

Chapter 47

Precautionary Self-Defense and the Future of Preemption in International Law

Elli Louka

I. The Al Kibar Incident

On September 6, 2007, Israel bombed a target in Eastern Syria located in the Al Kibar area¹ close to the Iraqi border.² The attack and the reasons for it were covered in secrecy and there was wild speculation in the media that the target might have been a nuclear reactor.³ Information about the incident was restricted to some officials, and the Israeli press was prevented from publishing information about the incident.⁴ After Israel's raid, satellite images showed the site being bulldozed clear in an alleged attempt by Syria to destroy evidence regarding the facility.⁵ In late October 2007, a nongovernmental organization successfully located the site through satellite imagery

-
- 1 The Al Kibar facility was located in an isolated desert region of eastern Syria called Dayr az Zawr close to the Euphrates River.
 - 2 CNN first reported the strike as an attack targeting Hezbollah militants. *See Syria Complains to UN About Israeli Airstrike*, CNN.COM, Sept. 11, 2007, <http://edition.cnn.com/2007/WORLD/meast/09/11/israel.syria> (last visited Aug. 23, 2009). In a letter to U.N. Secretary-General Ban Ki Moon, Syria called the raid "a breach of air space of the Syrian Arab Republic." There was speculation that about ten North Koreans working at the facility died but these reports remained unverified. *See Tak Kumakura, North Koreans May Have Died in Israel Attack on Syria, NHK Says*, BLOOMBERG.COM, Apr. 28, 2008, <http://www.bloomberg.com/apps/news?pid=20601101&sid=aErPTWRFZpJl&refer=japan> (last visited Aug. 23, 2009); *see also* Uzi Mahnaimi & Sarah Baxter, *Israelis Seized Nuclear Material in Syrian Raid*, TIMES ONLINE, Sept. 23, 2007, http://www.timesonline.co.uk/tol/news/world/middle_east/article2512380.ece (last visited Aug. 23, 2009).
 - 3 Mark Mazzetti & Helene Cooper, *Israeli Nuclear Suspicions Linked to Raid in Syria*, N.Y. TIMES, Sept. 18, 2007, <http://www.nytimes.com/2007/09/18/world/asia/18korea.html#> (last visited Aug. 23, 2009).
 - 4 David E. Sanger & Mark Mazzetti, *Israel Struck Syrian Nuclear Project, Analysts Say*, N.Y. TIMES, Oct. 14, 2007, at A1.
 - 5 Jonathan Marcus, *US Syria Claims Raise Wider Doubts*, BBC, Apr. 25, 2008, http://news.bbc.co.uk/2/hi/middle_east/7366868.stm (last visited Aug. 23, 2009).

and claimed that it was an nuclear reactor that was under-construction; others, however, disputed this claim.⁶

The media saw the attack on the alleged Syrian nuclear reactor as a reaffirmation of Israel's deterrent capability in the Middle East⁷ and as a reiteration of the Begin doctrine, named after Israel's Prime Minister Menachem Begin. Based on that doctrine, Israel is not to tolerate its enemies' acquisition of nuclear weapons. Israel applied the Begin doctrine in 1981 when it attacked Iraq's nuclear reactor, Osiraq,⁸ a few months before it became operational. "Begin referred to the [Osiraq] strike as an act of 'anticipatory self-defense at its best.'"⁹ The day after the Osiraq attack, Israel presented a letter to the U.N. Security Council describing the rationale for the attack. The message transmitted was that the attack was not an *ad hoc* response to a threat but a long-term national commitment.¹⁰

Based on the precedent of Osiraq, the Al Kibar attack was viewed as a reaffirmation of Israel's commitment to the Begin doctrine and its deterrent capability. The attack was meant to send a clear message to Syria, and potentially Iran, that Israel would not tolerate nuclear weapons, other than its own, in the region.¹¹ While Syria must have chemical and biological weapon programs, the acquisition of nuclear weapons is the "real red line" that other states in the region are not to cross. In contrast to what it had done after the Osiraq attack, Israel kept silent after the Al Kibar attack¹²—probably

6 *Syrian Nuke Site Images Claim Scrutinized*, CBS NEWS, Oct. 24, 2007, http://www.cbsnews.com/stories/2007/10/24/world/main3402004.shtml?source=related_story (last visited Aug. 23, 2009). The Institute for Science and International Security (ISIS) obtained the satellite imagery from DigitalGlobe, a commercial provider of satellite imagery. See DAVID ALBRIGHT & PAUL BRANNAN, INST. FOR SCI. & INT'L SEC., THE AL KIBAR REACTOR: EXTRAORDINARY CAMOUFLAGE, TROUBLING IMPLICATIONS 2 (2008), available at http://www.isis-online.org/publications/syria/SyriaReactorReport_12May2008.pdf.

7 See, e.g., *Israel Says Deterrent Ability Recovered After Syria Strike*, AGENCE FRANCE PRESS, Sept. 16, 2007, <http://afp.google.com/article/ALEqM5iPSxU5Nlch6Nzo-6RP-wuhDbjZb1Q> (last visited Aug. 23, 2009).

8 Bret Stephens, Op-Ed, *Osiraq II?*, WALL ST. J., Sept. 18, 2007, available at <http://www.opinionjournal.com/columnists/bstephens/?id=110010619>; see Leonard S. Spector & Avner Cohen, *Israel's Airstrike on Syria's Reactor: Implications for the Nonproliferation Regime*, 38 ARMS CONT. TODAY (July/August 2008), available at http://www.armscontrol.org/act/2008_07-08/SpectorCohen.

9 Spector & Cohen, *supra* note 8.

10 See generally MINISTRY OF FOREIGN AFF. & ATOMIC ENERGY COMM'N (OFF. OF THE PRIME MINISTER), GOV'T OF ISRAEL, THE IRAQI NUCLEAR THREAT—WHY ISRAEL HAD TO ACT (1981).

11 Sanger & Mazzetti, *supra* note 4.

12 *Israelis Upset U.S. Divulged Strike Details*, WASH. TIMES, Apr. 25, 2008, <http://www.washingtontimes.com/news/2008/apr/25/israelis-upset-us-divulged-strike-details> (last visited Aug. 23, 2009).

because of concerns of potential retaliatory strikes by Syria.¹³ Israel did not provide an account of the strike and never formally confirmed that the strike even happened.

There was speculation that Israel's Al Kibar attack was launched with the United States' approval, though the United States denies giving advance approval for the attack.¹⁴ The United States must have at least collaborated¹⁵ with Israel on the corroboration of intelligence information before the raid.¹⁶ According to news sources, the United States administration was internally divided and concerned about the ramifications of a preemptive strike in the absence of an imminent threat.¹⁷ The air raid was so highly classified that the United States refused to publicly acknowledge it after it happened.¹⁸

On April 24, 2008—eight months after the attack—United States intelligence agents briefed the United States Congress and the International Atomic Energy Agency (IAEA) about the nature of the Syrian facility attacked by Israeli forces. The building bombed by the Israeli forces on September 6, 2007 was a gas-graphite reactor based on a North-Korean design¹⁹ that was similar to, but not an exact copy of, the Yongbyon reactor of North Korea.²⁰ When operating at full power, such reactors can produce enough plutonium to produce a nuclear weapon every one or two years. While the full extent of North Korea's assistance in building the reactor was unknown, North Korea was suspected of providing engineering assistance and reactor components, but not a turnkey facility. The reactor building was camouflaged using a fake roof and surrounded by walls to make it appear like a regular building. Ground photos claimed to have been taken on site between 2002 and 2003 seemed to prove that camouflage had been used.²¹ Satellite photos taken just after the site's destruction identified three components of a graphite reactor: the reactor core, the

13 *Korea and Syria: Oh What a Tangled Web They Weave*, ECONOMIST, May 1, 2008, at 68.

14 *Id.*

15 The close collaboration between the United States and Israel has led some to claim that Israel often acts as a surrogate for the United States. See *Former U.N. Ambassador John Bolton Gauges Global Impact of Gaza Crisis*, FOXNEWS.COM, Dec. 30, 2008, <http://www.foxnews.com/story/0,2933,473968,00.html> (last visited Aug. 23, 2009).

16 Glenn Kessler & Robin Wright, *Israel, U.S., Shared Data on Suspected Nuclear Site*, WASH. POST, Sept. 21, 2007, at A01.

17 Sanger & Mazzetti, *supra* note 4.

18 *High Level Debate Stalled Syria Air Strike: US was Concerned over Intelligence, Stability to Region, Officials Tell ABC News*, ABC NEWS, Oct. 5, 2007, <http://abcnews.go.com/WN/story?id=3695754&page=1> (last visited Aug. 23, 2009).

19 Off. of Dir. of Nat'l Intelligence, Background Briefing with Senior U.S. Officials on Syria's Covert Nuclear Reactor and North Korea's Involvement, at 5, Apr. 24, 2008, *available at* http://www.dni.gov/interviews/20080424_interview.pdf [hereinafter Background Briefing]. Based on the briefing, North Korea's and Syria's cooperation dated as early as 1997.

20 *Id.* at 4.

21 *Id.* at 5.

spent fuel pond and the heat exchange system.²² There was no evidence, however, of the presence of nuclear fuel in the reactor. The building had neither the electrical supply system nor ventilation and the cooling system to help officials ascertain beyond doubt that it was a nuclear reactor.²³

The international community barely reacted to the attack. In his first public comments after the raid, Syria's President Bashar al-Assad acknowledged that Israel dropped bombs on a building that was related to the military but not in use.²⁴ Nevertheless, the fact that Syria rushed to bulldoze earth over the building after the attack intensified suspicions that the building could not have been merely a retired military facility. Syria claimed that the United States' allegations about the facility being a clandestine nuclear reactor were aimed at generating another Middle East crisis.²⁵ Syria further accused the United States of complicity in the raid.²⁶ Neither Iran nor any Arab state condemned the raid; only North Korea issued a protest.

The belated release of information about the event, and the nature of the facility attacked, elicited a response from the IAEA. The IAEA released a statement that mentioned, *inter alia*, that:

The Director General deplores the fact that this information was not provided to the Agency in a timely manner, in accordance with the Agency's responsibilities under the Nuclear Non-Proliferation Treaty (NPT), to enable it to verify its veracity and establish the facts. ... In light of the above, the Director General views the unilateral use of force by Israel as undermining the due process of verification that is at the heart of the non-proliferation regime.²⁷

On May 28, 2008, the United States asked the IAEA to broaden its search for secret nuclear facilities in Syria and provided the agency with intelligence information about three other sites to investigate.²⁸ The IAEA visited Syria between June 22 and June 24, 2008. The IAEA experts came back to the IAEA headquarters with environmental samples from the Al Kibar site, but they were not allowed to visit the other three sites.

22 The purpose of the heat exchange system is to transfer heated carbon dioxide gas from the reactor core to water drawn from the river close-by. See Albright & Brannan, *supra* note 6, at 26.

23 Background Briefing, *supra* note 19, at 2; see also *id.* at 20.

24 Sanger & Mazzetti, *supra* note 4.

25 *Syria: U.S. Nuclear Reactor Allegations Aim to Create Mideast Crisis*, HARARETZ.COM, May 3, 2008, <http://www.haaretz.com/hasen/spages/980214.html> (last visited Aug. 23, 2009).

26 Ewen MacAskill & David Batty, *UN Censures US and Israel over Syria Nuclear Row*, GUARDIAN, Apr. 25, 2008, <http://www.guardian.co.uk/world/2008/apr/25/syria.usa> (last visited Aug. 23, 2009).

27 Press Release, Int'l Atomic Energy Agency [IAEA], Statement by Mohamed El Baradei, IAEA Director General (Apr. 25, 2008).

28 Joby Warrick & Robin Wright, *Search is Urged for Syrian Nuclear Sites: U.S. Presses U.N. on 3 Alleged Facilities*, WASH. POST, May 29, 2008, at A14.

The inspection's purpose was to collect environmental samples to verify whether, as a result of Israel's attack, radioactive materials or graphite had been dispersed into the environment; evidence that the facility destroyed was indeed a nuclear reactor.²⁹ Analyses of the environmental samples taken at Al Kibar have revealed a significant number of anthropogenic uranium particles, but have not clarified what the human source of the uranium might be. Uranium particles by themselves do not irrefutably demonstrate the existence of a nuclear reactor in the area, and Syria claimed that the Israeli missiles that destroyed the building might have been the source.³⁰ Moreover, the layout and dimensions of the building's containment structure appear similar to those required for a nuclear reactor's biological shield, and the building's overall size was sufficient to conceal a 25 MWth reactor. The IAEA conducted an assessment of the water-pumping infrastructure and concluded that the pumping capacity was adequate for a 25 MWth reactor, and that there was sufficient electrical capacity to operate the pumping system.³¹

The IAEA has repeatedly requested access to three other facilities related to the alleged Al Kibar; requests that Syria has denied. Based on satellite imagery and landscaping activities, the removal of large containers has taken place following the agency's requested access to these facilities.³²

Based on the information provided to the agency by November 2008 (the building's characteristics and the connectivity to adequate pumping capacity of cooling water similar to those required for a nuclear reactor), it could not be excluded that the building destroyed by Israeli forces on September 2007 was a nuclear reactor given. The IAEA has asked Syria to produce documentation about the building's function and the nature of the three other facilities to which the IAEA has requested a visit. The agency has called on all states to produce any information they may have, including satellite imagery, and allow the agency to share that information with Syria.³³

29 George Jahn, *Diplomats: Syria Passes First Test of Nuclear Probe*, ASSOCIATED PRESS, Sept. 20, 2008.

30 See IAEA, *Report by the Director General, Implementation of the NPT Safeguards Agreement in the Syrian Arab Republic*, ¶ 12, IAEA Doc. GOV/2009/9 (Nov. 19, 2008) [hereinafter *Syria NPT Report*].

31 *Id.* ¶¶ 10-11.

32 *Id.* ¶ 14. In the meantime, the Director General of the IAEA told the Board of Directors that IAEA's main contact in Syria had been killed and that this would slow down the IAEA's work in Syria. The person killed facilitated the IAEA's access to Syria's alleged nuclear facilities. It has been speculated that the Director General implied the assassination of Brigadier General Mohammad Suleiman, a senior security adviser to President Bashar al-Assad, at a beach resort, in the city of Tartous in Syria. Suleiman was viewed by the intelligence sources as in charge of Syria's nuclear and chemical weapons program. See Mark Heinrich & Sylvia Westall, *Assad Aide Killing Hurts U.N. Probe in Syria: Diplomats*, REUTERS, Sept. 25, 2008, <http://www.reuters.com/article/topNews/idUSTRE48O6W720080925?sp=true> (last visited Aug. 23, 2009).

33 Syria NPT Report, *supra* note 30, ¶¶ 16-19.

II. 1981 to 2007: From Osiraq to Al Kibar

The attack on Syria's reactor was Israel's second attack at a would-be nuclear reactor. More than a quarter of a century prior, Israel attacked a reactor in Iraq. On June 7, 1981, Israeli aircraft attacked and destroyed a Tammuz 70 MWth reactor, the so-called Osiraq reactor, which France had built for Iraq in the Tuwaitha research center south of Baghdad, just before nuclear fuel was introduced to enable the commencement of the reactor's operations. Israel suspected that the reactor would be used to produce nuclear weapons and had attempted to dissuade France from providing Iraq with the reactor.³⁴

There are many commonalities between the Osiraq and Al Kibar incidents. Both attacks were planned so as to minimize collateral damage and neither provoked an immediate retaliation by the attacked state, which made them appear, at least in the short-term, successful. There are, however, differences between the two incidents as explained below.

A. Nature of Facility

The Osiraq attack involved a facility constructed openly and placed under the IAEA safeguards system.³⁵ On other hand, the Syrian facility was allegedly a clandestine nuclear reactor. If the facility was indeed a nuclear reactor, Syria should have notified

34 Israel had engaged in a number of overt and covert actions in order to prevent the building of Iraqi reactor. It was speculated, for instance, that Israeli agents destroyed the reactor's core when it was still located in Toulon waiting to be shipped to Iraq, and that Israeli agents might have been involved in the assassination of key scientists. At the instigation of the Israeli government, the Israeli press launched a crusade against the building of the reactor. See AMOS PERLMUTTER ET AL., TWO MINUTES OVER BAGHDAD 68-71, 73-75 (1982).

35 The Nuclear Non-Proliferation Treaty regime's inspection system is based on a safeguards system that gives significant latitude to sovereign states regarding verification that their nuclear programs are not used for weapons proliferation. States may, for instance, determine the extent of inspections they will allow within their territory. See IAEA, SAFEGUARDS SYSTEM OF THE INTERNATIONAL ATOMIC ENERGY AGENCY, available at http://www.iaea.org/OurWork/SV/Safeguards/safeg_system.pdf; IAEA, *The Structure and Content of Agreements between the Agency and States Required in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons*, IAEA Doc. INFCIRC/153 (June 1972) [hereinafter INFCIRC/153]; DEPARTMENT OF SAFEGUARDS, IAEA, SAFEGUARDS: STAYING AHEAD OF THE GAME 19 (July 2007); IAEA, *Model Protocol Additional to the Agreement(s) between State(s) and the International Atomic Energy Agency for the Application of Safeguards*, IAEA Doc. INFCIRC/540 (Sept. 1997); see also IAEA, PLAN OF ACTION TO PROMOTE THE CONCLUSION OF SAFEGUARDS AGREEMENTS AND ADDITIONAL PROTOCOLS (2008).

the IAEA about its construction in accordance with its safeguard agreement with the agency.³⁶

B. Threshold of Imminent Threat: Technology and Secrecy

The facility attacked by Israeli forces in Syria was much further from completion than the Osiraq facility. It would have been years before Syria could use the reactor to produce spent nuclear fuel that could then be reprocessed into bomb-grade plutonium at a separate facility. But the Osiraq reactor was not a ready-made nuclear weapon either. The reactor was a light-water moderated reactor—meaning that it was not designed for plutonium production. Iraq was dependent on France to provide fuel for the reactor and, given the France's conditions and the IAEA safeguards, it would have been difficult for Iraq to divert nuclear fuel for the secret production of plutonium.³⁷

Launching a defensive attack on a weapons proliferation activity requires that an attack from that activity be imminent.³⁸ Crossing a technological threshold could be

36 The agreement that Syria signed with the IAEA was the initial safeguards agreement based on INFCIRC/153. See INFCIRC/153, *supra* note 35. According to article 41 of that agreement, Syria is to provide the IAEA with design information regarding new facilities “as early as possible before nuclear material is introduced into a new facility.” See IAEA, *Agreement of 25 February 1992 between the government of the Syrian Arab Republic and the International Atomic Energy Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons*, IAEA Doc. INFCIRC/407 (July 1992). Before 1992, the phrase “as early as possible before nuclear material is introduced into a new facility” was interpreted to mean that design information on new facilities should be provided to the IAEA no later than six months before the introduction of nuclear material into a new facility. This interpretation was included in the General Parts of the Subsidiary Arrangements that were attached to each safeguards agreement. In 1992, however, the IAEA's Board adopted a new interpretation of this provision. According to this new interpretation, the design information on new facilities is to be provided to the agency as soon as the decision to construct or authorize construction of a new facility is made—that is, before construction actually begins. See IAEA, *Strengthening of Agency Safeguards: The Provision and Use of Design Information*, IAEA Doc. GOV/2554/ Attachment 2/Rev.2 (Apr. 1, 1992). This new interpretation was adopted as a confidence measure to safeguard the peaceful character of new facilities. Providing information before construction takes place should give the IAEA enough time for the application of its safeguards system. All non-nuclear weapon state parties to the NPT were required to adapt their related Subsidiary Arrangements to take into account this new interpretation. Based on this new interpretation on the provision of information on the design of new facilities before even construction begins, Syria was in violation of its safeguard agreement with the IAEA assuming it was building a nuclear reactor without notifying the IAEA, something that to this current date Syria denies.

37 Dan Reiter, *Preventive Attacks Against Nuclear, Biological, and Chemical Weapons Programs: The Track Record* 8 (Ctr. for Int'l Sec. Stud. at the Univ. of Pitt., Working Paper, 2006), available at http://www.ridgway.pitt.edu/working_papers/hittingfirst/Reiter%20formatted%20ofinal.pdf.

38 See *infra* Part 3.

used as evidence that an attack may be imminent.³⁹ If Osiraq offers an indication, the technological threshold for nuclear weapons programs seems to be quite low, reached even before a nuclear weapons program is in the works. The threshold seems to be from the moment a country is finalizing a nuclear reactor if, simultaneously, there are strong suspicions that such a reactor could be used to produce nuclear weapons. For example, the primary consideration in launching the Osiraq attack was intelligence that the nuclear reactor was about to become operational and that Iraq would no longer be dependent on France for operating the reactor. At the same time, Israeli action could not have taken place after the fuel was loaded in the reactor. After loading the fuel, an attack would have been prohibitive because of the catastrophic potential of radiological fallout. Therefore, there was a window of opportunity—after the reactor’s completion but before the loading of the nuclear fuel into the reactor—where Israel’s attack could have taken place. Israel took advantage of this window of opportunity.

The technological threshold assumed for the Osiraq reactor had not been reached in the case of the alleged Al Kibar reactor in Syria. According to United States’ intelligence sources, the Al Kibar reactor lacked the pipes and other necessary equipment that would connect it to an electricity grid. Therefore, it was not clear how the reactor would be fueled.⁴⁰ Because the reactor was far from technological completion, one could claim that Israel’s attack on a nuclear reactor before its finalization simply widened the window of opportunity during which an attack on a nuclear reactor may be launched. Given that the technological threshold for the operation of the reactor was not reached, a claim that the attack was imminent could not have been persuasive. On the other hand, looking only at the technological threshold may be insufficient. If the Al Kibar facility was indeed a clandestine reactor built outside the IAEA safeguards, and in violation of the safeguards agreement between Syria and the IAEA, one could not remain naïve about the reactor’s potential use. In other words, if a nuclear reactor is built in secrecy, the presumption that such a reactor would be used for military purposes is not unreasonable. If a country knows about a clandestine reactor’s existence, the question is whether it should wait for the reactor’s completion or attack while the reactor is being built. From the point of view of military necessity, choosing the first option may seem like an inefficient way to take down clandestine nuclear weapons programs at their inception.

C. *Methods of Execution*

The Osiraq attack was executed openly and generated a number of international reactions. In contrast, the Al Kibar attack was carried out covertly, to the point of creating intense speculation about whether the facility struck was indeed a nuclear reactor. Israel has neither acknowledged nor commented on the raid since its occur-

39 See, e.g., Robert S. Litwak, *The New Calculus of Pre-emption*, 44 SURVIVAL 53, 67 (2002).

40 See *supra* notes 19-23.

rence. In contrast, in the case of Osiraq, Israel was quick to claim responsibility for the attack, which it presented as an implementation of the Begin doctrine.⁴¹

Although the Al Kibar attack was to remain covert, especially with regard to the nature of the target, maintaining the attack's secrecy proved difficult. It was an NGO that, through the purchase of commercial satellite imagery, first argued with some credibility that the facility might have been a nuclear reactor. While the interpretation of the satellite imagery was intensely disputed, it demonstrates that it is becoming difficult for states to hide their activities from what is becoming a transparent earth.

D. International Reaction

The attack at the Osiraq nuclear reactor provoked an international reaction. The U.N. Security Council issued a resolution that condemned Israel's attack but stopped short from calling it an aggression.⁴² The international community was critical of Israel's actions. Israel's attack against a nuclear reactor was the first such attack and was widely viewed as setting a dangerous precedent. The Director General of the IAEA made clear that he viewed the attack as an assault on the IAEA safeguards system. In its meeting between June 9 and June 12, 1981, the IAEA's Board condemned Israel's action and asked the General Conference to consider all the implications of the Osiraq attack, including suspending Israel's privileges and rights of membership. The Board recommended that the General Conference suspended any provision of assistance to Israel under the IAEA technical assistance program. Unlike the 2007 IAEA General Conference, during which the Al Kibar incident was not even mentioned, the General Conference that convened on September 21, 1981 became the venue where IAEA member states expressed their anger at the Osiraq attack and requested that technical assistance to Israel be suspended, including suspending Israel's rights and privileges in the IAEA. A number of Arab states introduced a draft resolution to expel Israel from the IAEA for violating article XIX (B) of the agency's Statute.⁴³

41 During a press conference given after the Osiraq attack, Begin mentioned the non-tolerance for nuclear weapons applied to the "enemy" (not necessarily all Middle East countries). It was further mentioned that for Israel to sign the NPT the Arab states had to make peace with Israel. *See* Press Conference with Prime Minister Begin, I.D.F. Chief of Staff Eitan, I.A.F. Commander Irvi and Director of Military Intelligence Saguy, June 9, 1982.

42 S.C. Res. 487, U.N. Doc. S/RES/487 (June 19, 1981).

43 A proposition that was eventually defeated. Article XIX(B) of the Statute of the IAEA states that a member of the IAEA can have its rights and privileges suspended if found in persistent violation of the provisions of the statute of the IAEA. The United States argued that article XIX(B) could be invoked if there is a persistent violation of the statute of the IAEA. According to the United States, the attack on Iraq's nuclear research facility was not a violation of the IAEA statute because the statute contains no provision regarding the use of force against member states' nuclear facilities. Therefore, article XIX(B) did not provide legal grounds for suspending Israel's membership rights. Furthermore, the United States argued that punitive action against Israel would do great harm to the

In 1982, Arab countries proceeded to use the credentials committee (which examines the delegates' credentials) to, in effect, exclude Israel from participating in the IAEA. More specifically, Saudi Arabia objected to the recognition of Israel's credentials on the grounds that Israel violated both the IAEA Statute and the Charter of the United Nations, and that it was in non-compliance with the resolutions of the General Conference and the Security Council.⁴⁴ In 1982, the General Conference refused to accept the Israeli delegation's credentials, thereby effectively banning Israel from participating in the IAEA. In response, the United States, the United Kingdom and several other western delegations walked out of the conference. The United States claimed that abusing the United Nations system to carry on political vendettas was corrosively dangerous. The United States suspended its membership in the IAEA for five months and froze its funding to the IAEA until the IAEA's Board of Governors certified that Israel could participate fully. Two months later, the IAEA's new Director General stated that if the United States extended its suspension into the following year the IAEA's operations could be crippled. In 1982, the IAEA provided the assurances the United States required regarding Israel's participation, leading the United States to resume its cooperation with the IAEA in 1983.⁴⁵

In contrast, in the Al Kibar incident, Arab governments refrained from commenting on Israel's raid and did not ask for retaliation against Israel. One could surmise that many Arab governments are content that a clandestine nuclear attempt by Syria has been aborted for the time being. Iran, Syria's closest ally in the Middle East, did not issue any comment regarding the raid. North Korea was the only state to condemn the attack. The matter was not brought to the U.N. Security Council or to the First Committee of the U.N. General Assembly, which deals with disarmament and international security. The attack was not criticized at an IAEA international meeting held from April 28 to May 9, 2008 to prepare for the 2010 Nonproliferation Review Conference. The IAEA's Director General, however, condemned the attack.⁴⁶

The muted international reaction has been attributed to the lack of official information sources about the event. The international community, however, remained passive even after the United States provided a video, which became publicly available through the internet, about the nature of the Syrian facility and the extensive briefing given to the United States Congress and to the IAEA.⁴⁷

IAEA and the non-proliferation regime. On September 26, 1981, the IAEA Conference condemned Israel for the attack and voted to suspend all technical assistance to Israel. The Conference deferred for its next session (which was held in 1982) the suspension of Israel from the exercise of privileges and rights of membership in the IAEA in case Israel had not yet complied with the Security Council's resolution. S.C. Res. 487, *supra* note 42.

44 *Id.*

45 DAVID FISCHER, HISTORY OF THE INTERNATIONAL ATOMIC ENERGY AGENCY: THE FIRST FORTY YEARS 107-08 (1997).

46 Press Release, IAEA, Statement by Mohamed El Baradei, IAEA Director General (Apr. 25, 2008).

47 See Background Briefing, *supra* note 19.

Certainly the specifics of the Al Kibar incident differentiate it from the Osiraq incident. In contrast with Osiraq, Al Kibar was a clandestine nuclear facility and the alleged nature of the reactor (a graphite reactor) rendered it a more credible candidate for the production of nuclear weapons. Regional politics may have played a role in the lack of Arab reaction since Syria is an isolated state with close ties to Iran.

The tepid international reaction may be attributed to fears of undesirable repercussions. Learning a lesson from the Osiraq incident,⁴⁸ the IAEA refrained from bringing the item to the Board because it knew that costly repercussions might follow any condemnation of Israel's actions. It is also possible that the international community is increasingly desensitized to incidents that do not involve collateral damage and may quickly accomplish a desirable international objective—namely, promoting nonproliferation of nuclear weapons by neutralizing nuclear weapon threats at their inception.

In other words, a more somber interpretation of the lack of international reaction regarding the Al Kibar attack may be a realization that these types of attacks⁴⁹ are increasingly viewed as a legitimate means to surgically eliminate undesirable targets without generating civilian casualties and all the media attention that such casualties entail.⁵⁰ It has been argued that Iraq's gross violations of the Nuclear Non-Proliferation Treaty (NPT) regime,⁵¹ along with potential violations by Iran and North Korea,

48 The United States walked out of the agency and suspended its financial contribution. FISCHER, *supra* note 45.

49 A similar attack was executed against a chemical factory in Sudan. On August 20, 1998, United States Tomahawk missiles destroyed the El Shifa pharmaceutical plant in Khartoum, Sudan. The attack was launched thirteen days after the bombing of the United States embassies in Nairobi, Kenya and Dares Salam, Tanzania killed 224 people, including United States citizens. The United States claimed that the plant was linked to Osama bin Laden's terrorist network and was producing a precursor chemical for VX nerve gas. The attack destroyed the factory, though the evidence that the factory produced chemical weapons and had links to the bin Laden's network was assessed as weak. The United States blocked Sudan's efforts to launch a Security Council fact-finding investigation on whether the El Shifa plant produced lethal VX gas. The United States claimed self-defense under Article 51 of the United Nations Charter. The attack generated mixed responses and there was no clear consensus that the violation of Sudan's sovereignty was illegal. States expressed concerns mostly with regard to the use of the factory for terrorist purposes and there did not seem to be much debate about the violation of Sudan's sovereignty. Commentary concentrated on whether the United States possessed sufficient evidence to attack the pharmaceutical plant that would support the claim that it was used in terrorist activities. See Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT'L L. 537 (1999); see also Ruth Wedgwood, *Responding to Terrorism: the Strike Against bin Laden*, 24 YALE J. INT'L L. 559 (1999).

50 Spector & Cohen, *supra* note 8.

51 The non-proliferation regime is nested in the Nuclear Non-Proliferation Treaty and a number of export controls on 'sensitive proliferation material'—that is, material that can be used potentially for the production of nuclear weapons. See Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161. The Nuclear

have led traditional theories regarding the legitimacy of unilateral preemptive action to be revised. Revised, at least, in the case of clandestine nuclear facilities whose clandestine character points to their potential use for the production of nuclear weapons. In this light, the lack of international reaction could be seen as a silent endorsement of the raid, despite the fact that Israel was clearly not acting within a strict definition of anticipatory self-defense. The muted international response is, therefore, a tacit admission that the nonproliferation regime has been eroded to such an extent that the international community “breathes easier” when a state can play policeman by engaging in the unilateral and surgical removal of potential threats to international peace.⁵²

III. Anticipatory Self-Defense and Preemption

While Israel remained silent following the Al Kibar attack, which appeared to be a preemptive use of force, it openly invoked the doctrine of anticipatory self-defense in defending the Osiraq attack. Legal scholars have correctly differentiated between anticipatory self-defense (against imminent threats) and the doctrine of preemption (against future, contingent threats). As Michael Reisman and Andrea Armstrong note:

The claim to preemptive self-defense is a claim to entitlement to use unilaterally, without international authorization, high levels of violence to arrest an incipient development that is not yet operational or directly threatening, but that, if permitted to mature, could be seen

Suppliers Group establishes controls on the export of proliferation-prone equipment and material. See Nuclear Suppliers Group Home Page, <http://www.nuclearsuppliersgroup.org/> (last visited Aug. 23, 2009); see also IAN ANTHONY ET AL., REFORMING NUCLEAR EXPORT CONTROLS: THE FUTURE OF THE NUCLEAR SUPPLIERS GROUP (Stockholm Int'l Peace Res. Inst. 2007); Christopher A. Ford, *The Nonproliferation Bestiary: A Typology and Analysis of Nonproliferation Regimes*, 39 N.Y.U. J. INT'L L. & POL. 937, 944-46 (2007).

52 The attacks at Osiraq and Al Kibar are not the only attacks contemplated or executed against nuclear facilities. Such attacks were contemplated against the North Korean nuclear program but were not undertaken because of fears that they may provoke retaliation that could escalate into a full-scale war in the Korean peninsula. In addition, in the case of North Korea there was concern that the lack of accurate intelligence would increase the probabilities that not all the right targets would be hit. An attack was contemplated against the nascent Chinese nuclear program in the 1950s but the attack was not undertaken because the strategic threat of acquisition of nuclear weapons by China ceased to be that relevant. See Litwak, *supra* note 39, at 61, 64-65 (2002). Further attacks have been launched against facilities of weapons of mass destruction within the context of regular warfare. Five separate allied attacks were launched against Germany's nuclear weapon programs during World War II. The goal of operation Desert Storm in 1991 was not only to liberate Kuwait from Iraq but to disrupt the weapons of mass destruction program of Iraq. Further, Operation Iraqi Freedom was ostensibly carried out based on fears that Iraq was in possession of means of mass destruction. During the 1980-88 Iran-Iraq war, Iraq launched seven separate air strikes on Bushehr, the Iranian nuclear reactor. See Reiter, *supra* note 37, at 8; see also *supra* text accompanying note 49.

by the potential preemptor as susceptible to neutralization only at a higher and possibly unacceptable cost to itself.⁵³

Preemptive action is different from anticipatory self-defense in that the latter is meant to address an imminent and manifest threat. Thus, one can confidently claim that preemptive action refers to a hypothetical and uncertain threat, while anticipatory self-defense refers to a clear and imminent threat.⁵⁴ But universal, clear and unambiguous thresholds that would define the point of transition from a conjectural threat to an imminent danger are hard to factor. Clear-cut cases should exist, but they are exceptions.

Countries that wish to launch a unilateral attack in an overt fashion, and with the blessing of international law, have no other option but to couch such an attack in terms of self-defense, since a unilateral war must be conducted in self-defense to be a just war under the post-World War II United Nations Charter.⁵⁵ Unilateral actions taken in the name of anticipatory self-defense must meet the criteria first proposed in the 1842 *Caroline* case.⁵⁶ Anticipatory self-defense finds its origins in the *Caroline*

53 W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525, 526 (2006).

54 *Id.* According to historians, preemptive self-defense, as the term is currently used, refers more accurately to the concept of preventive war—war initiated on the basis that, while military conflict is not imminent, to delay taking action now against a threat would involve greater risk. See Lawrence Freedman, *Prevention, Not Preemption*, 26 WASH. Q. 1095 (2003); see also JOINT CHIEFS OF STAFF, U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 439, 435 (2008) (defining “preventive war” as a “war initiated in the belief that military conflict, while not imminent, is inevitable, and that to delay would involve greater risk,” while a “preemptive attack” is conceived as an “attack initiated on the basis of *incontrovertible* evidence that an enemy attack is imminent.” (emphasis added)).

55 According to Article 2(4) of the U.N. Charter: “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.” In addition to the exception of unilateral use of force in self-defense, the only other exception provided for in the Charter for the use of force is under Chapter VII, where the Security Council can use force to preserve the peace—what has been called collective self-defense. That said, countries have engaged in reprisals to the point that some scholars have developed a framework under which states may engage in lawful reprisals. See Richard A. Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT'L L. 415 (1969); see also W. Michael Reisman, *Self-Defence or Reprisals? The Raid on Baghdad: Some Reflections on its Lawfulness and Implications*, 5 EUR. J. INT'L L. 120 (1994).

56 The facts of the *Caroline* case: During a 1837 rebellion against British occupation in Canada, rebels were assisted by United States sympathizers and the steamer *Caroline* was used to transport supplies between the United States and Canada. The British protested the transfer of supplies from the United States to Canada to no avail. Subsequently, British forces entered the United States took over the *Caroline* and sent it ablaze over the Niagara Falls. As a result of this action, several United States citizens were killed and in-

case and United States Secretary of State Daniel Webster's pronouncement that a state need not suffer an actual armed attack before taking defensive action. Instead, a state can engage in anticipatory self-defense (defense in anticipation of an attack) if the circumstances leading to the use of force are instantaneous, overwhelming, and leaving no choice of means and no moment to deliberate.⁵⁷ The criteria for launching an anticipatory self-defense are: (1) necessity, (2) immediacy and (3) proportionality. Necessity entails the use of military force that must be restricted to attain a legitimate military objective. Proportionality has to do with the avoidance of destruction, especially civilian casualties that are disproportionate to the military goal sought. The factor of immediacy of an attack, however, remains perplexing because most states would not wait to see an opponent's army marching against them as a demonstration that an armed attack is on the way. In the nuclear era, the imminent nature of an attack that would allow for self-defense may include credible threats of an attack that make anticipatory self-defense a necessity. It has been argued persuasively that the concept of self-defense will lose its bite in the nuclear age if a nation has to wait until a nuclear attack, which would ensure its destruction, has already been launched in order to engage in self-defense.⁵⁸

On the other hand, the wording chosen for Article 51 of the U.N. Charter regarding the threshold of military offensive needed to trigger a self-defense action could be read restrictively⁵⁹ to limit prescriptions of anticipatory self-defense: "Nothing in the present Charter shall impair the inherent⁶⁰ right of individual or collective self-defence *if an armed attack* occurs against a Member of the United Nations. ..."

The attack, it has been argued, has to be an ongoing attack, and anticipatory self-defense is not provided verbatim the Charter. The International Court of Justice has read the term "armed attack" under Article 51 restrictively, in a way that would ex-

jured. The United States launched a formal complaint with the British government which claimed self-defense. In response, the United States Secretary of State Daniel Webster wrote that for a self-defense claim to be valid, the British had to demonstrate a "necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation." See Robert Yewdall Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 89 (1938).

57 *Id.*

58 MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* 67, 184 (1961).

59 It has been argued, for instance, that annoyance actions, which do not involve offensive operations by the forces of a state, do not constitute an armed attack. However, a "coordinated and general campaign by powerful bands of irregulars" with the "easily proven" complicity of a state would constitute an armed attack especially if the objective is the forcible settlement of a dispute or the acquisition of a territory. See Ian Brownlie, *The Use of Force in Self-Defense*, 37 BRIT. Y.B. INT'L L. 183, 245 (1961).

60 The use of the word "inherent" has been interpreted to mean that the Charter left largely unchanged the law on self-defense as it existed before the adoption of the Charter. It has been argued that Article 51 has not "extinguished" the right to self-defense as developed by customary international law and that that right is wider than the right to self-defense under Article 51.

clude low-level prolonged paramilitary warfare not sponsored by a state.⁶¹ This restrictive interpretation of Article 51 has generated concerns about the functionality of the Charter in the age of state-sponsored terrorism and loosely located aggression by hard to identify, yet potent, actors.⁶²

A. *The Osiraq Incident and Anticipatory Self-Defense*

In the case of the Osiraq attack, the Security Council was skeptical about Israel's claims that the attack was justified under the general rubric of anticipatory self-defense. The resolution adopted by the Security Council⁶³ was, however, essentially an innocuous slap on Israel's wrist since no punishment was delivered, and Israel correctly interpreted it as a license to operate in this field.

A number of factors unique to the Osiraq case have led observers to view the attack as more or less justified from the point of view of anticipatory self-defense.⁶⁴ These factors include the requirement of necessity: a state must have exhausted the peaceful process of dispute resolution before launching an attack on another state.⁶⁵ In the case of the Osiraq attack, from Israel's viewpoint, the process of peaceful settlement had been concluded.⁶⁶ Other factors include the realities brought by the nuclear age,⁶⁷ and Iraq's verbiage regarding the annihilation of the Israeli state in the context of what some have correctly called a constant para-war in the region.⁶⁸ Years after the attack, commentators have become even more celebratory.⁶⁹ They evaluate the attack, from an *ex-post-facto* perspective, as a necessary action that decisively trimmed Iraq's nuclear capabilities and, thus, made Iraq's expulsion from Kuwait possible and

61 Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. 53, ¶¶ 146-47 (Dec. 19); Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 62 (July 9); Oil Platforms (Iran v. U.S.), 1996 I.C.J. 161 (Nov. 6); Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 93-94 (June 27).

62 Reisman & Armstrong, *supra* note 53, at 525.

63 S.C. Res. 487, *supra* note 42.

64 See generally TIMOTHY L.H. MCCORMACK, SELF-DEFENSE IN INTERNATIONAL LAW: THE ISRAELI RAID ON THE IRAQI NUCLEAR REACTOR (1996).

65 Peaceful dispute resolution is restricted by the imagination and the will of states to find compromises.

66 Before the finalization of the reactor, Israel had used various covert and overt methods to dissuade France from proceeding with the reactor. See generally PERLMUTTER ET AL., *supra* note 34.

67 MCDUGAL & FELICIANO, *supra* note 58.

68 Yoram Dinstein, *The Legal Issues of "Para-War" and Peace in the Middle East*, 44 ST. JOHN'S L. REV. 466, 469-70 (1970); see also *The Hundred Years' War*, ECONOMIST, Jan. 10, 2009, at 9.

69 See, e.g., Anthony D'Amato, *Israel's Air Strike against the Osiraq Reactor: A Retrospective*, 10 TEMP. INT'L & COMP. L.J. 259 (1996); see also Charles Pierson, *Preemptive Self-Defense in an Age of Weapons of Mass Destruction: Operation Iraqi Freedom*, 33 DENV. J. INT'L L. & POL'Y 150, 168 (2004).

reduced the risks of engaging in the 1991 war. Professor Michael Reisman has argued that the Osiraq incident points to an amalgamation of a more permissive norm regarding unilateral preemptive actions against a state that is engaging in a program that could lead to the production of weapons of mass destruction, especially if that state has indicated its intention to use such weapons in an aggressive fashion.⁷⁰

Overall, the appraisal of unilateral claims of self-defense must be contextual, and the circumstances of each case must be taken into account when assessing self-defense actions of an anticipatory nature. Such circumstances may involve situations of serial conflicts—that is, continuing conflicts characterized by “intermittent explosions of violence” that are followed by periods of relative calm (unprovoked by a formal peace process), that are interrupted by new flares of violence.⁷¹ In the case of serial conflicts, the right to preemptive self-defense should be evaluated through the lens of the right to use force in ongoing conflicts without waiting for an opponent’s specific provocation. Israel’s explanation of the Osiraq attack contained these exact contextual elements, including the fact that Iraq was the only Arab state that had not even concluded an armistice agreement with Israel.⁷² Since an armistice agreement was not concluded, Israel and Iraq were still formally in a state of war despite the fact that publicized, overt cases of violence had not occurred in the interim. When combined with Iraq’s verbiage of Israel’s annihilation, this was not conducive to the creation of an ambiance that would render a defensive action of a preemptive nature totally unjustifiable.

Iraq’s subsequent behavior, however, of cooperating with the United States for the promulgation of a resolution acceptable to both countries, and the fact that Iraq did not engage in an immediate retaliatory act,⁷³ may also demonstrate that with the right carrots, Iraq could have been subjected to “reformation.” It has been pointed out that Saddam Hussein, while often miscalculating, was not unreasonable and, thus, he could be deterred. Therefore, the fact that he sought to develop nuclear weapons did not necessarily mean that he was planning to use them.⁷⁴ Furthermore, at the time of

70 W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT’L L. 3, 18-19 (1999).

71 Reisman & Armstrong, *supra* note 53, at 548.

72 “Iraq has always insisted that a state of war exists with Israel. It follows that since aggression cannot be committed against a state with which a country is already at war, Jerusalem could not possibly have been guilty for a ‘crime against peace.’” Louis Rene Beres & Col. Yoash Tsiddon-Chatto, *Reconsidering Israel’s Destruction of Iraq’s Osiraq Nuclear Reactor*, 9 TEMP. INT’L & COMP L.J. 437, 438 (1995).

73 See Interagency Intelligence Assessment, *Implications of Israeli Attack on Iraq* 2, 8 (July 1, 1981).

74 See, e.g., TED A. PIERSON, SADDAM HUSSEIN: OPERATIONAL ARTIST OR MADMAN? (1998). Anticipatory self-defense based on the aggressive intentions of a country’s government is hard to justify since evaluating intentions is by itself a tricky exercise. See Brownlie, *supra* note 59, at 227 (“As a matter of principle and policy, anticipatory self-defense is open to certain objections. It involves a determination of the certainty of attack, which is extremely difficult to make and necessitates an attempt to ascertain the intention of a government. This process may lead to a serious conflict if there is a mistaken assessment

the Osiraq attack, Iraq was not a pariah in the international system and it cooperated with France and Italy, who, in turn, had responded to some of Israel's nonproliferation concerns. After all, the Osiraq facility was a declared nuclear facility, functioning under the IAEA safeguards.⁷⁵

In other words, correctly interpreting the context of a case that would legitimize a preemptive strike is difficult, especially for regimes that are not open and offer mixed signals about their intentions. Therefore, with regard to these regimes, one may wish to err on the side of precaution.⁷⁶ Depending on the circumstances, this may entail a precautionary strike of a preemptive nature rather than a wait-and-see attitude. A precautionary strike of a preemptive nature is more likely when the target is clear and can be removed with a clean (surgical) attack that would leave minimal or zero casualties. A wait-and-see attitude is probably well advised when a country has already developed a number of nuclear facilities dispersed all over its territory, some of which are underground. For example, the Iranian and North Korean nuclear programs are not conducive to clean (surgical) strikes like those executed in Iraq and Syria and, therefore, they do not meet the element of proportionality required for such attacks.

Professor Michael Reisman has argued that the deterioration of the Charter security regime, to which we may add the serious inadequacies of the nuclear nonproliferation regime resulting, unfortunately, from the design and practice of its creators,⁷⁷ stimulates "a partial revival of a type of unilateral *jus ad bellum*."⁷⁸ The appraisal of

of a situation."); see also Miriam Shapiro, *Preempting Prevention, Lessons Learned*, 37 N.Y.U. J. INT'L L. & POL. 357, 367 (2005).

75 See Kristen E. Eichensehr, *Targeting Tehran: Assessing the Lawfulness of Preemptive Strikes Against Nuclear Facilities*, 11 UCLA J. INT'L L. FOREIGN AFF. 59 (2007) (arguing that although states may plan to develop nuclear weapons, those embedded in the international system are unlikely to use them).

76 Great Britain's legal advisors in the *Caroline* case included a footnote in their report to the British government that deserves to be mentioned. Regarding the notion of precaution and its use in claiming self-defense, the footnote read: "We feel bound to suggest to your Lordship that the grounds on which we consider the conduct of the British Authorities to be justified is that it was absolutely necessary as a measure of precaution for the future and not as a measure of retaliation for the past." See Jennings, *supra* note 56, at 87 (emphasis in original).

77 Despite official statements and admonishments against nuclear weapons proliferation, the attitude of states is marred by fatalism that nuclear technology will spread, bringing with it the spreading of nuclear weapons. Some have contended that states are simply not proliferation-serious. Stopping the spread of nuclear weapons is a priority for the United States policymaking but often not at the expense of other interests that loom more urgent. See, e.g., KENNETH WALTZ, *THE SPREAD OF NUCLEAR WEAPONS: MORE MAY BE BETTER* (Int'l Inst. for Strategic Stud. 1981), available at <http://www.mtholyoke.edu/acad/intrel/waltz1.htm>; see also Albert Wohlstetter, *Spreading the Bomb Without Quite Breaking the Rules*, 25 FOREIGN POL'Y 88-94, 145-79 (1976).

78 W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L. 279, 281 (1985).

such unilateral acts must not be executed *in abstracto* but in the context of each individual case. In other words, the inquirer must examine whether such attacks have advanced the goal of minimum order in the international system⁷⁹ and whether furtherance of such a goal was done in a way that minimizes the violation of the formal system's norms.⁸⁰ Taking these two parameters as our yardstick, the Osiraq attack favored the maintenance of the minimum order, at least from the perspective of states wishing to check the imperialistic desires of a murderous—even of its own citizens—regime. Moreover, the attack could potentially be justified as anticipatory self-defense given the realities of the nuclear age.⁸¹ *Jus in bello* was strictly followed given that the necessity of the target was justified, and also the requirements of proportionality and discrimination with regard to the target were strictly observed. Israel understood that the rules of proportionality and discrimination could be met only in the small window of opportunity provided after the finalization of the nuclear reactor, which established the independence of the Iraqi nuclear program, and before the introduction of nuclear fuel into the reactor.

Some have claimed that the long-term effect of the Osiraq attack is to strengthen the Arab states' resolve to acquire nuclear weapons and to do so all the more secretly, as the construction of the alleged Al Kibar reactor demonstrates. One could claim, however, that the constant para-war in the region has already generated plenty of destructive capacities among all of the parties involved, and that Osiraq may have not tipped that balance that much anyway. If one appreciates Osiraq as an action in a continuum of actions that ended up with the destruction of the state of Iraq, as it understood itself pre-2003, then, from a military perspective, the attack at Osiraq was an ingenious tactical attack that alleviated the pain till the administration of the curative remedy. Maybe that curative remedy was not completely in sight in 1981 but it could have been construed as a potential future scenario.

B. Appraisal of the Al Kibar Incident

In today's decentralized international system, law is a process of communication, through which those who have the role of authoritative policy-making need to generate signals about what counts as law and appropriate behavior among various international actors. This is a process of communication occurring in many different and overlapping directions. In this constant stream of communication, through words and actions, it is often difficult to distinguish between law and immaterial posturing under the pretext of generating or applying a norm.⁸² Through this incessant commu-

79 W. Michael Reisman, *Article 2(4): The Use of Force in Contemporary International Law*, 78 AM. SOC'Y INT'L PROC. 74, 85 (1984).

80 W. Michael Reisman, *Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice*, 13 YALE J. INT'L L. 171, 184 (1988).

81 See MCDUGAL & FELICIANO, *supra* note 58.

82 What pointedly has been called "legislatistic babble." See W. Michael Reisman, *Nuclear Weapons in International Law*, 4 N.Y.L. SCH. J. INT'L & COMP. L. 339 (1983).

nication and, inevitably, a considerable amount of miscommunication,⁸³ a number of lessons are learned, or best practices of behavior deciphered, by those who would like to be perceived as belonging to the class of international “responsible” actors.⁸⁴

If Israel learned a lesson by generating a process of communication through its 1981 Osiraq attack, it is that communication through explicit statements about what is or is not justified under international law as anticipatory self-defense is not always productive. The Al Kibar attack, which was followed by complete silence on Israel’s part, demonstrates that what Israel learned from the Osiraq attack is that while it could continue to attack non-fueled nuclear reactors, it could dispense with the legal sideshow of explaining its behaviour.

“Silence is eloquently ambiguous”⁸⁵ and can be interpreted as a sign of silent consent or simply as a sign of indifference toward an incident, which does not meet the threshold of a neutral state response. Unprotested acts that take place in the international sphere, however, generate new legal expectations independent of whether states that failed to protest intended them to do so.⁸⁶ The Al Kibar attack and the silence that followed need to be evaluated in terms of their potential to provide future guidance about the survivability of the norm of self-defense as delineated in Article 51 of the United Nations Charter. One possible interpretation is that Israel, viewing its actions as hard to reconcile even with the notion of anticipatory self-defense, dropped any such argument alluding to preserving the potency of its deterrent force.⁸⁷ Since Israel’s action was tolerated, we are in essence faced with circumstances in which a precautionary use of force will be illegal *de jure* (based on Article 51) but will be tolerated *de facto* based on considerations of what is reasonable, and thus legitimate, expected behaviour. One could claim that it is reasonable and, thus, legitimate to strike at an enemy that harbors clandestine nuclear facilities in contravention of its international obligations. The easy digestion of the Al Kibar incident points to the development of a norm that surgical strikes against clandestine reactors, which are likely to be used to produce nuclear weapons, are legitimate.

If this is the international norm established, the international community will refrain from condemning reasonable, zero-civilian casualty strikes that surgically remove an undesirable nuclear proliferation facility. The review executed when such strikes take place would not have to do with the lawfulness of the attack *per se* but

83 ROBERT JERVIS, PERCEPTION AND MISPERCEPTION IN INTERNATIONAL POLITICS 135-36 (1976) (sometimes miscommunication is generated by the failure to recognize openly the conflict between ideals and self-interests). For instance, the rhetoric of spreading democratic ideals is often confounded with need to secure energy resources.

84 See, e.g., Karthika Sasikumar, *India’s Emergence as a “Responsible” Nuclear Power*, 62 INT’L J. 825, 834 (2007).

85 W. MICHAEL REISMAN & JAMES E. BAKER, REGULATING COVERT ACTION: PRACTICES, CONTEXTS, AND POLICIES OF COVERT COERCION ABROAD IN INTERNATIONAL AND AMERICAN LAW 113 (1992).

86 *Id.*

87 See *Israel Says Deterrent Ability Recovered After Syria Strike*, *supra* note 7.

with the proportionality of the attack—namely, whether the means with which the target was hit were proportional to the perceived threat.

If the target at Al Kibar was indeed a nascent nuclear reactor, the attack could be considered a more legitimate articulation of anticipatory self-defense than was the Osiraq attack. If the facility attacked were a clandestine nuclear reactor, Syria would have been in violation of its safeguards agreement with the IAEA⁸⁸ and in contravention of emerging international norms regarding the transparency of nuclear programs,⁸⁹ which shift the burden of proof to states suspected of harboring secret nuclear weapons programs. These states now have the burden of proving that they do not support such programs by providing total transparency about their nuclear operations.⁹⁰ Based on these norms, the burden of proof is on Syria to demonstrate that it is not working on a secret nuclear weapons program. Syria, who was the victim

88 See *supra* note 36 and accompanying text.

89 The resolutions addressing Iraq's clandestine nuclear weapons program established the requirement of total transparency about a country's nuclear weapons program while the country is under suspicion of developing weapons of mass destruction in 1991. See S.C. Res. 1441, U.N. Doc. S/RES/1441 (Nov. 8, 2002); S.C. Res. 715, U.N. Doc. S/RES/715 (Oct. 11, 1991); S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991). On the "normative ripples" of these resolutions, see JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 422-23 (2005); see also S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004). Based on Security Council resolutions that address Iran's nuclear program, the standard for nuclear non-proliferation goes beyond what is articulated in the IAEA's safeguards agreements. In a 2006 resolution, the Security Council called on Iran to take steps (as required by the IAEA Board of Governors) toward making the international community confident that Iran's nuclear program is exclusively for peaceful purposes. This requirement shifts the burden of proof to the state suspected of proliferation activities, which now has to provide evidence that it is not involved in weapons proliferation activities. In other words, while under the safeguards agreements a state is innocent until the IAEA proves it guilty, under the new regime developing through the Security Council resolutions, a state under suspicion of producing nuclear weapons is presumed guilty until it proves itself innocent by allowing a total access to its nuclear program. In essence, the state must provide what the IAEA is asking it to provide, and must do what the IAEA is asking it to do, based on the presumption that unless it has something to hide there is no reason not to. See S.C. Res. 1696, ¶ 6, U.N. Doc. S/RES/1696 (July 31, 2006); see also S.C. Res. 1803, ¶ 1, U.N. Doc. S/RES/1803 (Mar. 3, 2008) (reaffirming that "Iran shall without further delay take the steps required by the IAEA Board of Governors in its resolution GOV/2006/14, which are essential to build confidence in the exclusively peaceful purpose of its nuclear programme and to resolve outstanding questions ...")

90 See S.C. Res. 1718, ¶ 6, U.N. Doc. S/RES/1718 (Oct. 14, 2006) ("DPRK [Democratic Peoples Republic of Korea] shall abandon all nuclear weapons and existing nuclear programmes in a complete, verifiable and irreversible manner, shall act strictly in accordance with the obligations applicable to parties under the Treaty on the Non-Proliferation of Nuclear Weapons and the terms and conditions of its International Atomic Energy Agency (IAEA) Safeguards Agreement...and shall provide *the IAEA transparency measures extending beyond these requirements, including such access to individuals, documentation, equipments and facilities as may be required and deemed necessary by the IAEA.*") (emphasis added).

of Israel's attack, is now the country that is under intense investigation because of its potential nuclear proliferation activities. Syria allowed belated access to the Al Kibar site; but this has not been considered sufficient enough to meet the IAEA's transparency standards given that Syria is now suspected of nuclear proliferation activities. Syria's legalistic arguments—that providing restricted access to the Al Kibar puts it in compliance with its safeguard agreement—have not been persuasive. The IAEA is proceeding with its investigation based on a complete transparency standard: “The Director General [of the IAEA] has called on Syria to provide the necessary transparency, including allowing visits to the requested locations and *access to all available information*, for the Agency to complete its assessment.”⁹¹

If Syria was indeed building a hidden nuclear facility capable of producing nuclear material suitable for nuclear weapons, pointing out the target of such weapons does not require an active sort of imagination. The threat from the Al Kibar reactor cannot in good faith be defined as an “imminent” armed attack even under a broad interpretation of anticipatory self-defense since, from the evidence presented, the reactor was far from completion. From a strategic/military perspective, however, Israel's choice was between a “why-not-nip-in-the-bud” attitude and a “wait and see” posture. Given the facility's clandestine nature, which left not much doubt about its potential use, a “wait-and-see” posture would be a potentially disastrous military gamble.

A contextual examination of the Al Kibar attack could classify this action as preemptive self-defense, especially given the state of relations between the two states. In contrast with Iraq, Syria had at least signed an armistice agreement with Israel;⁹² but this has not prevented the two countries from engaging in protracted warfare through a series of proxies and sub-proxies.⁹³ From Israel's perspective, allowing Syria to acquire nuclear weapons during this constant state of war, when it can effectively be stopped from such acquisition as early as possible, because a legalistic threshold of self-defense may not be quite met, did not make much sense. Under Israel's rationale, it is better to extinguish a nuclear proliferation danger, even in a nascent form, before it takes roots and grows; this could be seen as the most prophylactic and precautionary articulation of anticipatory self-defense. Furthermore, Israel could

91 IAEA, *Implementation of the NPT Safeguards Agreement in the Syrian Arab Republic*, ¶ 19, IAEA Doc. GOV/2008/60 (Nov. 19, 2008) (emphasis added).

92 See Israel and Syria Armistice Agreement, July 20, 1949, 42 U.N.T.S. 327. An armistice agreement means that the parties put down the arms, but it does not necessarily mean the end of the war. Accordingly, “belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice.” Convention Respecting the Laws and Customs of War on Land art. 36, Oct. 18, 1907, 36 Stat. 2277, 1 BEVANS 631.

93 The 2006 war in Lebanon is a case in point. The conflict lasted thirty-three days and ended through a cease-fire brokered by the United Nations Security Council on August 14, 2006. The conflict was between the Israeli military and Hezbollah paramilitary forces that were armed with advanced weapons including UAVs. Syria and Iran supplied arms to Hezbollah during the conflict. See, e.g., Conal Urquhart, *Computerized Weaponry and High Morale*, GUARDIAN, Aug. 11, 2006, <http://www.guardian.co.uk/world/2006/aug/11/syria.israel> (last visited Aug. 23, 2009).

not have followed a potentially well-trodden path to communicate Syria's allegedly clandestine activities to the Security Council or the IAEA. Extensive discussion in international fora about the authorization of collective action or unilateral self-defense is implausible in situations similar to Al Kibar. This is simply because the discussion itself will alert the rogue state and allow it time to take "evasive action," which would prohibitively increase the risks of subsequent violations of *jus in bello* and the risks of casualties to the state considering taking the preemptive action.⁹⁴

The fact that Israel decided to take action at Al Kibar in a semi-covert fashion by successfully imposing a media blackout based on national security purposes is very telling about the future of warfare, but it leaves international law's role in regulating such warfare much more obscure. For example, if it were not for the United States' revelations of April 2008, the incident could have remained shrouded in secrecy, buried in blogs about potential conspiracies.

C. Covert Operations Versus Overt Operations

There is an element of force in international relations, and while it can be controlled it cannot be eliminated.⁹⁵ In this respect, "[l]aw acknowledges the utility and the incapability of the use of coercion in social processes, but seeks to organize, monopolize, and economize it."⁹⁶ The law governing the regulation of international coercion needs to be updated in many ways considering the nasty but also insidious means of warfare currently available.

Conventional weapons are acquiring the potency of nuclear weapons, space is heavily militarized, and people are transforming themselves into bombs—all under intense media coverage. At the same time, a virus attack on a country's computer network, or infiltration of its power grid, can lead to a societal collapse. One wonders, therefore, how to begin to control the mix of technology, aggression and self-destruction. A prudent course of action is not to regulate war after it has broken out but to prevent war by taking precautionary/prophylactic measures.

States are offered two basic choices when they deem they need to defend themselves against real or imagined enemies or threats:

- They could conduct an open war couched in terms of self-defense or anticipatory self-defense hoping to place their actions under the blessing of international law; or
- They could engage in covert or semi-covert action so that, if they are lucky and any covert action does not come to light, they do not need to justify their actions.

94 Reisman, *supra* note 70, at 17.

95 LAWRENCE FREEDMAN, *THE EVOLUTION OF NUCLEAR STRATEGY* 459 (2003); *see also* JOHN KEEGAN, *A HISTORY OF WARFARE* 384 (2003) (arguing that a world without disciplined armies would be uninhabitable).

96 Reisman, *supra* note 78, at 279.

The truth of the matter is that the more difficult it is for states to believably couch their wars in terms of self-defense, the more prone they will be to conduct covert actions. If we assume that a claim of self-defense will not be credited, the nature of conflict in the future will likely involve the toleration of a significant amount of covert activity,⁹⁷ especially if such activity is less likely to escalate into a full-blown war.

Covert actions present some advantages. For example, covert actions are not meant to attract publicity. Therefore, they are unlikely to embarrass an adversary into retaliating. Contrarily, overt attacks can escalate into full-blown wars for the sole purpose of avenging the attacked state's offended honor.⁹⁸ Furthermore, a covert action will usually be executed so as to limit collateral damage and civilian casualties, which may generate unwanted media scrutiny. One of the goals of covert action is to minimize publicity and, thus, scrutiny. Therefore, surgical attacks that remove unwanted targets are preferable by definition to large scale events that invite nosey interference. A covert attack also further economizes on the means of communication because states do not have to justify their actions in terms of doctrines stretched hopelessly out of shape under traditional posturing about what is lawful and unlawful under international law. Covert actions, however, also entail costs, especially if they are revealed, and governments should be able to live with the consequences of their covert activity in case such activity becomes known.⁹⁹ Certain covert operations could entail more casualties than cleaner overt operations.¹⁰⁰ Covert operations collide with the principles of democratic and open societies.¹⁰¹ Covert action decisions are made in settings prone to groupthink and, thus, are likely to be executed erroneously.¹⁰² An overt operation makes a statement about a target's undesirability, thereby reinforcing potentially desirable norms that should govern international relations and thus having an educative and informative function.¹⁰³ For instance, the Begin doctrine regarding Israel's intolerance toward its adversaries' acquisition of nuclear weapons could become operational only through an overt operation.

One could argue that covert action is unlawful since states should conduct their affairs transparently, and that the age of secret dealings and covert operations is long

97 REISMAN & BAKER, *supra* note 85, at 16.

98 See ERNLE BRADFORD, *THERMOPYLAE: THE BATTLE FOR THE WEST* 148 (1980) (often overt attacks create common bonds of pride and honour and generate a larger national identity).

99 REISMAN & BAKER, *supra* note 85, at 141. A useful guideline for covert actions is that "an act accomplished covertly should be overtly lawful."

100 Before attacking Osiraq openly, Israel evaluated the possibilities of covert action to conclude that a secret raid, with the goal of disguising the identity of the attacker, would be more costly in terms of its own casualties and Iraq's casualties and likely to attract more attention than an overt operation. See PERLMUTTER ET AL., *supra* note 34, at 88-100. Covert actions must meet the standards for armed conflict namely proportionality and discrimination regarding the target. See REISMAN & BAKER, *supra* note 85, at 77.

101 REISMAN & BAKER, *supra* note 85, at 15.

102 *Id.* at 76.

103 *Id.* at 76, 142.

gone. For those who like to remain in touch with reality, covert action is far from a sanctioned behavior in international dealings and, while it could be punished when it is uncovered, it is generally a well-tolerated behavior. According to Michael Reisman, a variety of covert actions are conducted today through the use of military, economic, diplomatic, propaganda and cyberspace instruments. Often, the use of overt action is preceded by covert action. While it initially appears that covert operations should be unlawful, closer investigation reveals “a much more complex operational code” than a strict prohibition would entail.¹⁰⁴ While international law does not acknowledge covert action, the process of communication among states, most of which publicize their secret services,¹⁰⁵ demonstrates that, no matter how offensive covert action is to our democratic instincts, we are far from the creation of a transparent international system. Since terrorism is the preferred type of covert action by weaker states, an instinctive means to prevent terrorist actions is through covert counteractions.¹⁰⁶ Assuming that covert action is a legitimate and effective strategy, the international community’s efforts must be oriented towards defining and developing a “clearly prescribed and applied law governing covert action and the institutions for regulating it.”¹⁰⁷

The good news is that as states are launching their covert operations, more eyes are watching them through what is becoming a transparent earth. Google Earth and commercial satellites have brought the technology that was the prerogative of states into contact with the masses. And while not everybody can look everywhere all the time, enough vigilantes exist, which could make states self-conscious that someone is watching them, either inadvertently or intentionally. States are adopting the same attitude for satellite technology that they have for nuclear weapons. It is hopeless to try to stop the spread of technology. Therefore, the strategy should be to amass even more accurate information than others, through better means, and even more quickly, while simultaneously requesting that Google Earth blind some of its eyes looking at the Earth.¹⁰⁸ For example, the IAEA has had difficulties obtaining commercial satellite images that showed the Al Kibar facility immediately after it was bombed by Israel, which has led to intensive speculation that the states involved in

104 W. Michael Reisman, *Covert Action*, 20 YALE J. INT’L L. 419, 419-20 (1995).

105 *Id.* at 421.

106 *Id.* at 424.

107 *Id.* at 425.

108 *Group Asks Google to Stop Map Image Service*, REUTERS, Dec. 19, 2008, <http://www.reuters.com/article/oddlyEnoughNews/idUSTRE4BI5A120081219> (Google Earth has “drawn criticism from a variety of countries for providing images of sensitive locations, such as military bases or potential targets of terror attacks.”) (last visited Aug. 23, 2009); *see also* Rina Chandran, *Mumbai Attacks Show Up India’s Technology Shortcomings*, REUTERS, Dec. 11, 2008, <http://www.reuters.com/article/latestCrisis/idUSBOM339447> (after the Mumbai terrorist attacks of 2008, a ban was sought on Google Earth for providing easy access to defense and civilian establishments creating security hazards) (last visited Aug. 23, 2009).

the cover up had bought out all the commercial satellite imagery available including intellectually property rights to it.¹⁰⁹

Given that there is a choice between overt and covert action within the limitations of the new translucent earth, states have to decide how to go about in pursuing their interests. The more costly overt actions become in terms of publicity, prickly international lawyers offering strict interpretations of self-defense, and the prerogative to avoid attrition of one's own forces, the more desirable the prospect of covert actions with the added advantage of an unwanted target's surgical removal becomes. On the other hand, if covert action is to be avoided, one would need to construct a notion of self-defense that is much more expansive than even today's concepts of anticipatory self-defense. In this respect, a notion of precautionary self-defense may even be propagated. The proposition of such a precautionary notion of self-defense is in line with the practice of international actors. Today, precautionary self-defense is widely practiced and often unrestrained, in many areas of the world, especially within failed states.¹¹⁰

International lawyers have agonized over the concept of self-defense and its different offshoots—presented as either anticipatory¹¹¹ or preemptive self-defense. It has been correctly argued that while the context within which self-defense is evoked should be evaluated, the state launching the act of self-defense should not be left as the sole judge of its actions, and that the fact-finding ability of international organizations should be strengthened. International organizations should be empowered

109 George Jahn, *IAEA Chief Baffled Over Lack of Syria Nuclear Info*, ABC NEWS, Nov. 27, 2008, <http://abcnews.go.com/International/wireStory?id=6349363> (Aug. 23, 2009).

110 According to certain accounts, failed states like Somalia are the best places to combat terrorists because, given the absence of local sovereignty and the lack of media attention, virtually unrestricted Western counterterrorism efforts can take place. See Paul Salopek, *U.S. Appears to be Losing its Secret War in Somalia*, SEATTLE TIMES, Nov. 29, 2008, http://seattletimes.nwsourc.com/html/nationworld/2008448575_somalia29.html (last visited Aug. 23, 2009).

111 See PHILIP C. JESSUP, *A MODERN LAW OF NATIONS* 166 (1948); Ian Brownlie, *The Use of Force in Self-Defence*, 37 BRIT. Y.B. INT'L L. 183, 225-28, 244 (1961); Thomas M. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809 (1970); Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539 (2002); see also LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 295 (1979) ("[T]he Charter intended to permit unilateral use of force only in a very narrow and clear circumstance, in self-defense if an armed attack occurs."); Quincy Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546, at 560 (1963). *But see* McDUGAL & FELICIANO, *supra* note 58, at 67, 184, 234 (1961); Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 4 (1972) (mentioning that rejecting an anticipatory right is 'in this day and age, totally unrealistic and inconsistent with state practice'); Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984). For an insightful discussion on the concept of self-defense and its evolution in international law, see Emmanuel Roucouas, *Self-defense: Present Problems of the Use of Force in International Law*, Institut de Droit International, 10th Commission (2007), available at http://www.idi-iil.org/idiE/annuaireE/10th_com_leger_a.pdf.

to appraise the legitimacy of claims of self-defense under some form of community review.¹¹²

D. *The NPT Regime's Fairness and Effectiveness*

Tolerating attacks on non-fueled nuclear reactors owned by “rogue states”¹¹³ based on reasonable suspicions that such reactors will be used to produce nuclear weapons widens the contours of the meaning of anticipatory self-defense. The tolerance of such attacks has been attributed to the NPT regime’s ineffectiveness, in that it is unable, by design, to detect clandestine nuclear programs.¹¹⁴ A theory of precautionary self-defense that is able to legitimize attacks against nuclear programs that are tainted by their potential for enabling weapons proliferation will be favored by Western states but denigrated by other, so-called “anti-elite,” states.¹¹⁵ These anti-elite states challenge the essence of the international system in terms of the distribution of current entitlements.

The NPT regime’s ineffectiveness is due to more than just the IAEA’s verification mechanisms’ shortcomings.¹¹⁶ Objections against the nuclear non-proliferation regime, as shaped by the NPT and concomitant export control regimes,¹¹⁷ have deep ideological roots. Certain countries resent United States-led globalization and believe that if some circumstances were changed they could be world leaders.¹¹⁸ For these countries, possessing nuclear weapons has a psychological component. For them, having weapons entails the ability to use force and to thus alter the balance of power both regionally and internationally. Given that the nuclear club includes the most powerful nations in the world, these countries believe that they have been made second-class citizens through their exclusion from that club.¹¹⁹

Iran’s views regarding the division of the world into “nuclear rich” and “nuclear poor”—through the application of what has been called “nuclear apartheid”—are demonstrative of the mentality of those who refuse to accept a world where only five (now *de facto* nine) states have an oligopoly on nuclear weapons.¹²⁰ According to Iran,

112 Schachter, *supra* note 111.

113 Rogue states are states considered threatening to international peace and security. They are ruled by authoritarian governments, which restrict human rights. They also support terrorism and are interested in acquiring and proliferating weapons of mass destruction.

114 See *supra* notes 35, 77.

115 DAVID ROTHKOPF, *SUPERCLASS: THE GLOBAL POWER ELITE AND THE WORLD THEY ARE MAKING* 185 (2008).

116 See *supra* note 35.

117 See *supra* note 51.

118 ROTHKOPF, *supra* note 115.

119 *Id.*

120 According to article VI of the Treaty for the Non-Proliferation of Nuclear Weapons, states undertake “to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international

today's international system is unacceptably defined by Western states' pre-eminence and unilateralism, and the increased role of nuclear weapons as a means to coerce political compromises. These policies are understood as increasing the insecurity and vulnerability of states that do not possess nuclear weapons. Iran resents the "double standards" propagated by the NPT regime. Iran's nuclear program is associated with its national pride. Iran's nuclear capabilities are a way for Iran to operate at a level equal to the world's most powerful countries.¹²¹

Given that there are multiple reasons why a country may wish to acquire nuclear weapons,¹²² it would be difficult for a country like Iran to permanently refrain from acquiring the technologies to produce nuclear weapons. If other countries in the region have nuclear weapons, Iran's acquisition of nuclear weapons would at least provide it with a hedge strategy. Countries rejecting calls for them to "de-nuclearize" have, at their heart, an ingrained belief that giving up the nuclear option, and the technology to produce nuclear weapons, will increase their likelihood of becoming embroiled in local conflicts and becoming a "military basket case" like Afghanistan, Iraq and many of Africa's failed states.¹²³

control." Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 51, art. 6. The subsequent review conferences were rife with recriminations for the non-fulfilment of promises of nuclear disarmament perpetuating concerns regarding the regime's inherent inequity. The fact that the NPT regime is not really geared toward the reduction of existing nuclear weapons stocks deepens perceptions that the bargain struck in 1968 was not really fair.

- 121 See, e.g., Kaveh L. Afrasiabi & Mustafa Kibaroglu, *Negotiating Iran's Nuclear Populism*, 12 BROWN J. WORLD AFF. 255 (2005). Furthermore, Iran may honestly want to reduce its internal consumption of oil and gas in order to increase the export of its energy sources. Iran has projected nuclear power as a way to modernize its economy and provide jobs for a rapidly growing workforce. See Amir Azaran, *NPT, Where Art Thou? The Nonproliferation Treaty and Bargaining: Iran as a Case Study*, 6 CHI. J. INT'L. L. 415, 417 (2005).
- 122 States develop and maintain nuclear arsenals for various purposes: great powers like to match weapons of other great powers as a guarantee of their uniqueness and superiority; some states view nuclear weapons as an insurance policy in case there are doubts that a great ally will provide assistance during conflict; a country with adversaries would like to develop nuclear weapons if its adversaries have them (China, India, Pakistan); a country may acquire nuclear weapons to offset what it conceives to be a strength in conventional weaponry of an adversary; nuclear weapons could be considered a cheaper arms option than engaging in a conventional weapons arms race; a country may hope to strengthen its international standing through the acquisition of nuclear weapons; a country may want nuclear weapons for offensive purposes (but this is unlikely to happen because of fears of catastrophic calamities resulting from the use of such weapons). See Scott D. Sagan, *How to Keep the Bomb from Iran*, 85 FOREIGN AFF. 45, 47 (2006); Kenneth Waltz, *supra* note 77.
- 123 Similar concerns were prevalent in Europe during the Cold War under an understanding that if Europe were to "de-nuclearize" it would be reduced to the level of countries with local conflicts. See LAWRENCE FREEDMAN, *THE EVOLUTION OF NUCLEAR STRATEGY* 286 (2003).

Overall, a state's decision to acquire nuclear weapons involves a complex calculus that combines issues of security, self-perception and economic costs. The IAEA safeguards¹²⁴ and existing export control regimes¹²⁵ hope to increase the costs of developing nuclear weapons programs, but they cannot successfully address states' preoccupation with the incentives behind this complex calculus.¹²⁶

A correct appraisal of the attacks at Osiraq and Al Kibar cannot be performed outside the context of what is perceived as a fair international system. If the NPT regime is conceived as a just regime, which nevertheless lacks implementation effectiveness, the attacks at Osiraq and Al Kibar are more easily identifiable as lawful. But if the regime is identified as outdated and unjust, unfairly dividing the world into nuclear-weapon-haves and have-nots, then the attacks seem to be the biased imposition of self-perceptions of national security onto the construct of international stability while the former is not necessarily a pre-condition of the latter. For instance, one could ask (with a certain dose of cynicism): in a world where a number of states have latent nuclear capacity,¹²⁷ what is the harm of two additional states acquiring that capacity as a countervailing measure to a perceived threat? The answer has essentially to do with our preferred, and admittedly biased, sense of a future world order that is based on the asymmetrical acquisition of the nastiest weapons, which will allow, *inter alia*, for control of resources and the making or breaking great powers.

Another approach to the NPT regime is to not see it as a distributional agreement of weapons and, thus, of power; but to see it as a fair bargain in a world in which the constitutive element is the inequality among states.¹²⁸ This is a world where elites

124 See *supra* note 35.

125 See *supra* note 51.

126 See Daniel C. Rislove, *Global Warming v. Non-Proliferation: The Time has Come for Nations to Reassert Their Right to Peaceful Use of Nuclear Energy*, 24 WIS. INT'L L.J. 1069, 1091 (2006).

127 The technical capacity to manufacture a relative simple nuclear device is within the reach of forty to fifty countries. Given the "nuclear renaissance," based on hopes that nuclear energy is a means to decarbonize the economy, countries' technical capability to produce nuclear weapons will grow. See Robert L. Pfaltzgraff, Jr., *The Future of the Nuclear Non-Proliferation Treaty*, 30 FLETCHER F. WORLD AFF. 65, 70 (2006). As a matter of fact, once a country has mastered either the front or back end of the nuclear fuel cycle, the production of nuclear weapons, assuming the political will exists, is merely a matter of time. All countries that have fuel cycle capacity simultaneously have "virtual" weapons capability—that is, the capability to produce nuclear weapons. States, in other words, are exploring a hedge strategy regarding nuclear weapons. By building a technological and industrial base, through the development of enrichment and reprocessing facilities, they keep the option of acquiring nuclear weapons in the future open. See ANTHONY ET AL., *supra* note 51, at 92. Argentina, South Africa, Brazil and Japan could be considered virtual nuclear weapon states because they have nuclear technological know-how. See William Choong, *Chipping Away the Nuclear Taboo*, THE STRAITS TIMES, Aug. 3, 2008.

128 The Security Council, the most powerful organ of the United Nations system, is comprised of the victors of World War II, and as such is not an expression of a new kind of sovereign equality among nations. The asymmetries of power in the Security Council

are not treated (nor is it expected that they will be treated) the same as non-elites, and where it is in the benefit of all to control the spread of some of the most deadly weapons—even under undesirable and *passé*, yet useful, notions of paternalism. Today, one could fairly claim that most states have acquiesced to an international order where there are great powers,¹²⁹ second-rated powers, states in the name only and failed states. Under this understanding of the international order, while it is true that the control of nuclear weapons is probably an exercise in futility, making an open admission of that futility by deleting all international constraints would become too risky. Policymakers often prefer to put a mask of effectiveness and control on an international regime, despite the self-defeating reality. This is simply because doing otherwise would unbuckle any moral constraint imposed by the various societal taboos and, in this case, by the nuclear taboo. While the NPT does not do much to constrain superpowers, it could have normative influence as weaker states are trying to constrain their counterparts' potential nuclear ambitions. The NPT is based on the nuclear taboo—that is, an urge to resist rationalistic arguments that nuclear deterrence can work for all under a notion of universal nuclear deterrence and that efforts must be undertaken to control the bad genie that has come out of the bottle. For most people, even the sound of the word “nuclear weapons” generates a heart-sinking feeling, which is an advantage that the arms control movement does not enjoy for other weapons.

The problem is that the NPT regime has oscillated between two extremes. On the one hand there is a general fatalism, which views the spread of nuclear technology and weaponry as inevitable¹³⁰ and, thereby, generates a sense of futility in the mission of international institutions. On the other hand, there is an oedipal attachment to the nuclear taboo when those rogue elites are close to the acquisition of nuclear weapons. This suspended indecision between these diametrically opposed poles has dented the NPT regime's normativity, generating despondency in all those who believe in a world that is free of nuclear weapons (or at least with fewer nuclear weapons). Given this indecision, it is not paradoxical that states, for which nuclear weapons are deemed part of their national security apparatus, have adopted the view that a pain reliever is better when a curative remedy does not exist. In this respect, sporadic attacks at non-fueled nuclear reactors seem to be the appropriate pain reliever until a curative remedy is found in terms of restoring a coherent multilateral response.

States will have to gauge the costs and benefits of covert action versus those of overt hostilities and will be tempted frequently by the advantages offered by covert warfare. The evolution of warfare will stretch the notion of self-defense out of the currently acceptable legal bounds, making the possibilities of covert action even

“were neither a mistake nor an oversight. The whole idea was to marshal effective power in pursuit of peace.” See Michael Reisman, *Amending the UN Charter: The Art of the Feasible*, 88 AM. SOC'Y INT'L L. PROC. 108 (1994).

129 A great power is “a state with a resource base and an internal political organization that enables its elite to clarify its global interests and, if necessary, to deploy significant force to protect them.” *Id.* at 110.

130 See Reisman, *supra* note 77.

more tantalizing. For this reason, the Al Kibar attack may provide some solace to counter-proliferators because the attack was largely absorbed in the international arena without many hitches, which is tantamount to a tacit acceptance. It seems that the majority of states were relieved that this action was taken in a surgical manner by someone after contemplating, through the Iranian case, the nightmare that a Security Council engagement may entail.¹³¹

IV. Precautionary Self-Defense

Precautionary self-defense is defined here as a neighboring concept to anticipatory self-defense (imminent threat) and preemptive attack (future contingent threats), but it is distinguished from them. A central element of the attacks at Osiraq and Al Kibar was that they were undertaken under a presumption that a “rogue country,” under suspicion of developing nuclear energy for the production of nuclear weapons, has the burden of proving that it is not engaging in weapons production by providing complete access to its nuclear program. As long as it is perceived that such transparency is not provided, the presumption of weapons production will hold, and an attack on that country’s nuclear facilities will be tacitly tolerated and eventually legitimized.

In other words, precautionary attacks on nuclear facilities involve the reversal of the burden of proof from the attacker to the (potential) victim,¹³² because the victim must demonstrate that it is indeed not engaging in nuclear weapons production to prevent such an attack or demand a sort of relief after it happens. This proof can come *ex ante*, as the U.N. Security Council is now requesting of Iran, or still could come after a precautionary attack has taken place. Syria, as demonstrated by the Al Kibar incident, while the victim of an attack, is now the country that is under intense investigation about potentially harboring a secret nuclear weapons program.¹³³ Similarly, even after the Osiraq attack, Iraq never quite got rid of the stigma of engaging

131 See IAEA, *Implementation of the NPT Safeguards Agreement and Relevant Provisions of Security Council Resolutions 1737 (2006), 1747 (2007), 1803 (2008) and 1835 (2008) in the Islamic Republic of Iran*, IAEA Doc. GOV/2008/59 (Nov. 19, 2008); see also PAUL K. KERR, CONG. RES. SERV., *IRAN’S NUCLEAR PROGRAM: STATUS (2008)*, available at <http://openocrs.com/getfile.php?rid=65920>.

132 This differentiates a precautionary attack from a preventive war. Traditionally, the burden of proof rests with the state that claims self-defense. Both a precautionary attack and a preventive war have to do with the risk management of adversaries; but, in the case of precautionary attacks, the burden of proof shifts to the victim (or the potential victim) of such an attack, thereby requiring it to demonstrate that it does not present a security risk. It does so by allowing total access of its nuclear programs. For the traditional version of the burden of proof when a state claims self-defense, see *Oil Platforms (Iran v. U.S.)*, 1996 I.C.J. 161, 189 (Nov. 6) (“the Court has simply to determine whether the United States has demonstrated that it was the victim of an “armed attack by Iran such as to justify it using armed force in self-defence; and the burden of proof of the facts showing the existence of such an attack rests on the United States.”)

133 See IAEA, *Implementation of the NPT Safeguards Agreement in the Syrian Arab Republic*, IAEA Doc. GOV/2008/60 (Nov. 19, 2008).

in clandestine weapons production; a stigma skillfully used to eventually destroy that state. This application of preemptive self-defense of a precautionary nature has to do with the application in the security arena, of what could be called the “risk management paradigm,” in which the aim is to control and manage risk¹³⁴ so that it does not get out hand and result in the worst calamity.¹³⁵ In this respect, rogue states are viewed as risks that the prevalent powers would rather control, in anticipation of the worst-case scenario, rather than having to deal with them after the worst-case scenario materializes.¹³⁶

In the wake of 9/11, the Security Council seems to have endorsed a more assertive approach with regard to actions that can be taken to combat terrorism.¹³⁷ The right to self-defense under United States preemption strategies has been expanded to address the global war on terror (GWOT). After the 9/11 attacks, the United States National

134 The risk management paradigm is prevalent not only in the military but also in the finance and economic sectors. See GEORGE COOPER, *THE ORIGIN OF FINANCIAL CRISIS: CENTRAL BANKS, CREDIT BUBBLES AND THE EFFICIENT MARKET FALLACY* 4 (2008) (“In recent years this lopsided approach to monetary and fiscal policy has been further refined into what has been described as a “a risk management paradigm,” where policy makers *attempt to get their retaliation in early* by easing policy *in anticipation* of an economic slowdown, *even before firm evidence* of the slowdown has been accumulated. This strategy is best described as pre-emptive asymmetric monetary policy.”) (emphasis added). On the global financial crisis and how precautionary reserves contributed to it, see *Global Economic Imbalances: When a Flow Becomes a Flood*, *ECONOMIST*, Jan. 22, 2009: “The self-insurance against financial fragility is part of a more general bent towards precautionary saving in the developing world.” While the vast precautionary reserves of developing countries, a reaction to the painful memories of the Asian crisis, are a prudent safeguard against a sudden crisis in foreign finance and a protection against the sudden flight of domestic savers, they contribute to global financial instability.

135 See U.S. DEP’T OF DEF. [DOD], *NATIONAL DEFENSE STRATEGY* (2008) (mentioning the word “risk” over thirty times). According to DOD, the United States faces operational risk, future challenges risk, force management risk and institutional risk. “Implementing the National Defense Strategy and its objectives require balancing risks, and understanding the choices those risk imply ... Here we define risk in terms of potential for damage to national security combined with the probability of occurrence and a measurement of the consequences should the underlying risk remain unaddressed.” *Id.* at 20; see also DOD, *QUADRENNIAL DEFENSE REVIEW REPORT* 112 (2006) (“We cannot accurately characterize the security environment of 2025; therefore, we must hedge against this uncertainty by identifying and developing a broad range of capabilities. Further, we must organize and arrange our forces to create the agility and flexibility to deal with unknowns and surprises in the coming decades. This review has carefully balanced those areas where risk might best be taken in order to provide the needed resources for areas requiring new or additional investment.”).

136 For the precautionary approach as articulated in the *Caroline* case, see *supra* note 76.

137 See S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (recognizing “the inherent right of individual or collective self-defence in accordance with the Charter” for the cause of combating “by all means threats to international peace and security caused by terrorist acts.”); see also S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

Security Strategy expanded the notion of anticipatory self-defense, which, as traditionally understood in international law, has to do with a credible threat of an attack, to include notions that have to do with the mere capabilities, objectives and means of adversaries.¹³⁸ This occurred because these adversaries are no longer rational states that are likely to be deterred, but rogue states or terrorists who are not to succumb to traditional notions of deterrence. Thus, their actions must be preempted.

Unilateral surgical attacks like those at Osiraq and Al Kibar may have become a better (possibly optimal) way to deal with an enemy, rather than an all-out armed attack. Emphasis must be placed on the surgical (“clean”) nature of such unilateral acts, which meet the requirements of proportionality that should guide self-defense actions and, in general, *jus in bello*. Although counterintuitive, from civil society’s perspective, surgical operations of a precautionary nature may be an optimal way to launch an attack because of the low or zero number of civilian casualties. This feature, in addition to the silence and secrecy that surrounds such incidents, makes them unlikely to provoke a retaliatory action from the enemy or, at least, they are unlikely to compel opponents to take such action, thus minimizing the likelihood of an all-out war.

Since care for one’s own forces overrides concerns about the deaths of the opponent’s civilians,¹³⁹ and given that civilian casualties tend to generate public opprobrium, launching a semi-covert, surgical attack may be the way of future warfare.¹⁴⁰

138 NAT’L SEC. COUNCIL [NSC], THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002) (“For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack. We must *adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries*. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning.”) (emphasis added); see also NSC, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 28 (2006) (“If necessary, however, under long-standing principles of self-defense, we *do not rule out the use of force before attacks occur, even if uncertainty remains as to the time and place of the enemy’s attack*. When the consequences of an attack with WMD are potentially so devastating, we cannot afford to stand idly by as grave dangers materialize. This is the principle and logic of preemption. *The place of preemption in our national security strategy remains the same.*”) (emphasis added).

139 Diminishing the number of civilian casualties in Afghanistan, for instance, will mean putting more Western soldiers on the ground and at risk, a risk not acceptable compared to risking the lives of the civilian populations in Afghanistan. See *Western Forces in Afghanistan, Unfriendly Fire*, ECONOMIST, June 23, 2007, at 51.

140 See QIAO LIANG & WANG XIANGSUI, UNRESTRICTED WARFARE 28, 191 (1999) (referring to surgical strikes as a new method of warfare), available at <http://www.terrorism.com/documents/TRC-Analysis/unrestricted.pdf>.

Decision-makers may resolve to rely heavily on unilateral, covert, surgical strikes because:

- they limit harm to one's own forces and entail minimal civil casualties reducing the opprobrium that such casualties generate; and
- they remove the attack from the public eye allowing some relative freedom of action under modern effective constraints put in place by the transparency offered by Google Earth.

The goal of international law is to achieve a public order of human dignity, which has been defined as one in which all human beings have access to all the things they cherish: power, wealth, entitlement, skill, well-being, affection, respect and rectitude.¹⁴¹ No matter what the arguments are that can be made for precautionary surgical strikes, they certainly do not comprise an ideal, optimum world order, especially since the necessity for conducting such strikes is currently left each individual state's discretion. One is entitled to feel quizzical about the creation of international regimes in which action is based on individual states' judgments, free from the intervention of a multilateral mechanism that is able to somewhat objectively judge claims of lawfulness. One could only imagine the fate of a world where a number of emerging powers¹⁴² assert their claims by launching semi-covert, surgical, unilateral strikes without any restraint. It has been argued that the United States should not propagate the development of an international order where every state can use force against potential adversaries in preemptive self-defense. It is not in a great power's interests to establish preemption of a precautionary nature as a universal principle available to every nation. As Louis Henkin warns: "Extending the meaning of 'armed attack' and of 'self-defense,' multiplying exceptions to the prohibition on the use of force and the occasions that would permit military intervention, would undermine the law of the Charter and the international order established in the wake of world war."¹⁴³ In that world, what a world citizen could pray for is that unilateral, surgical strikes remain at least within the letter of the term "surgical."

141 By asserting human dignity as the central value in a globalized world the New Haven School at least establishes a standard about the acceptable level of behavior for states, groups and individuals when competing world views are vying for preponderance. Given that a sometimes fashionable cultural relativism is still used to suppress minorities, women and children, human dignity is the most important standard to uphold. The premise that "law should serve human beings," as the goal of international law, transforms that law from an instrument in the hands of some elites to a means for social change in the betterment of humanity. See MYRES S. MCDUGAL ET AL., *HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF INTERNATIONAL LAW OF HUMAN DIGNITY* (1980); see also W. Michael Reisman et al., *The New Haven School: A Brief Introduction*, 32 *YALE J. INT'L L* 575, 576-80 (2007).

142 See UNITED STATES NATIONAL INTELLIGENCE COUNCIL [NIC], *GLOBAL TRENDS 2025: A TRANSFORMED WORLD* (2008).

143 Louis Henkin, *The Use of Force: Law and U.S. Policy, in RIGHT v. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 37, 60 (Louis Henkin et al. eds., 1991).

Precautionary self-defense is not analyzed here as an optimum world order, but as the *de facto* world order. Law is an experimental science—it is not found by deriving theorems out of obscure axioms, but by studying what is going on in world affairs expressed through the communicative processes of words and actions of states and other international actors. Science’s role is to try to establish order out of chaos by finding the forces and the laws that govern scientific phenomena. Legal science’s purpose is to decode the international society’s laws as they can be deciphered from its everyday interactions. This is the way we derive what is called *lex lata*. One could certainly point out “the jungle is out there,” defeating any type of analysis that allows for making credible predictions about how nations will behave in the future.¹⁴⁴ Alternatively, one could engage in an analysis of how nations do indeed behave, all the while knowing that, based on the values of human dignity¹⁴⁵ or even elementary considerations of humanity, this should not be the way to behave.¹⁴⁶

The problem is that preemptive self-defense of a precautionary nature is already on the table, and the notion of imminence is, at least as far as these two incidents demonstrate, now stretched to involve decades. Preventive or precautionary strikes in an overt or covert fashion are constantly undertaken in the world without any international complaint.¹⁴⁷ While this is not a desirable world order, it is the current world order—one in which a number of emerging powers compete for pre-eminence and in which there are a vast number of less than sovereign states.

The question before us is not whether to institute preemptive self-defense of a precautionary character as an international norm; this has already happened. The problem, therefore, is what to do about it and how to potentially regulate it. After all, one should not have expected that in a world of weak nonproliferation institutions and loose enforcement machinery, against a backdrop of intensification of competition for the control of resources, that current and aspiring hegemonies would be content to stay within the confines of textual interpretation of neat international norms. Therefore, as the adoption of various doctrines demonstrates, various strategies have been invented to claim exceptionalism or offer one’s own interpretation of international norms.¹⁴⁸ Even proclamations of a responsibility to protect others have been invented

144 When a society’s operational code differs dramatically from the formal system, one would find it very difficult to survive knowing only the formal system’s norms. Immigrants often feel this way in their host societies when; while they know the rules of the formal system, they “cannot get things done” because they do not know how to “work” the system.

145 See MCDUGAL ET AL., *supra* note 141; see also Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

146 See *Corfu Channel Case*, (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9).

147 See, e.g., Salopek, *supra* note 110.

148 For example, the Monroe doctrine, the Reagan doctrine, the Bush doctrine. See generally PRESIDENTIAL DOCTRINES: NATIONAL SECURITY FROM WOODROW WILSON TO GEORGE W. BUSH (Robert P. Watson, et al. eds., 2003).

to allow for action that would not be permitted under a strict interpretation of Article 2(4) of the United Nations Charter.¹⁴⁹

Exceptionalism carries a certain weight. It is unlikely that Israel would have taken action at Osiraq and Al Kibar without believing that the United States would back-up its actions. While the United States went through the motions of diplomacy by officially condemning the Osiraq attack, it tried to moderate other states' reaction to the point that it walked out of the IAEA. Israel would probably not have undertaken the Al Kibar attack without at least cross checking its intelligence information with that of the United States. It was the United States Central Intelligence Agency that, eight months after the attack, published information about the nature of the facility targeted by Israel. Any Arab state wishing to retaliate against Israel knows fully well that it would not only engage Israel's nuclear might but also the United States' military. It has been claimed, "nations of the world will not accept international rules that yield a different answer to the question of whether an action is legal depending on the identity of the actor."¹⁵⁰ While this sounds theoretically accurate, reality is unfortunately lagging behind. This is true because equality before the law cannot subvert, and is often affected by, inequalities in wealth and power. After all, states have acquiesced to an international order in which "imperialistic states"¹⁵¹ (as they have come to be labeled in certain circles) determine the future world order. Since states are equal only in name, perceptions about what each state is permitted to do differ depending on that state's status.

For certain elites, therefore, a world of precautionary, preemptive, surgical, unilateral strikes that could be executed selectively by them is a preferred world order compared to the perils of another world war. These elites' goal is to make war a remote possibility for themselves and their allies, and to transfer all conflicts to other states and localities where a surgical attack that goes astray is unlikely to provoke the same furor as when Western soldiers are at peril. Western society is becoming a precautionary society¹⁵² and, in that vein, it would rather prevent a potential war

149 See, e.g., INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001), available at <http://www.iciss.ca/pdf/Commission-Report.pdf>. The United Nations Secretary-General Kofi Annan, in his report to the 2000 General Assembly, challenged the international community to develop a consensus on how nations are to intervene in other states' affairs. In September 2000, the Government of Canada established the independent International Commission on Intervention and State Sovereignty to respond to that challenge. The commission built its report around the "responsibility to protect" principle. This principle holds that U.N. member states have a responsibility to protect the lives, liberty, and basic human rights of their citizens. If states fail or are unable to carry the responsibility to protect their own citizens, the international community has a responsibility to intervene to do so.

150 Derek W. Bowett, *International Incidents: New Genre or New Delusion?*, 12 YALE J. INT'L L. 386, 388 (1987).

151 See, for example, the Russian Empire, the British Empire or, more benevolently, Pax Americana, Pax Sinica.

152 The notion of the precautionary society has to do with extreme aversion to risks threatening a certain standard of living or lifestyle. See also *supra* note 134. The circulation of

that may touch its gates than wait and see if such war would actually break out. Such a society would be largely risk adverse with regard to warfare that is likely to occur on its territory, but would likely tolerate, with different degrees of ease, conflicts that happen outside its gates, especially if they are surgical so that its conscience is not that much affected.

Actually, it is in the element of a precautionary society to strive to adopt prophylactic measures to avert at all costs the loss of privileges that it has so painstakingly gained, thereby affording itself the right to preempt conflicts entering its space. The fact that other societies may in the future claim the same right has yet to decisively enter strategic thinking because it is believed that the *status quo* of military superiority is likely to be maintained—and should be maintained at all costs¹⁵³—into the future.

The future of warfare may assume multiple directions and dimensions.¹⁵⁴ But, given the potency of new weapons, a third world war could actually bring the end of civilization as we know it. One could arrogantly believe that our Titanic will never sink, but the demise of some great civilizations should bring a sense of humility about what the future may bring.¹⁵⁵ Since another world war must be avoided at all costs, surgical unilateral operations of a precautionary character would be increasingly relied on and tolerated (often with a sigh of relief) and are likely to be viewed as a preferable alternative to an all-out war. In this case, Article 51 of the U.N. Charter may seem hopelessly antiquated, not because its meaning cannot be restricted but because it is limiting the number of broader interpretations that can be assigned to it. In a world filled with weapons of mass destruction, preemptive actions of a precautionary nature may be seen as a desirable, to-be-sought-after alternative to relieve the tensions that accumulate when negotiated solutions are not in sight and messages need to be delivered with actions rather than words. Surgical actions that exhibit one's potency without being overly destructive are, of course, preferred. Given that a world without conflict is an illusion, the question for the twenty-first century is how to structure such conflict so that it does not become a holocaust (this time of the entire human race). In this respect, anticipatory and preemptive self-defense of a

the precautionary principle in international law, for instance, involves the reversal of the burden of proof regarding the hazards of industrialization. According to the precautionary principle, those who initiate a potentially hazardous activity (i.e., the introduction of a new chemical substance) have to prove that the substance will not be harmful to humans and the environment. On the application of precautionary principle/approach in environment law, see ELLI LOUKA, *INTERNATIONAL ENVIRONMENTAL LAW: FAIRNESS, EFFECTIVENESS AND WORLD ORDER* 50-51 (2006).

153 See, e.g., Missile Defense Agency Home Page, DOD, <http://www.mda.mil/mdalink/html/mdalink.html> (highlighting some of the United States' military advancements)

154 See QIAO LIANG & WANG XIANGSUI, *UNRESTRICTED WARFARE* (Beijing: PLA Literature and Arts Publishing House 1999); see also ELLI LOUKA, *THE INTERNATIONAL LAW OF NUCLEAR WARFARE* (forthcoming 2010).

155 See, e.g., JARED M. DIAMOND, *COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED* (2005).

precautionary nature¹⁵⁶ will have a role to play no matter what lawyers who tear their clothes off in protest say.

156 See *Mysterious Air Raid on Sudan: A Battle between Two Long Arms*, *ECONOMIST*, Apr. 4, 2009, at 34 (“Israeli aircraft and/or unmanned drones ... destroyed a convoy of 23 lorries carrying Iranian arms destined for Hamas in mid-January in north-east Sudan. After some confusion, the Sudanese government admitted that such an attack, ‘probably’ by Israel, had indeed taken place just north of Port Sudan on the Red Sea. Exotic but unverifiable claims in various media aver that Israel’s Mossad intelligence service got a tip that the arms were going to be smuggled into the Gaza Strip via Sudan and Egypt; that Israel’s air force had only a few days to prepare its raid; and that 40 or so people in the convoy, including Iranians, may have been killed. Israel’s aim is said to have been to stop Hamas acquiring Iranian Fajr rockets, designed to be stripped down and carried in parts through the tunnels from Egypt into Gaza ... When asked about the attack Israel’s prime minister, Ehud Olmert, responded ‘Who needs to know, knows.’”).

