Israel’s Actions in Syria and the Outer Limits of Self-Defence

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Following the fall of the al-Assad regime in Syria, Israel carried out a series of airstrikes across Syria targeting military facilities, weapons and ammunition depots, defence systems, and Syrian naval and aircraft fleets. The targets reportedly housed “chemical weapons stocks and long-range missiles,” which Israel, according to Israeli Foreign Minister Gideon Sa’ar, sought to keep from falling “into the hands of extremists.” Sa’ar explained further, saying, “It is important right now to take all necessary steps in the context of the security of Israel.”

In its letter to the UN Security Council (UNSC), Israel said the “[Israel Defense Forces (IDF)] have deployed temporarily in a few points and in a limited capacity … focusing on specific locations where defensive measures are necessary to maintain security and stability and to prevent armed groups from threatening Israeli territory.” This deployment, which has not faced armed resistance, refers to “the area of separation,” a demilitarized stretch of land in Syria established by the 1974 Disengagement Agreement.

Prime Minister Netanyahu announced the deployment is a “temporary defensive position” to prevent any “hostile force” from establishing itself near Israel’s border. Later in its letter, Israel also said the IDF,

will continue to act as necessary in order to protect the State of Israel and its citizens, in full accordance with international law, and will continue to monitor the situation closely. It is important to emphasize, however, that Israel is not intervening in the ongoing conflict between Syrian armed groups; our actions are solely focused on safeguarding our security.

Apparently echoing this thinking, the United States reiterated that Israel “has every right to its self-defense and its security.”

In contrast, Syria’s letter to the UNSC condemned “Israeli aggression in the strongest terms.” According to Syria, Israel’s recent deployment amounts to,

a grave violation of the 1974 Disengagement Agreement endorsed by Security Council resolution 350 (1974). It is also a violation of the sovereignty, unity and territorial integrity of the Syrian Arab Republic that runs counter to the principles and purposes of the Charter of the United Nations, the provisions of international law, and Security Council resolutions 242 (1967), 338 (1973) and 497 (1981).

Similarly, Türkiye, Iran, Saudi Arabia, Egypt, and a few other States condemned Israel’s actions in Syria (see here and here). Ben Saul, the UN Special Rapporteur on the Promotion of Human Rights while Countering Terrorism, was reported to have stated that “there is absolutely no basis under international law to preventively or preemptively disarm a country you don’t like. … If that were the case, it would be a recipe for global chaos.”

Whether Israel’s actions violate international law depends on whether they are justifiable under the rubric of self-defence. In this post, I will consider the outer limits of self-defence in the form of pre-emptive and preventive self-defence and explain their rationale and status in international law. I will then analyse the criterion of imminence and argue that, whereas pre-emptive self-defence addresses the calculable threat of an armed attack, preventive self-defence addresses the risk of a prospective armed attack.

Although this post focuses on Israel’s actions due to the criticism they have attracted, readers should note that other States, including the United States, France, and even those that have criticised Israel, such as Türkiye, have taken military action in Syria following the fall of the Al-Assad regime to prevent the resurgence of terrorism (be it from the Islamic State, as the United States and France see things, or from the Kurds, as Türkiye sees it).

The Outer Limits of Self-Defence: Pre-emptive and Preventive Self-Defence

The right of self-defence permits States to use force to repel an armed attack. Article 51 of the UN Charter enshrines the right of self-defence in positive law, but it is also a rule of customary international law. Furthermore, Article 51 seems to require an ongoing or a completed armed attack to trigger the right of self-defence. Contemporary debates, however, surround the question of whether a State may exercise self-defence in anticipation of an armed attack.

There are two types of anticipatory self-defence. The first is when the armed attack is imminent in the sense of being immediate or proximate in temporal terms or, to put it differently, when the armed attack is "about to happen." This is called *pre-emptive* self-defence. American Secretary of State Daniel Webster laid out the criteria for pre-emptive self-defence in the Caroline case as a "necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment of deliberation." The Six-Day War is a good example of pre-emptive self-defence and Israel has been a persistent advocate of it.

The second type of anticipatory self-defence is when defensive action is taken against a potential armed attack. This is called *preventive* self-defence.

International jurisprudence has been quite ambivalent regarding the lawfulness of anticipatory (pre-emptive or preventive) self-defence. The International Court of Justice (ICJ), for example, has never decided the legality of anticipatory self-defence. In the *Armed Activities* case, the ICJ said that self-defence does not extend to the protection of a State's security interests (para. 148). Although some seized on this to claim the court rejected preventive self-defence, the protection of a State's security interests and its defence against an armed attack are different things.

Terrorist attacks, such as those of September 11, 2001, and the prevalence of weapons of mass destruction (WMD), convinced States (and some scholars) of the legality of *pre-emptive* self-defence. A 2004 document titled "A More Secure World" registered this change when it said, "[A] threatened State, according to long-established customary international law, can take military action as long as the threatened attack is imminent, no other means would deflect it, and the action is proportionate" (para. 188).

In contrast, many commentators have rejected the existence of *preventive* self-defence. The same 2004 document asks,

Can a State, without going to the Security Council, claim in these circumstances the right to act, in anticipatory self-defence, not just pre-emptively (against an imminent or proximate threat) but preventively (against a non-imminent or non-proximate one)? Those who say "yes" argue that the potential harm from some threats (e.g., terrorists armed with a nuclear weapon) is so great that one simply cannot risk waiting until they become imminent, and that less harm may be done (e.g., avoiding a nuclear exchange or radioactive fallout from a reactor destruction) by acting earlier. … The short answer is that if there are good arguments

for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. If it does not so choose, there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment—and to visit again the military option (paras. 189–190).

Placing Israel's actions within this framework, one could say that in the absence of an immediate or proximate armed attack, Israel did not act in pre-emptive self-defence, but its action was preventive. One could also add that instead of acting unilaterally, Israel should have brought its case to the Security Council which, if convinced, could have even authorised military action (granted, such a course of action would likely be futile, given the current state of affairs in the Security Council).

That having been said, some contend that the gap between pre-emptive and preventive self-defence is not as clear as it appears to be at first sight. It all depends on how "imminence" is interpreted. Traditionally, "imminence" has been interpreted in temporal terms, permitting self-defence against an armed attack that is about to happen. Such an approach is not useful —or even workable—in the case of certain cyber-attacks, terrorist attacks, or attacks with WMD (not to mention a combination thereof). For this reason, contemporary interpretations of "imminence" are more contextual. According to the Chatham principles of international law on the use of force by States in self-defence,

Whether the attack is "imminent" depends upon the nature of the threat and the possibility of dealing effectively with it at any given stage. Factors that may be taken into account include: the *gravity* of the threatened attack—whether what is threatened is a catastrophic use of WMD; *capability*—for example, whether the relevant State or terrorist organisation is in possession of WMD, or merely of material or component parts to be used in its manufacture; and the *nature* of the attack—including the possible risks of making a wrong assessment of the danger. Other factors may also be relevant, such as the geographical situation of the victim state, and the past record of attacks by the state concerned.

Also, according to Principle 8 of the Bethlehem Principles, which have been adopted by the United Kingdom, Australia, and the United States,

Whether an armed attack may be regarded as "imminent" will … be assessed by reference to all relevant circumstances, including (a) the nature and immediacy of the threat, (b) the probability of an attack, (c) whether the anticipated attack is part of a concerted pattern of continuing armed activity, (d) the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action, and (e) the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage. The absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a

conclusion that an armed attack is imminent for purposes of the exercise of a right of self-defense, provided that there is a reasonable and objective basis for concluding that an armed attack is imminent.

Such contextual interpretations of imminence mean that a State can act in self-defence well before the armed attack becomes proximate in temporal terms. Although it is unclear how the aforementioned factors relate to each other, they at least invite a more holistic, case-by-case evaluation of the circumstances that can lead to the conclusion that an armed attack is imminent.

Application to Israel's Actions

Regarding Israel's actions, certain authors opined that these criteria of imminence have not been met, and that even if some groups in Syria might one day use such weapons to attack Israel, there is no irrevocable commitment on their part to doing so. Of course, a lot depends on evidence and intelligence information (which I do not possess), but the answer is not as clear-cut as it may initially appear.

Certainly, bad-faith actors whose hostile intent towards Israel is well-documented can exploit the power vacuum in Syria to acquire highly advanced and disruptive weapons, including WMD. We should not disregard outright intelligence suggesting such actors may exploit the fog of war created by the downfall of the Syrian regime to attack Israel. Similarly, great uncertainty remains as to whether the new regime in Syria will be able to extend its authority and control over the whole territory and actors operating from Syrian territory.

Furthermore, there is uncertainty as to whether the new regime will choose peaceful or hostile relations with its neighbours, including Israel. However, Hay'at Tahrir al-Sham (HTS) is an offshoot of Al-Qaeda, which has traditionally been opposed to Israel and is still designated as a terrorist organisation by many States. Keeping this in mind, the possibility of WMDs falling into the hands of HTS as the new government of Syria is, to put it mildly, unsettling. At the very least, one could argue the gravity of a potential armed attack (particularly with WMD), the increased capability of inflicting such an attack if such weapons become available, the "track record" of attacks against Israel, and the views expressed by certain actors and their sponsors about Israel all collectively point to the conclusion that Israel was justified in taking reasonable measures in self-defence to prevent or mitigate the effects of a likely (albeit future) and devastating armed attack.

These events highlight a critical question facing international law. How can international law protect States from the risk of attacks by WMD or terrorists? As the 2004 "A More Secure World" document put it, "The problem arises where the threat in question is not imminent but still claimed to be real: for example the acquisition, with allegedly hostile intent, of nuclear weapons making capability" (para. 188).

Whereas a threat is a calculable danger based on an adversary's capabilities and intention to inflict harm, a risk refers to probable harm. For example, a terrorist attack can fall under the rubric of risk because, although such an attack can cause harm, it is usually much more difficult to know when and where it will take place, and, as a corollary, the extent of the harm it will cause.

Whereas *pre-emptive* self-defence addresses the threat of an armed attack that is sufficiently proximate and where the intention to attack, as well as the *ability* to attack, are demonstrable, *preventive* self-defence addresses the risk of an armed attack occurring in a context of uncertainty regarding the aggressor's plans, intentions, or timing. As Rasmussen put it, "A risk is never a present danger: it only becomes a danger because of what it is expected to cause in the future" (p. 118). As I have also argued elsewhere, in the case of risks, probability and harm do not exist in a symmetrical relationship, but a less probable but very harmful event amounts to a risk. *Preventive* self-defence thus involves defensive action taken immediately against a potential armed attack that is virtually certain to cause serious harm.

Accordingly, national leaders face a conundrum. They must make decisions now to protect their people to whom they are accountable by projecting into an uncertain and ever-changing environment, as is the case now in the Middle East, having limited or inconclusive evidence. There is unfortunately no algorithm or scientific method on how to make such predictions and determinations.

The 2002 U.S. National Security Strategy recognized the challenge posed by such risks. Notwithstanding the use of the language of pre-emption, it said "We cannot let our enemies strike first … [but instead must take] anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively." Likewise, the 2006 U.S. National Security Strategy said that "under long-standing principles of self-defense, we do not rule out the use of force before attacks occur, even if uncertainty remains as to the time and place of the enemy's attack."

Comparing reactions to Israel's strike against Iraq's Osirak nuclear reactor in 1981 and its strike against the Syrian nuclear research facility in 2007, it appears that views towards preventive self-defence are changing. About the 1981 strike, Israel said that it acted in accordance with the right to self-defence as understood in general international law and as preserved in Article 51 of the Charter of the United Nations. Israel reiterated that it could not stand idly by while what it saw as an irresponsible, ruthless, and bellicose regime, such as that of Iraq, acquired nuclear weapons. Israel further argued that terms like "armed attack" and the threat thereof should be interpreted in conjunction with the present-day criteria of speed and power, and placed within the context of the circumstances surrounding nuclear

attack, including any preparations for and consequences resulting therefrom. Whereas most States and commentators at the time criticized Israel's action as exceeding the bounds of imminence, reactions to the 2007 attack were far more restrained.

Before concluding, one more question remains. Does the ongoing armed conflict between Israel and Syria, which predates the current incidents, have any direct legal consequences on the self-defence analysis? Certain scholars (e.g., here at p. 285, and here) have taken the view that once there is an ongoing armed conflict between two actors, there is no longer a requirement to justify operations under the *jus ad bellum*. Israel and Syria have been engaged in an ongoing armed conflict since 1948, which began when Syria attacked Israel.

The armed conflict has never terminated, as the 1974 ceasefire agreement did not bring the ongoing armed conflict to a close, evidenced, among other things, by consistent occurrences of hostilities over the years, including in recent years. The fall of the Assad regime, in and of itself, did not alter the legal situation since Syria remains the opposing State. Consequently, and following this view, Israel's actions are a continuation of the ongoing armed conflict between Israel and Syria, and Israel does not need to justify its action anew under the *jus ad bellum* right of self-defence. Although I, as do other commentators, do not subscribe to this position, scholars should not completely disregard it as a potential legal justification Israel may offer for similar events.

Conclusion

In this post, I argued that a risk-informed approach to self-defence can justify Israel's actions in Syria. Such an approach takes a more granular assessment of the unique risks facing Israel, such as the increased capability of actors harbouring hostile intent to attack Israel by acquiring weapons like WMD and the gravity of any such attack. However, a word of caution is called for. Whereas this approach to self-defence attempts to eliminate future attacks, it requires a robust and multilevel assessment of the situation and clear objectives. Otherwise, decision-makers may fall into the trap of permanent anticipation which, in the long run, may prove to be counterproductive.

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