

DECISIVE POINT

The USAWC Press Podcast Companion Series

Podcast Transcript

Eric A. Heinze

“International Law, Self-Defense, and the Israel-Hamas Conflict”

This podcast examines the international law of self-defense as it applies to the ongoing Israel-Hamas conflict to determine whether the October 2023 attacks by Hamas against Israel can be interpreted under Article 51 of the UN Charter as an “armed attack” that gives Israel the right to use military force in self-defense against non-state actors. It situates the conflict within ongoing legal and political debates, shows how this conflict fits into a changing global reality where the most dangerous security threats do not exclusively emanate from other states and concludes that Israel’s resort to force in the current conflict appears to have a sound basis in international law.

Read the article here: <https://press.armywarcollege.edu/parameters/vol54/iss1/7/>.

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Keywords: self-defense, international law, non-state actors, Israel, Hamas

Episode Transcript

Stephanie Crider (Host)

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The views and opinions expressed in this podcast are those of the authors and are not necessarily those of the Department of the Army, the US Army War College, or any other agency of the US government.

Eric A. Heinze is joining me virtually today from Oklahoma. He’s the author of “[International Law, Self-Defense, and the Israel- Hamas Conflict](#),” which you can find in the Spring 2024 issue of *Parameters*. Heinz is a professor at the David L. Boren College of International Studies at the University of Oklahoma, where he teaches courses on international law and organizations, ethics and international affairs, and international human rights.

Welcome to Decisive Point, Eric.

Eric A. Heinze

Thank you. Glad to be here.

Host

Your article examines the ongoing Israel-Hamas conflict in light of the evolving rules of self-defense in international law. Please give us some background on this topic.

Heinze

Well, as most of your listeners are probably aware, on October 7th of this past year [2023], the terrorist group Hamas undertook a series of attacks against over 20 civilian and military sites in southern Israel. They targeted military sites as well as civilian kibbutzim and an outdoor musical festival. Numerous atrocities were committed during these assaults, including murdering entire families (including children), torture and mutilation, and egregious acts of sexual violence perpetrated against women and girls.

All told, around 1,200 people were killed, and about 240 more were taken hostage back to Gaza. As we know, Israel’s response has been swift and severe, entailing a relentless bombing campaign throughout Gaza, followed by a steady and

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methodical ground assault. Given that Gaza is one of the most densely populated places on Earth, and the fact that Hamas ensconces itself within civilian areas, casualties in Gaza have been very high—reportedly almost 35,000—and Israel has come under significant criticism for its use of force in self-defense.

Host

Let’s talk about self-defense. What does Article 51 of the [United Nations or] UN Charter say about self-defense?

Heinze

So, Article 51 basically says that nothing in the UN Charter is prejudicial to a state’s inherent right to individual and collective self-defense if it is the victim of an armed attack. So, it basically reaffirms the right to self-defense that all states have always had even prior to the advent of the UN Charter.

The reference to the inherent right of self-defense indicates a couple of things. First, that Article 51 didn’t invent the right to self-defense, but rather, states have always had this right. Second, it didn’t really define the limitations of the right to self-defense, and so, the specific parameters of this right have been subject to debate, interpretation, and even evolution over the decades.

For example, Article 51 used to be interpreted such that it only applied to armed attacks by states, and an armed attack by a non-state actor would not be sufficient to trigger a state’s right to self-defense under Article 51. But what I and others have argued is that states have increasingly interpreted Article 51 to apply to attacks from non-state actors and, as such, Israel’s use of force and self-defense in response to the October 7th attacks was probably lawful.

Host

What do we need to know about the legal status of Gaza/Palestine and what Article 51 says about self-defense against attacks by a non-state actors?

Heinze

Well, Article 51 is actually silent on whether the attack must come from a state actor or whether attacks from non-state actors would also qualify as armed attacks. And so, the notion that an attack has to be imputed to a state is something that has come about through state practice and decisions at the International Court of Justice and other international and judicial bodies. That said, there are a couple ways to interpret the legal status of Palestine/Gaza that are worth mentioning here.

The first is that most states actually recognize Palestine as a state. Palestine is party to numerous treaties and is considered a nonmember observer state at the United Nations. So, insofar as Hamas is a de facto authority of at least part of the Palestinian state, it can be the target of self-defensive measures just like any other state that has committed an armed attack. However, some observers have argued that Palestine is occupied territory and, since Israel controls Palestinian territory as an occupying power, that we cannot consider an attack emanating from this territory as an armed attack for the purposes of Article 51. This analysis, however, fails to distinguish between the occupation statuses of Gaza versus the West Bank. In the latter case, the West Bank seems pretty clear that Israel is indeed acting as an occupying power. In Gaza, on the other hand, Israel hasn’t had a meaningful presence there since 2005, and Hamas has been in control of that enclave since at least 2007. Accordingly, Israel’s relationship to Gaza, specifically, probably does not meet the definition of an occupying power under the Hague Conventions, which are the rules that set up the various aspects of international occupation.

So, while Israel can be considered the occupying power in the West Bank, the same cannot be necessarily said of Gaza. So, Hamas is either a non-state sector operating from outside Israel’s jurisdiction, or it is acting on behalf of the State of Palestine in Gaza. Either way, it is legally capable of undertaking an armed attack for the purposes of Article 51 of the UN Charter.

Host

Do you have any concluding thoughts that you’d like to share about this topic?

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Heinze

Yeah, simply that the right to self-defense is not a license to do whatever a state wants to do militarily. It’s not a license to undertake wanton destruction or to otherwise violate the rules of war. That said, the principle of proportionality does not require that the level of destruction that accompanies self-defensive measures be of the exact same magnitude as the original attack. Rather, proportionality means that a country that is attacked must use force that is proportionate to the threat that is being faced. And insofar as Hamas has threatened the annihilation of Israel as its goal, this probably gives Israel a broader license than many people will want to admit. Again, it does not permit them to suspend or violate the rules of war, but a state that has been attacked and faces continued threats of its annihilation is normally granted pretty substantial leeway in defending itself.

Host

I have one more question, if you’ll entertain it.

Heinze

Sure.

Host

Did you find any surprises when you were researching this article?

Heinze

Yeah, I did. I was surprised at the extent to which there are certain international lawyers who when it comes to Israel have a different opinion about international law when it comes to other cases. There’s actually a pretty growing broad consensus about this question in self-defense that attacks by non-state actors do, in fact, qualify as armed attacks, but it’s interesting how few people adopt that position when it comes to Israel. That’s the one thing that I found surprising. Now, it’s pretty early, [and] there haven’t been, you know, a whole lot of analyses published about this—at least in peer-reviewed outlets—but that’s what I found to be fairly surprising in a lot of the sort of commentary on this case.

Host

Well, thank you for answering [the question].

Thank you for joining me today, Eric. This was very interesting.

Heinze

My pleasure. Happy to be with you.

Host

Listeners, you can read the article at press.armywarcollege.edu/parameters. Look for volume 54, issue 1.

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