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1-6-2020

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By Mary Ellen O'Connell

January 6, 2020

On 3 January, missiles launched from a United States Reaper drone struck two vehicles leaving Baghdad's international airport. At least seven people died in the attack, including the commander of Iran's Quds force, General Qassem Soleimani. On 5 January, Iranian Major General Hossein Dehghan, reported to be the military adviser to Iran's Supreme Leader, gave an exclusive interview to CNN and said Iran "would retaliate directly against US 'military sites.'"

These killings and threats are the focus of this brief post. Developments are on-going, but enough has occurred so far to be able to analyze relevant principles of the *jus ad bellum*.

The killings and response have received extensive press coverage, unlike most drone attacks, such as the 63 against Somalia in 2019 alone. In connection with Soleimani, reporters have actually been asking about the legality of the killing. See Was It Legal to Kill a Top Iranian Military Leader? Much of the attention has focused on whether it was an "assassination". In a call to reporters a U.S. State Department official rejected the term "assassination" to characterize the killings because "Assassinations are not allowed under law." The answer leads to the next question, were the killings lawful?

The official went on to provide the analysis U.S. presidents have apparently relied on to justify killing with drones since 2002. (See, Mary Ellen O'Connell, *Game of Drones Game of Drones*, *Review Essay*, 109 Am. J. Int'l L. 889 (2015).) He applied two criteria to the case: "Do you have overwhelming evidence that somebody is going to launch a military or terrorist attack against you? Check that box. The second one is: Do you have some legal means to, like, have this guy arrested by the Belgian authorities or something? Check that box, because there's no way anybody was going to stop Qassem Soleimani in the places he was running around—Damascus, Beirut. And so you take lethal action against him."

President Trump has also provided many tweets and other remarks relevant to a legal assessment. He said he ordered the attack to "prevent a war", not as part of an on-going armed conflict with Iran. He also used terms relevant to a case for self-defense under the *jus ad bellum*. Suleimani, according to Trump, "was plotting imminent and sinister attacks on American diplomats and military personnel, but we caught him in the act and terminated him."



The U.S. Department of Defense in a brief press statement also inferred self-defense. The U.S. took “decisive defensive action to protect U.S. personnel abroad... General Soleimani was actively developing plans to attack American diplomats and service members in Iraq and throughout the region.”

Outside of an on-going armed conflict, the first use of military force is regulated under the *jus ad bellum*. The first principle of the *jus ad bellum* is the prohibition on the use of force, a peremptory norm codified in United Nations Charter Article 2(4). The only possible exception to the prohibition applicable in this case is self-defense. The exception is narrow. Some restrictions are provided in UN Charter Article 51; others in the general principles of international law. Article 51 permits the use of military force in such as the Hellfire missiles carried by Reaper drones, if “an armed attack occurs”. The International Court of Justice has emphasized that the attack must be “grave”. The ICJ has made this point in more than one case, but given the current protagonists, it is appropriate to cite from the case Iran brought against the U.S. for uses of military force against Iranian property that resulted in deaths.

The ICJ said in the *Oil Platforms* case:

...[I]n order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show that attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as “armed attacks” within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force. As the Court observed in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, it is necessary to distinguish “the most grave forms of the use of force (those constituting an armed attack) from other less grave forms” (*I.C.J. Reports 1986*, p. 101, para. 191), since “In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack” (*ibid.*, p. 103, para. 195).

Oil Platforms (Iran v. United States), Merits, Judgment of 6 November 2003, ICJ Reports 2003, para 51.

In addition to the significant armed attack, the general principle of necessity requires that the defensive military response be a last resort and one that is likely to succeed in accomplishing the lawful objective of defense. The use of force must not be disproportionate to the injury suffered by the victim state, and it must aim at the state legally responsible for the attack. If the attack is over with no follow-on attacks occurring, it is unlikely that the requirement of necessity can be met. Such intermittent attacks require alternative responses to the use of military force, such as countermeasures.

In *Legality of the Threat or Use of Nuclear Weapons (Nuclear Weapons)*, the ICJ found ‘a “specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.” This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed.’ ICJ, *Legality of the Threat or Use of Nuclear Weapons (Nuclear Weapons)*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, 245, para. 41 (quoting ICJ Reports 1986 at 94, para. 176).

The Court applied these principles in *Oil Platforms* to find both that the US had submitted insufficient evidence to prove Iran had carried out attacks on its ships. Even if attribution had been proven, however, the court doubted the necessity of the US counter-attacks:

‘[T]he Court is not satisfied that the attacks on the platforms were necessary to respond to these incidents. ...[T]here is no evidence that the United States complained to Iran of the military activities of the platforms, in the same way as it complained repeatedly of minelaying and attacks on neutral shipping, which does not suggest that the targeting of the platforms was seen as a necessary act. ...[I]n the case of the attack of 19 October 1987, the United States forces attacked the R-4 platform as a “target of opportunity”, not one previously identified as an appropriate military target ...’

The facts of the Soleimani killing do not meet these elements of lawful self-defense. The attacks that have already occurred raise questions of attribution as well as gravity, necessity, and proportionality. More importantly, the law does not permit the use of military force to respond to an alleged plan to attack in the future. U.S. officials stress that attacks were “imminent”. The *New York Times*, however, has cast doubt on intelligence reports do not support the claim that attacks were “imminent”. The idea that a right of self-defense is triggered by an “imminent” attack was first introduced by Derek Bowett in the wake of the Suez Crisis as a justification for the British use of force. “Imminence” does not appear in Article 51. The actual words are “if an armed attack occurs.”

Necessity and proportionality cannot be assessed with respect to attacks that are not yet occurring. Claims for a right to pre-empt future attacks do not meet the *jus ad bellum* requirements for lawful resort to force. See Mary Ellen O’Connell, *The Art of Law in the International Community* (Cambridge University Press, 2019), chapters 2 and 4. Moreover, it is inconsistent with self-defense to single out one military commander. The right is for a state to defend itself from another state.

Note that these principles apply equally to Iran. The killing of Soleimani can be attributed to the U.S. but was it grave enough to permit military force in response? Moreover, any military response now will not be aimed at halting and repelling attacks.

Without a justification under the *jus ad bellum*, the relevant law that remains is peacetime human rights. This law is clear that if the United States has intelligence that Soleimani was plotting attacks on U.S. personnel in Iraq, the appropriate response was to take the information to Iraqi authorities. It was the duty of the Iraqis to keep the invited Americans safe from the criminal acts of others on their territory. Iraq is bound by human rights law in dealing with criminal conduct of the type linked to Soleimani. In a case with certain parallels, the European Court of Human Rights set out the standard: Authorities may exercise lethal force only when “absolutely necessary in the defence of persons from unlawful violence.” *McCann & Others v United Kingdom*, Eur. Ct. H.R., Judgment of Sept. 27, 1995, ¶148. Similarly, the *United Nations Basic Principles for the Use of Force and Firearms by Law Enforcement Officials* (“UN Basic Principles”).

In the event the Iraqis failed to take adequate steps, the U.S. can keep its people safe by evacuating them from Iraq. Ironically, that is what the U.S. is busy doing now as the danger to Americans has grown exponentially following the killing of Soleimani. The Iraqi Parliament has voted for U.S. forces to leave in the wake of the violation of their sovereignty. The unlawful use of force has not aided the U.S. It will set back Iran even further from its urgent goal of economic prosperity.