

Is US action under the Ambit of International Law? Human Right and International Peace and Security at Risk?

“Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen.”

E. Vattel, on ‘The Law of Nations’

The corpus of international law is the most controversial area of law opened for legal battles, when different actors interpret it to favor their interest while taking actions. This regime of law has faced criticism for not having enforcement mechanisms which can be consider as an area of law like a lion without having a teeth. Leaving this behind, this piece assess the US drone strike of Iranian commander which took place in 3 January 2020 in light of international law through doctrinal analysis of different sources.

The world has learn from the atrocities of the two world wars and promised among other things to maintain international peace and security as well as to save succeeding generations from the scourge of war under the preamble of the UN charter. The charter under article 2(4) urge all member states to refrain from the threat or use of force against the territorial integrity or political independence of any state.¹ This system of territorial integrity is a matter of sovereignty which is attributable to the Westphalia system of 1648. However, states have an inherent right in exceptional circumstances to resort to use of force under the ambit of art. 51 of the UN charter in situations of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.² It’s only in these two scenarios that the charter allowed use of force by states against another state. In this vein, unsettled issues are evolving which are controversial to employ force by states such as, use of force for

¹ United Nations, Charter of the United Nations, 24 October 1945 art. 2 (4).

² Ibid art. 51.

humanitarian intervention, protection of nationals abroad and national liberation movements.³

The US action: Where it falls? Is it under the ambit of International Law?

In the first days of 2020 the Trump administration employed the bush doctrine of anticipatory self-defense in assassinating the Iranian Commander Soleimani in Baghdad.⁴ The action of US is not only limited in affecting one UN member state's sovereignty (Iran) rather it is also unwarranted interference against the territorial integrity of a third UN member state which is Iraq without its knowledge. This shows how power affects the international system and how it gives unfettered freedom for the superpowers in disregarding international law.

The US justified the measure as a self-defense against imminent threat or attack on American lives,⁵ which may not suffice to claim it under international law. Here, an exploration of self-defense against imminent threat or attack is necessary for understanding the legal underpinnings of the actions of US. US has a long history of intervention on other states claiming self-defense to justify its actions. The most cited jurisprudences are among others its intervention in Afghanistan following the horrific 9/11 attack, the aircraft attack in Libya in 1986 used for terrorist attacks on its citizens abroad,⁶ in 1993 when the United States launched a cruise missile attack on Iraq's Intelligence Service in Baghdad in response to a failed assassination attempt against former President Bush⁷ and the intervention against Nicaragua in assisting rebels.⁸ Similarly, like the 3 January 2020 attack US has invoked the doctrine of self-defense in

³ Jean Allain, the true challenges to the united Nations system of the use of force: the failures of Kosovo and Iraq and the emergence of African Union Max Planck UNYB 8 (2004) 251.

⁴ Iran's top general Soleimani killed in US strike <https://www.cnn.com>. (accessed 3 January 2020).

⁵ Iran news live: Trump claims Soleimani was plotting to kill Americans and urge US citizens to leave Iraq after killing of Iran's top general, <http://www.independent.co.uk/news>.; <https://cnn.it/36mhfgj>

⁶ John Alan Cohan, the Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law, 15 Pace Int'l L. Rev. 283 (2003) 41.

⁷ Ibid 42.

⁸ Military and Paramilitary Activities (Nicaragua. v. U.S.), 1986 I.C.J. 14, 119.

Libya but the action was condemned by the UN Security Council resolution⁹ resulting intense criticism by many states.

US justified its action as imminent threat or attack to resemble to the concept of anticipatory self-defense a well-established norm under international law, even though the US action is far to qualify as anticipatory self-defense. Unlike the present US qualification the doctrine of anticipatory self-defense which was propounded by the Caroline case¹⁰ needs a clear existence of imminent threat or attack against the state. Webster, claimed that to justify anticipatory self-defense a state must demonstrate that "the necessity of that self-defense is instant, overwhelming and leaving no choice of means, and no moment for deliberation."¹¹ His statement can be seen as a push of states to use other methods before resorting to use of force such as peaceful dispute settlement, negotiation and deliberation. Because, anticipatory self-defense has a very narrow range in which it can be legitimately deployed as it is restricted by the requirements of immediacy, necessity, and proportionality.¹² However, in the present US action it will be ill-conclusion to qualify the action as anticipatory self-defense on the basis of the above requirements. Here we have to question whether the US was left without a moment for deliberation or without a choice of means before launching its attack against the Iranian Commander. I would say that it's not, because there is no threat against the US which can be justified under the test of "no choice of means" (necessity) which usually claimed when states face a danger of weapons of mass destruction, danger of imminent terrorist attack or may be danger of its citizens in hostage. The US action is also disproportionate and ill-conceived move which expose other U.S. citizens in danger in the two countries as well as falls sort of cost benefit analysis. It would be better and easy for the U.S. to engage in peaceful means of solving

⁹ G.A. Res. 41/38, U.N. GAOR, 41st Sess., Supp. No. 53, at 34, U.N. Doc. A/ 41/53 (1986).

¹⁰ The Caroline v. United States, 11 U.S. 7 Cranch 496 496 (1813); See Michael Lacey, Self-Defense or Self-Denial: The Proliferation of Weapons of Mass Destruction, 10 Ind. Intl & Comp. L. Rev. 293, 294 (2000).

¹¹ Richard Erickson, legitimate use of military force against state sponsored international terrorism (1989) 412.

¹² John Alan Cohan (n 5) 47.

disputes through diplomatic protection¹³ to avoid the attacks in its embassy rather than posing a further great danger to its citizens. Furthermore, it would have been a better solution to seek diplomatic solutions whenever possible, and to give fair warning to the offending state before striking.¹⁴ Hence, the doctrine of anticipatory self-defense is insufficient to legitimize U.S. intervention and the action is out of the ambit of international law. Moreover, assassination of officials in other states represents a prima facie violation of international law.¹⁵ Where no state of war exists, such assassination would likely exhibit the crimes of aggression which is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.¹⁶

Claim of Preemptive Self-defense and Protection of Nationals Abroad: Can it favor the US.

These scenarios are a controversial issues but practiced by some states in resorting to use of force against others. Unlike a claim of anticipatory self-defense, where an imminent threat or attack clearly exist, preemptive self-defense relies instead on the mere possibility of an attack at some unspecified, future period of time.¹⁷ "The claim to preemptive self-defense is a claim to entitlement to use unilaterally, without prior international authorization, high levels of violence to arrest an incipient development that is not yet operational or directly threatening, but that if permitted to mature, could be seen by the potential preemptors as susceptible to neutralization only at a higher and possibly unacceptable cost to itself."¹⁸ This kind of action is a creation of save heaven to

¹³ ILC, Diplomatic Protection: Titles and Texts of the Draft Articles on Diplomatic Protection Adopted by the Drafting Committee on Second Reading, UN Doc A/CN.4/L.68/4 (2006) at 1, Draft Article 1.

¹⁴ Ibid 51.

¹⁵ Beres, Louis Rene (1991) "On Assassination as Anticipatory Self-Defense: the Case of Israel," Hofstra Law Review: Vol. 20: Iss. 2, article 2 p.4.

¹⁶ Resolution on the Definition of Aggression, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1975).

¹⁷ Patrick Kelly, preemptive self-defense, customary international law, and the Congolese wars, 3 September 2016, <http://www.e-ir.info/2016/09/03/>

¹⁸ Ibid.

deter future dangers which is not favored under international law because of its result of unwarranted violation of the sovereignty of states.

On the other hand, there is a concept of protection of nationals abroad which may warrant states to use force against another state. The Entebbe case is the typical example where Israel defense force operate a hostage rescue mission against Ugandan troops in Entebbe Airport in Uganda in 1967.¹⁹ In this case Israel used its force to protect its nationals in Uganda who were in an imminent threat after a plane hijacked by Palestinians to Entebbe airport supported by Eid Amin force and freed its nationals ambushing the Ugandan forces. Similarly, the present US attack resembles this scenario where it acted to avert an attack and a potential attack on its nationals working in Iran perpetrated by Soleimani. The problem here is that, unlike Israel's successful mission, the action of US cannot avert the danger to its citizens rather than escalating the situation and laying citizens of U.S. living in Iran and Iraq at risk.

Issues of Human Rights and International Peace and Security

Whether international law can make the world a better place or not is not a question in the international community. Because, there are different principles which guide the behavior of states in their actions and relations including good faith, exclusive jurisdiction, dispute settlement and international cooperation. For instance, the charter of UN under Article 2(3) requires all members to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."²⁰ Hence, it's the duty of states to appeal to diplomatic solutions and to live up to its obligations not to impair the international peace and security. Particularly, it is the sacred duty of the leaders of superpowers to refrain from malicious acts which may result the blown of the WWII. Thus, the strongest superpower U.S. which is capable to form a custom that will become a legal principle to be generally accepted by other states has to be careful in taking serious measures not to hamper the international

¹⁹ Smith, Terence (4 July 1976) "hostages freed as Israeli's raid Uganda airport" The New York Times, <http://www.nytimes.com/1976/07/04/>.

²⁰ United Nations, Charter of the United Nations, 24 October 1945.

system. It must also resort to use of force after exhausting all the available peaceful avenues for settling disputes.

On the other hand, states are under obligation to cooperate for the universal respect and observance of human rights and fundamental freedoms as stipulated under art. 55 and 56 of the UN charter. It is the duty of states to refrain from acts that can result violations of human rights. The doctrine of extraterritorial applicability of human rights imposed a diagonal obligation on states to protect and respect human rights out of its jurisdiction in certain situations.²¹ The Human Rights Committee (HCR), for instance, assumes that the ICCPR is applicable outside of the territory of a state party if it exercises effective control.²² Further, the European Court of Human Rights the court also impose extraterritorial obligation of human rights on states “whenever the state, through its agents, exercises control and authority over an individual.”²³ So, it’s only in this situation of jurisdiction and effective control that human right obligations can be established. Accordingly, a case where military drones are used in areas not under the control of a state most likely will not be considered a case of extraterritorial jurisdiction.²⁴ Because, military drones and their actors perform far away from the territory of the state and it is difficult to establish effective control over a territory or over a person.²⁵ However, as the case of military drones has a potential effect on human rights in there realization extraterritorially²⁶ the obligation of states must be established. Thus, the drone attack by U.S. which result the killing of other individuals along the commander is a violation of international human rights obligation.

Attacking Embassies, setting the Fire for War: Unlawful under International Law.

²¹ Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights 28 September 2011 principle 3.

²² Hum. Rights Committee General Comment 31: The Nature of the Gen. Legal Obligation on States Parties to the Covenant, para. 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004).

²³ Al-Skeini, App. No. 55721/07 at para. 133, 137.

²⁴ Marko Milanovic, Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age, 56 HARV. INT’L L. J. (2015) 118.

²⁵ Ibrahim Kanalan, Extraterritorial obligations beyond the concept of jurisdiction, German Law Journal Vol. 19 No. 01 (2018) 63 at: <https://www.researchgate.net/publication/325170353>

²⁶Ibid.

The protection of human beings by means of international law is today one of the principal goals of the international legal order,²⁷ this protection may be achieved among other things through consular protection, protection in international human right treaties and diplomatic protection.²⁸ Diplomatic protection which primarily consists of customary international law is a well-established norm²⁹ which gives ultimate protection for diplomats abroad. Under international law it is customary that the premises of the mission usually donates an embassy is inviolable and the receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.³⁰ The protection afforded to embassies cannot be derogated by the receiving state even in cases of broken diplomatic relations between the two States or even in case of armed conflict.³¹ Therefore, it is established that the duty of states to respect and protect the premises of the mission of a certain country is a well-developed norm under international law.

Disregarding this international obligation Iranian backed militias were participating in assaulting US embassy,³² though Iran denied the fact of the support. However, as the presence of Iran in Iraq is not in question as inferred from its official's statement³³ Iranian Brigadier-General Massoud Jazayeri who previously stated that Iran could best help Iraq by providing it with direction on its "successful experiments in popular all-around defense". Hence, the government's failure to prevent those actions where its presence is established is a breach of an inviolable international obligation which may

²⁷ World Summit Outcome Resolution adopted by the GA 24 October 2005, A/RES/60/1, paras. 119-120, 138-140.

²⁸ Draft Articles on Diplomatic Protection with commentaries, (Yearbook of the International Law Commission, 2006, vol. II) 95.

²⁹ See A/RES/60/22 Report of the International Law Commission on the work of its 57th session (2006), at 2.

³⁰ Vienna Convention on Diplomatic Relations (1961) done at Vienna on 18 April 1961, Entered into force on 24 April 1964) art. 22.

³¹ Ibid art. 45.

³² See <http://www.reuters.com/article/us-iraq-security-usa/trump-blames-as-protesters-erupt-outside-us-embassey>; a b c d "Iraqi supporters of Iran-backed militia attack U.S. embassy". Politico. 31 December 2019, Retrieved 31 December 2019; "Iraqi Protesters Attack US Embassy Compound in Baghdad". Voice of America, 31 December 2019. Retrieved 31 December 2019.

³³ Iraq crisis: Iran pledges military help against ISIL as battle for Tikrit escalates". Daily Telegraph. 22 June 2014; Mohsen, Milani , "Tehran Doubles Down". Foreign Affairs (22 June 2014).

entitle the US to exercise its right of diplomatic protection. As PCIJ and eighteenth-century jurist Emerich de Vattel noted, an injury to an alien is an injury to his state of nationality, which becomes therefore the holder of the right infringed.³⁴ Even he propounded saying that whoever ill-treats a citizen indirectly injures the State, which must protect that citizen.³⁵ In this respect, the International Court of Justice (ICJ) stated in an oft-cited case that “within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting.”³⁶ Even though, it is not possible and may not be effective for a state to protect the rights of persons subject to its jurisdiction when they were outside of its territory due to strategic difficulties, the right of the state is not in question. In such cases, action would be possible only through diplomatic channels and tools of diplomatic protection.³⁷

To sum up, for the common benefit of peaceful co-existence, protection of citizens, maintenance of international peace and security as well as for the promotion of international friendly relations established under international law the two countries must resort swiftly to calm the situation. Iran also need to refrain from involving in any kind of future reprisal which is prohibited under international law and may result a danger to the international community in blowing world wars. Besides, the UN which is an international organization to settle international matters must uphold its responsibilities to open up for new negotiations between the two states before the international peace and security become disrupted and face a big danger.

³⁴ E. Vattel, *The Law of Nations* (1758; Geneva: Slatkine reprints - Henry Dunant Institute, 1983) at 136, para.71; *Mavrommatis Palestine Concessions Case (Jurisdiction)(Greece v. UK)* (1924), P.C.I. (Ser. A) No. 2 at 12; Noura Karazivan, *Diplomatic Protection: Taking Human Rights Extraterritorially*, 44 *Can. Y.B. Int'l L.* 299 (2006) 303-304.

³⁵ *Ibid* Vattel.

³⁶ *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)* [1970] I.C.J. Rep. 3 at 44, para. 78; Noura Karazivan, *Diplomatic Protection: Taking Human Rights Extraterritorially*, 44 *Can. Y.B. Int'l L.* 299 (2006) 303-304.

³⁷ *Lopez Burgos v. Uruguay*, Communication no. R.12/52 (6June 1979), UN Doc. Supp. no. 40 (A/ 36/ 4o) (1981) at 184; Noura Karazivan, *Diplomatic Protection: Taking Human Rights Extraterritorially*, 44 *Can. Y.B. Int'l L.* 299 (2006) 345-346.

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