
FR | **ENDS**
OF | **SRAEL**
INITIATIVE

The Assault on Israel's Right
of Self Defense

Friends of Israel Initiative

Paper No. 15
September 5, 2013

The Assault on Israel's Right of Self Defense

If there is a state in the international community for whom the right of self-defense under Article 51 of the UN Charter is absolutely critical, it is the State of Israel. Since its establishment in 1948, while Israel's main strategic goal has been to guarantee its very survival, it has been surrounded by states, many times greater in area and population, which have openly declared that their ultimate political aim is its physical destruction.

As a result Israel has repeatedly faced the threat of land invasion, rocket attacks, and looking towards the future, the use of weapons of mass destruction, which are currently under development in Iran. And yet Israel, probably more than most states has found it extremely difficult to get its right of self-defense recognized, not only by the main bodies of the United Nations, but also by individual countries.

Time after time when conflict has been imposed on Israel, there has been a rush to judgment about the facts of what transpired, leading to groundless accusations being hurled at the Jewish state and a situation in which Israel's right to self-defense was downplayed or even ignored. In the last fifteen years, the UN alone has established special commissions to investigate what were to be proven to be false charges against Israel.

In the most famous instance of this trend, even Justice Richard Goldstone, whose commission on the Gaza War was appointed by the UN Human Rights Council, ended up renouncing the main conclusion his report had asserted about Israel. No other state was the object of such international scrutiny on repeated occasions as it acted to exercise its right of self defense.

There were other efforts undertaken whose purpose was to narrow the scope of Israel's right of self-defense, if not undermine it entirely. After it was exposed to a wave of suicide bombing attacks between 2000 and 2003 that had led to the deaths of hundreds of Israeli civilians, Israel decided to build a defensive barrier in the West Bank to keep the suicide bombers out.

The Israeli security fence was the subject of an advisory opinion that the UN General Assembly requested from the International Court of Justice (ICJ) in the Hague. Normally, contentious issues that are brought before the ICJ require the agreement of both parties to a given conflict. This was circumvented by having the UN General Assembly request the ICJ's involvement.

The ICJ determined in July 2004 that Israel could not invoke a right of self-defense in building the fence, because the fence was not intended to halt an armed attack by another state. This extraordinary example of excessive legalism in interpreting the plain language of UN Charter also ignored the fact that the perpetrators of the suicide attacks belonged to international terrorist groups, like Hamas, that were financed and supplied by states like Iran, and had undergone training in the territories of Lebanon, Sudan, and Syria.

To call the suicide attacks against Israel an "internal" problem, and therefore not covered by Article 51, was a total distortion of the facts that the ICJ was asked to consider. Without getting into the legal details, the ICJ was demanding that Israel dismantle a defensive barrier that had reduced significantly the number of Israeli fatalities from terrorist attacks.

True, the US was also deeply disturbed at the implications of the decision for the right of self-defense against terrorist groups, but Israel could find only little comfort in not being alone. It appeared that the majority of the international community simply denied that it had a right of self-defense that had been granted to every member state under the UN Charter, but was not granted when it came to lethal terrorist strikes in the case of Israel.

The following analysis will look at this phenomenon more closely. It will begin looking at the recent cases in which Israel's right of self defense was questioned. It will then look to a past period to show that Israel's right of self-defense appeared to have been upheld at times during the early years of the state. Third, it will assess why this has occurred and propose what type of remedies need to be adopted to change this unfortunate dynamic. It will also look at the challenges that Israel will likely face in the near future.

Recent Challenges to Israel's Right of Self-Defense

Take for example, the controversy on May 31, 2010, when the Israeli Navy intercepted a Turkish flotilla heading for the Gaza Strip, which Israel had previously placed under a naval blockade. Israel had no problem with

humanitarian supplies reaching Gaza, but it could not permit ships arriving that might be carrying arms. The flotilla commanders would not allow their ships to be boarded for any inspection. Nine passengers from the flotilla's lead ship, the Mavi Marmara, died during the Israeli operation.

Why was Israel so determined to enforce its blockade? Since 2001, the Gaza Strip had served as launching pad for thousands of mortar and rocket attacks directed against population centers in Southern Israel. The attacks had been launched by the same internationally recognized terrorist organizations, like Hamas, Islamic Jihad, that had taken responsibility for suicide bombing attacks.

Contrary to all expectations, Israel's unilateral withdrawal from the Gaza Strip in 2005 was not met with any reduction in the rate of hostile rocket fire on its civilian population. To the contrary, the number of rocket strikes from the Gaza Strip dramatically escalated between 2005 and 2006 by 500 per cent. Increasingly, imported rockets from Iran with improved capabilities, were placing larger parts of southern Israel within range.

At the same time, after Israel stopped a number of Iranian weapons ships in the Mediterranean destined for the Gaza Strip earlier in the decade, it decided in January 2009 to impose a naval blockade to prevent the arrival of further reinforcements to the Hamas. Iranian action in building up Hamas in the Gaza Strip was in violation of UN Security Council Resolution 1373, adopted after the 9/11 attacks, which called on all member states "to refrain from providing support, active or passive to entities or persons involved in terrorist acts."

If any country was justified in imposing a naval blockade it was Israel, given the conditions it faced: its own civilian population had been repeatedly targeted; it had removed its civilian military presence from the Gaza Strip, which had been assumed to be the main political grievance of its Palestinian residents, and it was trying to prevent the arrival of new weaponry to international terrorist organizations.

And yet when it exercised its right of self-defense, Israel faced a torrent of criticism which was not directed only against the Israel's decision to use force, but astonishingly against Israel's very right to impose a blockade in the first place. Thus in July 2010, the German Bundestag declared that Israel's blockade was a violation of international law. It called for lifting the blockade immediately. Baroness Catherine Ashton, the High Representative

of the European Union for Foreign Affairs, also appealed for an end to Israel's blockade.

Ironically, Israel's new critics had forgotten that blockades had been a legitimate instrument of self-defense in the recent past. Indeed, European countries themselves had participated in a blockade of Yugoslavia during the Bosnian conflict in the 1990's as well as in the UN blockade of Iraq. The Spanish and German navies patrolled the Horn of Africa in 2002 looking for ships carrying al-Qaeda operatives.

In fact, that very year Spanish commandos boarded a North Korean ship heading for Yemen, which was suspected of carrying weapons of mass destruction. In short, Israel's operation was not very different from what other navies did when Western security was at risk.

Nevertheless, the critics of Israel persisted. And none of them suggested what the international community should do with Iranian weapons ships that would be heading straight for the Gaza Strip once the Gaza blockade was removed. Indeed, the Iranians tried to resupply Hamas with armaments by using weapons ships like the MV Francop (2009) and the Victoria (2011), thus validating Israel's insistence on maintaining a naval blockade.

When UN Secretary-General Ban Ki-moon's Panel of Inquiry issued its report on the Gaza Flotilla in September 2011, it importantly established that Israel's blockade of the Gaza Strip was in fact, legal, contradicting the conventional wisdom put forth in dozens of statements and opinion articles written previously. But what still stood out was why so many in the international community were ready to deny Israel a basic right of self-defense, which they granted to themselves.

The issue of double standards regarding Israel's right to self-defense came up earlier in the decade in 2002, at the beginning of the wave of suicide bombing attacks against its cities, known as the Second Intifada. After a suicide attack on the Park Hotel in Netanya, during a Passover Seder on March, 27, 2002, Prime Minister Ariel Sharon ordered the IDF to re-enter Palestinian cities to uproot the infrastructure of terrorism that had grown there and been given sanctuary by the Palestinian Authority. In the month of March alone 132 Israelis had been killed as a result of these attacks. Israel had every right to exercise its right of self-defense against these attacks on its civilians.

The Jenin Refugee Camp posed a particular challenge to the IDF. The Palestinians themselves called Jenin, the “Capital of the Suicide Warriors” (al-‘asimat al-istashidin). But what military tactics should Israel have used to enter the area? US and Western military manuals wrote about using air power, artillery, and flame-throwers for counterinsurgency warfare in urban areas. Indeed, in Mogadishu, UN peacekeeping forces had used helicopter gunships to fight terrorist forces, who had pinned down their fellow troops.

In the exercise of its right of self-defense, Israel used none of these tactics in Jenin, but rather sent its ground forces in house to house combat in order to accomplish its mission and yet limit any civilian casualties. Some 23 Israeli reserve soldiers, many of them fathers, died in the Jenin battle from this careful urban warfare that the IDF high command chose to adopt.

Yet towards the end of the battle, Palestinian spokesmen, who were not present in Jenin, charged on CNN that Israel had committed a “massacre” in Jenin. Saeb Erekat said on CNN during an April 10, 2002 interview that “more than five hundred people” had been killed. The UN felt compelled to appoint a fact-finding team to investigate what Israel exactly did in Jenin and considered deploying a UN force. The Palestinians themselves who were on the ground said that 56 had been killed in Jenin. The IDF issued its assessment that 52 Palestinians had been killed in Jenin—the exact number authenticated by the UN Secretary-General’s August 1, 2002 report. Moreover, according to the IDF, 14 of the Palestinian fatalities were civilians.

The incidents with the Gaza flotilla and the battle over Jenin illustrate how false accusations about Israel have been used in order to constrict Israel’s freedom of action in defending itself. By making such charges its adversaries are hoping they can limit or even deny Israel’s right of self-defense, and thereby gain a strategic advantage in their struggle with the Jewish state.

Past Experiences

The reaction of the international community and the UN, in particular, to military incidents between Israel and its neighbors was not always automatically against Israel. On May 14, 1948, as the British completed their withdrawal from what had been their League of Nations Mandate over Palestine, Israel declared its independence. Immediately, the new Jewish state was invaded by five armies from the Arab League—Egypt, Syria, Lebanon, Transjordan, and Iraq. Token units from Saudi Arabia and Yemen also joined.

There was no ambiguity concerning the hostile intent of the invading armies. The Secretary-General of the Arab League, Azzam Pasha, in fact declared: “This will be a war of extermination and a momentous massacre which will be spoken of like the Mongolian massacres and the Crusades.”

The international reaction condemned the attack on the nascent State of Israel. Most importantly, UN Secretary-General Trygve Lie stood by Israel in determining that it was the party that was the victim of aggression: “The invasion of Palestine by the Arab states was the first armed aggression which the world has seen since the world war”.

The United Nations could not permit such aggression to succeed and at the same time survive as an influential force for peaceful settlement, collective security, and meaningful international law.” The first Arab-Israeli war was concluded when Israel and the Arab states signed a series of armistice agreements in 1949 in which the parties committed themselves to halting all hostile acts between them. Subsequently, the Egyptians attempted to deny Israel its right to use the Suez Canal, arguing that they had a right of self-defense under Article 51 of the UN Charter.

It was notable that on September 1, 1951, the UN Security Council adopted a resolution calling on Egypt to desist from interfering with international shipping in the Suez Canal, including that of Israel. The effort to use the right of self-defense against Israel at the UN utterly failed.

Another case in which the UN Security Council implicitly recognized Israel’s right of self-defense and rejected efforts to have it unfairly branded as an aggressor, was in the immediate aftermath of the Six Day War in June 1967. For example, on June 14, 1967, the Soviet Union proposed a draft resolution condemning Israel’s “aggressive activities” in that conflict at the Security Council; Moscow could only mobilize four votes out of fifteen back then.

Surprisingly, the Soviets were also unable to assemble an anti-Israel majority in the UN General Assembly for a resolution stating that Israel had “committed a premeditated and previously prepared aggression.” It was clear to key members of the UN, and the international community in general, that Israel had not started that conflict.

Indeed, during May 1967, Nasserist Egypt massed 90,000 troops on Israel’s southern border, then it demanded that the United Nations Emergency

Force (UNEF) be removed, and finally it closed the Strait of Tiran, which was an international waterway that served as Israel's outlet to the Red Sea. Formally, Israel engaged in pre-emptive strike on June 5, 1967 as Arab states dispatched their armies along the old armistice lines. Nevertheless, the UN Security Council refused to adopt the Soviet position that Israel had been an aggressor, thereby upholding its right of self-defense, even if it took the form of a pre-emptive action.

It is not surprising that in November 1967, the UN Security Council did not demand that Israel withdraw from all the territories it captured in UN Security Council Resolution 242. Israel, after all operated in the Six Day War, in self-defense. Resolution 242 posited that Israel had a right to "secure boundaries," in the language of the resolution, which were to replace the fragile pre-war armistice lines from which Israel was threatened during the crisis of 1967.

In contrast, in 1991, the UN Security Council would demand a full Iraqi withdrawal from Kuwaiti territory in what it viewed as an act of aggression. UN Security Council Resolution 687, in the case of Iraq, was adopted under Chapter VII of the UN Charter, which is used for cases of aggression.

No UN Charter Chapter is cited in Resolution 242, but it has been generally assumed that it was adopted under Chapter VI of the UN Charter, which is reserved for "the peaceful resolution of disputes". The UN Security Council was able in 1967 to draw a distinction between the legitimate exercise of self-defense and wars of aggression, in which Israel did not engage.

Why was the international community able to treat Israel more fairly in its formative years than more recently? Much of the change was a function of structural developments that had gone on in the international community. By 1960, the independence of many former European colonies and their admission to the UN led to a Third World majority in the UN that had a very different political orientation in comparison with the founding members of the organization in 1945.

These states formed an Afro-Asian bloc, which was structured around a grand bargain: Arab states in Asia would support the African states on the issue of South Africa if the African states would back the Arab and Asian states on the issue of Israel. This became the basis of automatic anti-Israel majority through what became known as the Non-Aligned Movement (NAM) in the main bodies of the UN, like the General Assembly.

Beyond the UN, there were important developments in Europe that altered the orientation of states like Britain and France towards Israel. After the Six Day War, France's policy on Israel under President Charles de Gaul put an end to the close Franco-Israeli alliance that existed in the 1950's and particularly their security cooperation.

The British had been one of the principle drafters of Resolution 242, with its famous territorial clause not requiring a full Israeli withdrawal. But once the British entered the European Economic Community (EEC) in the 1970's, they aligned their policy on Israel with that of the European community, as a whole and as a consequence they hardened their stand on the requirements of Israeli withdrawal.

When the US launched an airlift to re-supply Israel with weapons during the 1973 Yom Kippur War, all European states, with the exception of Portugal, refused to grant the American aircraft landing rights for re-fueling. Even the Portuguese only allowed the US to use a landing field in the Azores. Undoubtedly, the Arab oil embargo and the growing dependence of Europe on Middle Eastern oil played a major role in the formulation of European policies.

Looking to the Future

What can be done to protect Israel's right of self-defense from any further erosion due to heavily politicized initiatives against the Jewish state? The politics of the Non-Aligned Movement in the General Assembly are not going to fundamentally change in the near future. Even when Israel undertook major peace initiatives with the signing of the Oslo Accords with the PLO on September 13, 1993, the automatic majorities against it in the General Assembly returned within months as anti-Israel resolutions were adopted again on December 14, 1993.

Historically, the UN Secretary-General has played an important role in serving as an important voice protecting Israel's right of self-defense and characterizing correctly the nature of the conflict Israel faced. That was the role of Trygve Lie during Israel's War of Independence, as noted above, when it was invaded by five Arab states.

In response for calls to impose sanctions on Israel similar to what the UN imposed on Iraq, in order to force it to unilaterally withdraw from the

territories it captured in the Six Day War, Kofi Annan went out of his way to draw a distinction between UN resolutions on Iraq, which he described as “self-enforcing” and UN resolutions on Israel and the peace process which he said were “non-self enforcing” and therefore required a negotiation to be implemented.

Whether or not it was his intention, the net effect of the position that Annan took was to protect Israel’s right of self-defense, rather than allowing the UN to unilaterally strip Israel of its ability to defend itself.

On the horizon, there are a number of challenges which the international community will have to address with respect to Israel’s right of self-defense, particularly with respect to Iran. The UN Security Council has adopted a number of resolutions in the previous decade that called on Iran to halt its uranium enrichment program as well as its heavy-water reactor program for the production of plutonium. Unfortunately, Iran has ignored these resolutions completely.

At the same time, the Iranian leadership has made repeated statements calling for the destruction of Israel. Indeed, in Iranian military parades, missile transport vehicles have signs fixed to their sides, which state in Farsi and sometimes in English that Israel must be “wiped off the map.”

This was not just empty rhetoric. According to Professor Gregory Gordon, who worked with the International Criminal Tribunal for Rwanda, on indictments regarding incitement to genocide, the Iranian statements on Israel amounted to an even stronger case of such incitement and could not be dismissed or ignored.

While the world is hopeful that the next rounds of negotiations between the P-5+1 and Tehran will yield a verifiable agreement that will halt Iran’s march to a nuclear weapon, what will happen if diplomacy fails? If Iran breaks out of the restriction placed upon it by the International Atomic Energy Agency (IAEA), could Israel assert a right to move against the Iranian nuclear program under its right of self-defense? In 1981, Israel asserted a right of anticipatory self-defense, when its air force destroyed Iraq’s Osiraq reactor in Baghdad.

Formally, the right of self-defense according to Article 51 of the UN Charter states 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...” Did that language mean that Israel’s right of self-defense only existed after it came under attack?

In 1981, Israel’s Permanent Representative to the United Nations, Ambassador Yehuda Blum, rejected that narrow interpretation of the right of self-defense, during the Security Council debate over the Israeli raid against the Iraqi reactor.

Blum cited Sir Humphrey Waldock, the President of the ICJ, who delivered a lecture in 1952, before his appointment to that position, in which he sympathized with the view that the advent of atomic weapons would have to be taken into account in defining the right of self-defense. Waldock stated: “it would be a travesty of the purposes of the Charter to compel a defending State to allow its assailant to deliver the first and perhaps fatal blow.”

It is premature to try to determine whether Israel might assert a right of anticipatory self-defense in the Iranian case. But there are already commentators who reject that such a legal right exists. Perhaps they are influenced by the notion that weapons of mass destruction are essentially weapons of deterrence and they don’t take Iranian statements on the destruction of Israel seriously. However, the employment of chemical weapons by the Syrian regime in August 2013 against Syria’s civilian population should demonstrate that for rogue regimes, weapons of mass destruction are usable and hence “waiting for the first blow” is simply no longer tenable in the modern world.

Israel was condemned for destroying the Iraqi reactor in 1981 and its right to anticipatory self-defense was not recognized. Privately, there were officials from foreign governments who thanked Israel for preventing Saddam Hussein from acquiring nuclear weapons. The liberation of Kuwait from Iraq would have been far more difficult if not impossible if the 1991 coalition had to face a nuclear Iraq.

By 2007, there was little or no reaction to the destruction of a nuclear reactor in Syria, built with North Korean assistance, which according to non-Israeli sources, resulted from an Israeli air operation. International norms in this area are clearly evolving.

A fundamental principle of any legal system is the notion of equality under the law for all its members. Over the years, Israel’s right to self-defense has been under assault. As a result, it has not always enjoyed the recognition of its rights from the international community. In a domestic political system,

minority rights are often protected by a supreme court, especially when parliaments fail to provide equal protection.

There is no constitutional court in the UN, for example, that can require its main bodies to respect Israel's rights. That special responsibility falls upon leading powers acting individually. It also falls upon the secretary-general of the UN.

Israel is not perfect and has made its own mistakes. But has a strong legal system, and a prestigious Supreme Court which has demonstrated a capacity to investigate its own behavior whenever necessary.

Nonetheless, Israel has been unfairly condemned on repeated occasions and efforts have been undertaken to erode its international rights, despite the clear security challenges that it has faced. These challenges are likely to increase in the years ahead, which will require the UN and leading members of the international community to take a stand on Israel's right of self-defense in the future.

Join the Initiative

www.friendsofisraelinitiative.org
info@friendsofisraelinitiative.org

On social networks

Facebook: Friends of Israel Initiative
Twitter: @Friendsisrael