

Israel – Hamas 2023 Symposium – Strategy and Self-Defence: Israel and its War with Iran

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October 18, 2023

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The October 7, 2023 assault by Hamas terrorists into Israel and their perpetration of horrific war crimes has prompted several political, operational, and legal questions about the hostilities. These include: what led to the failure by Israeli security and intelligence organizations to predict and thwart the attack; what is the character of the hostilities between Hamas and Israel, with Prime Minister Netanyahu announcing that Israel was now “at war”; and to what degree was Iran engaged in the planning, preparation, and execution of the Hamas assault. The latter point relates not only to the political accountability of Iran, but also from a legal perspective whether the hostilities involving Hamas are part of an international armed conflict with Israel.

In assessing the current situation one of the challenges is separating rhetoric from the law. For example, the claim that Israel is “at war” must be considered in the context that it has previously responded to militant attacks with strikes into Gaza (including Operation Summer Rains (2006), Operation Cast Lead (2008-2009), Operation Pillar of Defence (2012), Operation Protective Edge (2014), and Operation Guardian of the Walls (2021)). In doing so Israel has consistently taken the view that it has been engaged in a continuing armed conflict

since 2000 with Hamas and other groups in Gaza. The present reference to being “at war” is perhaps best interpreted, in the Prime Minister’s words, as “Not an ‘operation,’ not a ‘round’” This suggests the hostilities this time will be significantly greater in scope and scale with an attendant increased level of destruction. Further, the language of “war” may be from a domestic political perspective a necessary precondition for widespread Israeli mobilization. In terms of international law, such distinctions as being at war or in an operation are irrelevant because international humanitarian law applies once any armed conflict is in existence.

This does raise questions regarding the categorization of the hostilities (i.e. international or non-international), which affects what international humanitarian law applies. As Mike Schmitt identified in an earlier post, the Israeli Supreme Court has uniquely taken the view that the conflict is international because of its trans-border nature. Domestically at least this may require Israel to apply the full body of international humanitarian law. Other States, courts, and experts have seen it as being non-international in character and therefore subject to a less fulsome set of international humanitarian law rules. In either event international human rights law also applies as a matter of treaty or customary international law.

The Recent Historical Setting

Israel has generally avoided categorizing the armed conflict as either international or non-international in character. In addition, there is the issue of State accountability and the degree of control that Iran exercises over Hamas’s actions. There is considerable debate whether Iran knew about the bloody attack and whether it “was directly involved in the planning, resourcing or approving of the operation.” This is occurring while it is widely acknowledged Iran has provided various proxies and surrogates the means and political backing during a 40-year conflict with Israel. It is hard to see that Iran is not at some level deeply involved in the present hostilities with the question remaining how that involvement is assessed strategically, including from an international law perspective.

A definitive assessment on many of these issues will have to wait for the inevitable post-conflict inquiry. However, allegations have already been made regarding Israel’s strategic approach. This includes arguments that Hamas was able to carry out the attack because Israel had, under what has been called the “Netanyahu doctrine,” adopted a strategy that divided power between the Gaza strip and the West Bank. Avoiding simultaneous Palestinian control of Gaza and the West Bank is suggested to have offered a way to undermine a two-State solution, and with the help of the United States and Arab States make possible “peace in the Middle East without the Palestinians.” Treating Hamas as both an enemy and a pragmatic organization that can be reasoned with is suggested to have backfired and ultimately provided Hamas the time and space to become even more dangerous.

Underlying these issues appears to be a “divide and conquer” approach that has often separately treated the threats to Israel posed by Iran, Syria, Hezbollah, Hamas, and Palestinian Islamic Jihad. Those threats are maintained at a “tolerable” level of violence in order to meet broader political objectives. Certainly, those who have followed hostilities in Gaza since 2005 will be familiar with the term “mowing the lawn,” whereby Israel is said to have treated Palestinian militants as “weeds that need to be cut back.” Such “landscaping” has been carried out with periodic defensive air strikes and sometimes ground action in response to rocket attacks and incursions by the Hamas and Palestinian Islamic Jihad terrorist organizations. What is not clear is whether the defensive response was restrained by policy or legal interpretations of the right to act in self-defence.

Since the 2006 war, Hezbollah and Israel have relied on a policy of mutual deterrence thereby avoiding “re-engaging in a large-scale military campaign, whose results are expected to be far worse than in the past.” At the same time Hezbollah, like Hamas, has undertaken a massive military buildup, albeit a potentially far more dangerous one. It is reported Hezbollah has amassed 150,000 rockets and developed a 5,000 strong commando force capable of infiltrating Israel’s northern border to kill and take hostages. The extent of the threat was graphically outlined in a 2018 report, Israel’s Next Northern War: Operational and Legal Challenges. What is not known is whether an overreaction or miscalculation will cause this powder keg to explode, or if Hezbollah’s engagement, should it occur, will simply be part of a broader strategic plan against Israel that is in the process of being operationalized. All perhaps coordinated by Iran in recent meetings with these non-State actors.

A threat management approach is also reflected in the Israeli “Campaign Between Wars” doctrine, which is the term used for Israel’s “prevention and influence approach for force employment short of war.” Under that doctrine, what is perceived as a simultaneous conventional, unconventional, and subconventional threat is addressed by integrated low-intensity, preemptive warfare where “[o]ffensive operations have been spread out in terms of time and space to allow the enemy system to ‘cool off,’ and special care has been given to maintain a low signature or to blend into background noise so as to provide the attacked enemy with ‘deniability space’ and reduce the political and public impetus to retaliate.” This is a hallmark of shadow warfare, which often involves covert or clandestine operations shaded from view and is frequently associated with “gray zone” or “hybrid conflict.” It has included operations in Iran, Syria, Sudan, and on the high seas that are designed to degrade Iran’s ability to arm Israel’s non-State opponents or acquire nuclear weapons. As appears to have occurred, the public—both domestic and international—can become habituated to low level and all too frequently deniable violence. Indeed, discussion about Israeli covert operations in Iran have become normalized to the point it is the subject of entertainment in an Apple+ television series: Tehran.

Assessing Approaches

On one level, the divide and conquer/management of violence approach is understandable. A full-scale ground campaign into Gaza was something that “would entail enormous casualties on both sides.” That is an outcome that until now was unlikely to find the necessary political support within Israel, or in the broader international community. International resistance to Israel entering Gaza and calls to end military action as civilian casualties increase with military action have been a hallmark of these operations. This includes the present security context. An operation against Hezbollah carries similar and perhaps greater risks due to the size and capability of that non-State actor’s military forces. As for an overt military action against Iran there have been and likely will continue to be significant political and military constraints against doing so.

However, this piecemeal approach can also mask the full nature of the threats and the responses necessary to address them. The events of October 7 highlight that errors in managing violence in these situations can carry with them tremendous risks, both on the ground and strategically. Any inquiry must closely assess the relevant international law governing Israel’s use of force with a particular emphasis on the exercise of State self-defence. It seems evident that this body of law, often associated with the concept of “outlawing” war between States, has in the case of these hostilities consistently failed to end, or create the conditions necessary to effectively terminate the violence. There is also the question of whether the application of that law has contributed, even inadvertently, to a situation of seemingly perpetual violence.

I have previously addressed the application of State self-defence during Iran’s shadow conflicts with Israel, the United States, and Saudi Arabia in a 2022 article, “Exercising Self-Defence in 21st Century Shadow Wars,” published in the *Israel Yearbook of Human Rights*. That article addresses a wide range of legal issues including the separation of the law governing self-defence from that regulating the conduct of hostilities, the concurrent application of both bodies of law, reconciling the thresholds for “armed attack” and determining the existence of an armed conflict, identifying the beginning and end of armed conflict when acting in self-defence, the tests for State attribution for the acts of non-State actors, and reconciling the application of both legal frameworks in terms of the principle of proportionality. Unfortunately, despite their relevance to such long-term hostilities these are matters that have not attracted sufficient attention or consensus within the international legal community. This has occurred, in part, because of a fundamental disagreement as to whether the law of State self-defence should be interpreted in a restrictive or expansive manner. However, from a strategic perspective an assessment of these issues is key to fully identify the protagonists in this conflict and determine how or whether present interpretations of the law governing self-defence provides an effective tool to end the violence.

Two Camps

At the heart of this discussion is how non-State actors fall within the legal framework governing the exercise of self-defence under the UN Charter, and what the criteria are to determine the nature of Iran's role in the hostilities. There is widespread use of the term "Iranian proxy" to describe Hamas, Hezbollah, and other groups. However, this "connecting" terminology appears to be at odds with the piecemeal individualistic approach seemingly applied towards addressing the threats facing Israel, and an apparent need to repeatedly establish Iran's involvement in the violence.

The restrictionist interpretive camp involves a classical interpretation of the law of self-defence, and the dominant one applied until the turn of the 21st Century and the attacks of 9/11. It has at its core a State-centric view of threats and responses, which seeks to champion the "anti-war" motivation that ultimately resulted in the Charter. As Yishai Beer outlines, it sets a high gravity threshold for determining the existence of an armed attack, aims at containing conflicts and strengthening the stability of the international order, preventing the escalation of relatively minor conflicts, and limiting third-State involvement. The challenge is determining how well it does so.

The restrictionist camp relies on a narrow imminence standard with attacks actually needing to be "occurring." It has been particularly resistant to the right to self-defence applying to non-State actor attacks that are not attributable to a State. That approach being further reinforced by relying on the stringent "effective control" test for State attribution established in the 1986 *Paramilitary Activities Case* (para. 115). There is also a reluctance to accept the "accumulation of events" or "needle prick" theory by which a series of minor attacks may be accumulated in assessing self-defence claims. Under this restrictionist construct, non-State actor attacks not narrowly attributed to a State are left to be dealt with by getting territorial State consent to act, taking the matter to the UN Security Council, or perhaps by treating the threat as a policing matter. In light of the significant threat posed by Hamas none of these options provides an effective or realistic remedy. The result would be an international security void.

In contrast, an expansionist theory, which has gained greater acceptance in the messier post-9/11 security environment, recognizes the right to act in self-defence against non-State actors. It reflects the significant change in international affairs since the Second World War. Just as international humanitarian law had to expand because of the changing character of conflict in the 1960s and 70s (e.g. Additional Protocols I and II) so too has the law governing State self-defence. Proponents of the expansionist theory tend to apply lower thresholds for determining if an armed attack has occurred and an armed conflict exists, they use a broader notion of imminence, seek to respond to a series or continuing low level attacks and apply self-defence in the midst of an going armed conflict, and more openly address the threat posed by State proxies. This approach is reflective of other permissive theories such as forceful countermeasures being permitted against a smaller-scale use of force and noncombatant evacuation operations (NEOs) falling outside the scope of Article 2(4) the UN Charter.

However, the expansionist theory also comes with significant risk. As Oona Hathaway and Scott Shapiro explain in their book *The Internationalists*, in the context of operations against ISIS,

Unfortunately, the growing reliance on self-defense as a justification for using force—for this and other operations against terrorist groups around the world—threatens to make self-defense the exception that swallows the rule against war . . . (p. 416).

Israel cannot be said to have applied the restrictionist theory, one that is regularly and vocally espoused by opponents to its use of force. However, its application of a more expansionist approach also clearly has not brought about peace. The repeated application of self-defence principles in Gaza over a 20-year period has not ended the conflict. To a degree, it can be seen to have underpinned the “mow the lawn theory,” and possibly even preserved Hamas’s rule. This is reminiscent of a whack a mole arcade game where each threat is beaten back in a piecemeal, incomplete or temporary fashion, but the overall threat posed by the actors in the background is not effectively addressed.

A Strategic Legal Prescription

Perhaps what is needed is a more strategic assessment of the threats posed to Israel by Iran. One that more fully assesses Iran’s involvement in order to bring it out of the shadows enabling a greater demand for accountability. This assessment can start with looking at Iran’s strategic goals and its relationship with the various affiliated actors apparently tasked with carrying them out. A May 2022 report by a senior Israeli military analyst, *Countering Iran’s Regional Strategy* (p. 7), suggests Iran has a goal of creating a Shiite crescent of influence based on “a critical land corridor connecting Iran with Lebanon via Iraq and Syria, all the way to the ports of the Mediterranean and Israel’s borders.” Iranian foundational support for Hezbollah, the assistance provided to Sunni militant groups in Gaza, and its 2011 intervention in Syria certainly reflect this theory. It is significant that Iranian officials call Israel the “Little Satan” and have publicly indicated it must be destroyed. The destruction of the State of Israel and its replacement with a Palestinian one is also the goal of Hamas. Iran’s status as a strategic threat is practically reflected in Israel’s 2020 creation of “Iran Command” to assess Iranian threats and plan operations against that State.

A key issue regarding the assessments of Iran’s relationships with Hezbollah, Hamas, Palestinian Islamic Jihad, and even Syria is the common use of the term “proxy.” It has been defined as “the physical manifestation of a dominant actor, or the principal, leveraging an intermediary, or a nondominant actor (the agent, or proxy), against an adversary to achieve the dominant actor’s objectives.” From a restrictionist perspective such a relationship is ordinarily assessed under a stringent “effective control” standard meaning attribution to a State and with it a right to act in self-defence is less likely to be accepted.

However, this represents just one approach. The *Paramilitary Activities Case* (para. 195) also suggested a less stringent “substantial involvement” test, which is also considered to be customary international law. It is a test that has been accepted by restrictionists (see Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law*, p. 470) “as covering massive support for armed bands operating from the territory of the State in question, without the State actually participating in the armed actions as such.” This less stringent approach is also reflected in an American Bar Association use of the term “surrogate” rather than proxy since it captures “a broader range of relationships in which one party seeks to support another party engaging in hostilities where the sponsor state may not exercise the ability to control its surrogate.” Also relevant is the International Criminal Tribunal for former Yugoslavia *Tadić Case* (para. 162) “overall control” test for establishing the existence of an international armed conflict. Finally, there is the issue of whether non-State actors such as Hamas or Hezbollah are simply allies or co-belligerents with Iran in an ongoing armed conflict with Israel. Due to this co-belligerent status, a defensive strike against Iran in the context of its involvement with Hamas in its attacks on Israel would make assessing the level of control it exerts over that non-State actor irrelevant.

In effect, there is a four-part test for assessing the State and non-State actor relationships: 1) effective control; 2) substantial involvement; 3) overall control; and then 4) “allied action.” It is clear Hezbollah, Hamas, the Palestinian Islamic Jihad, and Syria are all engaged in a common cause with Iran. Each has a unique relationship with Iran, with the non-State actors being dependant on its support, but also exercising a degree of independence. This suggests that the “effective control” test may be challenging to meet. However, it does not preclude assessing accountability being established under the “substantial involvement” test, the “overall control” test, or simply looking at these entities as Iran’s co-belligerents. Iran and Israel are engaged in an ongoing armed conflict sometimes in the open, but primarily in the shadows.

As just a sampling, Israel has focused on stopping the Iranian transport of weapons and weapons technology by targeting Iranian military sites and killing Iranian personnel including those advising Syrian armed forces. Farther afield, Israeli strikes are reported to have occurred in Sudan, in Iraq, and just inside Syria near the Iraqi border. Between 2021 and 2023, there has been a series of drone strikes allegedly carried out by the Israeli Mossad on missile, nuclear, and drone facilities in Iran. Added to this are the alleged killing of Iranian nuclear scientists and attacks by Iran on Israeli diplomats, attacks on commercial shipping by both parties, mine damage to an ICG cargo vessel, and cyber attacks such as Stuxnet. Applying the low 1949 Geneva Convention, Article 2, threshold for an armed conflict makes it possible to conclude these two countries have been “at war” on a regional and continuous basis for a number of years during which there has been no ceasefire or cessation of hostilities. This makes the recent indication that Iran will intervene if Israel enters Gaza an issue of politics and operations rather than law.

Concluding Thoughts

To date the application of the legal framework governing self-defence has not had the desired effect of avoiding the scourge of war. There is a need for the international legal community to widen its aperture on the exploration of this violence and lift the veil that has masked the scope and scale of conflict between these States that is purposely carried out in the shadows. A strategic assessment will in turn more realistically set the scene for discussing attribution, accountability, and the role the law governing self-defence can and should perform in regulating the use of force in the region.

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