

Setting a Clear Red Line in Israel's Legal Narrative toward Iran

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The threat arising from Iran's nuclear program has led to many discussions on the military feasibility and the strategic desirability of a possible strike by Israel on Iran's nuclear facilities. However, against the background of the complex and abstract nature of the Iranian nuclear threat, a thorough discussion of the legal justifications for such an act of self-defense is notably absent. This article attempts to launch this discussion by proposing a new legal narrative that argues why Israel has a right to anticipatory self-defense against Iran's nuclear program before the program reaches a zone of immunity.

Anticipatory Self-Defense in International Law

Any discussion on the use of force within the framework of the United Nations starts with Article 2(4) of the UN Charter, which provides that, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."¹ This prohibition on the use of force is the general rule to which the right to self-defense is the exception.

Article 51 of the UN Charter on self-defense provides that "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations."² Because of the relationship between the prohibition on the use of force and the self-defense exception to this prohibition, it

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is understood that self-defense can only be invoked when it meets the normative restraints of necessity and proportionality.³

In the temporal sense, there are four distinct types of self-defense.⁴ In order of decreasing chronological proximity to an armed attack, these are: reactive self-defense; interceptive self-defense; preemptive self-defense; and preventive self-defense.⁵ Reactive self-defense is the undisputed type of self-defense that a state may invoke in response to an armed attack that has already occurred. Interceptive self-defense may be invoked in response to an incipient armed attack that perhaps has not yet occurred but is underway in an ostensibly irrevocable way.⁶ Preemptive self-defense is a type of anticipatory self-defense to which a state is considered to have an “inherent right” and may be invoked in response to an “imminent threat.” Preventive self-defense is another type of anticipatory self-defense invoked in order to prevent a shift in the balance of power in the more distant future, but for which there exists no imminent threat.

Because the right to self-defense is dependent upon the normative restraints of necessity and proportionality, it is understood that the more distant the threat, the more difficult it is to argue that self-defense is in fact necessary. After all, over time a potential aggressor state may choose to change its course, and as a result, use of force may not be necessary. There therefore exists a consensus of sorts that preemptive self-defense can be legal in the international law system under certain circumstances, whereas preventive self-defense is thought to relate to threats too far into the future to argue convincingly for its legal necessity.

The Vital Interests Determining Necessity and Proportionality

Since the legality of self-defense is dependent upon the normative restraints of necessity and proportionality, it is important to focus on what constitutes such “necessity and proportionality.” To this end, the article will draw from domestic law systems and apply the findings of the domestic analogy to the system of international law.⁷

In virtually every domestic law system, there exists a prohibition on the use of force and a right, under certain circumstances, to use self-defense as an exception to this prohibition.⁸ A comparison of these law systems provides two valuable insights into the logic behind the admissibility of self-defense. First, the right to self-defense in domestic law systems seems to revolve heavily around the necessity and proportionality in defending

one's vital interests.⁹ Interests are considered vital when they relate closely to a person's rights to life, liberty, and property. If a vital interest is realistically threatened, which in turn threatens a person's life, liberty, or property, then a person is allowed to act in self-defense.¹⁰ Second, the necessity and proportionality of such self-defense seems to be heavily influenced by the strength of the legal order in which the person lives.¹¹ In other words, if a legal order proves to be ineffective in maintaining peace and security, then the person whose vital interests are threatened may possibly invoke self-defense at an earlier stage than would be the case in a strong legal order and perhaps also use more force to deter the aggressor from future misconduct. Even though in strong legal orders these tasks of prevention and deterrence might be performed by the state, in weak legal orders these tasks largely remain in the hands of the potential victims themselves. The logic behind both these insights is that if a person (even implicitly) accepts the social contract that prohibits him from using force, then this contract can never justify or be tantamount to a suicide pact.

By using the domestic analogy for the international legal order, one finds that the question whether a state is allowed to use self-defense also depends heavily on the necessity to protect its vital interests. For the state, these interests relate closely to its rights to sovereign existence, political independence, and territorial integrity.¹² When the vital interests of a state become realistically threatened, which in turn threatens these rights, then that state may invoke self-defense to protect these interests. Additionally, since the capability of the international legal order to protect these vital interests – for example, through the UN Security Council mandate – has proven to be largely unreliable, the protection of a state's vital interests therefore remains largely in the hands of the states themselves.

Although this linkage – whereby the right to self-defense is in part a function of the protection provided (or not provided) by the Security Council – is not without its critics, it is important to note that even the International Court of Justice (ICJ) has recognized this principle, albeit implicitly. In the ICJ Nuclear Weapons Opinion, the Court concluded that even though the use of nuclear weapons would

Preemptive self-defense does not merely apply to the imminence of an armed attack. The right to self-defense includes a right, under certain circumstances, to invoke self-defense to maintain a defensible situation.

ostensibly be in conflict with the principle of proportionality, the Court could still not conclude that it would be impermissible for a state to use a nuclear weapon in self-defense if its very survival were at stake.¹³ This reasoning seems to indicate that just as the social contract in domestic law systems can never be the framework for a suicide pact, neither can the UN Charter in effect mandate a suicide pact for a state in the international law system.

On the Right to Maintain a Defensible Situation

Because the protection of states' vital interests largely remains in the hands of the states themselves, states may need to invoke self-defense at earlier points in time.

This principle was clearly evidenced in 1967 with the Six Day War. Prior to the Six Day War, tensions rose steadily between Israel and the Arab states, specifically, Egypt, Iraq, Jordan, and Syria. Israel's adversaries mobilized troops near Israel's borders, signed a mutual defense pact, and formed a joint military command. The purpose of these events was expressed clearly by President Nasser of Egypt, who said in a speech two weeks before the war: "We intend to open a general assault against Israel. This will be total war. Our basic aim will be to destroy Israel."¹⁴ Given the continued buildup of enemy forces and the already overwhelming asymmetry in forces, Israel was de facto allowed by the international community to initiate the war by destroying the Egyptian Air Force, thereby ensuring air superiority and maintaining a defensible situation.¹⁵ Had Israel not struck first, then the

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continued buildup of enemy forces would for all purposes have come necessarily to equate a victory for Israel's adversaries. In such a scenario, Israel would have effectively already surrendered to the will of its adversaries before the first shot was even fired. Given the clear intentions of Israel's adversaries, such a scenario would have been an insurmountable threat to Israel's right to political independence and sovereign existence.

At the same time, it was doubtful whether an actual armed attack was imminent at the point in time of Israel's first strike. Rather, the line seems to have been drawn at a sufficient level of threat. This, according to Michael Walzer, who is credited with the most authoritative interpretation on the

admissibility of preemptive self-defense, should cover three aspects: “a manifest intent to injure, a degree of active preparation that makes that intent a positive danger, and a general situation in which waiting, or doing anything other than fighting greatly magnifies the risk.”¹⁶ Walzer detailed that “states may use military force in the face of threats of war, *whenever the failure to do so would seriously risk their territorial integrity or political independence*. Under such circumstances it can fairly be said that they have been forced to fight and that they are victims of aggression. *Since there are no police upon whom they can call, the moment at which states are forced to fight probably comes sooner than it would for individuals in a settled domestic society.*”¹⁷ This explanation acknowledges that the “imminence” requirement for the admissibility of preemptive self-defense does not merely apply to the imminence of an armed attack, but also to the imminence of threats “with which no country can be expected to live.” In other words, the right to self-defense includes a right, under certain circumstances, to invoke self-defense to maintain a defensible situation.¹⁸

The Indefensible Situation of a Nuclear Armed Iran

The Six Day War demonstrated that under certain circumstances, self-defense may be invoked to maintain a defensible situation, and even if an armed attack is not imminent but an indefensible situation is imminent. Furthermore, we have seen that there are threats with which no state can be expected to live when there exists a manifest intent to injure, an active degree of preparation that makes that intent a positive danger, and a general situation in which waiting, or doing anything other than fighting greatly magnifies the risk. These four criteria of intention, preparation, positive danger, and last resort will be applied to the Iranian nuclear threat.

The intention of Iran toward the State of Israel has been expressed clearly by President Ahmedinejad, who stated in the 2006 World Without Zionism conference that Israel must be wiped from the map.¹⁹ Although there has been some discussion regarding the exact translation of this phrase, when placed in the context of other statements made by the Iranian regime, it becomes apparent that the intentions toward Israel are the same as the intentions of Israel’s adversaries prior to the Six Day War, namely the destruction of the State of Israel. Furthermore, the view that Iran would not eschew the use of force in the pursuit of this goal is

supported by Iran's continued political, monetary, and military support for terrorist organizations such as Hamas and Hizbollah. This support has been of such degree that some legal scholars have even argued that it has become impossible to distinguish between Iran's official forces and its forces by proxy, and that Iran and Israel are therefore functionally already in a state of war.²⁰ Although this latter view may be somewhat far fetched, given the fact that Iran is the only state that calls for the destruction of another state and given the fact that Iran is the largest state sponsor of terrorist groups that not only share but also actively pursue this goal day in day out, Iran's intentions toward Israel are unequivocally clear.

Iran has also undertaken an active degree of preparation that translates its intent into a positive danger. Iran is currently in possession of a full nuclear fuel cycle, meaning that it has all the facilities in place to carry all of its nuclear intentions from start to finish. Furthermore, the IAEA has issued numerous reports that state that it is not possible for the IAEA to conclude that Iran's nuclear program is exclusively for peaceful purposes. The main unresolved issues outlined in these reports are the alleged studies into the potential weaponization of nuclear fuel, and activities at the Parchin R&D facility that indicate hydrodynamic experiments and activity at the Arak heavy water production plant, which Iran claims is not operational. Iran has rejected all of these claims and has attempted to divert the attention toward its nuclear enrichment plants at Natanz and

Fordow, where its enrichment activities take place under the supervision of the IAEA.

An imminent threat with regard to the Iranian nuclear threat thus needs to be interpreted as the imminence of a zone of immunity, which in turn needs to be assessed militarily.

This civilian part of Iran's nuclear program must not, however, distract from the degree of active preparation that Iran has undertaken toward the creation of a nuclear weapon. If one were to connect the dots of Iran's nuclear activities, both declared and undeclared, then it becomes clear that Iran is very close to completing the nuclear weapon puzzle. Although there are several other factors that add to the nuclear weapon threat –

mainly Iran's refusal to adopt the Additional Protocol or to adhere to UN Security Council resolutions that have negated Iran's right to continue enriching uranium – there is enough evidence to conclude that the only piece of the puzzle still missing in order for Iran to have a nuclear warhead

that can be fitted on its Shehab 3 missiles is the required Weapons Grade Fuel (WGF). Moreover, this final step can be achieved much faster now that Iran has started enriching uranium to 20 percent, since the further enrichment from 20 percent to WGF proceeds much faster than the jump from 3 percent to 20 percent, and due to the ever-expanding amount of operational centrifuges that are housed in Iran's heavily fortified enrichment facilities.

The positive danger Israel faces is that Iran will further enrich the stockpiled 20 percent enriched uranium to WGF to fuel a nuclear weapon that can be used to hold Israel at gunpoint. Especially combined with Iran's expressed intentions toward the State of Israel, such a scenario would constitute a threat with which no country can be expected to live. After all, even if Israel were to have the possibility of nuclear retaliation and second strike capability, if it were struck by a nuclear weapon at the right place, there would be little to defend for or defend with. Israel in this sense is a one-bomb country. Moreover, there exist serious doubts as to whether the Iranian regime could be deterred by potential (nuclear) retaliation. The differences between Israel and Iran in size of country and size of population, combined with a seemingly different rationale, mean that such an inherently asymmetrical situation would be indefensible for Israel. Furthermore, if Iran manages to "bring a gun to a knife-fight" then such a situation is also indefensible because it provides a nuclear umbrella for Iran, its proxies, and its allies. If Iran would attain a nuclear weapon, there would be little standing in its way to conduct attacks with conventional weaponry, backed by the threat of a nuclear strike. Similarly, Iran could use the threat of a nuclear strike in a potential future conflict between Israel and Hamas or Hizbollah or even arm them with a nuclear weapon directly. Finally, other states that have previously considered using other types of WMD against Israel but have refrained from doing so due to a perceived Israeli nuclear threat will feel less deterred if they know that Israel is held at gunpoint by Iran.

All of these threats, both direct and indirect, together constitute an indefensible situation for Israel that, in the domestic analogy, will cause it to either be shot with the nuclear bullet or kicked and stabbed with conventional weaponry until it bleeds to death. Either way, an Iranian nuclear weapon constitutes a positive danger to Israel's rights to political independence and to its sovereign existence.

The Last Resort for Israel

Given, therefore, that an Iranian nuclear weapon constitutes an indefensible situation for Israel, it becomes important to pinpoint *when* exactly there is a “situation in which waiting, or doing anything other than fighting greatly magnifies the risk.” In other words, where should Israel draw the red line in its legal narrative toward Iran to prevent it from taking the final step?

Two attributes concerning nuclear weapons (programs) must be reiterated here. First, because of the magnitude of destructive power of nuclear weapons, there exists a fundamental difference between nuclear weapons and conventional weaponry (and even other types of WMD). Although the exact level of deterrence a nuclear arsenal has will be determined by the number of nuclear weapons, their location, dispersion, and protection, nuclear weapons have a fundamentally different effect on risk analysis than non-nuclear weapons. Because of this attribute and because there is no police upon whom Israel can call, even the first Iranian built nuclear weapon will fundamentally change the equation for Israel in determining whether it should attack Iran in order to prevent the expansion of its nuclear arsenal.

Second, it is possible for Iran to build up its nuclear program to such a degree that it creates a situation in which a nuclear weapon – and thus a positive danger to Israel’s political independence and sovereign existence – will essentially be a *fait accompli* before the first actions have been taken that are unequivocally aimed at the creation of such a weapon (such as enrichment beyond 20 percent). Although there have already been numerous actions by Iran that make its intentions toward the creation of a nuclear weapon clear beyond any reasonable doubt, the international community has consistently responded to these actions with fading interest, thereby allowing Iran to continue on its collision course toward the creation of a nuclear weapon. However, similar to how Israel, prior to the Six Day War, did not have to accept the continued buildup of enemy force until the point where victory of its adversaries would be a *fait accompli*, neither does Israel have to accept the continued buildup of Iran’s nuclear program until the point referred to as the zone of immunity. After all, such a situation by its very definition would constitute an indefensible situation. An imminent threat with regard to the Iranian nuclear threat thus needs to be interpreted as the imminence of a zone of immunity, and therefore needs to be assessed militarily.

Prime Minister Netanyahu declared that the red line to prevent the creation of this zone of immunity lies at a stockpile of 240 kg of 20 percent enriched uranium, since such an amount could be quickly further enriched to create enough WGF to fuel the first bomb. Although it can be severely questioned whether such a one-dimensional approach actually provides Israel with enough opportunity to maintain a defensible situation, considering the speed and level of secrecy with which Iran can create WGF as well as redundancies created by the amount of heavily fortified enrichment plants, the number of centrifuges they house, and the amount of lower enriched uranium they store – or whether Iran's nuclear program will have entered a zone of immunity before that point, thereby irrevocably threatening Israel's very existence – it must be concluded that acting in self-defense after this red line is crossed would be the very definition of using force as a last resort.

Notes

- 1 Charter of the United Nations, Article 2(4).
- 2 Charter of the United Nations, Article 51.
- 3 This principle has been affirmed and reiterated in a number of ICJ judgments, including the Nicaragua case, the Nuclear Weapons Opinion, and the Oil Platforms case.
- 4 Different legal scholars have used different terms to describe the same events. The categorization listed in this article is based on the categorization made in Tom Ruys, *"Armed Attack" and Article 51 of the UN Charter* (New York: Cambridge University Press, 2010), pp. 253-54.
- 5 The right to self-defense can only be invoked when the threat posed, or the attack which has occurred, meets additional criteria for attributability and gravity. However, due to the brief and non-legal nature of this article, these criteria will not be discussed here in-depth since the temporal issue is the most controversial with regard to the Iranian nuclear threat.
- 6 Yoram Dinstein, *War, Aggression and Self-Defense* (New York: Cambridge University Press, 2011), pp. 200, 204-5.
- 7 Article 38(1)(c) ICJ Statute allows for the "general principles of law recognized by civilized nations" to be used as a source of international law. Given the pervasive presence of the principles of necessity and proportionality in domestic law systems, these principles and their addendi can be said to constitute such general principles of law.
- 8 Peter Haggenmacher, "Self-Defense as a General Principle of Law and its Relation to War," in Arthur Eyffinger, Alan Stephens, Sam Muller, eds., *Self-Defense as a Fundamental Principle* (The Hague: Hague Academic Press, 2009), pp. 3-7, 9-11.

- 9 Ibid.
- 10 Ibid.
- 11 Ibid.
- 12 E.g., Article 1 Definition of Aggression, Principle f(b)(d) Declaration on Friendly Relations, Declaration 1(7) Declaration on the Non-Use of Force.
- 13 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, para. 97 <http://www.icj-cij.org/docket/files/95/7495.pdf>.
- 14 UN Doc. S/PV. 1348, June 6, 1967, par. 150.
- 15 Although the admissibility of preemptive self-defense in the Six Day War has not been without its critics, all attempts to brand Israel as the aggressor, either in the UN General Assembly or UN Security Council, were rejected.
- 16 Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 2006), p. 81.
- 17 Ibid., p. 85, emphasis added.
- 18 Another acknowledgment of the right to maintain a defensible situation can be found in UN Security Council Resolution 242, which mentions the principle of “respect for and acknowledgment of the *sovereignty, territorial integrity and political independence* of every State in the area and their *right to live in peace within secure and recognized boundaries free from threats or acts of force*.”
- 19 “Ahmadinejad: Israel Must be Wiped Off the Map,” *IRIB News*, October 26, 2005.
- 20 E.g., Alan Dershowitz, “Israel Has the Right to Attack Iran’s Nuclear Reactors Now,” *Huffington Post*, March 16, 2011, http://www.huffingtonpost.com/alan-dershowitz/israel-has-the-right-to-a_b_836764.html.