

The United States and Iran: Hard Questions About Self-Defence

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By: Ken Watkin

On April 22, 2020 President Trump indicated in a tweet that he had instructed the United States Navy "to destroy any and all Iranian gunboats if they harass our ships at sea." This was the latest manifestation of a longstanding dangerous relationship between two countries which are highly influential in the Middle East. Lasting now for over 40 years, it is a simmering conflict exhibited by threats, covert and clandestine action, and at times open warfare that periodically escapes from the shadows. The most recent spasm of violence has included rocket attacks on Coalition forces in Iraq (therefore also potentially Canadian Forces personnel serving on Operation Impact) that killed American and Coalition personnel; the June 2019 shoot down of a United States drone; the January 2, 2020 targeted killing of a senior Iranian Qods force leader, Major General Soleimani, and an Iraqi

militia commander, Abu Mahdi al-Muhandis, on Iraqi soil; and tragically, the subsequent destruction by Iran of a Ukrainian commercial airliner taking with it the lives of 176 people, including 57 Canadian citizens and 29 permanent residents.

The killing of the Iranian military commander and the Iraqi militia leader met with a swift call by the international community for the United States to explain the legal basis for the strike. A common demand from international lawyers was for an explanation of how the threat posed by Iran was "imminent", one of the four principles of State self-defence (the others are necessity, proportionality and immediacy). Underpinning traditional interpretations of imminence is the 1837 Caroline incident doctrine where it was suggested a Government has "to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation." It should be noted that not all commentators viewed imminence through such a narrow lens, however, it was suggested by one analyst that an attack actually had to have occurred before a response could be justified. The UN Special Rapporteur on extra-judicial summary or arbitrary executions opined that the attack was also likely contrary to human rights law.

In the post 9/11 operational environment, lethal attacks by means of drones has been very controversial. It was made all the more so in the case of these killings since the strike took place in Iraq with whom the United States was allied in a fight against the Islamic State. The views expressed by most international legal commentators indicate that this controversy has not abated and highlight three aspects of contemporary self defense discourse. First, they reflected a mostly conservative approach. Secondly, they highlighted the unsettled status of this area of the law. Indeed, despite strongly stated views, which are often expressed with remarkable certainty, consensus is actually hard to ascertain. Finally, the focus was primarily and narrowly directed towards the January 2, 2020 missile strike.

In the aftermath of the strike, the President of the United States, the Secretary of State and the National Security Advisor referred to anticipated imminent Iranian action, but without giving a clear factual basis underpinning that claim. Notably, on March 4, 2020, the Department of Defence General Counsel stated the discussion about imminence is a "red herring" since "an imminent attack is not a necessary condition for resort to force in self-defense in this circumstance because armed attacks by Iran already had occurred and were expected to occur again."

The letter submitted to the UN Security Council by the United States on January 9, 2020, as mandated under Article 51 of the United Nations Charter, did not mention "imminence". Neither did the *Notice on the Legal and Policy Framework Guiding the United States' Use of Military Force and Related National Security Operations*. Instead, as was set out in the letter to the United Nations, the United States asserted a much broader context for justifying its defensive action. The letter referenced an "*escalating series* of armed attacks in the recent months" carried out by Iran and Iranian supported militia armed attacks on "U.S. forces and interests in the Middle East region". The United States was seeking to deter Iran from carrying out further attacks, and there was a desire to degrade both Iran's and the "Qods Force-supported militia's ability to conduct attacks." Reference was also made to "*a*

series of escalating threats [on the USS Boxer in the Strait of Hormuz] and armed attacks [shooting down a United States Navy drone]" on United States military units and personnel. Further that Qods Force backed militias had engaged in "*a series of attacks* against U.S. forces", including one that resulted in the death of a United States government contractor. There was also an attack by those militia on the United States Embassy in Baghdad on December 31, 2019.

In contrast to much of the international dialogue, the United States was clearly not narrowly focused on the immediate threat posed by Soleimani and al-Muhandis. The U.S. acted because of continuing armed attacks by Iran endangering international peace and security, including attacks on commercial vessels, "and missile and unmanned aircraft attacks on the territory of Saudi Arabia." This points to a broader rationale and provides examples of what might constitute the United States "interests" it believed justified such action.

The interested parties appear to be talking past one another. International lawyers applying traditional interpretations of State self-defence were focused on containing a specific incident while the United States adopted a much broader geopolitical view in order to justify its actions. The issue is not simply that one party is right and the other is wrong. In this analysis context matters. The use of force under the *United Nations Charter* must be authorized by the Security Council or justified as self-defence pursuant to Article 51. Unfortunately, there is little in the operative first sentence of Article 51 that indicates how it is to be interpreted: "*Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security*."

A number of factors have affected how the security framework of the Charter has been applied, which unfortunately can lead to considerable low-level conflict. First, for much of the misnamed "Cold War" - an incredibly violent period in much of the world - the exercise of veto powers by members of the Security Council limited UN enforcement of international peace and security as a check on armed conflict. This compelled states, by pragmatic necessity, to rely on Article 51 as the source of legal justification. Secondly, States not wanting to attract the attention of the international community have often relied on proxies, as well as clandestine and covert uses of force in order to keep "under the radar". Thirdly, the international community, including many international lawyers, concentrate on large-scale State versus State hostilities, tending to ignore smaller conflicts and violence involving non-State actors. Fourthly, a lack of clarity regarding the threshold for an "armed attack", and the setting of a "most grave" standard for such attacks in order to justify a defensive response in the 1986 Nicaragua Case reinforces the likelihood that smaller actions will attract less attention. Finally, the application of the self-defence principles has primarily focused on individual uses of force. While having a positive effect in terms of limiting the duration and scope of hostilities that could escalate to major conflict, what seems not to have been widely addressed is the cumulative effect of more minor clashes. That is made all the more likely since the practice has developed where the involved States themselves can choose to treat each incident as closed, often without the matter ever being dealt with

by the Security Council.

The U.S./Iran situation highlights the reality of recurring and long-lasting low-level hostilities between States, or States and non-State actors. This is the context upon which the United States appears to be relying in justifying its military responses to what it sees as “an escalating series of attacks in recent months”. The length and nature of the hostile relationship between the United States and Iran is significant and worth summarizing. The over-40 year conflict can be readily traced back to the 1979 Islamic Revolution with the ousting of the American backed Shah, the Iranian seizure of the American Embassy in Tehran and the aborted United States military hostage rescue mission, Operation Eagle Claw. Added to this are the 1983 bombings of Beirut Marine barracks and U.S. embassy by Iranian backed Shia militia, as well as the abduction, torture and murder in 1985 of the Beirut C.I.A. Station Chief. The U.S. Navy escorted commercial shipping through the Gulf during the 1980s Iran-Iraq ‘tanker war’. This era included open armed conflict on two occasions with Iran, which was the subject of the 2003 International Court of Justice *Oil Platforms Case* dealing with the right of State self-defence.

There was also the tragic 1988 shootdown of an Iranian commercial airliner by the USS Vincennes; the 1996 Iranian linked bombing of Khobar Towers in Saudi Arabia that killed 19 United States service members and wounded 372 others; the post 9/11 inclusion by the President Bush of Iran as part of the “Axis of Evil”; extensive Iranian support for Shia insurgents in post invasion Iraq, which included not only training, but also the provision of Enhanced Formed Projectiles used in IEDs which caused a significant number of American deaths; the 2009 United States and Israel linked “Stuxnet” cyber attack on the Iranian nuclear weapons program; and a 2011 Iranian plot by Iran to murder the Saudi ambassador on United States soil. Iran, and in particular its foreign covert and military operations Qods Force, has been linked to international terrorism with that force being declared by the United States in April 2019 as a terrorist organization. This hostile relationship with Iran is mirrored in the similarly longstanding conflict between that country and American allies: Israel and Saudi Arabia.

In addition to this litany of conflict in “the first 10 months of 2019, 32 attacks were undertaken by Iran-backed militias on U.S. bases” in Iraq, with three more attacks in November and December prior to the one that killed the U.S. contractor. There have been further attacks allegedly by Iranian-linked Iraqi militia since the January 2020 drone strike. Of note, al-Muhandis, the deputy chief of the Iranian linked Iraqi Shia Popular Mobilization Forces, had previously been convicted in absentia by a Kuwaiti court for an attack on the U.S. Embassy in 1983 highlighting another link to a longstanding animus against America.

This litany of violence between the United States and Iran makes the concentration by the international community on the January drone strike seem far too narrow. At the same time, it begs the question of whether the United States viewed itself to already be at war with Iran, and if so, when that conflict started.

One problem with the traditional approach towards interpreting the right to self-defence is that it appears anchored in the 20th Century Cold War experience. Its proponents should be challenged on their apparent unwillingness to acknowledge the broader interpretations of 'imminence' that have gained acceptance since 9/11. There is also growing recognition that an accumulation of events may establish a right to self-defence where the threats are linked in time, source and cause. As Thomas Ruys notes in his excellent book, *Armed Attack and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, this theory (p. 168) permits a retrospective look at the threats, contemplates lesser attacks can qualitatively be viewed as an "armed attack", and accepts consideration can be given to the likelihood that more attacks will imminently follow.

One effect of the January drone strike has been some discussion about whether an armed conflict was created by that action, or whether such a conflict might already be in existence. Given the very low threshold for establishing an armed conflict between States under international humanitarian law, the conclusion can easily be reached in respect of the United States and Iran that the drone strike itself was governed by international humanitarian law with the targets being assessed as "military objectives". The issue is more difficult regarding the use of force by the Iraqi Shia militia. However, that threshold may be more readily attained with greater reliance now being placed on a "totality of circumstances" approach in assessing conflicts with non-State actors rather than the more dated 1995 *Tadi? Case* -based criteria requiring "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".

Suggestions that an "assassination" took place, or that human rights law applies rather than the specialized law of armed conflict highlights the fact that much more needs to be done to address the fundamental issue of conflict categorization. As Professors Geoffrey Corn and Chris Jenks have explained, determining what law governs a defensive response is a key question; one that must be addressed before the trigger is pulled. International lawyers need to holistically apply the whole range of laws applicable to the use of force, reference alternative views, acknowledge the broader context within which such force is used, assess the credibility of asserted legal justifications by placing themselves in the situation of persons deciding to use force at the time that decision was made, and directly address the consequences of not acting. Without adopting a broader perspective international security is left looking like the old arcade game of "whack-a-mole".

At the same time, the United States has not been clear about what its reliance on the broader context of the hostilities actually means in self-defence terms. Is it applying an accumulation of events approach? What does this mean in respect of 'imminence', a principle that remains highly relevant, notwithstanding the views of the Department of Defence General Counsel. If no further attacks are envisaged, then there is no need to act. Does reference to the broader context mean the United States takes the view that an armed conflict was already in existence before the January drone strike? If so, did it start in 1979, in 2019, or sometime in between? And if so, when and how do we know it ends? If the former, how are the gaps in hostilities, and even diplomatic rapprochements over the years (e.g. 2015 nuclear deal) consistent with the claim of a pre-existing armed conflict?

If an armed conflict determination relates primarily to the 2019 attacks by the Iraqi Shia militias, then how are their actions linked to those more directly carried out by Iran? Is Iran implicated as a matter of law in terms of establishing that country had sufficient control (e.g. effective control) over the Iraqi Shia militia involved, such that State responsibility is invoked for their actions? Does the Iran and Iraqi militia relationship mean that State is involved in an international armed conflict with the United States? What was Iran's involvement with those militia forces, and to what degree did it extend beyond providing financing, organization, training, supplies etc.? However, given the long history of United States involvement in unconventional warfare this is an area where it might want to tread lightly.

Further, was the United States actually more directly engaged in an armed conflict with Iraq, given that the militia involved were Iraqi and part of the largely autonomous Popular Mobilization Forces so therefore officially part of the security forces of that country; al-Muhandis appears therefore to have had a form of official status; and the strike took place on Iraqi soil? If the claim is there was no armed conflict with Iraq, then do the hostilities with the Popular Mobilization Forces meet the criteria for an armed conflict with a non-State actor? Finally, in light of reporting that the United States has also used cyber means against Iran, questions might also be asked whether the letter to the United Nations addresses all the defence actions that have been taken, how cyber means fit into the analysis, and whether such further action will also be reported on. Ultimately reprehensible conduct on the part of the targets - and there is much to dislike about Soleimani and al-Muhandis - should not preclude a more thorough discussion. Hard questions need to be asked of both the United States and its critics in order to ensure the parties do not just talk past one another. The dialogue must be one that fully addresses the law and the facts in order to find a solution that limits future escalation.

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About the author

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