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Let the *Caroline* Sink! Assessing the Legality of a Possible Israeli Attack on Iranian Nuclear Facilities and Why the Traditional Self-Defense Formula Is Incompatible with the Nuclear Age

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Due to the length of this article, endnotes are not included here. If you would like to receive a copy of Mr. Roznai's article including all endnotes, please contact the editor at lisa.earl@pillsburylaw.com.

'The unleashed power of the atom has changed everything save our modes of thinking, and thus we drift toward unparalleled catastrophe...[A] new type of thinking is essential if mankind is to survive.'
(Albert Einstein)

I. INTRODUCTION

Sunday, June 7, 1981, 16:40 hours, 14 military Israeli Air Force aircrafts took off from Etzion air base and struck the Iraqi Osiraq nuclear reactor, dropping more than 900kg of bombs on the reactor, totally demolishing it before any radiation could be released, and without civilian casualties. Whereas Israel argued that the attack was a lawful act of anticipatory self-defense, on June 19, 1981, the United Nations (UN) Security Council unanimously adopted Resolution 487 which strongly condemned the Israeli attack. Now imagine the following scenario: 90 Israeli Air Force military combat aircrafts flying above the Turkish-Syrian border, through Northern Iraq, dropping more than two tons of bombs on Iran's nuclear facilities. Would such an act be deemed legal under current international law? Evaluating of this question is the main aim of this paper.

The circumstances that existed before the Osiraq attack differ from those that exist in the current Iranian context, as the international community is involved and is attempting to halt Iran's nuclear program through diplomatic negotiations and Security Council resolutions. Nonetheless, the Osiraq attack, its legal repercussions and the surrounding commentary will be reviewed as they have important

implications in evaluating the legality of any potential attack on Iran's nuclear facilities.

While Tehran insists it desires nuclear power for peaceful energy purposes, experts argue that the evidence suggests that Iran is pursuing a nuclear weapons program. This paper focuses on Israel's possible response to Iran's nuclear program, as it is broadly recognized to be the state most directly threatened by a nuclear-armed Iran, especially in light of Iranian President Mahmud Ahmadinejad's assertions that Israel 'must be wiped off the map'. Facing the Iranian threat, Israel has numerous courses of action, one of which is the military option. A pre-emptive attack on Iran's nuclear facilities might be strategically mistaken even if viable, but would it be legal? While some commentators maintain such an attack to be unlawful, others deem it to be lawful and, even if not, Israel should nevertheless protect itself, since 'international law is not a suicide pact'.

This paper examines the possible arguments regarding the legality of an Israeli pre-emptive attack on Iran's nuclear facilities. Chapter 2 reviews Iran's nuclear program, its intentions and the risks Israel perceives in it are reviewed. Chapter 3 assesses the legality of a possible Israeli attack on Iran's nuclear facilities. Various arguments are examined, including whether such an attack violates the prohibition on the use of force; whether such an attack is a legal exercise of self-defense; whether such an attack is allowed; and whether such an attack can be viewed as international law enforcement. I claim that under current conditions and international law rules, an Israeli attack cannot be legally justified under any of those arguments. Chapter 4 examines whether traditional anticipatory self-defense criteria are suitable for the nuclear era. Chapter 5 fleshes out my claim that Israel might view an attack on Iran's nuclear facilities as justified—even if not legal—as a call for international law development along with technological progress.

The importance of this paper is two-fold: *first*, while the legality of a considered way of action will not necessarily be the main determining factor in a state's decision-making, the lack or existence of well-delineated legal support might be a noteworthy factor in the decision-making process. *Secondly*, I hope to demonstrate the incompatibility of the current self-defense legal requirements with nuclear weapons technological developments.

An analysis of the legality of an Israeli attack on Iran's nuclear facilities depends on the existing facts at the time of the attack. This paper refers to the existing facts as of October 2009, and, therefore, at this point in time, it is not feasible to decisively declare what would be the final conclusion.

II. IRAN'S NUCLEAR PROGRAM AND THE ISRAELI PERSPECTIVE

A. Nuclear Technology and the Treaty on the Non-Proliferation of Nuclear Weapons

A wide coverage of nuclear technology is beyond the scope of this paper. It would be sufficient to brief that once uranium ore is mined, compressed and reconstructed in solid form, it is then enriched in centrifuges to increase the quantity of more powerful elements. The enriched uranium can subsequently be channelled to a nuclear reactor in order to generate electricity for civil use. Throughout enrichment, uranium can be enriched to a higher degree to form the basic components of a uranium bomb; and throughout reprocessing, uranium and plutonium waste can be used for bomb construction. These phases thus present the peril of nuclear material diversion from civil to military use. To obtain nuclear weapons, a state must build up a nuclear materials store, create nuclear warheads, and construct missiles for their delivery. Nuclear development gave rise to concern due to the potential of running a covert nuclear weapons program within a broader civilian nuclear energy program.

The Treaty on the Non-Proliferation of Nuclear Weapons ("NPT") is the keystone of international non-proliferation efforts. NPT recognizes two kinds of states: Nuclear Weapon States ("NWS") and Non-Nuclear Weapon States ("NNWS") (Article 9). NNWS, party to the NPT, agree not to acquire NW and to accept safeguards on all their peaceful nuclear activities (Article 2); whereas, NWS agree to pursue negotiations in good faith to eliminate their nuclear stockpiles (Article 6). NPT upholds the equally right of all states to develop nuclear energy for peaceful purposes (Article 4). NPT's main problems are that enforcement measures or non-compliance penalties are remarkably lacking, and that any state-party is allowed to withdraw from the NPT regime with only three months notice (Article 10).

B. Iran's Nuclear Program

Iran signed the NPT in 1968 and ratified it in 1970.

As a NNWS party, it is obligated not to develop nuclear weapons, but may engage in peaceful nuclear activities. Generally, Iran is developing uranium enrichment capabilities to produce weapons-grade uranium, a heavy-water plutonium production reactor, and associated facilities for reprocessing spent fuel for plutonium separation, which cause proliferation risks. As mentioned, NPT safeguards are insufficient as Iran could legally produce uranium, then withdraw from NPT and rapidly build its own nuclear arsenal.

The Iranian nuclear crisis began in August 2002, when the National Council of Resistance of Iran ("NCRI"), announced that Iran was clandestinely constructing a uranium enrichment plant in Natanz and a heavy water plant in Arak. Since that announcement, Iran and the international community have been 'playing cat and mouse'. In a wide number of International Atomic Agency ("IAEA") Director General reports and Board of Governors Resolutions, the IAEA found Iran in breach of its NPT safeguard obligations with respect to its nuclear program, and called on Iran to fully cooperate with the IAEA and to suspend all uranium enrichment related activities. In response, Iran continuously swayed: on the one hand, it agreed to suspend enrichment activities (October 2003, November 2004, May 2005), and even signed an Additional Protocol to its nuclear safeguards agreement with the IAEA (December 2003); on the other hand, Iran continued announcing that it would recommence all its enrichment activities (June 2004), and rejected any compromise over its right to nuclear power (September 2005).

During all this time, the West was trying to convince Iran, via various negotiations and incentives, to halt its nuclear program. The United Kingdom, Germany and France ("EU3") proposed broad economic and technological collaboration with Iran, including nuclear energy; the United States ("US") proposed the European Union efforts by modifying its policies regarding Iran's submission to World Trade Organization membership and the sale of civilian aircraft parts. Russia proposed a mutual enterprise to enrich uranium on Russian soil, with no Iranian access to sensitive technology. This proposal was encouraged by the US, EU3 and Israel. Iran eventually rejected all these offers and refused to suspend enrichment activities in Iran, an essential element of the offers. Whereas Iran argued it was not under any legal obligation to suspend its uranium enrichment, the European Union and IAEA argued

that, given Iran's 18-year concealment of its nuclear program, suspending enrichment would provide crucial reassurance of peaceful intentions.

In 2006, diplomatic efforts changed gear. In February, the IAEA Board of Governors referred Iran's case to the UN Security Council, given the absence of confidence in Iran's peaceful purposes. In March, the Security Council issued a Presidential Statement calling on Iran to take the steps required by the IAEA Board, and to suspend all enrichment-related and reprocessing activities. On July 31, after Iran rejected the additional EU3 and American offers, the Security Council, acting under chapter VII, Article 40 of the UN Charter, adopted Resolution 1696. That resolution demanded that Iran take the confidence-building steps required by the IAEA, and suspend all enrichment and reprocessing activities. Reflecting Russian and Chinese opposition to harsh wording, the resolution stopped short of imposing sanctions, but did specify that appropriate measures under Article 41 may follow if Iran did not comply by 31 August 2006.

After the August 2006 IAEA Board's resolution, which stated that the agency remains unable to verify the peaceful nature of Iran's nuclear program, on 23 December 2006, the Security Council adopted Resolution 1737 under Article 41 of the UN Charter, which demanded that Iran suspend all enrichment-related, reprocessing activities and heavy water-related projects. It further imposed a ban on states to transfer to Iran any materials, technology and knowledge which might contribute to its nuclear program. It also provided for extensive state monitoring of the movements of certain individuals involved in Iran's nuclear and ballistic missile programs, and for freezing all economic assets of those individuals. The resolution stated that further Article 41 measures would follow in case of noncompliance. Again, Resolution 1737 stopped short of imposing economic sanctions not related to Iran's nuclear program and *a fortiori* did not state use of force under Article 42 of the UN Charter.

After the IAEA reported that Iran had not complied with Resolution 1737's requirements, and that it cannot be certain of the peaceful nature of Iran's program, on 24 March 2007, the Security Council adopted Resolution 1747, which repeated the suspension demand and affirmed certain travel restrictions on individuals. It added more entities to the list of those whose assets should be frozen and

imposed a ban on sales and transfers of certain arms and knowledge by Iran and to it, and stated that further measures under Article 41 would follow in case of noncompliance.

These resolutions were criticized for being limited in scope and that even their full implementation would hardly have any considerable coercive effect. Furthermore, these resolutions merely targeted those directly involved in Iran's nuclear program, thus barely provide the ordinary Iranian population incentive to pressure the regime into compliance.

After Iran announced it was capable of industrial-scale production of nuclear fuel, and the failure of yet another round of negotiations between Iran and the European Union (April 2007), on 3 March 2008, the Security Council adopted Resolution 1803. That resolution reaffirmed previous demands and sanctions, and imposed new sanctions on Iran, stating that further measures under Article 41 of the Charter would follow in case of noncompliance.

In two IAEA Director General reports from May and September 2008, the IAEA stated that Iran has not suspended its enrichment activities or heavy water reactor construction, and that alleged projects which give rise to concern need to be clarified in order to exclude the possibility of a military dimension to Iran's nuclear program. Consequently, on 27 September 2008 the Security Council adopted Resolution 1835, in which it called upon Iran to comply fully and without delay with its obligations under Security Council's resolutions. Two IAEA Director General reports from February and June 2009 state that Iran has not complied with the Resolution. In the August report, it was noted that 'as referred to in the Director General's previous reports to the Board (most recently in GOV/2009/35, para. 17), there remain a number of outstanding issues which give rise to concerns, and which need to be clarified to exclude the existence of possible military dimensions to Iran's nuclear programme'.

C. Iranian Intentions

Iran claims that its aim is the civil nuclear sector to meet future electricity and energy demands. Iran, it is argued, is not a small petro-state that can afford to live well and *ad infinitum* on revenues generated by oil exports. By 2020 Iran's growing population and expected oil demand will necessitate extensive use of nuclear power to meet Iran's increasing needs and

serve Iran's long-term economic interests. Moreover, Iran's current plan for nuclear power development might require several decades to realize, by then its oil production may be fading. Support for Iran's claims comes from an unexpected direction: the December 2007 *US National Intelligence Estimate Report*, stated that Iran had halted its nuclear weapons program in 2003 and, as of mid-2007, had not restarted it.

Despite Iran's constant denials of any nuclear weapons program, several factors raise suspicion regarding Iran's peaceful motives:

First, Iran's oil and gas reserves are among the largest in the world. It seems implausible that Iran would construct such a large-scale nuclear infrastructure merely to produce electricity. Indeed, Iran's lengthy nuclear program stands at variance to its relative disregard of technology and its gas reserves funding.

Second, Iran repeatedly failed IAEA inspections and has a rich record of concealment and deception in its dealing with the IAEA. In September 2009, Iran revealed the existence of a concealed second uranium enrichment plant at Qom, a city to the south of Tehran. This was revealed after Iran acknowledged that the plant's security had been breached. This newly discovered facility in Qom is another clear confirmation of Iran's 'serial deception'. If it were not enough that Iran has sought to deceive the world about the Qom plant's existence, the evidence also showed that the facility was intended for military use.

Third, Iran's pace of activity. The only power reactor Iran will possess in the near future is the Bushehr reactor being constructed by Russia, for which Russia has committed to supply fuel for the first decade. It is hard to believe that Iran must rapidly produce fuel for reactors that do not yet exist. The only probable rationalisation for the urgency is production fissile material that can be used in nuclear weapons as soon as possible.

Fourth, Iran's rejection of the EU3 and Russia's cooperation and development package offers, which would have gained Iran extensive economic benefits in energy, civil aviation and telecommunication areas, is very peculiar. If Iran's nuclear objective was purely civilian it would not have refused such offers, including the Russian proposal to regularly supply low-grade nuclear fuel.

Fifth, most of Iran's nuclear program is directed by

Pakistani Abdel Kader Khan, who is responsible for the development of the Pakistan nuclear program.

Sixth, Iran's vigorous missiles program, which includes long-range Shihab-3 missiles and Soviet-designed nuclear-capable cruise missiles, implies Iran's pursuit of nuclear weapons.

Although Iran's nuclear program intentions remain uncertain, Iran's peaceful claims are not very convincing. Even if each piece of evidence could be elucidated, the overall pattern leads observers to conclude that Iran is pursuing nuclear weapons.

Nuclear capability would boost Iran's influence, sense of power and prestige in the region. It is a long-term strategic ambition of Iran, as it would exhibit the brilliance, modernity and scientific ability of the great Persian civilisation. Iranian leaders believe that nuclear weapons will be a source of power and autonomy as they would keep external forces from invading Iran or dictating to it, and could function as a weapon of final resort for the revolutionary regime. Iran's risky location near major nuclear powers and the hard-line approach taken toward it further encourage Iran's program.

D. The Israeli Perspective

Iran and Israel share a long history of aggression and hostilities, as Iran is funding, leading and training terrorist groups such as Islamic Jihad, Hamas and Hezbollah. Beres argues that the Islamic view is that a land in the heart of the abode of Islam can only be ruled by a Muslim authority. The Jewish state's continuation, regarded by Iran as a cancerous growth in the Middle-East, must therefore be fought with a holy war. Because Iran is eager to demolish Israel, its nuclear development poses grave danger for Israel.

The Israeli fear might be cogently reasonable in relation to public statements by Iranian leaders calling for Israel's destruction. In 2005, Iranian President Ahmadinejad stated that Israel 'must be wiped off the map' and that 'all the conditions for the removal of the Zionist regime are at hand ... It won't take long before the wrath of the people turns into a terrible explosion that will wipe the Zionist entity off the map'. On other occasions Ahmadinejad repeated this call for Israel's annihilation. Ahmadinejad is not unaccompanied. The Supreme leader Ayatollah Khamenei revealed that 'setting Israel on fire' is a top Iranian ambition, and Rafsanjani, the chair of the Expediency Council, articulated that nuclear weap-

ons can solve the Israeli problem, as one nuclear bomb will destroy Israel.

When Shihab-3 missiles are wrapped with banners proclaiming 'Israel should be wiped off the map' and 'Death to Israel', and Iranian Parliament Members chant 'death to Israel!' right after calling the government to enrich uranium, Israel finds it difficult to view Iran's nuclear enrichment as a path to generate electricity.

Some, however, argue that in the field of threat assessment, isolating quotations is empirically proven to be a flawed method to inspect intentions. In Iran, the extreme rhetoric serves an internal political function. In contrast, others have argued that Ahmaad-enijad's statements violate both the prohibition of incitement to commit genocide, contained in Article 3 of the Convention on the Prevention and Punishment of the Crime of Genocide to which Iran is a party, and the prohibition on the threat of use of force contained in Article 2(4) of the UN Charter.

I agree with Greenblum that Iran's annihilation threats cannot be dismissed outright. While this rhetoric alone does not justify an Israeli attack, it underlines Iran's fundamental hostility toward Israel and must be viewed in the wider context of Iranian-Israeli hostilities and the crucial function nuclear weapons might play in it.

Israelis view several threatening scenarios if Iran possesses nuclear weapons: *First*, a domino-style arms race in the region. *Second*, Iran's nuclear weapons possession would serve as an umbrella for terrorist acts. *Third*, a nuclear Iran raises the likelihood that nuclear weapons or fissile materials would reach the hands of terrorist groups. *Fourth*, Iran might use its nuclear umbrella to shield itself and its allies, such as Syria, from an attack. *Lastly*, a nuclear Iran represents an existential threat to Israel as Iran might fulfil its destructive threats and use nuclear weapons to attack Israel.

E. An Israeli Pre-Emptive Attack?

'The pre-emptive doctrine', Tal explains, is 'well embedded in Israel's national security concept and it was the result of its unique geo-strategic situation'. From its establishment, Israel faced immediate military threats along its borders. Israel's basic security conception premise is that post-1948 it was still under an existential threat. Due to geographic and demographic reasons, Arab states could uphold

limitless military defeats, whereas, for Israel, the first defeat might be the last.

Due to the existential threat imagined by a nuclear Iran, there is a deep tendency in Israel to consider a 'never again' strategy and pre-emptively attack Iran before it can think of attacking Israel. Israeli public opinion seems to support such an attack. Indeed, Israeli officials have issued statements regarding a possible attack against Iran, and it has also been reported that Israel is rehearsing for such an attack. A recent report, denied by Israel, claims that after the Iranian opposition riots broke out following the June 2009 presidential election results, Israel sought US approval for attacking Iran's nuclear facilities. The US administration's lack of response resulted in abandonment of the action.

The implications of a strike against Iran are severe. *First*, an attack would almost certainly reinforce national feelings, unite the people around the regime and shift the balance of power within Iran to the right. *Second*, it would be politically provocative and might deepen Israel's international isolation. *Third*, it might inflame regional hostility; increasing the risk of terrorist retaliation or full-scale war. *Fourth*, it carries the risk of high collateral damage, because many of Iran's nuclear facilities are located near heavily populated areas.

Putting aside the possibility of a US attack on Iran's nuclear facilities, the military challenge for Israel to repeat the Osiraq success is formidable, as the Iranians have learned important lessons from the 1981 experience. *First*, the Iranians are expecting an attack and have prepared their air-defences accordingly. *Second*, there is a longer distance between Israel and Iran, which would require en-route refuelling. *Third*, Iran's nuclear complex is large, widely-spread and hidden underground. *Fourth*, it has been suggested that Iran is probably operating a parallel covert nuclear program alongside the known program. These factors make it almost impossible to destroy Iran's entire nuclear infrastructure or to cause its nuclear program a significant delay.

While the Iranian facilities are significantly more challenging than Osiraq, Israeli Air Force capabilities have also developed significantly since 1981, especially with regard to enhanced accuracy and penetration. Would such an attack be legal from an international law perspective? That question is the subject of the next chapter.

III. ASSESSMENT OF THE LEGALITY OF A POSSIBLE ISRAELI ATTACK ON IRANIAN NUCLEAR FACILITIES

One purpose of International law is peace. To achieve this goal, the UN Charter places a positive duty on states to resolve disputes in a peaceful manner. At the heart of the Charter lies a general prohibition on the use of force (Article 2(4)), with two exceptions: *First*, it permits individual and collective self-defense (Article 51). *Second*, the Security Council is empowered to determine whether there is a ‘threat to the peace, breach of the peace, or act of aggression’ (Article 39), and, if so determined, it may authorise the use of force against the offending state (Article 42). In assessing the legality of a potential Israeli attack on Iran’s nuclear facilities, this paper focuses on unilateral action by Israel and not on an action taken according to UN Security Council authorisation. Moreover, as this paper focuses on the relations between Israel and Iran – both UN member states – I proceed with the analysis based on the determination that the UN Charter obligates both states.

A. Article 2(4) of the UN Charter

As noted above, one axis of the UN Charter is the prohibition on the use of force provided in Article 2(4): ‘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.’ This principle has developed into customary law and is considered as *jus cogens*, binding all states.

The interpretation of Article 2(4), is problematic. According to one view, it prohibits any trans-boundary use of force unless it is an act of self-defense or authorised by the Security Council. This view partially relies on the claim that the *travaux préparatoires* make it clear that the phrase ‘against the territorial integrity or political independence’ was not intended to limit the broad prohibition against the use of force. This seems to be the widely accepted view supported by key International Court of Justice (“ICJ”) decisions. Nevertheless, a narrower view of the prohibition exists. In 1983, D’Amato cast doubt on whether Israel’s Osiraq strike was a use of force against either Iraq’s territorial integrity or its political independence. According to D’Amato, ‘no portion of Iraq’s territory was taken away from Iraq

by the bombardment. A use of territory – namely, to construct a nuclear reactor – was interfered with, but the territory itself remained integral. Nor was Iraq’s political independence compromised. Iraq’s power was without a doubt lessened, but in what sense was its governmental authority *vis-à-vis* other sovereign governments diminished?’

Regarding the last element of Article 2(4), that the use of force must not be inconsistent with the purposes of the UN, D’Amato asserts that ‘there is hardly a more fundamentally important value than the preservation of the lives of the inhabitants of the claimant state. If Iraq were to develop a nuclear weapons capability, the existence of a small state such as Israel would be in jeopardy. In other words, Israel may have been justified in attacking a nuclear reactor in Iraq ... because of the enormous destructive potential of nuclear weapons’. One of the purposes of the UN is disarmament (Articles 11, 26 of the Charter). While D’Amato acknowledged that ‘Israel’s unilateral, military and self-interested aerial attack on the Iraqi reactor is hardly a peaceful or desirable precedent for the purposes of non-proliferation’, he asserts that ‘it is possible to surmise that the community of nations breathed a little easier after the deed was done.’

D’Amato’s analysis should be rejected. D’Amato’s narrow interpretation of Article 2(4) allows every use of force not resulting in occupation, territorial annexation, coup d’état, etc. Entering a state without its consent, acting at will in its territory and destroying ground constructions do not leave the territory unimpaired. These acts violate territorial integrity. While some violations of territorial integrity might be legal, they are still violations.

B. Self-Defense

1. The Caroline Formula

The right to self-defense is an ancient customary law right. The early great theorists of international law, Gentili, Pufendorf, Vattel and Grotius, to mention few, have all affirmed the natural right of self-defense in the face of immediate danger from a potential aggressor. Grotius explained that states’ right of anticipatory self-defense was wider in scope than that of individuals, for in contrast to individuals who live in settled societies with government protection, states must protect themselves.

The classic self-defense doctrine emerged during a rebellion against British occupation in Canada in

1837. The *Carolina* vessel, owned by US nationals, was allegedly assisting the Canadian rebels. On 29 December 1837, while the *Caroline* was anchoring in the US side of the Niagara River, British troops boarded it, killed several US nationals, set the vessel on fire and sent it over Niagara Falls. Initially, the British asserted this was an act of self-defense, but ultimately apologised for the incident. During a famous correspondence, Webster, US Secretary of State, wrote to Lord Ashburton, Britain's special Minister to Washington, stating that in order for a self-defense claim to be founded, Britain had to show a 'necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation'. Moreover, the action must involve 'nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity and kept clearly within it'. This *Caroline* formula, which transformed the political self-defense excuse into a legal doctrine, seems to recognise a right of anticipatory self-defense subject to the requirements of necessity, immediacy and proportionality.

2. Article 51 of the UN Charter

Article 51 of the UN Charter provides an explicit exception to the prohibition on the use of force: 'nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the UN, until the Security Council has taken measures necessary to maintain international peace and security'. The interpretation of this article has been widely debated and two main schools of thought have developed. The first applies a restrictive reading of the provision, considering Article 51 exclusive with regard to the right of self-defense, and emphasising the words 'if an armed attack occurs', according to which an actual attack must commence in order to invoke the right to self-defense. The second emphasizes that the words 'nothing shall impair the inherent right of ... self-defense' indicates a pre-existing right, independent of the Charter, leaving the customary right of self-defense unimpaired, an interpretation which could be supported by the *travaux préparatoires*.

The narrow interpretation excludes anticipatory attack, while the customary rule, as discussed above, permits recourse to anticipatory self-defense pursuant to certain restrictions. Arguably, had the Charter's framers meant to allow anticipatory self-

defense, one could reasonably expect them to state it explicitly in the provision. Indeed, according to the maxim '*expressio unius est exclusio alterius*', the authorisation to exercise self-defense under certain circumstances serves as evidence that the Charter-makers considered exceptions to the use of force restrictions and that the omission of other authorisations was intentional. Hence, anticipatory self-defense should be excluded. Moreover, as an exception to the more general prohibition on the use of force, Article 51, as a rule of interpretation, should be narrowly interpreted so as not to undermine the principle.

Nevertheless, I contend that the arguments in favour of a broad interpretation of Article 51 as including anticipatory self-defense should outweigh those against.

First, those who argue that Article 51 is exclusive, mainly focus on the English text: 'if an armed attack occurs'. But the French version is equally authoritative yet less conclusive: '*dans le cas ou un membre ... est l'objet d'une agression armée*'. 'Aggression' may exist detached from and prior to an actual attack.

Second, anticipatory defense must be recognized as legitimate in the nuclear era, when failing to preventively act in a case of a nuclear missile attack might end in annihilation. As Freidman contended:

The ability of missiles with nuclear warheads, to paralyse and destroy the nerve centres even of vast countries ... and to kill or maim major parts of their populations in one blow, may make it a form of suicide for a state to wait for the actual act of aggression before responding... self-defense must probably now be extended to the defense against a clearly imminent aggression, despite the apparently contrary language of Article 51 of the Charter.

Since 'no nation would willingly sit by while another prepares its doom', anticipatory self-defense is completely reasonable in the nuclear age to ensure national survival.

On the other hand, it is argued, allowing anticipatory self-defense in the nuclear age will invite abuse and may lead to catastrophic results. Moreover, nuclear states rely on second-strike capacity deterrence rather than anticipatory attack. Notwithstanding

these observations, it is doubtful whether this analysis applies to small states facing a nuclear threat. Additionally, if a nuclear attack is imminent, it means that deterrence failed and an anticipatory attack is necessary.

Using *reductio ad absurdum*, Article 51 cannot be interpreted so as to preclude a state from acting in self-defense until it has actually been attacked. Therefore, the best response to the restrictive interpretation advocates is common sense:

In a nuclear age, common sense cannot require one to interpret an ambiguous provision in a text in a way that requires a state passively to accept its fate before it can defend itself...it is the potentially devastating consequences of prohibiting self-defense unless an armed attack has already occurred that leads one to prefer this interpretation.

Third, although it must be recognized that others have taken a different view, and keeping in mind the problems of assessing state practice, customary law may support anticipatory self-defense. For example, in the Six-Day War, Israel's anticipatory attack was not condemned by the Security Council or by most states. After the Osiraq attack, while the Security Council rejected Israel's argument of anticipatory self-defense, it did not reject anticipatory self-defense *per-se*. Moreover, during the Security Council debate several delegates made statements recognizing such a right. With regard to the United States attack on Libya in 1986, both the United Kingdom and the United States asserted that self-defense applies when an attack is imminent. While the view expressed here is debatable, it would be safer to say that as a minimum there is no rule of customary law prohibiting anticipatory self-defense.

Therefore, I will analyse the Israel-Iran situation according to the traditional *Caroline* doctrine, which recognises anticipatory self-defense, subject to the requirements of necessity, immediacy and proportionality. These requirements, albeit not mentioned in the Charter, are considered rules of customary or general principles of international law.

a. Necessity

i. Certainty

Self-defense requires sufficient evidence that the threat of attack exists, including evidence of the possession

of weapons and an intention to use them. The major problem with anticipatory and, even more so, with pre-emptive attack is the certainty of the attack. The further we are in time from the attack, the greater the chance that the state will change its decision and the possibility of mistake becomes likely, whereas if one stringently waits until an attack is undertaken, the problem of certainty does not arise.

Is there near certainty that Iran will attack Israel? As noted above, Iran's denials regarding any intentions to produce or to use nuclear weapons are widely suspicious. Nevertheless, there is still a long way from suspicion to proof. Eichensehr argues that several combined factors support the view that Iran has no intentions to use nuclear weapons and therefore the near certainty test fails: the devastating consequences for Iran if it uses nuclear weapons; US human intelligence in Iran is faulty; Iran is not engaged in hostilities with any of its neighbours; Iran is deeply embedded in the international community, having strong economic ties with Russia, China and India; and within Iran's elite ruling there is a level of politics. Iran is not a totalitarian regime, as President Ahmadinejad was elected.

I question Eichensehr's factors and their implementation: *First*, Iran may not act rationally and fear severe consequences. *Second*, there have been public indications that the US broke some Iranian codes and gained access to Iranian intelligence. Moreover, the analysis should consider Israeli intelligence claiming that Iran has crossed the technological threshold for making an atomic bomb. *Third*, while Iran is not *directly* involved in hostilities with its neighbours, it is arguably involved in anti-Israeli terrorism. *Fourth*, the fact that Iran is well-embedded in the international community could serve as a counter-argument. The economic dependency of the international community on Iran's oil could enhance Iranian confidence that no serious implications would result from its nuclear weapons program. *Fifth*, Iran's democratic elections' are open to doubt, as suspicions of voter fraud in the disputed previous Presidential elections showed.

Regardless of any reservations with those factors, I share Eichensehr's conclusion that evidence regarding the existence of the threat of an Iranian attack is insufficient. Even if one accepts the disputable conclusion that Iran is pursuing nuclear weapons and intends to use them against Israel, Iran is not yet in possession of nuclear weapons.

ii. Exhaustion of peaceful alternatives

The proof of necessity requires exhaustion of all reasonable alternative means of avoiding the threat concerned without forcible means. In the Security Council debate over the Osiraq attack, the US vote in favour of the resolution condemning Israel was established upon the acknowledgement that Israel had failed to exhaust peaceful means to resolve the conflict. Has Israel exhausted all alternative means to resolve the Iranian dispute?

As noted above and, in contrast to the situation before the Osiraq attack, diplomatic efforts have been long set in motion by EU3, US and Russia to convince Iran to halt its nuclear enrichment and to bring it into NPT compliance by offering different incentives. Iran rejected all offers.

Although failure of the incentive approach seems widely recognized, diplomatic efforts have not been exhausted. This year, US President Obama offered Iran an ultimatum until September to negotiate for solving the nuclear crisis. In August 2009, the Israeli Foreign Ministry initiated comprehensive diplomatic actions intended to pressure some of the world's leading countries to impose sanctions on Iran, even if the Security Council does not make such a decision. Israel is endeavouring to persuade certain leading countries to tighten the economic sanctions and blockade imposed on Iran.

While it was suggested that a widespread boycott of Iran by the European Union, which supplies 44% of Iran's imports, or a severe oil embargo, might rapidly coerce Iran to cease its nuclear program, there are no signs of such severe sanctions on Iran. In the beginning of October 2009, Russia, France and the US were negotiating a draft agreement with Iran, at the IAEA meeting in Vienna. According to the draft agreement discussed at the negotiations, Iran would ship about three-quarters of its low-enriched uranium to Russia by the end of 2009. There it would be enriched to a higher grade and converted into fuel plates in France, after which it would be shipped back to Iran to power the Tehran medical research reactor. On 29 October 2009, Iranian officials told the IAEA that they could not agree to the deal that their own negotiators had reached. By the time this paper was written, it is not clear what the outcome of the deal will be, as Iran's public responses have been ambiguous.

In contrast to the state of affairs before the Osiraq attack, the Security Council is involved. From July 2006 to September 2009, the Security Council, acting under Chapter VII, has adopted five Resolutions demanding that Iran suspend all enrichment-related and reprocessing activities, and imposing various economic sanctions related to Iran's nuclear program. Nevertheless, the Resolutions stop short of imposing extreme economic sanctions. As of today, Iran has not complied with the basic demands of these resolution. Iran, it appears, has invested a great deal of pride, funds and scientific capacity in its nuclear program development and is not prepared to utterly abandon it.

It seems that Security Council approval of extreme economic sanctions, *a fortiori* a use of force against Iran, is not expected due to a Russian/Chinese—two permanent members of the Security Council—possible veto. Both states, which have significant economic relations with Iran and were involved in its nuclear program, have continuously hindered any significant Security Council action.

Eichensehr argues that, although diplomacy seems to be failing to stop Iran's nuclear development, the threat of mere nuclear materials possession does not rise to a level of necessity which permits self-defense, because Iran could still be deterred from using nuclear weapons or passing nuclear materials to terrorist organisations. In the same vein, Boroujerdi and Fine claim that because 'Iran's behaviour appears increasingly rational', there is no ground to suppose that it would not be deterred by nuclear retaliation like any other state would.

In response to these claims, it should be initially noted that if Iran wants nuclear capability only in order to deter US or Israeli aggression, the development of nuclear capability does not solve Iran's problem rather increases it. More importantly, deterrence is not an enticing proposition for Israel:

First, even if 'the Iranian leaders are not necessarily acting irrationally', they are not necessarily acting rationally either. Some claim that based on Iran's apocalyptic messianism, exaltation of martyrdom and obsession with Israel as the Zionist enemy, manifested in the Iranian leader's genocidal rhetoric, Israel cannot rely on traditional deterrence models or on Iran's self-preservation instinct, because it is facing an irrational adversary. As Pogany puts it 'a radical regime, imbued by an extremist ideology, is

less likely to be deterred from launching a nuclear attack, by the fear of nuclear retaliation, than a stable government.' Without accepting any postulation regarding Iran's rationality, I certainly accept Ben-Israel's evaluation that deterrence models are not compatible, not because Iranian people are irrational but because of their different way of thinking and erroneous conception of Israel.

Second, while Israel's own alleged nuclear arsenal is assumed to outmatch Iran's in the near future, nuclear deterrence strategy is inappropriate for Israel, which lacks second-strike capability. Given its size and resource concentration a nuclear first blast can eliminate Israel and destroy its nuclear potential.

Third, deterrence would not be applicable if nuclear material could reach the hands of terrorists. Moreover, the rationality constraints referred by some to Iran's leadership do not apply to terrorists, since many believe in martyrdom.

Fourth, the absence of communication between Israel and Iran makes it complicated to establish a monitored deterrence relationship as existed during the Cold-War, when even then, the world was moments away from an incident that could possibly have caused a nuclear holocaust.

Iran and Israel are not the Soviet-Union and US, two global superpowers, thus traditional models of deterrence cannot and perhaps should not be relied upon.

b. Immediacy

The right to anticipatory self-defense can be evoked only against an imminent threat. Indeed, Israel's Osiraq attack failed the legal self-defense test because the action was taken before an imminent threat was posed. Does Iran pose an imminent threat to Israel? The answer depends on what the threat is. If the threat is the *possession* of enriched nuclear material which can be used for dirty bombs, then the threat may well be deemed immediate. If the threat is the *use of* nuclear weapons itself, one has to determine whether Iran already possesses weapons system capable carrying a nuclear warhead or is it developing such a system and if so, when is it due to be operational. Iran does not yet possess a nuclear weapons delivery system. Although it possesses long-range Shihab-3 missiles, they need to be modified in order to be capable of carrying nuclear warheads.

Estimates regarding Iran's acquisition of nuclear

weapons capability vary. On the one hand, O'Connell and Alevraz-Chen argue that the Iranian nuclear weapons plan is far from being substantiated, since the uranium processed in Natanz was enriched only to 3.6%, a level suitable for producing power but far short from the 90% commonly associated with weaponry. Also, a recent report by the US State Department's Bureau of Intelligence and Research assessed that Iran will not be able to produce weapons-grade material before 2013. On the other hand, *The Times* recently reported that Iran has mastered the technology to produce and detonate a nuclear warhead and is merely waiting for the supreme leader, Ayatollah Ali Khamenei's word to create its first bomb. Once such a decision is adopted it would take about six months to convert low-enriched uranium to highly-enriched uranium and another six months to assemble the nuclear warhead. In another report, it was claimed that according to a leaked IAEA report, Iran has the ability to manufacture a nuclear bomb and worked on developing a missile system that can carry an atomic warhead.

While the deadline is quickly approaching, it seems that imminence is the primary legal obstacle of an Israeli attack, as the acquisition of nuclear weapons-making capacity does not pose an imminent threat. There is still more time for deliberation and diplomatic efforts. The skeptics would argue that also a month or a week leaves time for more deliberation, but does it necessarily mean that a state has to wait *juxta* before a nuclear missile is launched in its direction? At least until Iran actually possesses nuclear weapons, the threat of a nuclear attack cannot be considered imminent.

c. Proportionality

Even if a state resorts to force to achieve a justifiable aim as self-defense, it will nevertheless violate international law if its conduct involves excessive force. The proportionality doctrine appraises the character and amount of force required to remove the threat posed to the defending state. The means used must be no more than necessary to attain a certain goal, but also that the goal's value must outweigh the disvalue of the means; e.g., even if in order to remove a certain threat two nuclear bombs are necessary, their use in itself may outweigh the given end. This principle includes limitation on time, geographical scope, choice of targets and means. As proportionality in self-defense is forward looking, a

state can only estimate the scale of damage it would have endured. Threat of nuclear explosion is severe, for its indiscriminate character infers great harm to civilians.

Mallison and Mallison claimed, in relation to the Osiraq attack, that an armed attack in response to an estimated non-imminent future attack, even if the latter is deemed to be nuclear, can never be proportionate. Others have argued that the attack was proportionate, as Israel targeted only the reactor that it conceived as posing a threat, and struck on Sunday when fewer people were expected to be present, leaving Iraqi airspace soon after the strike.

As we have seen, an attack on Iran's nuclear facilities would be a different story from the Osiraq attack. An attack on Iran would be more comprehensive, with more powerful weapons, causing greater damage to civilians, infrastructure and environment. Such an attack, it is argued, would be disproportionate for two main reasons: *Firstly*, bombing will have little potency in slowing Iran's nuclear program, because it might not destroy all the nuclear sites. Even if it does, Iran is suspected of operating a parallel covert nuclear program besides the known one. Thus an attack may not eliminate the threat of nuclear development. *Secondly*, even if an attack could halt the nuclear program, the required heavy bombing of populated areas would cause disproportionate death and destruction.

I am not as conclusive as those writers, as their analysis disregards the other side of the equation – the threat posed by a nuclear Iran to Israel's existence. One can only reflect ICJ's *Nuclear Weapons* Advisory Opinion, in which the ICJ held that keeping in mind every state's fundamental right to survival, it cannot conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a state would be at stake. The proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defense in all circumstance. I believe that *prima facie*, an attack solely on Iran's nuclear facilities to remove the nuclear threat would be proportionate to the threat it poses.

3. Conclusion

It is fair to claim that a pre-emptive attack by Israel against Iran, under current conditions, would not

be legally acceptable under the right to self-defense. Even if one conceives a pre-emptive attack on Iran's nuclear facilities as necessary and proportionate (both perceptions are highly controversial), the Iranian threat is not imminent. Only once there is definitive proof that Iran possesses nuclear weapons and has clear intentions to use it against Israel in the near future – creating an imminent threat – and all other efforts have been exhausted, would an attack on Iran's facilities would legal.

C. Does a Customary Exception Exist?

One of international law's sources is customary law which 'consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way'. It therefore requires state practice and *opinio juris* - state recognition of that practice as a legal obligation. Customary law is a flexible source of law which can change over time in light of new conditions.

One argument might be the emergence of a customary exception to the general prohibition on the use of force, according to which a pre-emptive attack under nuclear development circumstances is allowed. The observation of whether such an exception has emerged would require a study of countries' acts, of whether they justified their acts by reference to a new exception to the rule, and of the response of other countries to this justification.

Use of force to halt nuclear programs is not a novel phenomenon, and one has to question whether the incidents imply a certain trend. In the 1960's, the US considered the destruction of China's nuclear facilities but ultimately decided against it. In 1993, the US considered a pre-emptive attack against North-Korea to disable a potential nuclear weapons program, but abandoned it when North-Korea entered into an agreement with it. Although in these incidents, action was eventually not taken, the state's mere believe that pre-emptive self-defense could be undertaken makes them relevant.

Nevertheless, it seems that weapon development for future use, even nuclear, does not give rise to exercising pre-emptive self-defense. For this reason, for example, the US did not claim self-defense to justify its 1962 blockade around Cuba in order to prevent the Soviet-Union from stationing missiles in Cuba. While some officials urged pre-emptively attacking missile sites in Cuba and ships delivering

rockets, the US decided against an air-strike.

In the Security Council debate following the Osiraq attack, Israel invoked the right of anticipatory self-defense, claiming that the technological advance had broadened the scope of self-defense, now including the right to a preventive attack. While Israel indeed acted and justified its acts as it believed to be legal, this was rejected by other countries. Many delegates held that the conception of pre-emptive strikes were unacceptable; others held that it may only be permitted when a state is facing an imminent threat after all other means have been exhausted, criteria which were not met by Israel. The debate resulted in Security Council resolution 487 of 19 June 1981, in which the Security Council 'strongly condemns the military attack by Israel in clear violation of the Charter of the UN and the Norms of International Conduct'. The attack was also strongly condemned by the IAEA Board of Governors in a resolution of 12 June 1981 and by the European Parliament Resolution of 19 June, 1981. Conversely, D'Amato argues that the resolution can only be regarded as an under-the-table support for Israel's acts, for while the resolution's wording is tough, no penalty or sanction was imposed on Israel, which might imply that the attack was just.

In September 2007, it was reported that a secret Israeli raid destroyed a nuclear reactor in Syria. While we may have another consistent act by Israel, we lack *opinio juris* as Israel did not take official responsibility for that attack.

The necessity of pre-emptive self-defense in the weapons of mass destruction age seems to be accepted now by US national strategy. However, the US did not try to justify the 2003 invasion of Iraq (where weapons of mass destruction allegedly existed) based on pre-emptive self-defense rather than on the Security Council's authorization.

Recalling the difficulties with assessing state practice, it would be safe to conclude that state practice and *opinio juris* have permitted the exercise of anticipatory self-defense only when an attack is ongoing or imminent. The Osiraq attack and the US approach are not sufficient to create a new customary rule. Moreover, even if one can find support of such a claim, it could be argued that Article 2(4) of the Charter is *jus cogens* which cannot be changed in the same manner as other international law rules.

D. Does a State of War Exist?

If a state of war exists between Israel and Iran, then arguably, Israel's attack on Iran would be a legitimate part of the broad conduct of war. This argument was made by commentators with regard to Israel's Osiraq attack. Arguably, at the time of the air strike, Iraq was still in a state of war against Israel since it never signed the 1949 Armistice Agreement and therefore the Israeli attack was not an act of aggression rather 'another round of hostilities in an on-going armed conflict'.

Although the argument regarding a state of war between Israel and Iraq was itself disputable, a similar argument can be made regarding a state of war between Israel and Iran. While traditionally a state of war existed only after declaration by the parties involved, it seems that a state of war might now exist without formal declarations.

One can argue that Iran is already at war with Israel, through terrorist organisations. Iran supplies weapons, training, and financial support to organisations openly adverse to Israel such as Hamas, Palestine Islamic Jihad, and Hezbollah. More specifically, Iran seems to be behind or at least assisted many anti-Israeli incidents such as Hezbollah's bombing of the Buenos-Aires Israeli Embassy and the Jewish cultural centre in 1992 and 1994, respectively; suicide bomber recruitment; the recent 2006 conflict in Lebanon; and arms trafficking into Gaza and to Hezbollah. According to this argument, Iran's anti-Israel terrorism has created a *de facto* state of war between the two states, in which Israeli use of force should only be evaluated according to the standards of *jus in bello*, not *jus ad bellum*, for the latter do not apply in a state of war.

Several responses are applicable. If one acknowledges that a state of war exists between Israel and Iran, this grants legal support for Iran's acts, since Iran would be allowed – according to the same argument – to attack Israeli targets as long as it obeys *jus in bello*. Moreover, if Israel counted on a state of war, a missile strike on Iran could be regarded as a radical escalation of hostilities. In any case, the basic premise should be rejected on theoretical grounds. According to Lauterpacht and later by D'Amato, resorting to war has been illegal since the 1928 Kellogg-Briand Peace Pact and the UN Charter afterwards. The newly established legal order banished war as a legal custom, turning the normal relationship

between states to that of peace. If this relationship is interrupted by illegal hostilities, upon their cessation the situation returns to the original state of peace. Thus, any hostilities between Israel and Iran whether they regard themselves as being in a state of war or not, would amount to a breach of peace. Even if it is still possible to instigate a war, Greenwood adds, this would not grant states the permit they had before 1948 to wage war subject only to *jus in bello* limitations.

Other arguments brace this theoretical notion: *First*, the international community's consistent view is that the relations between Israel and Arab states are ought to be assessed according to the UN Charter's standards. *Second*, on its merits, the state of war argument does not apply to the Israel-Iran context. Iran and Israel are not in a formal state of war and have not been involved in any *direct* active hostilities which could indicate a factual state of war. It is arguable whether Iran's support for Hezbollah is sufficient to attribute Hezbollah's acts to Iran. In order for Iran to be legally responsible for Hezbollah's attacks there must be 'effective control' of Hezbollah's acts by Iran. It seems that by supporting Hezbollah's activity, Iran has not exercised the necessary control over Hezbollah to be responsible for its acts. A similar but not identical argument was made by Maggs, according to which, the US may justify an attack on Iran's nuclear facilities due to its continuous engagement in hostilities against US allies. Nonetheless, this 'accumulation of events' theory is very hard to distinguish from prohibited reprisals and was rejected by the Security Council.

E. Enforcing International Law

1. Enforcing Security Council Resolutions

Beres and Tsiddon-Chatto argue that the Israeli Osiraq attack was not a violation of international peace and security, but a 'heroic and indispensable act of law enforcement', for given the nonexistence of a central enforcement body, international law relies upon the readiness of individual states to act under the auspices of the international community.

This statement is, at a minimum, inaccurate. The Security Council is the international community's central enforcement body. Whereas at the time of the Osiraq strike the Security Council was not even involved, this is not the case with regard to Iran. As noted above, in five resolutions the Security Council,

acting under chapter VII, demanded that Iran suspend all its enrichment-related activities and imposed various economic sanctions related to Iran's nuclear program. Iran did not comply and since July 2006 is in breach of Security Council Resolutions. According to Article 25 of the UN Charter, Iran, as a party to the Charter, agreed to comply with Security Council resolutions. Iran cannot claim that the NPT grants it an inalienable right of enrichment and accordingly it does not have to suspend its enrichment, because the UN Charter is superior over other international agreements (Article 103).

Can Israel claim that by using force against Iran's nuclear facilities it merely enforces Security Council resolutions? Some might find such a claim particularly inciting, as more extreme economic sanctions, not to mention an authorisation to use force, seems wholly unlikely, due to the opposition of Russia and China, which prevented any more meaningful sanctions so far.

Lesson can be learned from the 2003 military action against Iraq. Greenwood argued that at the commencement of that action, Iraq was in material breach of Security Council Resolutions 1441 (2002) and 687 (1991), meaning it posed a threat to international peace and security. Since resolution 687, which remained in force at the time of attack, authorised the use of all necessary means, the use of force was legal. One can theoretically argue that since Iran is in breach of the Security Council resolution, and since the Security Council is in a deadlock because of a probable Russia or China veto, an Israeli attack on Iran's nuclear facilities is an instrument for enforcing Security Council resolutions.

This argument is tenuous. The comparison to the Iraq invasion in 2003 is inappropriate, for the resolution relied on by the allies clearly referred to all necessary means which was understood to be an authorisation to use military action. In contrast, the language of the Security Council resolutions regarding Iran is very cautious and there is nothing to authorise unilateral military action. It seems that China and Russia learned from the experience of how Article 41 was used to justify the invasion of Iraq, and carefully drafted the language of the resolution to exclude any possible invocation of implied authorisation to use force. All Security Council resolutions explicitly refer to sanctions under Article 41 which authorise the Security Council to impose sanctions not involving the use of force. Article 42 which contains

authorisation to approve military action as may be necessary to maintain or restore international peace and security is not mentioned in any of the resolutions.

2. Enforcing NPT

With regards to the Osiraq attack, Brown argued that since Iraqi nuclear development and threat to use force against Israel was a violation of its NPT obligation, which caused Israel injury by 'subjecting it to intolerable situation of an indefinitely high alert' and putting it at a 'significant tactical disadvantage if it did not strike', Israel's attack was justified as an appropriate remedy. Can this be argued with regard to Iran? I agree with Eichensehr that such an argument would be flawed, because Israel as a non-party to NPT cannot be injured as a party to the convention. Moreover, such an argument undermines the entire UN Charter regime and purposes, mainly reducing recourse to force.

A different argument, suggested by the IAEA in 1946, is that 'a violation [of the NPT] might be so grave a character as to give rise to the inherent right of self-defense'. However, Iran's NPT's violations do not give rise to the use of force in self-defense. Putting aside claims that there is no hard evidence that Iran has violated its NPT obligations and that the pursuit of enrichment for peaceful purposes is permitted (Article 4), the mere possession of nuclear weapons does not amount to an unlawful threat to use force, let alone an armed attack in Article 51 terms. In its *Nuclear Weapons* advisory opinion, the ICJ emphasised the tension between the continuing nuclear deterrence practice and the emerging custom of prohibiting the manufacture, possession and use of nuclear weapons, held that the mere possession of nuclear weapons did not necessarily violate the Charter or general principles of international law.

F. Conclusion

An examination of different legal arguments leads to the moderate conclusion that under current conditions, there is no persuasive legal support for an Israeli attack on Iran's nuclear facilities. While a strict application of international law rules results in this conclusion, one cannot avoid wondering whether these rules are suitable to a nuclear era when one state can destroy another with one stroke. This is the next chapter's concern.

IV. LET THE CAROLINE SINK! THE INCOMPATIBILITY OF CUSTOMARY SELF-DEFENSE CONDITIONS WITH THE NUCLEAR ERA

A. Why the Traditional Self-Defense Formula is Incompatible with the Nuclear Era

International law of armed conflict is aimed, *inter alia*, to regulate states' right to use force in order to effectively defend themselves, but historically, it addressed conventional threats. When conventional armies were preparing to commence an attack, the *Caroline* formula was suitable, as the defending state had sufficient time to act effectively, even if required to wait until an attack was imminent. Nuclear weapons, however, pose new complications, for by the time nuclear weapons use is imminent, it may be too late and extremely difficult for a state to effectively defend itself. That was Blum's argument in the Security Council debate regarding the Osiraq attack:

To assert the applicability of the *Caroline* principles to a State confronted with the threat of nuclear destruction would be an emasculation of that State's inherent and natural right of self-defense...indeed, the concept of a State's right to self-defense has not changed throughout recorded history... [but] the concept took on new and far wider application with the advent of the nuclear era.

The *Caroline* formula seems too restrictive for the modern era. Even Mallison, who criticised the Osiraq strike, acknowledged that 'in the contemporary era of nuclear and thermonuclear weapons and rapid missile delivery techniques, Secretary Webster's formulation could result in national suicide'. Since nuclear weapons pose new challenges to international law, the formula cannot realistically and practically apply in *haec verba* to the danger posed by weapons of mass destruction attack. As D'amato claimed:

The destructive potential of nuclear weapons is so enormous as to call into question any and all received rules of international law regarding the trans-boundary use of force. Many of the old rationales for these rules no longer apply.

Nuclear weapons can hit a state in ways customary international law did not address and could not have

imagined. It thus seems that international law lags behind modern weaponry developments. The UN Charter also lags behind, for when it was adopted in 1945 its drafters imagined traditional conflicts and could not have considered nuclear weapons which were a carefully guarded secret until August 1945. The UN Charter is thus 'a pre-atomic' document. Its interpretation, nevertheless, should keep pace with technological developments, for it is unwanted and unrealistic to demand a state to wait until it is too late before it may defend itself. As Waldock articulated, '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 the fatal blow.' Consequently, it is more logical to attack nuclear facilities long before an imminent attack, if the aim is to maintain effective self-defense.

B. Relaxing the Imminent Requirement

Following the Osiraq attack, international lawyers embarked on a task to find a suitable formula for evaluating the legality of a pre-emptive strike on nuclear facilities. While each formula has its own flaws, I will not attempt to propose a new formula according to which existing law has to be modified, for I find such formulas often problematic. The proposed parameters are usually narrowly tailored to prior events' circumstances to which application of the law is believed to be unsatisfactory, and thus may not be compatible with prospective events. When thinking about what the law ought to be with regard to pre-emptive attacks on nuclear facilities, we should try to look beyond the narrow Israeli-Iranian conflict. I believe that the best way to do so would be to remain as close as possible to the traditional *Caroline* formula, but to address its main flaw which is the immediacy requirement.

First, in the nuclear weapons context, it is difficult to determine whether an attack is *imminent*. By the time an imminent nuclear weapon attack has been established, it might be too late to undertake any effective action. A miscalculation regarding the possible nuclear weapon attack could result in the death of millions. To require a state to wait until faced with an imminent nuclear weapon attack before lawfully acting in self-defense seems intolerable in light of the magnitude and uncertainty of risks.

A strict imminence standard is impracticable because the time lag between a potential threat and an actual attack may be practically no time at all,

as a ballistic missile can speed across continents in less than an hour. Since the difference between an attack and an imminent attack may be exiguous, the imminence standard must adapt to nuclear weapons implications.

Determining the time within which a threat of a nuclear ballistic missile would realise is puzzling and difficult. As Pogany demonstrated, even states with sophisticated intelligence have failed to discover conventional attacks. This problem is accentuated with regards to a nuclear attack. In contrast to conventional assaults, which are accompanied by detectable indications, a nuclear ballistic missile surprise attack would be much more difficult to anticipate for it lacks an identifiable physical activity.

Second, while threats differ according to their nature and extent, the *Caroline* formula provides a single standard – an imminent threat—applicable to all cases, whether the defending state is facing extinction or not. The formula does not distinguish between threats deriving from guns, cannons and tanks, or nuclear missiles albeit their inherent differences. As Greenwood articulated, when assessing the imminent requirement one has to take into account factors that did not exist when the *Caroline* affair occurred, such as the magnitude of harm that the attack would inflict:

The threat posed by a nuclear weapon... is so horrific that it is in a different league from the threats posed...by cross-border raids conducted by men armed only with rifles. Where the threat is an attack by weapons of mass destruction, the risk imposed upon a State by waiting until that attack actually takes place compounded by the impossibility for that State to afford its population any effective protection once the attack has been launched, mean that such an attack can be reasonably be treated as imminent in circumstances where an attack by conventional means would not be so regarded.

The imminent threat concept is thus misplaced and should be relaxed; one has to take into account the threat's gravity: the higher the threat to the existence of the defending state, the more pre-emptive force should be acceptable. Thus the suggestion that 'prevention is better than cure is as good a motto for foreign policy as it is for medicine', seems appropriate

in the nuclear age given the tremendous destructive potential of nuclear weapons.

Third, in the nuclear era, the proportionality and immediacy requirements conflict each other. After the Osiraq attack, Israel argued that although an Iraqi attack was not imminent, if it had waited until the reactor was operating, an attack would have caused a dangerous radioactive cloud, causing more casualties than the strike actually did. While some studies have dismissed the possibility of radiation exposure as a result of a conventional attack on the reactor, the IAEA pronounced, following the Osiraq attack, that an armed attack on a nuclear installation might cause radioactive releases with grave consequences.

A conventional military attack against an operational plutonium production reactor, or an operational reprocessing plant, is likely to cause catastrophic loss of life and severe radiological damage to the surrounding environment. In order to avoid such consequences, the attack would have to be conducted before nuclear material is introduced into the facility.

It is therefore clear, that within these two factors – proportionality and imminence—lays a tension which supports a relaxation of the immediacy requirement. If an earlier attack might prevent the death of many innocent peoples, then proportionality should prevail over immediacy. Other conclusion would mean that when nuclear facilities are at issue, a pre-emptive attack would almost never be allowed, for if the condition of imminence is fulfilled, the attack would be disproportionate and *vice versa*. Relaxing the imminence requirement would thus strengthen the proportionality requirement.

A relaxed imminence requirement would be easier for nations to adhere to in practice, may avoid a nuclear holocaust and would strengthen the necessity and proportionality requirements. However, relaxing the imminence requirement raises some problems:

First, acknowledging one state's right to pre-emptive self-defense allows the other state to attack first for exercising its own right to self-defense thus creating a circle of legal attacks and counterattacks. By acknowledging Israel's right to pre-emptive self-defense before the threat is imminent, we ironically grant Iran a legal right to anticipatory attacks against Israel. The legal argument is thus a 'double-edged' sword, preventing one state from exclusively

benefiting from it.

Second, a relaxation of the imminence requirement risks rendering the prohibition against the use of force devoid of meaning would lead to a slippery slope, abuse and uncertainty, increase the risk of major confrontations and would endanger the whole world.

The fact that a relaxed imminent requirement would be open to abuse should not end the debate. The customary anticipatory self-defense rule was also open to an abuse, as the further we move from the objective 'attack' criteria to a subjective state's judgment of 'threat', the more this would be open to abuse. Therefore, the danger of abuse of pre-emptive self-defense is no greater than that of anticipatory self-defense. Moreover, this relaxation would be less open to abuse for it refers only to attacks against a nuclear weapons facility. Lastly, the imminence relaxation would have to be compensated by more strengthened requirements of necessity and proportionality. The attacking state must have strong evidence that its adversary is developing nuclear weapons and has intent to use it against it, and must exhaust all other measures prior to the attack, which must be limited to the nuclear facility target and executed with the least possible fatalities.

Preferably, such a pre-emptive action would be collective, under Security Council auspice. However, given the Security Council structure and composition, an authorisation to use force against nuclear facilities seems wholly unrealistic. Since nuclear weapons are capable of sudden and mass destruction, in the absence of any actual collective security, states have no option but to consider a unilateral pre-emptive attack for self-preservation.

V. ILLEGAL BUT JUSTIFIED?

In 1672, Pufendorf claimed that a 'good action is one which agrees with law; a bad action is one which disagrees with the same', and that a 'just action is one which of free moral choice is rightly directed to that person to whom it is owed'. An Israeli attack on Iran's nuclear facilities, according to the existing conditions, would be illegal, but can it be deemed justified? It must be admitted that there is no immediate clear answer to this question. Beres consistently claimed that in order to preserve itself, Israel may resort to pre-emptive self-defense as long as Iran remains committed to Israel's genocidal

destruction. Looking back at the Osiraq attack, commentators argued that Israel did the world a great service and its acts were justified.

While the ‘illegal but justified’ idea is appealing because it enables preservation of the current rules of use of force while permitting individual ‘justified’ exceptions, it may undermine the law since it shifts the centre of attention from issues of legality to issues of legitimacy. As legitimacy is a subjective concept, the only certain thing one can say is that an attack on Iran’s nuclear facilities – even if currently illegal – might be viewed as justified *from Israel’s point of view*. I nevertheless agree that the claim that a certain action is legitimate despite being illegal is strengthened when one conceives the existing law as incompatible with certain circumstances and in need of modification. This is precisely my assertion regarding the *Caroline* self-defense formula. To reiterate, I do not take a stand on whether Israel should attack Iran or not, rather I assume that in the Israeli-Iranian nuclear program context, it would be reasonable for Israel to claim that its potential actions would be legitimate as a critique of the law and as a call for its development along with technological progress.

VI. CONCLUSION

For Israel, a nuclear-armed Iran is a clear and present threat, which seems particularly acute in view of the Iranian leader’s extreme anti-Israeli rhetoric. Therefore, Israel is preparing for the option that, when all else has failed, military action will be the only means to prevent Iran from obtaining nuclear weapons. This paper does not take a position as to whether Israel should attack Iranian nuclear facilities. The implications of such an attack, whether successful or not, may be consequential, yet the repercussions of a nuclear armed Iran may not be less grave. This paper is intended to address one aspect of the issue: whether such an attack would be legal, regardless of whether it is possible or desirable.

The analysis conducted in this paper demonstrates that under current conditions an Israeli pre-emptive attack on Iran’s nuclear facilities cannot find convincing, legal support under any existing legal arguments. The key argument of self-defense cannot be evoked yet, mainly because Iran does not pose an imminent threat to Israel.

Facing a possible future nuclear attack, but subject to

international law rules, the Israeli dilemma demonstrates the perilous gap that exists between the actual security needs of certain states in the nuclear age and the protection standard that international law provides. Hence, a solution is needed to avoid placing states in the untenable position of either violating international law or risking annihilation.

Determining what forms a legitimate act of self-defense is a thorny question in the nuclear age. Reduced response time to potential threats and the potential destructive capabilities of nuclear weapons necessitates the harmonisation of ancient precepts of self-defense with modern nuclear conditions. Since it is clear that ‘the law of nations does not require any state to wait passively for its own annihilation’, this paper suggests that the threat posed by a nuclear weapons and its means of delivery necessitates the relaxation of the traditional imminence requirement to allow, under certain conditions, pre-emptive self-defense strikes against nuclear facilities.

Due to the incompatibility of the traditional self-defense formula with certain nuclear threats, it would be reasonable for Israel to claim that a potential attack on Iran’s nuclear facilities is legitimate – even if not legal – as a critique of international law and a call to its modification in light of technological developments.

Irrespective of Israel’s decision regarding an attack, it appears that Iran would share significant responsibility for the overall atmosphere that might cause a potential Israeli strike.

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