



## THE KILLING OF GENERAL SOLEIMANI: AN INTERNATIONAL LAW PERSPECTIVE

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*The killing of the Iranian Major-General Qasem Soleimani had stunned the world. Iran had rallied on a war-cry and relations between the United States (US) and Iran have currently stooped to an all-time low. The US argues that the strike was conducted to stop 'imminent' terror attacks. The relations have been further aggravated by the pulling-out of the US from the Iranian nuclear deal and its arguments that Iran, and Soleimani, in particular, were supporters and sponsors of terrorism. This article shall study and critically analyse the killing of Soleimani through the lens of international law in order to determine whether it was lawful or not. It shall explore questions such as: whether the strike was anticipatory self-defence and whether it could be used as a justification or would this be an assassination or targeted killing under international law? The arguments shall follow two basic principles of international law: opinio juris and jus cogens. Opinio Juris is part of customary international law which literally translates to 'opinion of the law' and is accepted as*

*evidence of the legal obligatory practice of the State under rule of law as provided in the Nicaragua case<sup>1</sup>. Jus Cogens is the principle of international law established by a treaty and its provisions are obligatory on the international community. Any treaty violating this peremptory norm shall be declared void.*

### Introduction

On 3<sup>rd</sup> January 2020, a United States (US) drone carried out a strike on Iranian Major General Qasem Soleimani of the Islamic Revolutionary Guard Corps (IRGC), and commander of Iran's special operations force: Quds Force, killing him and nine others,<sup>2</sup> which included the deputy chairman of Iraq's Popular Mobilization Forces and the commander of the Kata'ib Hezbollah, Abu Mahdi al Muhandis, who had been designated as a terrorist in the US.<sup>3</sup>

The brazen attack in Iraq near the Baghdad International Airport created furore all over the world. Many criticised the US, saying that it had breached international law and that it had given way to a potential war.<sup>4</sup> Iran promised repercussions of the assassination of the second most powerful man in Iran, only behind Ayatollah Khamenei, the Supreme Leader.

The US defended its actions, claiming that there was an 'imminent threat' of further attacks on the US and its interests in Iraq.<sup>5</sup>

<sup>1</sup> The Republic of Nicaragua v. The United States of America 1986 I.C.J. 14.

<sup>2</sup> Zachary Cohen, Hamdi Alkshali, Kareem Khadder, Angela Dewan, *US drone strike ordered by Trump kills top Iranian commander in Baghdad*, CNN INTERNATIONAL, (Jan 4, 2020, 05:51 GMT), <https://edition.cnn.com/2020/01/02/middleeast/baghdad-airport-rockets/index.html>.

<sup>3</sup> *Qasem Soleimani: US kills top Iranian general in Baghdad airstrike*, BBC, (Jan 3, 2020),

<https://www.bbc.com/news/world-middle-east-50979463>.

<sup>4</sup> Sheren Khalel, *Was it legal? What US and international law say about Trump's strike on Soleimani*, MIDDLE EAST EYE, (Jan 3, 2020, 21:02, UTC), <https://www.middleeasteye.net/news/was-it-legal-what-us-and-international-law-says-about-trumps-strike-soleimani>.

<sup>5</sup> Elliot Setzer, *White House releases report justifying Soleimani strike*, LAWFARE, (Feb 14, 2020, 12:17



Thus, followed repeated attacks on each other's interests and personnel from both sides, while their leaders also traded words. These circumstances call for a re-evaluation of the principle of self-defence under international law. These acts by the US raise several questions, being *firstly*, whether the US could use anticipatory self-defence as a justification. *Secondly*, is the targeted killing using a drone strike lawful? Could this be termed as an 'assassination'?

### Is the argument of self-defence justified?

Article 2(4) of the United Nations Charter<sup>6</sup> prohibits the use of force in undermining territorial integrity and political independence. This applies to States which are not at war at the time of the use of force. However, an exception arises to this rule in the form of self-defence and UN authorization of force.<sup>7</sup> From a bare reading of Article 51<sup>8</sup>, self-defence can be exercised 'if an armed attack occurs'.<sup>9</sup> It is pertinent that we examine the Oil Platforms case where these principles were laid down. The claim of the US that it acted in self-defence to repeated attacks by Soleimani on American interests in the Middle East and more attacks were 'imminent' needs to be verified. The question arises whether pre-emptive strikes would be legal in such a situation where a nation deems that an imminent attack is about to occur.

### Oil Platforms Case 2003<sup>10</sup>

During the Iran-Iraq war of 1980-1988, the tension between the two countries extended to the US Navy launching attacks on the Reshadat and Resalat oil complexes in 1987 which resulted in the complete destruction of one of the oil complexes.

In 1988, US ships launched another attack on two Iranian complexes and almost destroyed one of them. The US government justified its acts under the pretext of *self-defence* in response to Iranian actions against American resources.

The case was heard in the International Court of Justice where Iran claimed justice under the 1955 Treaty of Amity, Economic Relations and Consular Rights between the US and Iran. Article I<sup>11</sup> of the Treaty established peaceful relations among the two countries, based on which Iran accused the US of breaching the terms of the treaty. The US sent a letter to the UN describing the attack on oil platforms as a mode of self-defence to deter Iran from misusing the platforms for '*offensive military purposes*'.<sup>12</sup>

### Was this anticipatory self-defence? Did the strike fulfil the conditions of the Caroline Test?

Anticipatory self-defence is considered permissible to conduct the first attack in case

PM), <https://www.lawfareblog.com/white-house-releases-report-justifying-soleimani-strike>.

<sup>6</sup> Charter of the United Nations, 1945 art 2, cl.4.

<sup>7</sup> *What are jus ad bellum and jus in bello?*, INTERNATIONAL COMMITTEE OF THE RED CROSS, (Jul 26, 2020, 15:57 PM), <https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-in-bello-0>.

<sup>8</sup> Charter of the United Nations, 1945 art 51.

<sup>9</sup> Mary Ellen O'Connell, *The Killing of Soleimani and International Law*, EJIL: TALK

BLOG OF THE EUROPEAN JOURNAL OF INTERNATIONAL LAW, (Jan 6, 2020), <https://www.ejiltalk.org/the-killing-of-soleimani-and-international-law/>.

<sup>10</sup> Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I. C. J. Reports 2003, p. 161.

<sup>11</sup> Treaty of Amity, Economic Relations and Consular Rights, 1955 art I.

<sup>12</sup> William H. Taft, *Self-Defense and the Oil Platforms Decision*, 29, Y.J.I.L., 291. 295(2004).



a nation faces an imminent threat. The Caroline test, which is a part of customary international law, determines the conditions for conducting pre-emptive strikes to counter an imminent threat.<sup>13</sup> The attack must be about to occur and a nation should be left with no choice to pursue alternate methods and must not have any time to deliberate on the issue, further the need for self-defence should be *'instant and overwhelming'*.<sup>14</sup> Therefore, force used as anticipatory self-defence is something which is so extreme that it should be used as a last resort. What matters here is the question of whether the threat of Soleimani attacking the US or its interests in the Middle East was so imminent that they had to kill him? It seems unnecessary that the US had to take such drastic measures. It could have explored options such as informing the Iraqi authorities to arrest Soleimani. Such was the haste, that the administration did not even consult Congress.<sup>15</sup>

Alas, this question remains vague for now. However, we can certainly establish that the intelligence for the killing would be the sole deciding factor to determine whether the attack was indeed imminent or not.

### The Bethlehem Doctrine: An arbitrary justification of the US

The Bethlehem doctrine was established by Daniel Bethlehem, who served as Legal Adviser to Israeli Prime Minister Benjamin Netanyahu.<sup>16</sup> The Bethlehem doctrine, although not a part of international law, is still important to examine in this debate as it is an intense version of the Caroline test. This doctrine propounds that all States have the right of pre-emptive self-defence against an imminent attack.<sup>17</sup> This doctrine has its own different meanings of *'imminent'*, one that the governments of the US, UK and Israel have given as justification for carrying out drone strikes on non-State actors such as terror groups like Al Qaeda. This doctrine does not define *'imminent'* to be *'soon'* or *'in the near future'*.<sup>18</sup> If a government receives intelligence that a suspect is planning something, and it has no details about where, when or in what kind of manner, it would still be considered an imminent attack and he can still be killed since he was involved in planning.<sup>19</sup> The whole doctrine is full of arbitrariness on the face of it. There would be no check on arbitrariness, and anyone suspected even a hint would be killed. If the US acted under this doctrine, it would be in contravention of international law, since the

<sup>13</sup> Merrit Kennedy, Jackie Northam, *Was It Legal For The U.S. To Kill A Top Iranian Military Leader?*, NATIONAL PUBLIC RADIO, (Jan 4, 2020, 8:02 AM ET),

<https://www.npr.org/2020/01/04/793412105/was-it-legal-for-the-u-s-to-kill-a-top-iranian-military-leader>.

<sup>14</sup> Ibid.

<sup>15</sup> Ken Dilanian, *Was it legal for Donald Trump to order the killing of a top Iranian General?*, NBC, (Jan 4, 2020, 11:01 PM IST), <https://www.nbcnews.com/news/world/was-it-legal-donald-trump-order-killing-top-iranian-general-n1109961>.

<sup>16</sup> Craig Murray, *Lies, the Bethlehem Doctrine, and the Illegal Murder of Soleimani*, CRAIG MURRAY, (Jan 4, 2020), <https://www.craigmurray.org.uk/archives/2020/01/lies-the-bethlehem-doctrine-and-the-illegal-murder-of-soleimani/>.

<sup>17</sup> Daniel Bethlehem, *Principles relevant to the scope of a State's right of self-defense against an imminent or actual armed attack by nonstate actors*, <https://web.archive.org/web/20140912080044/http://www.un.org/law/counsel/Bethlehem%20-%20Self-Defense%20Article.pdf>.

<sup>18</sup> Supra note 16.

<sup>19</sup> Ibid.



meaning of imminence in this doctrine is flawed.

### **Were the conditions of Necessity and Proportionality fulfilled?**

Enshrined within the Caroline test, one must take a look at the concepts of necessity and proportionality. Necessity means carrying out a particular act of self-defence is absolutely necessary when there are no other legal means to protect itself or its interests.<sup>20</sup> Proportionality refers to the moral principle that the response to the threat must be proportionate, and not in excess of the threat.<sup>21</sup>

If the US was surely short on time and had no other alternative, then this action may be necessary. It seems like this action may not have been the last resort as the US might still have had time to consult the Iraqi government or the Congress.<sup>22</sup> Talking about proportionality, the attack, if done through anticipatory self-defence, must have been proportionate to the imminent threat. According to US officials, Soleimani was planning to attack embassies.<sup>23</sup> However, scholars have contended that proportionality will not apply in cases of attacks that have not yet occurred since a proportionate response to the attack which has not occurred cannot be determined.<sup>24</sup>

### **Was there an ‘Armed attack’ by Soleimani or Iran?**

*Prima facie*, it does not seem that Soleimani’s killing was in response to an armed attack. There had been no armed attack immediately preceding the killing of Soleimani. Reports claim that Trump had ordered the killing as a counterattack for the attack on the US embassy in Baghdad.<sup>25</sup> If one were to look at whether the attack on the embassy qualifies as an ‘armed attack’, whatever view he takes would be debatable since there is no legal definition of armed attack given in statutes or by the Courts. In the Nicaragua, Oil Platforms and the Armed Activities<sup>26</sup> cases, the International Court of Justice used Resolution 3314 to give some meaning to ‘armed attack’.<sup>27</sup> It stated that ‘armed attack was the most grave form of the use of force’.<sup>28</sup> Thus, an armed attack and a legitimate response of self-defence will depend only on the facts and circumstances of the case, which can only be verified with complete details from intelligence and conclusive evidence.

### **Was this a ‘Targeted Killing’ using drones?**

There is no legal definition of a ‘targeted killing’ under international law<sup>29</sup>, however,

<sup>20</sup> Supra note 9.

<sup>21</sup> Ibid.

<sup>22</sup> Supra note 15.

<sup>23</sup> Alex Pappas, *Trump tells Fox News’ Laura Ingraham ‘four embassies’ were targeted in imminent threat from Iran*, FOX NEWS, (Jan 2020), <https://www.foxnews.com/politics/trump-tells-laura-ingraham-four-embassies-were-targeted-in-imminent-threat-from-iran>.

<sup>24</sup> Supra note 9.

<sup>25</sup> Supra note 2.

<sup>26</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J Reports, 2005.

<sup>27</sup> Öykü Irmakkesen, *The Notion of Armed Attack under the UN Charter and the Notion of International Armed Conflict – Interrelated or Distinct?*, (Aug 2014), [http://www.prix-henry-dunant.org/wp-content/uploads/2014\\_IRMAKKESEN\\_Paper.pdf](http://www.prix-henry-dunant.org/wp-content/uploads/2014_IRMAKKESEN_Paper.pdf).

<sup>28</sup> *Military and Paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, I.C.J Reports, 1986.

<sup>29</sup> *Legality of Targeted Killing Program under International Law*, LAWFARE, <https://www.lawfareblog.com/legality-targeted-killing-program-under-international-law>.



states have often conducted killings with the excuse of stopping potential attacks. In these types of killings, there is always a predetermined target and a plan for carrying out the killing.

- The legality of these drone strikes is debatable, with academics contending that these strikes are unjustified as they can only be used in self-defence or with the Security Council's authorisation, which the US does not seek and instead uses pre-emptive strikes to stop its 'imminent threats'. It says that it is currently involved in a non-international armed conflict with terror groups and that the use of force is inevitable in times of conflict and it does not matter whether one is acting in self-defence or not.<sup>30</sup> Ambiguities surround this; some say that this conflict is not equal to the status of 'armed conflict' and even if so, it does not allow for targeting and assassination of enemy leaders, rather it asks for the usage of peaceful means such as arrest or detention.
- Drone strikes have been frequently conducted against non-state actors such as terror groups. Soleimani was not a non-state actor. He was on the way to relay a message to the Iraqi Prime Minister<sup>31</sup> and was commanding the Quds Force and the IRGC, which are parts of the Iranian state.

#### Can this be termed 'assassination'?

The general definition of assassination can be regarded as an unlawful killing in times of peace. But some say that assassinations are

unlawful in both peacetimes as well as in armed conflict. They say that the Iranian attacks were intermittent and limited, rather than being direct and full-fledged.<sup>32</sup> If Soleimani was heading forces against the US, under the laws of war of the Geneva Convention, he and his forces would be considered legitimate targets, whether the war was declared or undeclared. Thus, the claim of the US, that they are in an armed conflict with such terror groups, would have to be applied to Iran. Again, this depends on the evidence that the US had and whether the Iranian attacks were as grave and frequent as claimed by the officials so as to constitute an armed conflict.

#### Other possible arguments by Iran

##### Soleimani- A terrorist with no fair trial?

US airstrikes killed Soleimani outside the Baghdad International Airport. Every individual has a right to a fair trial under Article 10<sup>33</sup> of the Universal Declaration of Human Rights, 1948 and Article 14<sup>34</sup> of the International Covenant on Civil and Political Rights. Soleimani was designated a terrorist without any trial at the International Court of Justice or the United Nations to provide him with a right to defend himself against the charges.

On the contrary, the US government undertook steps that fall under the provisions of the **draft** Comprehensive Convention of International Terrorism defining the crime of

<sup>30</sup> Ibid.

<sup>31</sup> *PM: Iran's Soleimani was in Iraq to discuss relations with Saudi*, (Jan 6, 2020, 11:55 AM), <https://www.middleeastmonitor.com/20200106-pm-irans-soleimani-was-in-iraq-to-discuss-relations-with-saudi/>.

<sup>32</sup> John Daniszewski, *Was the Drone Attack on Iranian General an Assassination?*, US NEWS AND WORLD

REPORT, Jan 4, 2020, 12:03 A.M.), <https://www.usnews.com/news/us/articles/2020-01-03/was-the-drone-attack-on-iranian-general-an-assassination>.

<sup>33</sup> The Universal Declaration of Human Rights, 1948 art. 10.

<sup>34</sup> International Covenant on Civil and Political Rights, 1976 art. 14.



terrorism under Article 1(a)<sup>35</sup> as any person committing an unlawful and unjustified act of causing death. The treaty has still not been formed and thus is not applicable in international law.

### **Innocent until proven guilty**

The innocence of the individual is maintained until the contrary is proved through the procedure established by law as per Article 11(1)<sup>36</sup> of the Universal Declaration of Human Rights. In this case, there was no conclusive evidence to prove the guilt of the General in any manner whatsoever by the US government before taking a decision to take his life.

The act was *per se* unlawful in nature due to the mutual agreement<sup>37</sup> signed between Iraq and the USA in 2008 to prevent attacks on other countries from Iraqi soil.

### **International Protection on foreign soil**

Soleimani was a diplomat on Iraqi soil as he visited the place in his official capacity for official work. Article 1(b)<sup>38</sup> of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973, to which the US is a party,<sup>39</sup> states the meaning of internationally protected persons for the purpose of the Convention as '*any representative or official of a State*' which includes an army general

within its ambit. Article 2<sup>40</sup> of the Convention provides for the act of intentional commission of an offence against internationally protected persons, which makes the act of a drone strike an offence by the US government, meant to intentionally kill the army general by attacking him as provided in Article 2(1) (a)<sup>41</sup>. It is an arbitrary action driven by accusations from the US government that stand invalid unless the contrary is proved. The burden of proof lies on the one initiating an attack violating the model code of peaceful relations among the nations. The Iraqi authorities had the duty to protect the internationally protected person from any sort of attack that also involves aerial attacks from the US government.

### **Other justifications of the US**

#### **Lack of Trust with International Law**

The US took swift actions on the information about the strategy of the Iranian General and wanted to retaliate against the rising attacks on the United States forces by Iran and Iran backed militias according to the Trump administration.

The US took such extreme measures without relying on international law that involves time-consuming procedures proving detrimental to a nation in cases of individuals being successful in their mission.

The concerns over the nature of international law are restricted to soft law with no real

<sup>35</sup> Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, General Assembly, 2002, A/57/37, AD HOC AND SPECIAL COMMITTEES, (28 January 2002), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N02/248/17/PDF/N0224817.pdf?OpenElement>

<sup>36</sup> The Universal Declaration of Human Rights, 1948 art. 11, cl.1.

<sup>37</sup> U.S.–Iraq Status of Forces Agreement, 2008.

<sup>38</sup> Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973 art. 1, cl.b.

<sup>39</sup> UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-7&chapter=18&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-7&chapter=18&clang=_en).

<sup>40</sup> Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973 art. 2.

<sup>41</sup> Id at art. 2, cl. 1, sub cl.a.



legal obligations on the member states to abide by them but there is a choice for these states to ratify the laws through consolidation with domestic laws and provide enforceability to them. The lack of trust with international law is a long-standing debate among the nations and it shall stay until measures to bind all nations with the laws are achieved.

### Conclusion

The case is more or less on the side of Iran. *Prima facie*, it seems that the US did have other options than resorting to a drone strike but the final call has to be taken by using the intelligence that was available at the time with the US about Soleimani and the imminent attacks. It all comes down to whether the intelligence actually suggested that the attacks were imminent or not. Even if it is proved that this strike was illegal, Iran would not be immensely benefited from it since the concept of self-defence is constantly evolving to keep up with modern threats and international law as a soft law can only succeed so long as to regulate such relations by imposing sanctions and claiming damages, which do have lasting effects, but nations find ways to circumvent and cope with the effects of such sanctions. A nation's standing in the UN and its power also matter in influencing accountability for actions. International law and relations will always evolve and perhaps have some ambiguities to it, with the world facing new kinds of threats in future, where nations may not rely on or think about international law when taking actions to protect their interests. These threats could be undetectable up until the last second, and may be grave, requiring nations to take adverse actions. Public opinion of States may also play a part in determining these actions. In the future, these actions will be regulated and motivated more by

international relations and the balance of power, with international law having a lesser role to play.

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