

6-19-2017

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Recommended Citation

Peter Margulies, Containing Iran and Maintaining Legitimacy, *Lawfare* (June 19, 2017, 2:00 AM), <https://www.lawfareblog.com/containing-iran-and-maintaining-legitimacy>

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Containing Iran and Maintaining Legitimacy

By Peter Margulies Monday, June 19, 2017, 2:00 AM

The threat posed by the Iranian regime was one focus of a recent Academic Exchange (AE) retreat of International Relations specialists and international lawyers. Even with the reelection of President Hassan Rouhani, the Iranian regime poses a two-pronged threat to the Persian Gulf and the Middle East. For one thing, Iran is poised to gain on the ground in Syria, Yemen, and elsewhere. The need to counter Iran's ground game is the catalyst for President Trump's efforts to collaborate with Persian Gulf states. Countering Iran seems even more urgent after news that Iran has sponsored Shia militias in the Syrian Golan Heights, abutting Israel (see report here). Moreover, Iran is also fighting a war of ideas, contesting the West's legitimacy.

The U.S., Israel, and Persian Gulf states should recognize that countering Iran has two components: 1) gains "on the ground" from tangible measures, including sanctions and, where necessary, the use of force, and, 2) gaining the *moral* high ground of legitimacy in the war of ideas. Tensions between these two elements are inevitable, but manageable.

Let's start with the legitimacy tourney. Here, the U.S. and its allies have some work to do. Consider one action that has recently triggered substantial U.S. litigation: President Trump's revised executive order (EO) pausing travel from six countries, including Iran. I've written before about why I believe the revised EO is legal (see my analysis here and Josh Blackman's *New York Times* op-ed here), but nevertheless constitutes bad policy. The EO's effects on Iranian nationals vividly demonstrate the policy point. Iranian immigrants to the U.S. confer substantial advantages on the U.S. population, through service as doctors and other professionals (in addition, a significant number of doctors in the U.S. hail from Syria, another one of the six countries listed by the EO, as this *New York Times* story shows). While Iran's moves in the Middle East are indeed troubling, there is no reason to think that Iranians who wish to emigrate to the U.S. endorse those moves. Indeed, a Homeland Security study of terrorist-related crimes committed by foreign-born individuals in the U.S. shows precious little activity in this sphere by persons born in Iran (only three out of approximately ninety cases).

While the policy rationale for pausing admissions from *any* of the six countries is modest, the weakness of the justification regarding Iran is salient. The Administration may be right as a legal matter that the Iranian *regime's* role as a state sponsor of terror justifies a pause in admissions to ensure that U.S. immigration authorities are receiving accurate data from Iran. However, the collateral damage of the EO for Iranian *people* and the U.S. individuals who benefit from services provided by Iranian doctors and other professionals provides a strong basis for rethinking the EO's policy underpinnings. Count the EO as a victory for Iran in the legitimacy tourney.

The U.S. and its allies are heading for another defeat on the legitimacy front in the Saudi intervention against Iran-sponsored Houthi rebels in Yemen's civil war. As Mike Newton and Ryan Goodman have rightly indicated, the Saudis have engaged in repeated violations of established law of war norms, including violations of the rule of proportionality. That rule bars attacks with expected harm to civilians that is excessive given the military advantage anticipated, when judged from the perspective of a commander prior to the attack. The U.S. has been trying to rein in Saudi forces for well over a year. I believe the U.S. has been sincere; some of the nation's most capable military lawyers have invested substantial time and effort in working with the Saudis on compliance with the law of war. However, the results of this tutelage continue to be disappointing. At some point soon, unless the Saudis substantially improve their compliance, the U.S. may bear both policy and legal responsibility for Saudi violations. Although the jury is still out, score this as a preliminary win for Iran in the legitimacy tourney.

As to the score "on the ground," consider the activities of pro-Iran Shia militias such as Harakat al-Nujaba on the Syrian Golan Heights. As I can testify based on a recent visit to the portion of the Golan Heights now held by Israel, this area presents commanding views of both Syria and Israel. Prior to the 1967 war, Syrian forces regularly shelled Israeli towns from positions on the Golan Heights. For good reasons, Israel is determined not to be put in this vulnerable position again. That is why Israel is intensely concerned about al-Nujaba's announcement that it is moving militia units into the portion of the Golan Heights still controlled by Syria. Israel has made it clear that, if necessary, it will take military action to prevent opening up this new front in the Syrian conflict. The militia activities continue, although their precise scope is unclear.

Suppose Israel were to use force to hold the Shia militia at bay. How would Israeli action fare under international law? Three theories could support Israel's action. It could be, (1) merely another episode in a continued state of war with Syria since 1967, (2) a response to a "material breach" by Syria of the 1974 post-Yom Kippur War disengagement agreement, or, (3) a form of self-defense under the U.N. Charter.

Theory (1) receives support from the preeminent international law scholar Yoram Dinstein, who outlined the theory in his essential treatise, *War, Aggression and Self-Defence*. This theory allows each party to the armed conflict substantial leeway, since no triggering action by one party would be required as a justification for the other party's action. It is logically true that if a state of war continues to exist, Israel would be within its rights in taking military action against Shia militias on Syria's portion of the Golan Heights. The Shia militia's commander has

made it easier for Israel to situate the militia's activities within the Israel-Syria conflict. Speaking of his militia, which has collaborated in Syria with Iran's Quds force, al-Nujaba leader Akram al Kabi said earlier this year that the group would undertake to "liberate" the portion of the Golan annexed by Israel if Syria so requested.

The difficulty with the continued-war theory is its disconnect from facts "on the ground." While the relationship between Israel and Syria over the past 43 years has not exactly been harmonious, sustained military encounters have been rare. Against that relatively uneventful backdrop, it seems counterintuitive to insist that a turn toward force does not require some triggering event. While this theory is buttressed by Professor Dinstein's estimable support, it may be another loser in the legitimacy tourney.

Option (2) — arguing that Syrian consent to Shia militias' activities in the Golan constituted a "material breach" of the 1974 disengagement agreement — suffers from a different problem: its inconsistency with the U.N. Charter framework governing the use of force. Article 2(4) of the Charter bars the use of force against another state. Absent Security Council authorization, the only exception is the use of force in self-defense against an "armed attack," pursuant to Article 51. Some distinguished commentators, including Professor Dinstein, have argued that a material breach theory is viable despite the Charter (including in the case of the 2003 Iraq War). However, other experts strongly disagree. (See Sean Murphy's rebuttal here.) The U.N. played a substantial role in implementing the 1974 Israel-Syria disengagement agreement by providing peacekeepers (including four Austrians who died when a mine exploded in the demilitarized zone created by the agreement; see Robert Morriss's piece [behind pay wall] here). It seems incongruous to accept the U.N.'s help, but then reject the U.N. Charter's framework governing the use of force. Score another loss in the legitimacy tourney.

On balance, the best option is theory (3): arguing that Israeli action against al-Nujaba would constitute self-defense. International law, going back to then-Secretary of State Daniel Webster's 1841-42 correspondence with the British regarding their targeting of the U.S.-owned steamship *The Caroline* for aiding Canadian rebels, has held that a state can use force to thwart an imminent attack, as long as that force is necessary and proportionate to address the threat. (For current glosses relevant to nonstate actors, see UK Attorney General Jeremy Wright's January 2017 speech, the important 2012 article by Sir Daniel Bethlehem and this insightful piece by the U.S. Naval War College International Law Department's Alan Schuller.)

In the self-defense context, the uneventful climate of the past 40-plus years on the Golan would *favor* Israel. Dropped into this atmosphere of relative calm, the presence of a powerful Shia militia would itself be a marked departure from the status quo. Since Israel has not signaled any aggressive designs on Syrian territory, the mere presence of the militia suggests the kind of massing of troops that is consistent with the early phases of an attack. Intelligence information obtained by Israel that is consistent with this apparent hostile intent would reinforce the case, already strengthened by al-Nujaba leader Akram al Kabi's stated plan to "liberate" the portion of the Golan controlled by Israel (which annexed that portion in 1981). The combination of forces massed on the ground and specific manifestations of hostile intent moves the current situation in the Syrian Golan Heights closer to the situation that prevailed just prior to Israel's Six Day War fifty years ago, when Egypt's President Gamal Abdel Nasser massed troops in the Sinai, instructed U.N. peacekeepers to quit the area, and blockaded the Straits of Tiran.

Of course, the reading of imminence outlined here is not free from controversy. (See the recent post by Charlie Dunlap here on alleged Israeli airstrikes in Syria targeting Hezbollah arms shipments and Kevin Jon Heller's response here). However, relying on a self-defense justification would acknowledge the primacy of the U.N. Charter and put Israel on solid footing along with the U.S. and United Kingdom. Score this as the West holding its own in the legitimacy tourney.

In sum, containing Iran requires both action on the ground and maintaining legitimacy under international norms. In some areas, such as the inclusion of Iranian nationals in President Trump's revised refugee EO and U.S. assistance to Saudi efforts in Yemen, the West has suffered blows to its legitimacy. Israel's response to Shia militias in the Syrian Golan Heights presents another test. Careful attention to the justification for the use of force will be central to containing the Iranian regime's regional ambitions and recouping ground on the legitimacy front.

Topics: Iran

Tags: Syrian Golan Heights, legitimacy, Sanctions, Harakat al-Nujaba, Israel, Syria

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