
Israel's 'Right to Defend' Itself

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A State's Right to Defend Itself Under International Law



01

A State's Right to Defend Itself Under International Law

Self-defence in international law refers to the inherent right of a state to use of force in response to an armed attack.¹ Self-defence is one of the exceptions to the prohibition against use of force under article 2(4) of the UN Charter and customary international law.²

According to Article 51 of the UN Charter, until the UN Security Council takes measures to maintain international peace and security, “nothing in the charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations”.³

Self-defence is triggered by an armed attack, but not all attacks are sufficient: only the gravest forms of attack will qualify.⁴

Whether an armed attack exists does not depend on its perpetrator being a State.⁵ When the International Court of Justice (ICJ) defined an armed attack as a grave use of force, it provided a description of the nature of an armed attack by using factual qualifications such as scale and effects.⁶ This means there is no restriction as to who can commit an armed attack; it can be a State or a non-State actor.⁷

The ICJ held in the Nicaragua Case that ‘self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it’.⁸ This statement sets out two important principles in international law concerning the use of force: the principle of proportionality and the principle of necessity.⁹ In this context, proportionality means that the response to an armed attack must be reflective of the scope, nature and gravity of the attack itself.¹⁰ On the other hand, the principle of necessity guards against the use of measures which are excessive and not necessary in response to an armed attack.¹¹

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Israel's Argument About its Right to Self-Defence



02

Israel's Argument About its Right to Self-Defence

Israel and its allies have insisted the bombings are justified because it has the right to self-defence following Hamas' attack on 7 October.¹² Israeli officials argue that it has the right to act in self-defence against Hamas because the conditions for triggering the right to self-defence have been fulfilled.¹³ Israel argues that there was an armed attack and Hamas was the author of the 7 October 2023 attack, regardless of the status of Hamas as non-State actor.¹⁴

Israel claims that it is not occupying Gaza since its 'withdrawal' in 2007, and therefore is not an occupying power, against whom the indigenous population have a right to resist.¹⁵ However, since its 'withdrawal', Israel has increased its oppression of the Gaza strip, and its military controls the movement of all people and goods through its borders.¹⁶

The US government has repeated these claims, with the Secretary of State Antony Blinken stating at a press conference: "I've said and said repeatedly, and as President Biden has said and has said repeatedly, we stand strongly with and behind Israel in its right and obligation to defend itself, defend its people, and take the steps necessary to try to ensure that this never happens again".¹⁷

However, the vast majority of legal experts have rejected these claims, emphasising that an attacked state must inform the UN prior to using force, that Palestine is not a state, and Gaza is occupied, thus leaving no international legal standing for Israel's claims.¹⁸

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Why Israel does not have a Right to Defend itself Against Gaza



Why Israel does not have a Right to Defend itself Against Gaza

Many experts have refuted Israel's claims that it has a right to defend itself against attacks from Gaza.¹⁹ According to Francesca Albanese, the UN Special Rapporteur on human rights in the Occupied Palestinian Territories, a state's right to self-defence can be invoked when the state is threatened by another state, which is not the case since Hamas is not a state actor.²⁰

Although states can have a right to self-defence against non-state armed groups, this does not apply to territory occupied by the state, as people have a right to resist their occupation.²¹ Military occupation is a recognised status under international law and since 1967, the international community has designated the West Bank and the Gaza Strip as militarily occupied.²²

In international humanitarian law, a territory is considered occupied when it is placed under the authority of the adverse foreign armed forces.²³ The occupation extends only to the territory where such authority has been established and can be exercised.²⁴

Since Israel's military controls what and who enters Gaza, regularly exerts control over Gaza through frequent bombing campaigns, and Gaza is not allowed a state nor armed forces, Gaza can still be considered occupied according to Human Rights Watch and other legal experts.²⁵

Occupation Law forms part of the laws of armed conflict.²⁶ Military occupation is classed as an outcome of war and enumerates the duties of an occupying power until peace is restored and the occupation ends.²⁷ To fulfil its duties, the occupying power is afforded the right to use police powers, or the force permissible for law enforcement purposes.²⁸

Police authority is restricted to the least amount of force necessary to restore order and subdue violence.²⁹ In such a context, the use of lethal force is legitimate only as a measure of last resort.³⁰ Even where military force is considered necessary to maintain law and order, such force is circumscribed by concern for the civilian non-combatant population.³¹

This argument was already applied to Israel in 2004, when the ICJ said the construction of Israel's separation wall in the occupied West Bank was illegal.³² The ICJ rejected the Israeli argument to build the wall, saying it could not invoke the right to self-defence in an occupied territory.³³

The claim by Israel that Hamas uses civilians as human shields does not absolve a party from its obligations under international humanitarian law.³⁴ Even if combatants are present, attacks must still adhere to the principles of distinction and proportionality.³⁵

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Proportionality and the Right of States to Defend Themselves



Proportionality and the Right of States to Defend Themselves

Even if Israel did have a right to defend itself in Gaza, this right could still not be invoked to justify its attacks on Gaza.³⁶ Even when states have the right to self-defence, they must still abide by the principle of distinction between civilians and combatants, and only respond proportionately, out of necessity.³⁷

At its core, proportionality requires determining whether the force used aligns with the legitimate ends sought:

- The term “necessary” holds a pivotal role, encompassing two distinct interpretations:⁴²
 1. The availability of non-forcible means to address an armed attack.⁴³
 2. The rational connection between the force used and the legitimate ends of self-defence.⁴⁴
- The proportionality test involves three key questions:⁴⁵
 1. Whether the action in question aims to achieve legitimate ends.⁴⁶
 2. Whether there are less restrictive means available to achieve the same ends.⁴⁷
 3. Whether the harm caused to the protected right by the restriction outweighs its benefits.⁴⁸

Although Hamas’ attack killed 1200 Israelis, Israel has indiscriminately bombed civilian areas in Gaza since 7 October, killing over 30,000 Palestinians – most of whom are women and children.³⁸ The number of Palestinians killed is clearly disproportionate with the armed attack Israel suffered, and the ICJ has ruled there is a case for genocide in Gaza.³⁹ Israel’s bombardment of Gaza was also initiated without any non-violent attempts to address the attack on Israel’s behalf.⁴⁹

Civilian objects, such as hospitals, schools, ambulances, and places of worship, must also not be attacked.⁴⁰ Israel has attacked numerous hospitals, education facilities, and places of worship since 7 October 2023, which cannot be justified by the right to defend itself.⁴¹

Footnotes

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