

Israel – Hamas 2023 Symposium – Israel’s Right to Self-Defence against Hamas

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by [Nicholas Tsagourias](#) | Dec 1, 2023



Recent posts ([here](#) and [here](#)) have discussed Israel’s right to use force by way of self-defence against Hamas following the October 7 attacks. The gist of the first post’s argument, notwithstanding the caveats, is that the right to self-defence provided in Article 51 of the United Nations (UN) Charter is an exception to the rule prohibiting the use of force enshrined in Article 2(4) of the UN Charter and that self-defence applies only when the prohibition of the use of force is engaged. Based on this construction, this view claims that whether Article 2(4) and consequently Article 51 apply depends on whether Palestine “already existed as a State and Gaza was its sovereign territory.” By implication, if Palestine is not a State or Gaza is not its sovereign territory, Article 2(4) does not apply and consequently neither does Article 51.

In this post I want to challenge these views and claim that: (1) the right to self-defence is not dependent on Article 2(4) of the UN Charter, but it is a free-standing primary rule of international law; and (2) that self-defence can be exercised against non-State actors. In order to do this, I will explain the morphology of the right to self-defence.

The Morphology of Self-Defence as a Primary Right

There is no doubt that self-defence as formulated in [Article 51](#) of the UN Charter and customary law is a right that belongs to States. Article 51 refers to an inherent right of self-defence which the International Court of Justice (ICJ) tried to circumscribe by interpreting the word “inherent” as referring to customary law (*Paramilitary Activities*, para. 176). Even such a construction indicates that self-defence has a long pedigree beyond the Charter. Moreover, the right is expressed in absolute terms—“nothing in the Charter shall impair the inherent right of self-defence”—which also includes Article 2(4) on the prohibition of the use of force.

Second, self-defence is a free-standing right and a primary rule of international law containing a permission to use force (see this excellent [post](#)). Such force is lawful *per se* and *ab initio*. As a primary rule, the right to self-defence is legally disentangled from Article 2(4). It is not an exception to Article 2(4), a view supported by: (1) the way it is formulated in the UN Charter (in absolute terms); (2) the wording of Article 2(4) which does not say that the use of force is prohibited except in the case of self-defence; and (3) its place in Chapter VII of the UN Charter which provides for lawful uses of force, namely Security Council (SC) enforcement action, the use of force by regional organisations, and the use of force by way of self-defence. Furthermore, in its jurisprudence the ICJ has not linked self-defence to a violation of Article 2(4) but rather assessed the lawfulness of self-defence by looking at its components, namely, the existence of an armed attack, proportionality, and necessity.

Third, self-defence is not an international sanction; it is not a reaction to a prior breach of international law. If self-defence was a reaction to a delict, countermeasures and self-defence would conceptually collapse into each other. Instead, the aim of self-defence is to permit States to defend themselves against armed attacks and not to hold the author of the attack to account or punish them.

Fourth, self-defence is triggered by a factual occurrence, an armed attack. Whether an armed attack exists does not depend on the status of its author as a State, contrary to the ICJ’s opinion (see *Wall Advisory Opinion*, para. 139). This is evident from the wording of Article 51 which does not define the author of the armed attack but only the triggering event. Also, an armed attack is not conterminous with a violation of Article 2(4) of the UN Charter. When the ICJ defined an armed attack as a grave use of force (*Paramilitary Activities*, para. 191), it provided a description of the nature of an armed attack by using factual qualifications such a scale and effects. This means there is no restriction as to who can commit an armed attack; it can be a State or a non-State actor.

Fifth, self-defence as a right is exercised against the author of the armed attack which, as was said, can be a State or a non-State actor.

All this means that Israel has the right to act in self-defence against Hamas because the conditions for triggering the right to self-defence have been fulfilled. There was an armed attack and Hamas was the author of the October 7 armed attack. This is regardless of whether Article 2(4) is implicated or the status of Hamas as non-State actor.

At this juncture it is important to consider the implications of the argument which pairs self-defence and Article 2(4). States that suffer an armed attack by non-State actors will not be able to defend themselves because Article 2(4) does not apply to non-State actors.

It could be argued that at least territorial non-State actors should be bound by the customary law prohibiting the use of force because of the importance of this rule for the international legal order, peace and security ([Tsagourias](#)). If this view is accepted, the construction put forward pairing Articles 2(4) and 51 will apply. However, since this proposition has not been accepted because States have many reservations in accepting non-State actors as their counterparts, contending that self-defence depends on the prohibition of the use of force creates a dangerous legal and factual gap which can be exploited by non-State actors and their State sponsors to attack States with impunity.

Self-Defence as a Circumstance Precluding Wrongfulness

The question to consider now is whether Israel can exercise its right to self-defence against Hamas if Palestine (including Gaza) exists as a State but is not involved at all in Hamas's attack. Put differently, the question is whether Israel can take self-defence action against Hamas on Palestinian territory.

In my opinion, the answer is in the affirmative. As explained earlier, Israel has the right to use force by way of self-defence against Hamas as the perpetrator of the armed attack whereas its intrusion within Palestinian territory and the violation of its sovereignty will be excused by self-defence as a circumstance precluding wrongfulness according to [Article 21](#) of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).

Article 21 is a secondary rule dealing with the consequences of a breach of international law. The role of Article 21 ARSIWA is to excuse the responsibility of a State for any incidental violation of international obligations committed during the exercise of the primary right to self-defence (see [Tsagourias](#)). In this case it would be the breach of Palestinian sovereignty occasioned by the act of self-defence (provided of course that sovereignty is a rule of international law). Otherwise no State would be able to defend itself against non-State armed attacks because non-State actors are always located within States and thus will be protected by State sovereignty unless of course the territorial State consents to such action or is "unable or unwilling" (see [Deeks](#)).

One can say that Article 21 ARSIWA is not applicable in his case because it only applies to the relations between the attacking and defending State whereas Palestine is not the attacking State. This view is not, however, correct. First, Article 21, as a secondary rule, is of

general application and thus applies to any incidental breach of international obligations occasioned by the exercise of the right to self-defence. Secondly, Article 21 is parasitic on the primary rule of self-defence but does not define the primary rule. How self-defence is defined and what is its scope is a matter for the primary rule. Because self-defence covers non-State armed attacks even on the territory of third States, Article 21 will consequently apply. That having been said, it should be noted that the incidental breach of sovereignty will be excused only if the self-defence action stays within the confines of self-defence. This is an important caveat which I will not explore in this post but refer to the posts mentioned in the introduction.

Conclusion

The main take-aways from this post are that the right to self-defence is a primary rule of international law which is not dependent on Article 2(4) prohibiting the use of force. It is also a right which is triggered by a factual event, an armed attack, and is exercised against the author of the attack be that a State or a non-State actor. If a State takes self-defence action against non-State actors on the territory of a State which is not implicated in the attack, the incidental breach of that State's sovereignty is excused by self-defence as a circumstance precluding wrongfulness according to the law of State responsibility provided that the action stays within the boundaries of self-defence. This shows that there is no gap in international law when faced with non-State attacks and the right to self-defence demonstrates its full potential.

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