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978-1-107-03206-4 - The Six-Day War and Israeli Self-Defense: Questioning the Legal Basis for Preventive War

John Quigley

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PART ONE

A War is Generated

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I

Who Was to Blame and Why It Matters

Responsibility for wars of the past may seem an inconsequential matter. But the consequences of wars need to be sorted out, and how a war started may be key to an appropriate resolution. Beyond the particular conflict, the manner in which one war is fought may set a precedent for future wars. A war may be rationalized in a way that stretches the legal basis for military action. The UN Charter indicates that when the UN Security Council takes military action, it should be by national forces seconded to the UN operating under UN command.¹ But in 1950, leading member states wanted military action in support of South Korea but were unwilling to second troops to UN control. So the Security Council adopted a resolution in which it “recommended” to member states that they provide assistance to South Korea. No command structure or method of coordination was specified.² That same technique of, in effect, farming the operation out to individual member states was used again in 1990 for military action against Iraq, following its occupation of Kuwait,³ and again in 2011 for military action in Libya.⁴ While one can agree or disagree with the Security Council’s approach, the effect was to broaden the bases on which military action might be taken under UN auspices.

The June 1967 Middle East war was fought not under UN auspices but on the strength of the power of individual states to resort to war. Under the UN Charter, states may not initiate war against another.⁵ Force may, however, be used in defense in the event of an “armed attack.”⁶ Egypt, as we shall see, charged aggression, and self-defense was invoked by Israel. According to Israel, Egypt had attacked by land and by air on the morning of June 5, 1967, and Israel responded. Eventually, however, as we shall also see, the propriety of the war’s initiation came to be contested on defending not against an actual attack, but against an anticipated attack. Israel would make the legal claim that force may be used in anticipation

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[More information](#)

of an attack by the other state, and the factual claim that Egypt was about to attack it.

No such claim had been made by a state as a basis for use of force against another state since the adoption of the UN Charter, although some analysts had urged such an interpretation of self-defense. As arguments would be made in later decades for the lawfulness of defensive force where an adversary had yet to strike, the June 1967 Middle East war would be invoked as a precedent. In the first years of the twenty-first century, certain governments and analysts would argue for the permissibility of use of force well in advance of action by an adversary. A state that was preparing weaponry for eventual use in an “armed attack” might lawfully be attacked in self-defense, on the rationale that defeating it may be more feasible prior to its acquisition of the weaponry. These arguments would expand self-defense, even beyond what was asserted by Israel in relation to the June 1967 war. Nonetheless, these arguments built on Israel’s assertion.

Significantly, these arguments accepted the validity not only of Israel’s legal theory, but of its factual assertions as well. Yet, as will shortly become clear, Israel’s factual assertions did not go unchallenged. The parties to the June 1967 conflict differed sharply in their assessment of the circumstances preceding the outbreak. To Israel, the war was forced upon it by reckless neighbors bent on immediate attack. Israel had to fight to keep its population from being driven into the Mediterranean Sea. To Egypt and its allies, on the other hand, the war was perpetrated by an aggressive Israel, which had been in no danger.

If Israel’s version of facts is correct, those who assert a broad scope for self-defense have a respectable precedent in their arsenal. If Egypt’s version of facts is correct, those who assert a broad scope for self-defense are building their case on a precedent that does not serve their cause. The invocation of self-defense against an adversary who is at a significant distance from attacking may be seen as a dangerous doctrine, one subject to manipulation by a state that asserts facts that are not true. One’s view of the facts of the June 1967 war thus makes a difference in whether that war suggests the propriety of use of force in anticipation of force by an adversary.

A second reason that the question of responsibility in the 1967 Middle East war matters is the current situation in the Middle East itself. If Israel acted in self-defense, the measured response that, as we shall see, was taken by the international community might have been in order. If Israel acted aggressively, action against it should perhaps have been sharper. In

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Excerpt

[More information](#)

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5

the immediate aftermath of the June 1967 war, the states dealing with it in the UN Security Council, and then in the UN General Assembly, were, in the main, uncertain which version to believe. That uncertainty kept the United Nations from adopting stronger measures that might have brought a reversal of the territorial changes that accompanied the war.

If the international community acted on faulty information in the war's immediate aftermath, its handling of the war is open to question. The issue has continuing relevance, since the consequences of the June 1967 war have yet to be resolved. If the international community continues to act on faulty information, then its current approach to the Israel-Palestine conflict is based on less than a full understanding of how that conflict was generated.

The June 1967 war is the subject of disagreement even as to its name. To Israel, it was the "Six-Day War," an appellation that highlighted Israel's military superiority for winning in a short time. To Arab states, for whom the war ended less than gloriously, it was the "1967 war" or the "June 1967 war," a designation that carried no emotional baggage. Since the war is generally known in the West as the Six-Day War, that name is used in the title of this book. The Arab designation, being more neutral, is used in the text.

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[More information](#)

2

The Syrian Connection

Examination of the June 1967 war requires inquiry into the underlying circumstances. On the Arab side, the war would involve principally Egypt. But confrontation between Israel and Syria early in 1967 set the context. This 1967 Arab-Israeli tension was nothing new. Relations between Israel and its Arab neighbors had been tense from the time of Israel's emergence in 1948. Israel had sprung from a movement calling itself Zionism that developed within European Jewry at the turn of the twentieth century as a reaction to anti-Semitism in Europe. Zionists called for a Jewish state in territory that historically went by the name Palestine, then part of the Turkish Empire.

During World War I, Britain battled Germany and Turkey, and in the case of Turkey sought to wrest away its extensive territories in the Arab world. Britain enlisted the Arabs of the Turkish Empire to fight on its side, promising independence after Turkey's expected defeat. Arab military support was forthcoming. In hopes of turning opinion in Europe and the United States in its favor against Germany, Britain responded favorably to entreaties from the Zionist movement. In November 1917, Britain declared that it favored a "national home" for the Jews in Palestine.¹

Within a short time after issuing that declaration, Britain drove the Turks out of Palestine. It then enlisted the European powers in the "national home" project through the newly formed League of Nations, which recognized Britain's right to administer Palestine as a prelude to eventual independence.² Over the next two decades, Britain oversaw Jewish migration into Palestine, sparking resistance from the Arab population. Unable to fashion a governing arrangement for Palestine as conflict deepened between Arab and Jew, Britain announced in 1947 that it would

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depart Palestine. The United Nations, replacing the League of Nations, sought to arrange for governance, suggesting a split of the territory into an Arab state and a Jewish state but with economic union between them.³ But this proposed partition was seen as unfair by the Palestine Arabs, both because they sought a government for the entirety of Palestine and because they found the particular territorial division unfair for allocating the bulk of the territory to the projected Jewish state, even though Jews were less numerous than Arabs. Violence broke out in Palestine, and the United Nations abandoned the partition proposal. Military units of the Jewish community of Palestine began to occupy territory, over opposition by Arab military units. In the course of the Winter-Spring 1948 military operations of the Jewish units, several hundred thousand Arabs were displaced from the country.⁴

Immediately upon Britain's departure in May 1948, the Jewish community declared statehood for a state it called Israel. The neighboring Arab states sent in troops. Israel denounced the Arab action as aggression.⁵ The Arab states responded that they were protecting the Palestine Arabs from expulsion.⁶ The Jewish units secured the entirety of Palestine's territory except for the Gaza Strip, which Egypt managed to control, and the eastern sector, which Jordan managed to control, and which came to be called the West Bank of the Jordan River. By late 1948, the UN General Assembly called on Israel to repatriate the displaced Arabs, but Israel said that it would consider doing so only after peace agreements were made with the Arab states.⁷ In 1949, Israel concluded armistice agreements with Egypt, Syria, Jordan, and Lebanon.

Cross-border violence was a fact of life through the 1950s, as military units of the displaced Palestine Arabs raided Israel from Egypt, Jordan, and Syria. Israeli military units responded with counter-raids. On complaints by the Arab states, the UN Security Council on occasion criticized Israel.⁸ Raids from the Egypt-controlled Gaza Strip were a factor in an invasion by Israel of Egypt in 1956. Egypt had just nationalized the Suez Canal, which was under British-French ownership. Israel secretly agreed with Britain and France to launch an invasion into Egypt's Sinai region toward the Suez Canal, whereupon Britain and France would intervene ostensibly to separate the two armies and force a withdrawal of Egyptian forces from along the canal. British and French troops would then position themselves along the canal to ensure free navigation.⁹ In October 1956, Israel did invade and enjoyed success against Egyptian troops in Sinai. Britain and France bombed Cairo. Both the USSR and United

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[More information](#)

States denounced the invasion and pressured Israel, Britain, and France to withdraw. Britain and France withdrew by the end of 1956, and Israel by Spring 1957. On the Egyptian side of the Israel-Egypt armistice line, the United Nations installed multinational military units to monitor the Israel-Egypt cease-fire, calling them the United Nations Emergency Force (UNEF).¹⁰

In 1966, a new government came to power in Syria that was more assertive than its predecessor in supporting Palestinian Arab efforts to regain Palestine.¹¹ By then, a new Palestinian organization, Fatah, had entered the picture with a strategy of armed struggle against Israel, and Syria became its base of operations. From early 1965 to mid-1967, Fatah launched more than one hundred attacks into Israel, some with fatal consequences.¹² In one raid, four border patrol guards were killed by a mine planted on an Israeli *kibbutz* (collective farm).¹³ Fatah raids into Israel were initiated either directly from Syria or through Jordan.¹⁴

The new Syrian government was on close terms with the USSR. Given that Israel had developed ties to the United States, the Syrian affinity to the USSR raised the specter of superpower conflict should the Israel-Syria confrontation break out into open warfare. Yitzhak Rabin, Chief of Staff of the Israel Defense Force (IDF), said that raids into Israel from other Arab countries could be handled by Israel through counter-raids, but the raids from Syria were more serious.¹⁵ “The problem with Syria,” said General Rabin, “is basically one of a clash with the government.”¹⁶ Israel deemed Syria responsible, said Rabin, for all hostile acts emanating from Syrian territory.¹⁷

In addition to tension over Palestinian raids, Syria and Israel had a long-standing dispute over small demilitarized zones along their mutual border. The zones had been set up in the 1949 Israel-Syria armistice agreement.¹⁸ Israel removed Arab civilian residents from the zone, drawing criticism from the Security Council.¹⁹ The IDF began sending military personnel to cultivate land in the zone.²⁰ The Syrian army would fire at the tractors, and the IDF would respond. The Security Council criticized Israel for using its air force against Syria in counter-raids.²¹

RAID INTO JORDAN (WITH A MESSAGE FOR SYRIA)

Egypt was the major Arab power, and the Israel-Syria tension was something Egypt could not ignore. On November 4, 1966, Syria and Egypt

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[More information](#)

concluded a mutual defense treaty.²² A few days later, a situation developed between Israel and Jordan that had the effect of heightening tension between Israel and Syria. Israel raided the town of Samu, located in the Jordanian-held West Bank, near Jordan's armistice line with Israel.

Israel's raid into Samu was a response to an incident of November 11, 1966, in which an Israeli border patrol vehicle ran over a land mine, resulting in three deaths.²³ Israel said that residents of Samu were responsible. The IDF sent a military force into Samu, including tanks. When Jordanian troops tried to intercept, the IDF used its tanks, killing several civilians and upwards of a dozen Jordanian soldiers. Once in control of Samu, the IDF spent four hours blowing up houses, destroying a hundred of them by the time it finished.²⁴

The UN Security Council condemned Israel for the Samu raid, viewing it as an illegal reprisal and a violation of Israel's armistice agreement with Jordan.²⁵ Although the raid was against Jordan, Israel's Prime Minister, Levi Eshkol, accused Syria of involvement in the November 11 incident. Eshkol took the occasion to say that Syria was the organizer of "saboteurs for operations in Israeli territory, whether they come from Syria or via other countries." Eshkol heightened the rhetoric by warning Syria that it should not "imagine that it is safe in the shelter of a great power."²⁶ By "great power," Eshkol meant the USSR. He was warning that the Syria-Soviet tie would not keep Israel from acting against Syria. The United States saw the Samu raid as a serious escalation in the Arab-Israeli confrontation. Assistant Secretary of State Joseph Sisco told Avraham Harman, Israel's ambassador in Washington, that the United States was "dismayed" at the raid.²⁷ US Secretary of State Dean Rusk told Harman that the raid was "disproportionate."²⁸

ESCALATION ALONG THE ISRAEL-SYRIA ARMISTICE LINE

Israel-Syria tension built to an even more explosive level in early 1967. Reacting to further Palestinian cross-border attacks from Syria, Abba Eban, Israel's foreign minister, issued a warning: "We want Syria and the world to understand that we have reached a limit."²⁹ The Israeli *chargé d'affaires* in Moscow detailed to the Soviet Foreign Ministry attacks by Syrian forces against Israel, day by day from January 10 to 16. "Any continuation of such an aggressive policy will force Israel," he said, "to act in its self-defense."³⁰ Eshkol told the Knesset, Israel's parliament, that the Syrian government could not be allowed to "run amuck on the

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borders.” The Western powers became concerned that the Israel-Syria border situation might escalate into a general Middle East war.³¹ Secretary Rusk warned Israel against military retaliation, which he said would be counterproductive.³²

The US Central Intelligence Agency (CIA) feared that “a crisis was building.” CIA Director Richard Helms set up a special task force to monitor the crisis.³³ The CIA assessed the military strength of the potential adversaries. In February 1967, when a request came to the United States from Israel for additional military aid, the Joint Chiefs of Staff demurred. “Israel’s present military forces,” the Joint Chiefs reported, “are capable of defending successfully against any individual or collective Arab attack.”³⁴

Fatah raids picked up in intensity. Israel gave a count of thirty-seven into its territory during the first four months of 1967.³⁵ Confrontations over the demilitarized zones also worsened. Moshe Dayan, who would soon become Israel’s Minister of Defense, described the Spring 1967 incidents: “We would send a tractor to plow the earth in some plot you couldn’t do anything with, in a demilitarized zone, knowing in advance that the Syrians would start shooting. If they didn’t shoot, we would tell the tractor to go farther, until finally the Syrians would lose their temper and shoot. And then we’d fire back, and later send in the Air Force.”³⁶

In one such incident, on April 7, 1967, Syria attacked a tractor in the demilitarized zone, and Israel retaliated.³⁷ Syria then shelled a *kibbutz*, and the IDF responded with an air attack.³⁸ The US Department of State described the events:

A major border clash centering in and around the Southern and Central Demilitarized Zones took place today. The trouble apparently began when an Israeli tractor plowing in the DZ [demilitarized zone] near Haon [a *kibbutz*] was fired upon by Syrians. The resulting battle lasted most of the day and involved mortar, artillery and tank fire and several aerial dogfights. Israel claims to have downed seven Syrian MIG-21 aircraft without loss to its own air arm, and claims to have damaged several Syrian ground positions that had fired on Israeli cultivators and settlements. Syria also claims a victory, alleging that five Israeli aircraft were shot down and at least 70 Israelis killed in fighting that came about when Israel “insisted on aggression.” Syria admits losing four MIGs and suffering 5 deaths.³⁹

The CIA placed the onus on Israel: “On April 7 the Israelis turned a border shelling incident into an aerial dogfight.”⁴⁰ The Department of State tasked the US embassy in Tel Aviv to ask Israel to stop cultivating