and delegitimize adversary actions.<sup>12</sup> Lawfare is seen as a form of combat in itself.<sup>13</sup> The Three Warfares are used in concert to garner international sympathy and support, a “powerful pillar to support the whole operational activity.”<sup>14</sup> Russia has copied China’s lawfare tactics, and other states and non-state actors have begun to employ them as well.<sup>15</sup>

Dunlap later modified his definition to define lawfare as “the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective.”<sup>16</sup> Building on Dunlap’s definition, Orde Kittrie introduced the term “instrumental lawfare,” which he defines as the use of law to achieve a military objective. U.S. sanctions against Iran to halt its nuclear program, for example, could have been achieved militarily, but at much higher cost. As states have increasingly employed lawfare in new ways, academics have not coalesced around a new definition of lawfare. A Cleveland Panel of Experts convened to create a definition of lawfare in 2010, without resolution.<sup>17</sup> The popular Lawfare Blog, begun in 2010, uses the term lawfare to include both Dunlap’s conception and national security law issues writ large.<sup>18</sup> In 2016, Joel Trachtman defined lawfare as “legal activity that supports, undermines, or substitutes for other types of warfare.”<sup>19</sup> Both definitions are too broad to be operationalized by the U.S. government and military. All warfare fought by the United States is rooted in law. To say that lawfare involves any use of law, or any national security matter, risks a definition too broad to provide useful guidance for policymakers and the military.

A contemporary definition of lawfare must consider how law can be used as a weapon of war and the information environment in which all military activity now occurs. Many states now utilize lawfare in a manner congruent with the Chinese conception, in concert with information and psychological operations, during peacetime and wartime, and at the strategic, operational, and tactical levels. Law can be used to weaken the adversary by creating facts on the ground, by advancing a narrative counter to what the adversary would like the public to

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11. STEFAN HALPER, CHINA: THE THREE WARFARES (2013) (This report was produced for the Office of Net Assessment of the Department of Defense.).

12. ELSA KANIA, *THE PLA’S LATEST STRATEGIC THINKING ON THE THREE WARFARES*, 16 China Brief 13 (Aug. 22, 2016), <https://perma.cc/X2XC-E57R> (discussing the 2015 Chinese National Defense University Science of Military Strategy).

13. DEAN CHENG, HERITAGE FOUND., *WINNING WITHOUT FIGHTING: CHINESE LEGAL WARFARE* (May 21, 2012), <https://perma.cc/79KD-PN55>.

14. *Id.*

15. See Goldenziel, *supra* note 1 at 1140–1156.

16. Charles Dunlap, *Lawfare Today: A Perspective*, YALE J. INT’L AFFAIRS 146 (Winter 2008).

17. Michael P. Scharf & Elizabeth Andersen, *Is Lawfare Worth Defining - Report of the Cleveland Experts Meeting - September 11, 2010*, 43 CASE W. RES. J. INT’L L. 11 (2010).

18. Lawfare Blog, <https://perma.cc/2L8U-6KMK>.

19. Joel P. Trachtman, *Integrating Lawfare and Warfare*, 39 B.C. J. OF INT’L & COMP. L. 267, 268 (2016).

believe, or to weaken the adversary's will to fight. It can be used in "legal preparation of the battlefield," for U.S. military or whole-of-government actions. And it is a critical tool for winning hearts and minds.

To reflect the use of lawfare by state and non-state actors and its potential as a weapon of war, I define lawfare as "1) the purposeful use of law taken toward a particular adversary with the goal of achieving a particular strategic, operational, or tactical objective, or 2) the purposeful use of law to bolster the legitimacy of one's own strategic, operational, or tactical objectives toward a particular adversary, or to weaken the legitimacy of a particular adversary's particular strategic, operational, or tactical objectives."<sup>20</sup> I further define "Information Lawfare" as "the use of law to control the narrative of the conflict."<sup>21</sup> For the United States, information lawfare would mean undermining the legitimacy of the adversary's cause for going to war, or the adversary's strategies, operations, or tactics used in and out of armed conflict.<sup>22</sup> The United States can also use information lawfare to bolster its own legitimacy with the international and domestic public, and with its own military by emphasizing the justness and legality of its cause. Lawfare is more than the adoption of law involving a foreign nation, and does not include all *jus ad bellum* or *jus in bello* actions. To be lawfare, laws and legal actions must be employed with an explicit purpose, against a particular adversary, and to achieve a specific objective.

These definitions of lawfare and information lawfare can be operationalized by policymakers and the military. The United States is positioned to fight lawfare, and to win. An improved U.S. lawfare strategy is especially crucial in the information realm.

## II. INFORMATION LAWFARE CASE STUDY: THE SOLEIMANI STRIKE

The killing of Iranian Major General Qassem Soleimani and several others in his convoy on January 3, 2020, spurred immediate criticism of the United States, both domestically and internationally.<sup>23</sup> Soleimani was the leader of the Quds force of the Islamic Revolutionary Guard Corps, a commander of the Iran-backed

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20. See Goldenziel, *supra* note 1 at 1097.

21. *Id.* at 1099

22. Legitimacy, as defined by Max Weber, is having certain beliefs or a faith in regard to a political system: "the basis of every system of authority, and correspondingly of every kind of willingness to obey, is a belief, a belief by virtue of which persons exercising authority are lent prestige." *Political Legitimacy*, STANFORD ENCYCLOPEDIA OF POLITICAL PHILOSOPHY (Apr. 24, 2017), <https://perma.cc/S2ME-P7TN>; see also MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 382 (Talcott Parsons ed., 1964).

23. See, e.g., David Leonhardt, *No One Believes Trump*, N.Y. TIMES (Jan. 7, 2020), <https://perma.cc/UEY6-P45F> (summarizing criticism of the legality of the strike in prominent U.S. media outlets); Neil Vigdor, *Killing of Iranian Commander is Met with Criticism and Tough Talk*, N.Y. TIMES (Jan. 2, 2020), <https://perma.cc/H4WK-K4HF>; Colby Itkowitz & Hannah Knowles, *U.S. strike on top Iranian commander sharply divides Congress*, WASH. POST (Jan. 3, 2020, 12:51 PM), <https://perma.cc/TP7V-H62C> (summarizing criticism of the strike by U.S. politicians, including its legality); *The Killing of Gen. Qassim Suleimani: What We Know Since the U.S. Airstrike*, N.Y. TIMES (Jan. 3, 2020), <https://perma.cc/HKV4-L3GP> (quoting a U.N. expert who said the strike was most likely illegal).

Shia paramilitary group Kata'ib Hezbollah, which operates in Iraq; and the architect of many lethal operations against U.S. forces over the past 20 years. Kata'ib Hezbollah is designated as a terrorist organization by the United States. Soleimani was killed, along with several Iraqi militia officials, in a missile strike in Iraq.<sup>24</sup> Critiques of the legality of the strike in the media quickly undermined the legitimacy of U.S. actions. Iran seized upon ambiguity about the legality of the strike and began to use information warfare against the United States. The United States could have won the battle for public opinion through proper planning and coordination between its Judge Advocates and public affairs officers. Its failure to do so may mean lasting damage to public views of the legitimacy of U.S. military actions.

### A. *The United States' Muddled Legal Messaging*

The United States initially asserted no legal rationale for the killing of General Soleimani—sparking immediate and widespread debate about the legality of the strike.<sup>25</sup> Many media reports misunderstood the complicated issues involved in any determination of the legality of the strike, which involved considerations under both U.S. and international law. Legality of the strike under one does not equate to legality under the other.

#### 1. Legality of the Strike Under U.S. Law

More confusion about the legality of the strike stemmed from the Trump administration's conflicting statements about the legal rationale for the strike in the weeks that followed.<sup>26</sup> Some government officials, like Vice President Michael Pence, initially argued that the 2001 and 2002 Authorizations to Use

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24. Michael Crowley, Falih Hassan & Eric Schmitt, *U.S. Strike in Iraq Kills Qasim Soleimani, Commander of Iranian Forces*, N.Y. TIMES (Jan. 2, 2020), <https://perma.cc/M7Q3-3RDZ>.

25. See, e.g., Oona A. Hathaway, *The Soleimani Strike Defied the U.S. Constitution*, ATLANTIC (Jan. 4, 2020) <https://perma.cc/7FA3-FHGF>; Rebecca Ingber & Adil Ahmad Haque, *Iran's Shifting Views on Self-Defense and 'Intraterritorial' Force*, JUST SECURITY (July 3, 2019), <https://perma.cc/U59W-XD7H>. For an example of how the United States could have gotten ahead of the narrative, see Major General (ret.) Charlie Dunlap, *The killing of General Soleimani was lawful self-defense, not "assassination"*, LAWFIRE BLOG (Jan. 3, 2020), <https://perma.cc/8U2A-X8E8>; Jill Goldenziel, *Analyzing the Legality of the Soleimani Strike*, INT'L J. CONST. L. BLOG (Jan. 7, 2020) <https://perma.cc/96D9-AZFC>.

26. See Aaron Blake, *Pence's Dubious Tweet Tying Qasem Soleimani to 9/11*, WASH. POST (Jan. 3, 2020, 6:37 PM), <https://perma.cc/4K2V-9SW7> (citing President Pence offering Soleimani's ties to 9/11 as the basis for the legality of the strike); Aaron Rupar, *Pompeo's Shifting Reasons for Killing Soleimani Puts the Strike on Shaky Legal Ground*, VOX (Jan. 7, 2020, 4:10 PM), <https://perma.cc/8N9J-2Y34> (citing a DoD statement shortly after the strike stating it was about self-defense; also citing Secretary of State Michael Pompeo backtracking on "imminence" as the rationale for the strike); AP, *Trump Administration Briefs Congress on Soleimani Killing, Democrats Say Case Was 'Profoundly Unconvincing'*, CNBC (Jan. 8, 2020, 6:58 PM), <https://perma.cc/SF8T-LFPP> (citing dubious intelligence on imminence of the strike in a Congressional briefing); Brian W. Everstine, *Esper: Soleimani 'Days' Away From Attack on Americans When Killed*, AIR FORCE MAG. (Jan. 7, 2020), <https://perma.cc/755J-G8YB> (citing Defense Secretary Mark Esper offering a rationale of imminence); Catie Edmondson, *White House Memo Justifying Suleimani Strike Cites No Imminent*, N.Y. TIMES (Feb. 14, 2020), <https://perma.cc/9WE7-BHLF> (citing a White House memo of February 14, 2020 providing no evidence of an imminent threat before the Soleimani assassination).



Military Force (AUMFs) provided a legal basis for Soleimani's killing.<sup>27</sup> However, most commentators found this interpretation of the AUMFs to be insufficient.<sup>28</sup> The 2001 AUMF, passed just after 9/11, authorized the President to use force against al Qaeda and the Taliban. The executive branch, dating back at least to the George W. Bush and Obama administrations, has interpreted the statute to authorize the use of force against associated forces, such as the Islamic State. These interpretations themselves have been highly criticized. Administration officials offered no further justification to link the use of force against Soleimani to Al Qaeda or the Taliban. The 2002 AUMF authorized the President "to defend the national security of the United States against the continuing threat posed by Iraq."<sup>29</sup> However, the Trump administration offered no evidence that Soleimani's killing was part of the continuing threat posed by Iraq.

Even without statutory authority, however, the President may have had authority to order the strike without Congressional approval under Article II of the Constitution. Most commentators agree that the President has authority to act in self-defense against an imminent attack. Initially, however, the U.S. government did not release any facts to support the assertion that the killing of Soleimani was justified by imminence. Even when attacks are not imminent, the executive branch has interpreted the President's Article II powers to allow some military operations.<sup>30</sup> Congress has repeatedly refrained from restraining these powers, as evidenced by their refusal to amend the 2001 and 2002 AUMFs, in the face of much criticism.<sup>31</sup> President Trump may not have notified Congress of the strikes in a timely or appropriate manner. However, recent precedent suggests that he had legal authority to order them.

Even assuming President Trump's authorization of the strike were legally permissible, it is troubling that Trump administration officials were inconsistent in their legal justifications for the strike. The legal team of any competent lawmaker should have known that assertions that the 2001 and 2002 AUMFs provided the legal basis for the strikes would be criticized. A question arises, then, as to why government officials did not initially rely on the more solid Article II justification—and the precedent set by past administrations in using it.<sup>32</sup> Both justifications would have been subject to criticism. However, consistent statements by the Trump

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27. Blake, *supra* note 26.

28. See, e.g., Goldsmith Lawfare article Cited above.

29. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (codified at 50 U.S.C. § 1541 note (2018)).

30. Scott R. Anderson, *Did the President Have the Domestic Legal Authority to Kill Qassem Soleimani?*, LAWFARE BLOG (Jan. 3, 2020, 4:49 PM), <https://perma.cc/MH9S-GJNN>.

31. As of this writing, Congress is considering repeal or revision of the 2001 and 2002 AUMFs. Charlie Savage, *Biden Seeks Update for a Much-Stretched Law that Authorizes the War on Terrorism*, N.Y. TIME (Mar. 5, 2021), <https://perma.cc/M2FD-86CG>.

32. The administration did eventually rely on an Article II justification in its Section 1264 report to Congress. See THE WHITE HOUSE, NOTICE ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS I (2020) [hereinafter Section 1264 report], <https://perma.cc/6RAH-7ZTZ>.

administration would have raised fewer questions and bolstered the legitimacy of the strike.

## 2. Legality of the Strike Under International Law

The question of legality under international law and the law of armed conflict (LoAC) is a separate issue from the legality of the strike under U.S. law. Under international law and LoAC, the legality of the strike turns on whether LoAC applies to this circumstance at all, and if not, what law applies. Under LoAC, if the United States and Iran were not engaged in armed conflict, the killing would be an illegal assassination. In the author's view, LoAC applies to the Soleimani strike. The United States and Iran were not involved in traditional armed conflict. However, Kata'ib Hezbollah, which has taken direct orders from Soleimani, has been involved in active hostilities against the United States.<sup>33</sup> It has launched persistent attacks on U.S. forces, and the United States has designated it as a terrorist organization. If the United States holds itself to the principles of LoAC even in conflicts with non-state actors, the principles of LoAC must apply to the Soleimani strike.

Other international legal questions center on two issues: whether the United States could conduct military operations in a foreign state, and whether Soleimani was a legitimate target. Customary international law and Article 2(4) of the U.N. Charter generally bar foreign military operations within a sovereign state. However, exceptions exist if the sovereign state consents and if an operation is conducted in self-defense or in response to an armed attack. It is unlikely—but not impossible—that Iraq consented to the strike. Iraq spoke out against the strike, and in its wake, its parliament narrowly voted to expel U.S. forces.<sup>34</sup> Given Iraq's complex relationship with Iran, Iraq may have said one thing publicly and done another privately. The parliamentary vote was passed by a bare majority, and the Iraqi Prime Minister must sign an order for U.S. forces to leave for it to have binding force. U.S. forces resumed operations with the Iraqi military by January 15, suggesting that Iraq's actions may have been bluster.<sup>35</sup>

The next international legal question is whether Soleimani was a legitimate target. A general of a state's military is not usually a legitimate target outside of active hostilities. However, the United States rationalized Soleimani's killing based on his support of non-state militias and terrorist groups.

Presuming LoAC applies, the relevant legal question is if the strike could qualify as self-defense—which turns on whether the killing stopped an imminent

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33. Alan Yuhas, *Airstrike That Killed Suleimani Also Killed Powerful Iraqi Militia Leader*, N.Y. TIMES (Jan. 3, 2020), <https://perma.cc/LV6H-8GHU>; see also Ben Hubbard & Jane Arraf, *With Strikes in Syria, Biden Confronts Iran's Militant Network*, N.Y. TIMES (Feb. 26, 2021), <https://perma.cc/EY9Y-H54P> (discussing President Biden's continuing efforts to fight Kataib Hezbollah).

34. Ben Connable, *Iraq's Vote to Expel U.S. Troops Is Iran's True Victory*, RAND BLOG (Jan. 6, 2020), <https://perma.cc/DSA4-VD2J>.

35. Alissa J. Rubin & Eric Schmitt, *U.S. Military Resumes Joint Operations With Iraq*, N.Y. TIMES (Jan. 15, 2020), <https://perma.cc/CE73-YVUV>.



attack on the United States or its forces. More specifically, the question is whether an “imminent” attack on the United States or U.S. forces could only have been prevented by killing Soleimani. “Imminence” is undefined in international law. Most experts agree that imminence is determined based all facts and circumstances known at the time. Imminence need not mean immediate or instantaneous. A determination of imminence may be made at any level of the chain of command. This definition of imminence is reflected in the United States’ Standing Rules of Engagement.<sup>36</sup> Most likely, the determination to kill Soleimani, and any imminence thereof, was made at the highest levels in Washington.

Department of Defense (DoD) handbooks provide further interpretation of imminence. The DoD Operational Law Handbook cites Professor Michael Schmitt, who says that states may legally employ force in advance of an attack when: (1) evidence shows that an aggressor has committed itself to an armed attack, and (2) delaying a response would hinder the defender’s ability to mount a meaningful defense.<sup>37</sup> The Commander’s Handbook on the Law of Naval Operations allows anticipatory self-defense “where attack is imminent and no reasonable alternative means is available.”<sup>38</sup> The United States interprets the UN Charter’s Article 51 inherent right of self-defense to apply to any “armed attack,” not just attacks by states.<sup>39</sup> The United States also uses a standard of whether a host state is “unwilling or unable” to deal with non-state actors who launch armed attacks from within its territory to justify the use of force.<sup>40</sup> The United States last applied this standard in Syria in 2014 to justify self-defense against ISIS.<sup>41</sup> In Soleimani’s case, Iraq may have been “unwilling or unable” to stop him from planning and ordering terrorist attacks. This standard, however, has been criticized by analysts.<sup>42</sup>

For observers to assess the legality of Soleimani’s killing under international law, the United States would need to provide evidence of whether Iraq consented to the strike. More importantly, it would need to provide evidence of the imminence of the threat, and whether any means could reasonably be used to halt an imminent attack besides killing Soleimani. Instead, Trump administration officials did the opposite. For days, they wavered on the rationale for the killings. President Trump asserted that Soleimani was targeting four U.S. embassies, but

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36. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT (SROE)/STANDING RULES FOR THE USE OF FORCE (SRUF) FOR U.S. FORCES (13 June 2005).

37. U.S. DEPARTMENT OF DEFENSE, OPERATIONAL LAW HANDBOOK (2020), at 7.

38. U.S. NAVY, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 4.14 (2017), <https://perma.cc/F3W8-ZZYU>.

39. U.N. Charter art. 51.

40. See Ashley Deeks, *‘Unwilling or Unable’: Toward a Normative Framework for Extra-Territorial Self-Defense*, 52 VIRGINIA J. INT’L L. 483 (2012).

41. See Samantha Power’s letter to the Secretary General of the UN of 23 September 2014, cited here, Jens David Ohlin, *The Unwilling or Unable Doctrine Comes to Life*, OPINIO JURIS (Sept. 23, 2014), <https://perma.cc/95CN-XLWU>.

42. See, e.g., 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://perma.cc/9QGA-P2MV>.

Secretary of Defense Mark Esper claimed that he had not seen intelligence supporting that assertion.<sup>43</sup> Responding to President Trump, Representative Justin Amash stated that the claim about the embassies was “totally made up.”<sup>44</sup> Later, Secretary Mike Pompeo asserted that the strike was justified by imminence, without providing supporting facts. On Twitter, President Trump stated that Soleimani posed an imminent threat to U.S. forces but also said that it “doesn’t really matter because of his horrible past.”<sup>45</sup> Perhaps most tellingly, in her letter to the U.N. defending the attack, U.S. Ambassador Kelly Craft did not mention imminence or necessity at all. Instead, she justified the strike because “[o]ver the past several months, the United States has been the target of a series of escalating threats and armed attacks by the Islamic Republic of Iran,” including the shooting down of a U.S. drone in June, and a “series of attacks” by “Qods Force-backed” militias.<sup>46</sup> Before the international body that was most likely to be concerned with the legality of the U.S. strike, the United States’ own representative was unable to advance a proper international legal argument. In fact, she advanced an illegal one: the use of force as retaliation or punishment for a past wrong is illegal under international law.<sup>47</sup>

### 3. Information Lawfare and the Costs to U.S. Legitimacy

The United States’ failure to get ahead of the narrative about the Soleimani strike and maintain consistency in its legal rationale cost it credibility domestically and internationally. Secretary Pompeo’s changing his proffered justification for the strike undermined public confidence.<sup>48</sup> On February 12, 2020, the Trump administration submitted a notification to Congress presenting its justification for the Soleimani strike, as required by section 1264 of the National Defense Authorization Act (a “1264 Notification”).<sup>49</sup> The notice raised further concerns about the legality of the strike under domestic and international law. The Trump administration continued to rely on both Article II and the 2002 AUMF to justify the legality of the strike under domestic law. However, the memo makes no mention of imminence and fails to discuss the key international legal issues analyzed above.<sup>50</sup> Nearly two months after the strike, using appropriate legal terminology,

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43. Karen DeYoung, *Senior Administration Officials Struggle to Explain Intelligence Behind Killing of Soleimani*, WASH. POST (Jan. 12, 2020, 9:50 PM), <https://perma.cc/52LA-NWC8>.

44. Rebecca Ingber, *If There Was No ‘Imminent’ Attack From Iran, Killing Soleimani Was Illegal*, WASH. POST (Jan. 15, 2020, 12:19 PM), <https://perma.cc/HA3H-FESQ>.

45. Annie Karni, *A Narrative Collapses as Trump Tweets: ‘It Doesn’t Really Matter’*, N.Y. TIMES (Jan. 13, 2020), <https://perma.cc/3WM8-9H4Z>.

46. Letter from Ambassador Kelly Craft, Permanent Representative of the United States, to the President of the United Nations Security Council (Jan. 8 2020), <https://perma.cc/G8ES-SMAB>.

47. *See Reprisals*, ICRC CASEBOOK, <https://perma.cc/F553-VEN6>.

48. *See* Rupar, *supra* note 26.

49. *See* Section 1264 report, *supra* note 32.

50. For a detailed critique of additional legal and policy concerns raised by the 1264 notification, see Ryan Goodman, *White House ‘1264 Notice’ and Novel Legal Claims for Military Action Against Iran*, JUST SECURITY (Feb. 14, 2020), <https://perma.cc/W4PN-HEQN>.

Marine Corps General Frank McKenzie stated that attacks by Soleimani's forces were imminent, in terms of hours or days.<sup>51</sup> However, to the author's knowledge, as of this writing, neither McKenzie nor other DoD officials have publicly provided specifics on the imminence of the attacks.<sup>52</sup> The 1264 notification to Congress makes reference to a "classified annex," and it is possible that some information about the rationale for the strike cannot be revealed for national security reasons.<sup>53</sup> However, the United States' lack of transparency and muddled messaging enabled Iran to win an information lawfare victory.

### *B. Iranian Information Lawfare and Its Quest for Legitimacy*

In the wake of the Soleimani strike, Iran seized on the opportunity to win the information war through clear and unequivocal messaging. Iran swiftly responded to Soleimani's killing by striking a U.S. military base in Iraq with non-precision missiles. The U.S. military received advance warning of the attack—as Iran likely knew they would—and troops sustained injuries from the blast but avoided casualties. On Twitter, Iranian foreign minister Javad Zarif quickly called the strike “. . . proportionate measures in self-defense under Article 51 of UN Charter.”<sup>54</sup> Zarif thereby used information lawfare to support the legitimacy of Iran's kinetic actions.

Iran consistently invoked international law to support its actions surrounding the Soleimani strike. On January 3, the day Soleimani was killed, Iran asked the Security Council to condemn the strike.<sup>55</sup> Its letter stressed that Soleimani had, “in accordance with the obligations of the Islamic Republic of Iran under international law and relevant resolutions of the Security Council,” played a major role in assisting other countries to fight terrorism. The letter condemned the U.S. strike as an abject violation of international law and the UN Charter. Iran reserved “. . . all of its rights under international law to take necessary measures . . . in particular in exercising its inherent right to self-defence.”<sup>56</sup> The letter emphasized that Iran's military, including the Quds Force of the Islamic Revolutionary Guard Corps, “. . . are determined, in line with the rights and obligations of the Islamic Republic of Iran under international law, to vigorously continue the path of Martyr Major General Qassem Soleimani in combating terrorist groups . . . .”<sup>57</sup> Iran thus repeatedly asserted that its government and military, together with Soleimani and his organization—which the United States has designated as a terrorist group—complied with international law.

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51. See David Martin, *Inside the Attack That Almost Sent the U.S. to War with Iran*, CBS NEWS (Feb. 28, 2021), <https://perma.cc/3S5M-FPMZ>.

52. *Id.*

53. See Section 1264 report, *supra* note 32.

54. @JZarif, TWITTER (Jan. 7, 2020, 7:32 PM), <https://perma.cc/38Q3-4J87>.

55. Letter from Ambassador Majid Takht Ravanchi, Permanent Representative of the Islamic Republic of Iran, to the Secretary-General of the United Nations and the President of the Security Council, S/2020/13, (Jan. 3, 2020) <https://perma.cc/4PZA-K4SD>.

56. *Id.* at 1.

57. *Id.* at 2.

Iran's characterization of the legality of its actions is incorrect. No evidence exists that Iraq consented to Iran's strike, and it is unlikely that Iraq would consent to Iran conducting a strike against U.S. forces within its borders. In the absence of Iraq's consent, for its strikes to be legal, Iran would have to invoke its right to self-defense under the UN Charter, which permits use of force to repel an armed attack that has already begun, remains ongoing, or is imminent. Since the United States' attack on Soleimani was complete, Iran would have needed to show that it launched the attack to prevent an imminent threat from the United States. Iran has presented no such evidence. Iran's strike, then, was not only illegal, but likely designed to be ineffective, given its use of non-precision missiles and its probable knowledge that the United States had advance warning of the strike. Iran likely wished to save face before its people and the international community without escalating the conflict.

Iran knew it could not win a decisive military victory against the United States. However, it fiercely struck the United States using information lawfare. In the aftermath of the Soleimani strike, Iran saw an opportunity to seize the narrative of conflict in a way that the United States did not. Iran, a known rogue state, attempted to justify the legitimacy of its actions using the language of law. Following international law implies credibility and trustworthiness. By emphasizing the supposed legality of its actions, Iran saw a chance to portray itself as a legitimate actor that plays by the rules of the international system. Iran simultaneously portrayed the United States as an actor that defied the international order while presenting itself as an upstanding citizen of the globe. Especially after President Trump's subsequent tweet asserting that the U.S. military would target sites important to Iranian culture—an act prohibited under international law—and statements that the law of armed conflict poses an unfair advantage to U.S. adversaries, Iran used information lawfare to bolster its own legitimacy in the public eye.<sup>58</sup>

#### CONCLUSION

No patriotic American is mourning Soleimani's death. However, all patriotic Americans should care about the United States' compliance with international law, and about what the United States' handling of the Soleimani strike means for the legitimacy of the U.S. military's actions, domestically and internationally. Sparring between the United States and Iran in the information realm over the legality of the Soleimani strike emphasizes the importance of information lawfare to contemporary conflict and the narrative that surrounds it.

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58. President Trump's Twitter account has since been suspended; thus, citing the tweets themselves is not possible as of this writing. For discussion of the tweets, see Seung Min Kim & Philip Rucker, *Trump Threatens to Strike Iranian Cultural Sites and Impose 'Very Big' Sanctions on Iraq as Tensions Rise*, WASH. POST (Jan. 5, 2020, 10:47 PM), <https://perma.cc/AY54-32W2>; Maggie Haberman, *Trump Threatens Iranian Cultural Sites, and Warns of Sanctions on Iraq*, N.Y. TIMES (Jan. 5, 2020), <https://perma.cc/NR7W-7BEW>.

War is easier to win after an actor prevails in the court of public opinion. Indeed, victory in the court of public opinion may matter more in war's aftermath. In today's world, legality equals legitimacy in the hearts and minds of many. The United States lost credibility with its own public because of its failure to seize the narrative involving legality. Its failure to seize the narrative likely cost it hearts and minds among its own citizenry, in Iran, in Iraq, and throughout the world.

If the United States had considered information lawfare when deciding to strike Soleimani, it could have avoided this mistake and its consequences. Judge Advocates and others trained in lawfare could have easily anticipated that commentators—and Iran itself—would spin the United States' actions as illegal. Accordingly, the U.S. government and military, working with lawyers and public affairs officers, could have gotten ahead of the narrative and publicized a consistent legal justification for the strike from the moment the strike became public. Information lawfare is about more than just public relations, however. Messaging of the legality of U.S. actions is critical to bolstering their moral legitimacy before the global public.

The damage surrounding the Soleimani strike has been done. However, the United States must apply its lessons in the future by developing a strategy of information lawfare. In today's information environment, framing the legality of U.S. actions will be crucial to winning hearts and minds and shaping the narrative for future victory. U.S. military and civilian agencies must reassure U.S. allies, partners, and adversaries that the United States will wage only just and legal wars. U.S. adversaries have successfully used information lawfare against it in the past. During the war on terror, American war crimes were among Al Qaeda's biggest recruiting tools.<sup>59</sup> American lives have been lost because the U.S. military acted illegally and failed to win the narrative surrounding the overarching legality of its actions. American lives depend on the U.S. government and military maintaining the moral high ground—and on messaging it.

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59. See, e.g., Douglas A. Johnson, Alberto Mora & Averell Schmidt, *The Strategic Costs of Torture*, FOREIGN AFFS. (Sept./Oct. 2016), <https://perma.cc/UNQ5-9F5H>.

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