

## The Death of Qasem Soleimani and the Law of Armed Conflict

Elliot Winter, Lecturer at Newcastle Law School (UK)

06 January 2020

On 03 January, the US launched a drone strike against the Iranian defence chief Qasem Soleimani. The strike occurred while Soleimani was in Iraq and it killed both the general and a number of other personnel in the area, including Iraqis. The event raises questions that touch on various aspects of international law. For example, there is the question of whether the US was acting in self-defence – as it has suggested – in response to earlier attacks such as that against the US embassy in Baghdad and in deterrence of anticipated future attacks. There is also the question of the violation of Iraq's sovereignty which accompanies the action which took place within its borders and yet without its consent. These are undoubtedly important legal issues and much has been, and will continue to be, said about them.

However, there is another question which is seemingly a little off-piste compared to current media discourse. That is the significance of recent events in terms of the law of armed conflict (also known today as international humanitarian law and, formerly, as the law of war). Does this strike trigger the application of LOAC? If so, who are the parties? What regulations does LOAC impose on the conduct of those parties? These are important questions too, even if not as headline-grabbing as the right to use force or the violation of state sovereignty.

On the first point of whether the strike triggers the application of LOAC, the answer is a qualified 'yes'. The US attack may, alone, trigger a war, or an 'international armed conflict' to use the *mot juste*, between the US and Iran. This is not terribly difficult to establish given that the threshold for an IAC is very low. All that is required under Common Article 2 of the Geneva Conventions 1949 is that there is an 'armed conflict' 'between two or more of the High Contracting Parties'. According to the ICTY in *Tadic*, the violence need only amount to 'armed force' with no particular minimum intensity requirement. Certainly a missile strike against a military general would qualify. In terms of the inter-state element, there is no doubt here that we are dealing with states as opposed to non-state groups or individuals. Indeed, we can clearly see from Article 4 of Geneva Convention III that we have the archetypal exchange between 'members of the armed forces'. However, the 'yes' is qualified – and the effect of this particular strike all rather moot – because there was already an IAC in existence on the basis of earlier exchanges between the US and Iran. Those were each capable of triggered the application of LOAC in their own right too. Still, the recent action helps to solidify the fact that an IAC is in place between the US and Iran.

On the second point of the parties to the conflict, clearly the US and Iran are involved. That said, for the same reasons as given above, the strike also triggers, legally, an IAC between the US and Iraq as it was violence perpetrated by the former on the territory of the latter without its consent. That said, it is unlikely that, politically, the US or Iraq have the appetite for (yet another) war.

On the third point, moving back to the US and Iran IAC, the short answer to the question of what regulations LOAC imposes is ... 'a lot'. The regime surrounding IACs is long-established and highly detailed. It can be contrasted in this regard with the comparatively juvenile regime in place for non-international armed conflicts which governs violence between states and non-state (rebel) armed groups (or violence between two or more such groups). It would be unrealistic to give a full account of the applicable rules of the IAC regime here. That said, it is worth noting a few points of immediate significance.

Firstly, given that an IAC is in place between the US and Iran, it is legitimate under LOAC for either side to target and kill members of the opposition's armed forces. That is, after all, the expectation in war as set out in the principle of distinction/targeting which can be found at Article 48 of Additional Protocol I to the Geneva Conventions. The shock in this case seems to have resulted from the fact that both sides have thus far been engaging in comparatively low-intensity, often indirect, strikes in an attempt to avoid acknowledging the existence of a 'war'. This is an increasingly common, and perhaps understandable, strategy. However we can see here that it has come at the cost of clarity for the actors – in their own minds, not in the law – about the nature of the game they are playing. It is war.

Secondly, we have seen inflammatory language from Iran to the effect that it will wreak 'crushing retaliation' on the US and, in response, the US has suggested that it might even respond 'disproportionately'. On this point, we must appeal to both sides to remember that the need to act 'proportionately' at all times in war is an absolutely key requirement of the law. Actions must always be measured rather than extreme. This requirement is best expressed in Articles 32, 51 and 57 of Additional Protocol I to the Geneva Conventions. In essence, the rule is that the collateral damage resulting from an attack must not exceed the military gain garnered from it. Hopefully, both sides were engaging in political rhetoric when making these remarks and we will not see the tenor of the comments transposed onto the battlefield. Nonetheless, language should be chosen carefully.

Thirdly, there was a suggestion that sites 'important to ... Iranian culture' may be hit in future US strikes. This language was evidently vague and the potential targets were not divulged so it is impossible to say whether or not attacks against them would be legal. However, it should be borne in mind that 'cultural property' (if that is indeed what was referred to) benefits from a detailed regime of bespoke protection comprised of treaties such as the Hague Convention for the Protection of Cultural Property 1954 and its protocols. The regime is by no means perfect and it is certainly not true to say that cultural property is immune from attack in any situation. However, it is not promising to see it singled out for destruction in this way. The appalling damage caused by ISIS to Palmyra should be seen as a wake-up call, not a blueprint.