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THE ATTACK ON OSIRAK: DELIMITATION OF SELF-DEFENSE UNDER INTERNATIONAL LAW

On Sunday June 7, 1981, the Israeli Air Force bombed the Osirak nuclear research reactor near Baghdad, Iraq.¹ As a consequence, the \$275 million² reactor sustained massive damage and at least one person was killed.³ Within twenty-four hours of the raid, Israel's Prime Minister, Menachem Begin, assumed responsibility for the raid, contending that his country was acting in legitimate self-defense.⁴ The Prime Minister insisted that Iraq intended to use the Osirak reactor to produce plutonium bombs that would be used against Israel.⁵ Furthermore, he contended that the attack could not have been delayed because the reactor would have been operational within a few weeks; any raid at that point would result in the emission of radiation throughout the heavily populated center of Baghdad.⁶ Nevertheless, the world commu-

1. McDonald, *Fallout Spreads from Osirak*, MACLEANS, June 22, 1981, at 20. While the Osirak reactor was completely destroyed, the French Foreign Ministry reported that two smaller reactors in the complex were not damaged. Shipler, *Israeli Jets Destroy Iraqi Atomic Reactor*, N.Y. Times, June 9, 1981, at A1, col. 6.

2. Shipler, *supra* note 1, at A1, col. 6.

3. Lewis, *France Condemns Attack and Rejects Israeli Account*, N.Y. Times, June 9, 1981, at A7, col. 1. Shortly after the attack, the French Foreign Ministry reported that a French national, working at the reactor, had been killed. *Id.*

4. Shipler, *supra* note 1, at A1, col. 6. Shortly after the attack, the Israeli Government issued a statement which asserted that:

For a long time, we have followed with grave concern the construction of the Osirak nuclear reactor. Sources of unquestioned reliability told us that it was intended . . . for the production of atomic bombs. The goal for these bombs was Israel. . . . A danger to Israel's existence was being produced. . . . We were therefore forced to defend ourselves against the construction of an atomic bomb in Iraq, which itself would not have hesitated to use it against Israel and its population centers.

N.Y. Times, June 9, 1981, at A8, col. 1. *Text of Israeli Government Statement on Raid, contra Lewis, supra* note 3, at A7. France's condemnation of the raid emphasized that a January 1981 inspection of the Osirak reactor by the International Atomic Energy Agency revealed no diversion of nuclear fuel for military purposes. *Id.*

5. N.Y. Times, *supra* note 4. For a report on Carter Administration concerns that Iraq had purchased equipment from Italy which could be used to produce weapon's grade plutonium, see Burt, *Iraq Said to Get A-Bomb Ability With Italy's Aid*, N.Y. Times, Mar. 18, 1980, at A1, col. 5.

6. Shipler, *supra* note 1, at A1, col. 6. See also N.Y. Times, *supra* note 4, which states:

Highly reliable sources gave us two dates for completion of the reactor and its operation: The first, the beginning of July 1981, the second, the beginning of September this year.

Within a short time, the Iraqi reactor would have been in operation and hot.

nity publicly condemned Israel for the raid.⁷

The focus of world attention soon shifted to the United Nations Security Council as both Iraq and Israel reported the raid pursuant to Articles 39⁸ and 51⁹ of the United Nations Charter.¹⁰ In his initial letter to the President of the U.N. Security Council, Iraq's Minister of Foreign Affairs, Dr. Saadoun Hammadi reported the raid and requested a meeting of the Security Council.¹¹ Dr. Hammadi stated that Iraq was a signatory of the Nuclear Non-Proliferation Treaty (NPT)¹² and did not violate its safeguard agreement with the International Atomic Energy Agency (IAEA).¹³ Iraq noted that Israel had never signed the NPT and termed the raid a "barbarous act."¹⁴ Subse-

In such conditions, no Israeli Government could have decided to blow it up. This would have caused a huge wave of radioactivity over the city of Baghdad and its innocent citizens would have been harmed.

Id.

7. Between June 8, 1981 and June 16, 1981, the President of the United Nations Security Council received letters from twenty-eight governments expressing regret over the raid. For the texts of these letters, see 36 U.N. SCOR, Supp. (April-June) (forthcoming), U.N. Doc. S/14511-44 (1981). See also Lewis, *supra* note 3 (the reactions of the United Kingdom, France and the Soviet Union).

8. U.N. CHARTER art. 39. The article states that "[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace or act of aggression" *Id.*

9. U.N. CHARTER art. 51. The article states in relevant part that "[m]easures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council" *Id.*

10. Both Iraq and Israel reported the raid to the Security Council pursuant to articles 39 and 51 of the U.N. Charter. For texts of these reports, see 36 U.N. SCOR, Supp. (April-June) (forthcoming), U.N. Doc. S/14509 (1981) (Iraq's report) and 36 U.N. SCOR, Supp. (April-June) (forthcoming), U.N. Doc. S/14510 (1981) (Israel's report).

11. 36 U.N. SCOR, Supp. (April-June) (forthcoming), U.N. Doc. S/14509 (1981).

12. *Id.* Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161. The treaty provides for each signatory possessing nuclear weapons not to transfer to or encourage other states to acquire nuclear devices, *id.* art. 1, and each non-nuclear signatory, not to acquire such weapons, *id.* art. 2. The Treaty also provides for the commencement of safeguard agreements between non-nuclear signatories and the International Atomic Energy Agency. *Id.* art. 3. The Treaty further provides for the sharing of peaceful applications of nuclear technology, *id.* art. 5, and is open for the signature of any State during the Treaty's existence. *Id.* art. 9.

13. 36 U.N. SCOR, Supp. (April-June) (forthcoming), U.N. Doc. S/14509 (1981). On January 15, 1957, Iraq became a signatory to the Statute of the International Atomic Energy Agency. This statute established the Agency and promulgated regulatory and inspection procedures to be utilized in safeguarding the peaceful use of nuclear materials. Done October 26, 1956 (multilateral) No. 3988, 276 U.N.T.S. 3. See, e.g., Treaty for the Safeguarding of Nuclear Materials, Sept. 21, 1967, Iraq-International Atomic Energy Agency, 630 U.N.T.S. 41.

14. 36 U.N. SCOR, Supp. (April-June) (forthcoming), U.N. Doc. S/14509 (1981). In a

quently, the Foreign Minister asserted that the Osirak reactor was being constructed for peaceful purposes,¹⁵ pointed out again that Israel had not signed the NPT, in defiance of a General Assembly resolution,¹⁶ and argued that Israel had previously attempted to raid the Osirak complex.¹⁷ He contended that Israel possessed nuclear weapons and was attempting to impose military hegemony over the region.¹⁸

Israel's Ambassador to the United Nations, Yehuda Blum, stated that the reactor would be used to produce nuclear weapons. He further stated that "the target for such bombs would be Israel. This was clearly announced by the ruler of Iraq. After the Iranians inflicted slight damage on the reactor, Saddam Hussein stressed that the Iranians had attacked the reactor in vain since it was being constructed against Israel alone."¹⁹ The Ambassador pointed out that the reactor would have provided Iraq with the capacity to produce Hiroshima-type bombs and would have become operational between July and September of 1981.²⁰ Further, he explained that the raid was executed on a Sunday, when the 100-150 foreign technicians who worked there would not be present.²¹

telegram to the United Nations Security Council, the Board of Governors of the IAEA declared that Iraq had not violated its safeguard agreement and condemned Israel's raid as undermining its safeguard system. 36 U.N. SCOR, Supp. (April-June) (forthcoming), U.N. Doc. S/14532 (1981).

15. 36 U.N. SCOR, Supp. (April-June) (forthcoming), U.N. Doc. S/14514 (1981). An Iraqi Government statement issued shortly after the raid stated that Israeli planes previously attempted to destroy the Osirak reactor "in the first days of the war . . . in collusion with the suspect regime in Iran." *Text of Iraqi Government Statement on Raid*, N.Y. Times, June 9, 1981, at A8, col. 3.

16. See G.A. Res. 71, 31 U.N. GAOR Supp. (No. 39) at 36, U.N. Doc. A/31/39 (1976). See also G.A. Res. 89, 34 U.N. GAOR Supp. (No. 46) at 65, U.N. Doc. A/34/46 (1979). The General Assembly refers to evidence that Israel had been developing nuclear weapons in collusion with South Africa. In addition to calling upon Israel to submit to IAEA safeguards, the resolution asked for other states to terminate nuclear cooperation with Israel. *Id.*

17. 36 U.N. SCOR, Supp. (April-June) (forthcoming), U.N. Doc. S/14514 (1981). In September 1980, a bombing raid on the Osirak reactor failed. The press had reported that this raid was perpetrated by Iran in furtherance of its war with Iraq. Tanner, *Khomeini Dismisses Truce Offer, Vowing "Fight to the End,"* N.Y. Times, Oct. 1, 1980, at A1, col. 6.

18. 36 U.N. SCOR, Supp. (April-June) (forthcoming), U.N. Doc. S/14514 (1981). See also, Burnham, *C.I.A. Said in 1974 Israel Had A-Bomb*, N.Y. Times, Jan. 27, 1978, at A5, col. 1. The article reveals the contents of a C.I.A. report released pursuant to the Freedom of Information Act, which reports suspicions that at the time Israel had produced ten nuclear devices. The report further stated that Israel's Government had invested heavily in the development of a delivery system capable of carrying weapons. *Id.*

19. 36 U.N. SCOR, Supp. (April-June) (forthcoming), U.N. Doc. S/14510 (1981).

20. *Id.*

21. *Id. See also supra note 4.*

The Security Council concluded its debate by unanimously condemning Israel.²² It based its condemnation on a telegram from the Board of Governors of the IAEA asserting that Iraq had not violated its safeguard agreement,²³ and termed the Israeli attack to be "in clear violation of the Charter of the United Nations and the norms of international conduct."²⁴

Despite prolonged debate at the Security Council, the legality of the Israeli attack under international law has not yet been determined.²⁵ This article will examine that question by utilizing a legal analysis developed by Myres S. McDougal and Florentino Feliciano in their book *Law and Minimum World Public Order*.²⁶ The McDougal-Feliciano analysis promulgates a theory of self-defense premised on the concept that the common interest demands at least a minimum level of public order.²⁷ Their theory, therefore, seeks to restrict the use of violent self-defense while recognizing that the world community has not yet achieved the capacity to provide security from aggression within the state system.²⁸ They assert that in certain circumstances the unilateral use of force is a permissible means of self-defense.²⁹ They con-

22. See U.N. Doc. S/PV 2280-88 (1981) for texts of debates in the Security Council on this matter. For the text of the resolution condemning Israel for the raid, see 36 U.N. SCOR, Supp. (April-June) (forthcoming), U.N. Doc. S/14556 (1981).

23. 36 U.N. SCOR, Supp. (April-June) (forthcoming), U.N. Doc. S/14556 (1981). See also 36 U.N. SCOR, Supp. (April-June) (forthcoming), U.N. Doc S/14532 (1981) for the text of the telegram from the IAEA. But see N.Y. Times, Nov. 8, 1980, at A4, col. 4, which reports that Iraq denied the IAEA inspectors and French technicians access to the Osirak reactor during part of 1980, ostensibly because of the war with Iran. *Id.*

24. 36 U.N. SCOR, Supp. (April-June) (forthcoming), U.N. Doc. S/14556 (1981). The resolution found that Israel had violated article 2(4) of the United Nations Charter, and in addition to condemning the act, called upon Israel to "place its nuclear facility under IAEA safeguards." U.N. Charter art. 2(4) states that "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. . . ." *Id.*

25. D'Amato, *Imagining a Judgment in the Case of Iraq vs. Israel*, Washington Star, June 15, 1981, at A8, col. 3. Anthony D'Amato, Professor of Law at Northwestern University, contends that it is probable that the legality of the Israeli raid will never be determined by an international tribunal. *Id.*

26. M. McDougal & F. Feliciano, *LAW AND MINIMUM PUBLIC ORDER* (1961) [hereinafter cited as M. McDougal & F. Feliciano].

27. M. McDougal & F. Feliciano, *supra* note 26, at 213-14. McDougal and Feliciano assert that the maintenance of at least a minimal degree of public order is in the common interest. Attempts to change the status quo, what they term the present distribution of values by force, are inconsistent with this common interest. *Id.*

28. *Id.* at 213-14. Professor John Spanier writes that the United Nations cannot play a peacekeeping role since it merely reflects the political interests of its member states, unable to rise above politics. J. SPANIER, *GAMES NATIONS PLAY* 243 (2d ed. 1975).

29. M. McDougal & F. Feliciano, *supra* note 26, at 213-14. McDougal and Feliciano identify the most conspicuous circumstances in which the unilateral use of force may be

cede that the target state, the state claiming to have used self-defense, must initially determine whether such force is justifiable.³⁰ The lawfulness of a claim to self-defense, however, ultimately should be determined by objective third parties. Such parties should be charged with furthering the common interest by facilitating at least a minimum level of order among states.³¹ They must base their determination upon the necessity for the target state to utilize force and the proportionality of the force used, in reference to the threat imposed by the initiating coercion. McDougal and Feliciano recommend that objective decisionmakers first examine the lawfulness of the initiating coercion, and then the magnitude of the threat posed by the unlawful action.³² The initiating coercion should be examined in terms of the characteristics of the participants, the nature of their objectives, the conditions in which they operated and the actual and prospective effects of their plans.³³ The actions of the state claiming to have acted in self-defense must also be examined in terms of these same factors.³⁴ At this stage, the decisionmakers can determine whether force was legally utilized by comparing the need to act and the proportionality of that act. McDougal and Feliciano assert that “[p]roportionality in coercion constitutes a requirement that responding coercion be limited in intensity and magnitude to what is reasonably necessary to secure the permissible

justified as those in response to current forceful coercion, and those in anticipation of highly intense coercion. They recognize, however, that the concept of anticipatory self-defense is subject to abuse. *Id.* at 209-10.

30. *Id.* at 218. McDougal and Feliciano recognize that it is unrealistic to expect a target state to wait for authorization by an international body in order to defend itself because there is an everpresent possibility that an international organization will not act. *Id.*

31. *Id.* at 220. It is asserted that the reporting provisions in articles 39 and 51 of the U.N. Charter indicate that the Security Council is competent to determine the legality of a claim to self-defense. *Id.* But see J. SPANIER, *supra* note 28. Spanier argues that the United Nations “only registers the power politics of the state system.” *Id.* at 243. Spanier wrote that decisions of the United Nations “are not made according to some impartial, nonpolitical, and therefore purportedly morally superior standard of justice.” *Id.*

32. M. McDUGAL & F. FELICIANO, *supra* note 26, at 217-18. Under the United Nations Charter, threats to use force as well as the actual use of force, may constitute unlawful state action. See U.N. CHARTER art. 2, para. 4.

33. M. McDUGAL & F. FELICIANO, *supra* note 26, at 217-18. These factors are considered by McDougal and Feliciano to be particularly useful for balancing necessity and proportionality. *Id.*

34. *Id.* at 220. Although when examining initiating coercion the decisionmaker is concerned with those aspects of the status quo a state is seeking to change, when examining these factors in relation to the target state, it is important to isolate portions of the status quo that state is seeking to maintain. *Id.*

objectives of self-defense."³⁵

An examination of available facts leads to the conclusion that the Israeli Government could have reasonably perceived that the Osirak reactor would be used for the production of nuclear weapons. On the other hand, the Israeli contention that Iraq would use nuclear weapons against them is less persuasive. Although historical factors and recent Iraqi government statements lend credibility to the Israeli claim, an Iraqi first-strike was neither imminent nor certain to occur in the future.

Once these factual findings are developed, it will be necessary to clarify the scope of permissible self-defense under international law. The argument will be made that while Article 51 of the United Nations Charter recognizes a State's inherent right to self-defense, it does not limit that right solely to the repulsion of an actual armed attack. The factual questions relevant to this analysis are: Could the Israelis have reasonably perceived that Iraq was planning to use the Osirak reactor for the production of nuclear weapons? If so, is it reasonable to perceive that Iraq would indeed use such weapons in a surprise attack against Israel?

The Security Council has emphasized that Iraq has signed the Nuclear Non-Proliferation Treaty and has submitted safeguards to IAEA.³⁶ In his June 12 speech before the Security Council, Dr. Hammadi noted that the last inspection of the Osirak reactor, in January 1981, had accounted for all reported nuclear fuel.³⁷ The IAEA sent a telegram to the Security Council affirming that it had not found violations by Iraq during its inspections.³⁸ Nevertheless, the Israeli Government contends, and collateral evidence confirms,³⁹ that a finding by the

35. *Id.* at 242-43.

36. See U.N. Doc. S/PV 2280, at 26 (1981). See also 36 U.N. SCOR, Supp. (April-June) (forthcoming), U.N. Doc. S/14556 (1981) (the Security Council resolution condemning the Israeli raid).

37. U.N. Doc. S/PV 2280, at 31 (1981). Mr. Hammadi quoted from the statement of the IAEA made at the agency's Board of Governors' meeting on June 9, 1981 assuring that "all nuclear material there (Osirak) was satisfactorily accounted for." *Id.*

38. 36 U.N. SCOR, Supp. (April-June) (forthcoming), U.N. Doc. S/14532 (1981). See *supra* note 14.

39. *The Israeli Attack on Iraqi Nuclear Facilities: Hearings Before the Sub-Committees on International Security and Scientific Affairs on Europe and the Middle East and on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 97th Cong., 1st Sess. (1981) [hereinafter cited as *Hearings*]. Despite IAEA safeguards, the Carter Administration was concerned that the sale of a hot cell, a laboratory which could be used to transform materials with relatively low concentrations of uranium into enriched uranium, by Italy to Iraq, could lead to the proliferation of nuclear weapons. Burt, *supra* note 5, at A-1.

IAEA of no violation should not be considered conclusive.⁴⁰ In June 1981, Roger Richter, who had been an IAEA inspector at the time of the raid, testified before the Senate Foreign Relations Committee and the House Foreign Affairs Committee that IAEA inspection procedures were inadequate to prevent Iraq from producing plutonium at Osirak.⁴¹ He testified that several key facilities are not subject to safeguards.⁴² Natural uranium, otherwise known as yellowcake, is not subject to inspection, despite a potential to transform that material to plutonium.⁴³ He further stated that "in spite of having signed the NPT, the most sensitive facilities in the nuclear reactor complex would remain outside of the purview of the IAEA, as long as Iraq did not declare that they contained either plutonium or uranium metal or oxide."⁴⁴ Near the conclusion of Richter's testimony, he read the following passage from a letter he had written in 1980 to the United States mission to the IAEA:

The available information points to an aggressive coordinated programme by Iraq to develop a nuclear weapons capability during the next five years. As a nuclear safeguards inspector at the IAEA, my concern, and complaint is that Iraq will be able to conduct this program under the auspices of the Non-Proliferation Treaty, and while violating provisions of the NPT. The IAEA safeguards are totally incapable of detecting

40. The safeguard procedure prior to the starting-up of the reactor is limited to measuring amounts of enriched uranium reported to the IAEA. It is clear that the process of separating plutonium from enriched uranium cannot commence until the reactor has become activated. It is at this state that IAEA procedures are alleged to be inadequate. See generally *infra* notes 41-50. See also *Hearings, supra* note 39, at 51-59. (testimony of Roger Richter). Albert Carnesdale, Professor of Public Policy at Harvard University's Kennedy School of Government, testified that it was improbable, but not impossible for Iraq to produce nuclear weapons without detection by the IAEA or intelligence organizations of various states. *Id.* at 47.

41. *Hearings, supra* note 39, at 51-59. A concern expressed by Richter is that states receive advance notice of IAEA inspections due to the need for inspectors to obtain a visa in order to enter the country. *Id.* at 53. Iraq and other states may also veto inspectors. *Id.* Since 1976 only Soviet and Hungarian nationals have inspected the Osirak reactor. *Id.* Richter further testified that the infrequency of inspections makes it possible for illicit activities to be covered up. *Id.* at 55.

42. *Id.* at 59. IAEA inspectors can only inspect materials declared by the host country to be used for fabricating uranium fuel. *Id.* at 54-55. The hot cells provided by Italy are capable of converting yellowcake (uranium 308) into uranium metal, but are not subject to IAEA safeguards. *Id.* at 54.

43. See *infra* notes 56-58 and accompanying text. See also *Hearings, supra* note 39, at 54. Mr. Richter, in his testimony, described a scenario in which Portugal reported that it supplied 200,000 pounds of yellowcake to Iraq. He noted that this material would not be subject to IAEA safeguards. *Id.*

44. *Hearings, supra* note 39, at 54 (testimony of Roger Richter).

the production of plutonium in large size material test reactors under the presently constituted safeguards arrangements.⁴⁵

Concern about the Indian explosion of a nuclear device in 1974⁴⁶ and Iraq's efforts to obtain highly enriched uranium in larger quantities than needed for non-military purposes⁴⁷ led Francis Perrin, former head of France's Atomic Energy Commission, to oppose the sale of nuclear technology to Iraq.⁴⁸ The exemption of yellowcake from the safeguard system,⁴⁹ the ability of Iraq to have prior notice of inspections and reject inspectors,⁵⁰ the lack of video or photographic surveillance at Osirak and the temporary denial of access by Iraq to French technicians and IAEA inspectors in 1980,⁵¹ cast a measure of doubt upon the reliability of the IAEA safeguards system. Therefore, further examination is necessary to determine whether Israel's government reasonably perceived Iraq to be using the Osirak reactor for the production of nuclear weapons.

During the Security Council debate, Israel's Ambassador contended that in 1974 Iraq sought to buy a 500 megawatt nuclear reactor designed to produce plutonium.⁵² He also contended that Iraq insisted on acquiring weapons grade uranium rather than caramel, a fuel which is incapable of being transformed into plutonium.⁵³ Moreover, Iraq has acquired a \$50 million laboratory, in which weapons grade plutonium can be separated from spent uranium.⁵⁴ In addition to insisting upon

45. *Hearings, supra* note 39, at 58-59. The record of the hearings reveals an attempt to have this letter classified. Albert Carnesdale testified that French concern about diversion might have led to an agreement to maintain French technicians until 1989. *Id.* at 79.

46. Kramer, *Israel was Right*, NEW YORK, June 29, 1981, at 8. For an Indian perspective on the NPT system and diplomatic effects of India's 1974 nuclear test, see Kapur, *India's Nuclear Presence*, 30 WORLD TODAY 459 (1974).

47. *Hearings, supra* note 39, at 69. Roger Richter testified that Iraq's purchase of 200,000 pounds of yellowcake from Portugal appeared to be in excess of its needs. *Id.*

48. *No Option*, NEW REPUBLIC, June 20, 1981, at 5 [hereinafter cited as *No Option*].

49. See *supra* note 43 and accompanying text.

50. See *supra* note 41 and accompanying text.

51. N.Y. Times, *supra* note 23.

52. U.N. Doc. S/PV 2280, at 46 (1981).

53. Lewis, *French Ask Aid on Atomic Fuel Unsuited to Bomb*, N.Y. Times, Mar. 9, 1980, at A5, col. 1. Despite the projected availability of caramel by the time Iraq was scheduled to receive its first shipment of nuclear fuel from France, Iraq insisted upon obtaining enriched uranium. The Iraqis contended that a substitution of the enriched uranium would imply that Iraq was not to be trusted. *Id.*

54. Burt, *supra* note 5 at 1. United States officials expressed concern to Italy about this sale which included collateral plans for Italy to provide sophisticated training to Iraqi technicians on methods to separate plutonium from spent uranium. The article noted that Italy purchases ½ of its oil supply from Iraq. *Id.*

obtaining weapons grade uranium from France,⁵⁵ Iraq had purchased yellowcake from Brazil⁵⁶ and was negotiating with Portugal for additional amounts of this substance.⁵⁷ Yellowcake contains fissionable uranium in very low proportions, but can be converted to plutonium and, unlike the enriched uranium supplied by France, is not subject to IAEA safeguards.⁵⁸

In his speech before passage of the Security Council resolution condemning the Israeli raid, Ambassador Blum contended that Iraq failed to address Israel's contentions.⁵⁹ At no point during the Security Council debate did Iraq explain why, in addition to buying a nuclear reactor, it insisted upon acquiring, and did acquire, materials capable of producing plutonium which were not subject to IAEA safeguards. Nor did Iraq explain its insistence upon acquiring a \$50 million facility in which materials could be converted into plutonium.⁶⁰ In the absence of such an explanation, the Israeli perception that Iraq would produce nuclear weapons was understandable.

Further analysis reveals that Israel plausibly could have perceived a scenario in which it would be victimized by a surprise nuclear strike by Iraq. Nevertheless, serious doubts exist about the likelihood of such an event. One could speculate that Iraq planned to produce nuclear weapons in order to increase its prestige among non-aligned states. Plausibly, Iraq could have perceived nuclear weapons as a deterrent to a threat by any other state to expropriate forcibly its vast oil resources. Moreover, it is likely that a nuclear attack by Iraq would be deterred because it would wreak havoc on a territory Iraq would like to see controlled by its Palestinian allies. The risk of reprisal by Israel or the United States would be a further deterrent. Nevertheless, one must bear in mind that since Israel achieved statehood in 1948, continuous friction has existed between Israel and Iraq in varying degrees of inten-

55. See *supra* note 53 and accompanying text.

56. Schechter, *Could Iraq Have Built the Bomb?*, DISCOVER, Aug. 1981, at 62. Upon the signing of a nuclear cooperation pact with Brazil on Sept. 29, 1979, Iraq's Ambassador to that country was reported to have stated: "If our enemy Israel is close to building an atomic bomb, or already has one, what prevents us from developing the same capacity?" *Hearings, supra* note 39, at 22. United States officials were unable to confirm or deny the authenticity of the aforementioned statement.

57. See *Hearings, supra* note 39, at 54. Roger Richter testified that Portugal reported to the IAEA a sale of 200,000 pounds of yellowcake to Iraq. *Id.*

58. Schechter, *supra* note 56, at 62.

59. U.N. Doc. S/PV 2288 (1981), at 18.

60. See generally U.N. Doc. S/PV 2280-88 (1981). Iraq limited its arguments pertaining to its own intentions and activities to frequent reiterations that it was a signatory of the NPT and that the IAEA reported no violation in its January 1981 inspection. *Id.*

sity.⁶¹ Three wars have erupted between Israel and Arab states, including Iraq, during that period.⁶² In the 1973 Yom Kippur War, Iraq contributed 20,000 men and 320 tanks to an Arab invasion force perpetrating an attack on the State of Israel.⁶³ Iraq claimed that this assistance did not violate international law because it had never signed a peace treaty with Israel and, therefore, it considered the two countries to be in a state of war.⁶⁴ Iraq's Government continues to contribute resources to the Palestinian Liberation Organization, which has utilized terrorism against Israel's civilian population.⁶⁵ In fact, Iraq has never acknowledged Israel's right to exist as a state.⁶⁶ Refusing to refer to Israel by name, official Iraqi communications refer to Israel as the "Zionist Entity."⁶⁷ Moreover, official organs of Iraq's government have made statements indicating a willingness to attack Israel once again. During the Arab Summit of August 1980 the following message was broadcast over Radio Baghdad: "President Saddam Hussein has stressed that a decision better than boycotting the states that move their embassies to Arab Jerusalem is to destroy Tel Aviv with bombs."⁶⁸ It was widely reported that after the attempted attack of Osirak in September 1980, Baghdad's official newspaper claimed that the reactor would not be used against Iran but rather against what it termed the "Zionist Entity."⁶⁹ No evidence has been uncovered that the Iraqi Government sought to assure Israel that this was not the case.⁷⁰

61. Iraq has been among the most strident of Arab countries challenging Israel's right to exist as a state, and has continually rejected a peaceful solution to its longstanding dispute with Israel. Freedman, *Inter-Arab Politics and the Arab-Israeli Conflict*, in **WORLD POLITICS AND THE ARAB-ISRAELI CONFLICT** 89, 106 (R. Freedman ed. 1979).

62. *No Option*, *supra* note 48, at 5.

63. *Id.*

64. *No Option*, *supra* note 48, at 5. Iraq's Ba'athist regime has served to goad Arabs toward a violent solution of the Arab-Israeli conflict. It has rejected Security Council Resolution 242, which provides for negotiations based upon the principle of peaceful co-existence. Thoman, *Iraq Under Ba'athist Rule*, 62 *CURRENT HISTORY* 31, 37 (1972). See also D'Amato, *supra* note 25.

65. *No Option*, *supra* note 48, at 5. In 1981, the Reagan Administration listed Iraq as one of the world community's leading supporters of international terrorism. *Hearings*, *supra* note 39, at 14 (testimony of Ambassador Stoessel).

66. *Hearings*, *supra* note 39, at 14 (testimony of Ambassador Stoessel).

67. *No Option*, *supra* note 48, at 5. See also N.Y. Times, *supra* note 15.

68. Kramer, *supra* note 46, at 10.

69. Safire, *Hail to the Nuclear Entebbe*, N.Y. Times, June 11, 1981, at A23, col. 5. The State Department has not publicly confirmed or denied that this statement appeared in an editorial in the Oct. 4, 1980 edition of Iraq's government newspaper, *al-Gumhuriya*. *Hearings*, *supra* note 39, at 22.

70. See generally U.N. Doc. S/PV 2280-88 (1981).

A major factor that would prevent Iraq from launching such a surprise attack is the threat of nuclear retaliation. It is believed that Israel has stockpiled nuclear weapons at Dimona in the Negev Desert.⁷¹ Iraq rationally could perceive, however, that unless the Israelis constantly maintain nuclear weapons in flight, a surprise nuclear attack could destroy Israel's retaliatory capacity. Israel's vulnerability to nuclear attack is heightened by its concentrated population and relatively small territory.⁷² Thus, it is clear that Israel could perceive a scenario in which Iraq would use nuclear weapons in a surprise attack against its territory. At this stage, it must be clarified that this conclusion, as well as the previous finding that Israel could reasonably have perceived that Iraq was planning to use Osirak for the production of nuclear weapons, is based solely upon presently available information.⁷³ Nevertheless, factual findings are indispensable to the framing of the legal issue of this case. Taking into account the plausibility of Israel's perceptions regarding Iraq's nuclear program, the question for consideration is: Was the bombing of this nuclear complex a legitimate act of self-defense under international law?

Professor McDougal has characterized the concept of self-defense as highly intense coercion in response to unlawful initiating coercion.⁷⁴ Julius Stone, another scholar of international law, stated that "[t]he right of self-defence under general international law is as vague as it is unquestioned, and as liable to abuse in its application as it is indispensable in the present phase of international society."⁷⁵ Prior to this cen-

71. Burnham, *C.I.A. Said in 1974 Israel Had A-Bomb*, N.Y. Times, Jan. 27, 1978, at A5, col. 1. The CIA disclosed pursuant to a Freedom of Information Act request that it believed Israel had produced atomic bombs as early as 1974. Israel had also been developing an expensive missile system, capable of delivering nuclear weapons. *Id.*

72. *No Option*, *supra* note 48, at 8. Israel's territory, including areas occupied prior to the 1973 war was 7,993 square miles with a population density of 360 people per square mile. Iraq's territory is 167,925 square miles and its population density is 53 people per square mile. *Rand McNally Premier World Atlas* 163 (1971).

73. A glimpse at transcripts of hearings held by subcommittees of the United States House of Representatives reveals that the great magnitude of facts on this matter are classified. See generally *Hearings*, *supra* note 39.

74. M. McDUGAL & F. FELICIANO, *supra* note 26, at 209. McDougal and Feliciano divide self-defense into three categories. The type of self-defense dealt with in this article is referred to as a claim "to employ highly intense coercion against allegedly impermissible coercion." *Id.* The present claim can be sub-categorized as a claim "to resort to force in anticipation and prevention of intense coercion." *Id.* at 209-10.

75. J. STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 243, 244 (1954). Stone further contends that Article 51 provides that a state is not the sole judge of its own actions, but is subject to review by the Security Council. Yet the effect of this restraint is reduced due to the ability of permanent members of the Security Council to veto resolutions. *Id.*

tury, self-defense was not a term of art in international law.⁷⁶ Throughout the nineteenth century Europeans equated security with a balance of power among states.⁷⁷ War was considered a tool, at the disposal of states, to restore this balance when one state threatened to achieve military hegemony over a region.⁷⁸ Thus, non-participants were not expected to consider the legality of armed conflict.⁷⁹ The massive devastation brought upon by World War I, however, led to a popular revulsion against war and a change in the nature of international relations.⁸⁰ War was discredited as an instrument of national policy,⁸¹ and statesmen, spurred by popular opinion, attempted to establish a structure, the League of Nations, whereby states could settle their disputes and achieve security by peaceful means.⁸²

By 1928 the notion of outlawing war had captured the imagination of Americans and was received enthusiastically by a war-ravaged Europe.⁸³ On August 27, 1928, a multilateral treaty, which outlawed war

76. See generally KISSINGER, A WORLD RESTORED (1973). Kissinger describes the balance of power system which, he argues, dominated international relations during the nineteenth century. *Id.*

77. *Id.* at 144-74. Kissinger wrote: "The foundation of a stable order is the *relative* security—and therefore the *relative* insecurity—of its members. . . . The security of a domestic order resides in the preponderant power of authority, that of an international order in the balance of forces and in its expression, the equilibrium." *Id.* at 145.

78. A. TOYNBEE, A SURVEY OF INTERNATIONAL AFFAIRS: 1928 3(1929). Hans Morgenthau wrote:

The balance of power of that period (19th century) was amoral rather than immoral. The technical rules of art of politics were its only standard. Its flexibility, which was its peculiar merit from the technical point of view, was the result of imperviousness to moral considerations, such as good faith and loyalty, a moral deficiency that to us seems deserving of reproach.

H. MORGENTHAU, POLITICS AMONG NATIONS 190 (3d ed. 1960).

79. J. STONE, *supra* note 75, at 297. Stone writes that "[r]esort to war was neither legal nor illegal; international law suffered, as it were, a kind of blackout while the choice of peace or war was being made." *Id.*

80. A. TOYNBEE, *supra* note 78, at 4-6. In the twentieth century, beginning with World War I, the fraction of each state's population involved in war increased dramatically. Civilian populations became targets due to their productive contributions to war efforts. H. MORGENTHAU, *supra* note 78, at 242.

81. M. McDUGAL & F. FELICIANO, *supra* note 26, at 139. Morgenthau argues that the result of World War I was the breakdown of a system of international relations in which compromise could often be used to maintain the peace. H. MORGENTHAU, *supra* note 78, at 259.

82. M. McDUGAL & F. FELICIANO, *supra* note 26, at 139. A component of the Versailles Treaty was the establishment of the League of Nations. Its preamble states: "The High Contracting Parties In order to promote international cooperation and to achieve international peace and security by the Covenant of the League of Nations." League of Nations Covenant Preamble. See generally H. BRAILSFORD, A LEAGUE OF NATIONS (1917).

83. A. ZIMMERN, THE LEAGUE OF NATIONS AND THE RULE OF LAW: 1918-1935, at 399

as an instrument of international relations, was signed.⁸⁴ This treaty is popularly referred to as the Kellogg-Briand Pact.⁸⁵ Despite its outlawing of war, it seems clear that the Kellogg-Briand Pact did not limit the right of any state to exercise self-defense.⁸⁶ The Senate Foreign Relations Committee Report recommended United States consent to the Treaty and contained the following passage: "The Committee reports the . . . Treaty with the understanding that the right of self-defence is in no way curtailed by the conditions of the Treaty."⁸⁷ In analyzing the Treaty, the British scholar Arnold Toynbee wrote:

On the question of self-defence, Mr. Kellogg declared that the right of self-defence was not limited to the defence of territory under the sovereignty of the state concerned, and that, under the Treaty, each state would have the prerogative—or the responsibility—of judging for itself what action the right of self-defence covered and when it came into play, subject to the risk that this judgement might not be endorsed by the rest of the world.⁸⁸

While renouncing war as a legitimate tool of national policy, it is clear that Secretary Kellogg, a major architect of the Treaty, intended that the right to self-defense remain.⁸⁹ The Kellogg-Briand Pact as interpreted by Toynbee recognized a broad right of self-defense, one that certainly was not limited to repulsion of an actual attack. Nevertheless, while recognizing that initially only the state claiming self-defense is competent to make that determination, eventually the propriety of a

(1945) [hereinafter cited as A. ZIMMERN]. The Kellogg-Briand Pact had its roots in a crusade led by S.O. Levinson, a Chicago lawyer, shortly after World War I. Despite non-membership in the League of Nations, this pact provided the United States a leadership role in the new world order. *Id.* at 399.

84. General Treaty for Renunciation of War as an instrument of National Policy, Aug. 27, 1928, 46 STAT. 2343, T.S. No. 796, 94 L.N.T.S. 94 [hereinafter cited as Kellogg-Briand]. This treaty originally was signed in Paris by 15 countries, and by March 10, 1930, 65 countries joined as signatories. ZIMMERN, *supra* note 83, at 399.

85. See A. ZIMMERN, *supra* note 83. The diplomatic activity which led to this treaty began with communications between U.S. Secretary of State Francis Kellogg and French Foreign Minister Aristole Briand. *Id.* at 397-99.

86. J. STONE, *supra* note 75, at 300. The Kellogg-Briand Pact, *supra* note 84, states: "[T]he High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another." *Id.* art. 1.

87. A. TOYNBEE, *supra* note 78, at 39.

88. *Id.*

89. Kellogg, *Address by Secretary of State Kellogg Before the American Society of International Law: April 28, 1928*, PROC. AM. SOC. INT'L L. 141, 143 (1928).

self-defense claim must be judged by the world community.⁹⁰

After World War II, the world community once again sought to develop a structure, the United Nations, which would facilitate order among states. Article 2(4) of the United Nations Charter states: "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."⁹¹ Article 51 states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations."⁹²

Although the United Nations Charter outlaws the aggressive use of force, scholars have debated the permissible scope of self-defense.⁹³ Some argue that the U.N. Charter should be literally interpreted, recognizing self-defense *only* in situations when an armed attack occurs.⁹⁴ They argue that the restrictive language of Article 51 reveals an explicit intent of the framers to so limit this right of self-defense.⁹⁵ Others have written that Article 51 only recognizes the right of self-defense as an inherent component of state sovereignty and that the legitimacy of this right is not subject to review when utilized against an attack which has commenced.⁹⁶

The Israeli raid on Osirak was perpetrated to prevent a possible future attack, not to repel an attack which had begun. Under the restrictive interpretation of self-defense, the Israeli raid violates international law. Such a constricted conception of self-defense, however, was not recognized prior to the passage of the United Nations Charter,⁹⁷

90. M. McDougal & F. Feliciano, *supra* note 26, at 218-19. The party using force in self-defense does so at its peril. However, to wait for organs of the world community to determine the necessity of acting is a utopian concept. *Id.*

91. U.N. CHARTER art. 2(4).

92. U.N. CHARTER art. 51.

93. See *infra* notes 94 and 96.

94. See, e.g., P. JESSUP, A MODERN LAW OF NATIONS 166 (1948); 2 OPPENHEIM'S INTERNATIONAL LAW 156 (H. Lauterpacht 7th ed. 1952).

95. See, e.g., Moursi Badr, *The Exculpatory Effect of Self-Defense in State Responsibility*, 10 GA. J. INT'L & COMP. L. 1, 16 (1980). Moursi Badr argues that it is self-evident from the text of the Charter that self-defense is only permissible in response to an armed attack. He states that "only the most violent and massive forms of armed aggression qualify as armed attack and justify the use of force in self-defense under Article 51." *Id.*

96. See, e.g., M. McDougal & F. Feliciano, *supra* note 26, at 240-41; L. GOODRICH, E. HAMBRO & A.P. SIMONS, CHARTER OF THE UNITED NATIONS 344 (3d rev. ed. 1969). [hereinafter cited as GOODRICH]. See also D. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 192 (1958).

97. Contra Moursi Badr, *supra* note 95. He argues that although the law of self-

and, as some writers have suggested, such an interpretation is inappropriate in the present nuclear age.⁹⁸

Louis Henkin⁹⁹ is among the group of renowned international law scholars that interprets Article 51 literally. He writes:

The fair reading of Article 51 permits unilateral use of force only in very narrow and clear circumstances, in self-defense if an armed attack occurs. Nothing in the history of its drafting . . . suggests that the framers of the Charter intended something broader than the language implied. Since the Charter was drafted, the world for which it was written has changed. The United Nations has changed. The quality of force has changed. But neither the failure of the Security Council, nor the Cold War, nor the birth of new nations, nor the development of terrible weapons, suggests that the Charter should now be read to authorize unilateral force when an armed attack has not occurred.¹⁰⁰

Henkin further argues that a broader right to self-defense would serve to encourage abuse.¹⁰¹

Despite the explicit language and the risk of abuse, several statesmen and scholars have argued persuasively that an examination of the reasons for drafting Article 51 and common sense indicate that the U.N. Charter, like the Kellogg-Briand Pact, does not restrict a state's right to use self-defense.¹⁰² Commenting upon the Dumbarton Oaks

defense was not specific, it was understood that self-defense was only valid in response to an armed attack. *Id.*

98. See, e.g., MacChesney, *Some Comments on the "Quarantine" of Cuba*, 57 AM. J. INT'L L. 592, 595 (1963).

Nothing in the history of Article 51 requires a construction limiting self-defense to a response to an armed attack. Realism, common sense, and the destructive nature of modern weapons demand the retention of this customary right under adequate safeguards until the community system makes its use no longer necessary.

Id.

99. Louis Henkin is a Professor of Law at Columbia University.

100. L. HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 232-33 (1968). See *supra* note 94 for scholars who adhere to Henkin's view.

101. *Id.* at 233-36. Henkin concedes that a state which perceives that a nuclear attack against it is imminent will certainly not idly wait for obliteration. He argues, however, that legal recognition of anticipatory self-defense would encourage states to execute violence using self-defense as a pretext. *Id.*

102. See *supra* note 96 and accompanying text. See also McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597, 600 (1963) which states in part:

Nothing in the "plain and natural meaning" of the Charter requires an interpre-

Proposals, the document which formed the basis for the U.N. Charter, Turkey's delegate to the San Francisco Conference stated:

The Proposals do not contain any provisions on the subject of legitimate defense. Although this right is of an obvious nature, it would be useful to insert in the Charter a provision justifying legitimate self-defense against a surprise attack by another state. Nevertheless, even in such a case the Council should have an entirely free hand to judge the circumstances under which legitimate defense has occurred, as well as the justification for the measures taken by the party which has been compelled to defend itself.¹⁰³

Article 51 was not inserted into the U.N. Charter in order to define the scope of self-defense.¹⁰⁴ Moreover, rather than granting a right to self-defense, Article 51 merely recognized that such a right existed and was inherent.¹⁰⁵

Common sense dictates that it is unrealistic to expect a state to wait until an actual armed attack has occurred before taking steps to defend itself.¹⁰⁶ This notion is strengthened when a state reasonably perceives that nuclear weapons will be used against it. During the Cuban Missile Crisis, for example, the United States utilized the military option of blockading Cuba, in order to prevent further nuclear materials from reaching that country.¹⁰⁷ If missiles were operational from

tation that Article 51 restricts the customary right of self-defense. The proponents of such an interpretation substitute for the words "if an armed attack occurs" the very different words "if, and only if, an armed attack occurs."

Id.

103. *Suggestions of the Turkish Government Concerning the Proposals for the Maintenance of Peace and Security Agreed on at the Four Power Conference at Dumbarton Oaks*, Doc. 260, II/G/14, 3 U.N.C.I.O. Docs. 480, 483 (1945).

104. McDougal, *supra* note 102, at 599.

There is not the slightest evidence that the framers of the United Nations Charter, by inserting one provision which expressly reserves a right of self-defense, had the intent of imposing by this provision new limitations upon the traditional right of states. In fact, Professor Bowett summarizes, the preparatory work suggests "only that the article should safeguard the right of self-defence, not restrict it." Thus, Committee I stressed in its report, approved by both Commission I and the Plenary Conference, that "the use of arms in legitimate self-defense remains admitted and unimpaired."

Id.

105. GOODRICH, *supra* note 96, at 344.

106. See *supra* note 98.

107. See Note, *The Cuban Crisis and the U.N. Charter: An Analysis of the United States Position*, 16 STAN. L. REV. 160 (1963).

[T]he United States argument is summarized as: The sudden and clandestine introduction of offensive missiles into Cuba by the Soviet Union constituted an

Cuba in 1962, the security of the United States would have been compromised.¹⁰⁸ Rather than basing their actions on international law, United States policymakers fulfilled what they perceived to be their domestic constitutional duty of protecting their nation's territorial integrity and political independence.¹⁰⁹ In his analysis of the Cuban quarantine, Quincy Wright¹¹⁰ notes that efforts explicitly to broaden the right to self-defense in the U.N. Charter failed, due to an inability to reach agreement on the matter.¹¹¹ He contends that the world community has relied on the capacity of retaliatory strikes to deter a surprise nuclear attack.¹¹² This deterrent would have little significance if an attacking state reasonably could perceive that its first strike would destroy its target's capacity to retaliate. "The development of atomic and hydrogen bombs and methods of delivery creating the possibility that the initial armed attack will be decisive, make it highly unlikely that states will wait for such an attack to occur before exercising the right of self-defense."¹¹³

Nevertheless, Professor Henkin's contention that a broad interpretation of self-defense will contribute to abuse must be addressed.¹¹⁴ Although the initial determination that force must be used in self-defense is often unilateral, abuses can be deterred by a later objective determination by third parties.¹¹⁵

unlawful threat to the security of the United States; the response of the United States to this initiating coercion met the customary international law prerequisites of self-defensive action, namely, 'necessity' and 'proportionality'. . . .
Id. at 163 (footnotes omitted).

108. See Chayes, *Law and the Quarantine of Cuba*, 41 FOREIGN AFF. 550 (1963). This article presents the argument that the United States leaders acted consistently with the U.N. Charter during the missile crisis.

109. See Alford, *Cuban Quarantine of 1962: An Inquiry into Paradox and Persuasion*, 4 VA. J. INT'L L. 35, 42 (1964). "[T]he situation was a novel one and there was actually little international law that would aid in making a decision at the Presidential level. The dominating feature was the constitutional responsibility of the President to take defensive action--which he did." *Id.*

110. Professor of Law, University of Virginia.

111. Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546, 560-61 (1963). A suggestion that the concept of armed attack be broadened was considered in 1946 while the United Nations was attempting to establish a structure which would control development of nuclear energy. *Id.* at 561.

112. *Id.* at 561.

113. GOODRICH, *supra* note 96, at 345.

114. See *supra* note 101 and accompanying text.

115. McDougal, *supra* note 102, at 599. Professor McDougal's article was written in response to Professor Quincy Wright's article on the Cuban Quarantine *supra* note 111. McDougal wrote: "Save for an occasional uninformed and uniformly rejected whisper, it has, however, been generally agreed that both this first provisional decision by a claimant target state and the measures it actually takes are subject to review for their neces-

In their book *Law and Minimum World Public Order*¹¹⁶ McDougal and Florentino Feliciano suggest a framework, within which objective third parties could determine whether a state's claim of self-defense is valid.¹¹⁷ Those determining the validity of a self-defense claim must decide whether the need to act in self-defense was reasonably perceived, and if so, whether the defensive action was proportionate to the threat.¹¹⁸ The defending state is limited in that it may utilize force only to preserve a limited number of fundamental objectives.¹¹⁹ Preservation of a state's territorial integrity and political independence are among the objectives (values) which may be conserved through violent self-defense in extreme circumstances.¹²⁰

McDougal and Feliciano suggest that the existence and intensity of the threat posed upon the state claiming self-defense,¹²¹ be compared with the intensity, duration and consequences of the force used by that state to alleviate the threat.¹²² In this way the world community would be able to determine the validity of a self-defense claim in terms of necessity and proportionality.¹²³ As a starting point, they recommend that the participants be identified and that their characteris-

sity and proportionality by the general community of states." *Id.*

116. M. McDougal & F. FELICIANO, *supra* note 26.

117. *Id.* at 218. McDougal and Feliciano concede that the target state must unilaterally decide when coercive self-defense is appropriate. *Id.* The Security Council has authority to determine the validity of threats to peace and breaches of the peace. *Id.* at 162.

118. *Id.* at 217-18. Necessity and proportionality are remnants of customary international law. These terms are deliberately restrictive in order to discourage extravagant claims. *Id.*

119. See McDougal, Lasswell & Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968). The theory espoused by these scholars at Yale University emphasizes values. They argue that values transcend political boundaries.

There is today among the peoples of the world a rising, common demand for the greater production and wider sharing of all basic values associated with a free society or public order of human dignity; that there is an increasing perception by peoples of their inescapable interdependence in the shaping and sharing of all such demanded values

Id. at 193.

120. M. McDougal & F. FELICIANO, *supra* note 26, at 222. It is noted that states can only use self-defense to prevent others from changing the status quo. *Id.*

121. *Id.* at 209-10.

122. *Id.* at 229-30. This condition of necessity must be examined by the third-party decisionmaker in terms of the reasonable expectations of the target state. *Id.*

123. *Id.* at 241-42. McDougal and Feliciano write: "It is primarily in terms of its magnitude and intensity—the consequentiality of its effects that alleged responding coercion must be examined for its proportionality." *Id.* Proportionality is termed a relationship between initiating coercion and responding coercion. *Id.*

tics be examined.¹²⁴ The analyst should then proceed to a comparison of the relative power of the participants and their allies.¹²⁵ Also, an identification of the nature of authority in the alleged aggressor state is relevant to the inquiry.¹²⁶ Certainly, knowledge of the capabilities and personalities in authority in the alleged aggressor state have an effect on the decisionmakers in the state claiming to have acted in self-defense.¹²⁷

The principal participants in the present dispute are Iraq and Israel. Both of these participants are sovereign states and members of the United Nations. Israel has a well-equipped military force¹²⁸ and is believed to possess nuclear weapons.¹²⁹ Also, it has received military and economic support from the United States.¹³⁰ Despite these strengths, Israel is vulnerable to aerial attack due to its small territory and consequently concentrated population.¹³¹ Iraq has obtained sophisticated military equipment from France and the Soviet Union,¹³² and in the past has been joined by, *inter alia*, Syria, Jordan and Egypt in its disputes with Israel.¹³³ At the time of the raid, Iraq was engaged in a war of attrition with its neighbor Iran¹³⁴ and Egypt had signed a

124. *Id.* at 220.

125. *Id.* at 173. If the participants are states and members of the United Nations, it is clear that they have consented to act consistently with the United Nations Charter. *Id.* at 221.

126. *Id.* at 173.

127. *Id.* at 173. McDougal and Feliciano write:

The degree to which both authoritative and effective power are shared by several organs of government and the extent to which a system of power-balancing is maintained within a state, as well as the character and composition of the ruling elite and of predominating symbols, appear in the present world to have some impact on the capacity and likelihood of a state undertaking arbitrarily to resort to force and violence. It is significant that states which have been explicitly determined by an international organization or tribunal to have unlawfully resorted to force . . . were commonly totalitarian in internal structure. . . .

Id. at 173-74.

128. See Hoffman, *Israel's Burden: The High Cost of Defense*, N.Y. Times, Feb. 4, 1979, § 12, at 65.

129. See *supra* text accompanying note 71.

130. Israel receives approximately \$2 billion each year from the United States for military purposes. A general accounting of military hardware obtained by Israel from the United States in 1981 is contained in *Hearings, supra* note 39, at 11-12.

131. See *supra* note 72.

132. Prial, *France Confirms Reports it has Handed over 4 Mirage Jets to Iraqis*, N.Y. Times, Feb. 2, 1981, at A6, col. 3. The article lists military hardware supplied by France to Iraq, and notes suspension of arms shipments from the Soviet Union due to the war with Iran. *Id.*

133. See *supra* notes 61-63 and accompanying text.

134. Middleton, *Iraqis Massing Near Iran Port: Drive Expected*. N.Y. Times, June 7, 1981, at A11 col. 1. At the time the raid occurred, Iraq was preparing to attack the Iranian refining center of Abadan. *Id.*

peace treaty with Israel.¹³⁵ Iraq had been able to lure Western cooperation for its nuclear program due to its control of vast oil reserves.¹³⁶ It seems clear that authority in Iraq emanates from its President, Saddam Hussein and his ruling Ba'ath Party.¹³⁷ On the other hand, Israel's government is modeled upon Western parliamentary systems. Power is vested in the Prime Minister and his Cabinet, whose tenure is subject to termination by periodic elections or the lack of confidence by the Knesset (parliament).¹³⁸

Iraq's objectives in this controversy must next be examined.¹³⁹ Are those objectives consistent with the United Nations Charter?¹⁴⁰ Iraq argues that it is developing nuclear technology for peaceful purposes.¹⁴¹ However, evidence identified earlier in this article indicates that an analyst reasonably could perceive that Iraq was planning to produce nuclear weapons at Osirak.¹⁴² Thus, this analysis must include inquiry into Iraq's objectives in producing nuclear weapons.¹⁴³ One can speculate that Iraq was developing nuclear weapons to defend itself against attack by other countries or occupation of its oilfields. However, the statements by official organs of Iraq's government mentioned earlier in this analysis¹⁴⁴ indicate that Iraq could have been developing nuclear weapons for use against Israel. Shortly after the raid, Professor D'Amato¹⁴⁵ wrote: "Such a government (Iraq) should hardly be able to complain of a violation of international law if, by its own admission, it was contemplating the gravest of such violations—the destruction of another nation."¹⁴⁶

135. See *Egyptian President Sadat and Israeli Prime Minister Begin Sign Formal Treaty*, N.Y. Times, Mar. 27, 1979, at A1, col. 6.

136. See Burt, *supra* note 5.

137. See generally Thoman, *Iraq Under Ba'athist Rule*, 62 CURRENT HISTORY 31 (1972).

138. See generally E. LIKHOUSKI, ISRAEL'S PARLIAMENT: THE LAW OF THE KNESSET (1971).

139. M. McDUGAL & F. FELICIANO, *supra* note 26, at 176-79. "Fundamental community policy does not seek to prohibit all coercion, nor even all highly intense coercion; it explicitly permits coercion for certain purposes, such as that necessary to protect certain indispensable values. . . ." *Id.* at 176. Among the values termed as indispensable are territorial integrity and political independence. *Id.* at 222.

140. *Id.* at 177-79.

141. U.N. Doc. S/PV 2280, at 26 (1981).

142. See *supra* text accompanying notes 36-60.

143. Iraq's purpose for establishing a nuclear program was examined by the House committee investigating this matter. See Hearings, *supra* note 39, at 12-14.

144. See *supra* text accompanying note 69.

145. Professor of Law, Northwestern University.

146. D'Amato, *supra* note 25, at A8, col. 3.

It was suggested on Baghdad Radio, an Iraqi government entity, that Tel Aviv be bombed,¹⁴⁷ and Iraq's official newspaper was quoted as claiming that Osirak would produce nuclear weapons aimed at Israel.¹⁴⁸ These statements amounted to admission of an objective to destroy Israel's territorial integrity and political independence. McDougal and Feliciano wrote: "The appraisal of the objectives of a participant alleged to have resorted to unlawful coercion, would of course, present no difficulties if the participant explicitly and publicly declared an intention to destroy the territorial integrity or political independence of its opponent. . . ."¹⁴⁹ Thus, an analyst could find that statements by Iraq government organs indicated that the state's objectives posed a threat to Israel's political independence and territorial integrity.

Once the alleged aggressor state's objectives are clarified, the consequences of these objectives must be examined.¹⁵⁰ In the present case, if there were a nuclear attack, given the size of Israel as a geographic unit, its very existence as a sovereign state would be endangered and its population would be subjected to similar effects as were Hiroshima's inhabitants in 1945.¹⁵¹ McDougal and Feliciano have written: "Objectives that approach the upper extremes of consequentiality, such as the total destruction of the territorial integrity and political independence of the target state, require for their achievement the application of highly intense coercion. An objective of this sort causes strong expectations of violence in response."¹⁵²

Once objectives of the alleged aggressor are clarified, one must evaluate whether the alleged aggressor's objectives could be executed.¹⁵³ At this stage, the objective third party must ask, what are the "expectations about the nature of the available technology of violence,

147. See *supra* text accompanying note 68.

148. It is argued that the statement appeared in the October 4, 1980 edition of *al-Gumhuriya*, an official Iraqi newspaper. For a Reagan Administration interpretation of this statement, see *Hearings, supra* note 39, at 22.

149. M. McDougal & F. Feliciano, *supra* note 26, at 180. McDougal and Feliciano argue that:

[t]he comprehensiveness or consequentiality of the objectives, considered in terms of the nature, scope and relative importance (to each participant) of the values a given state seeks to affect, is of obvious preliminary significance. . . . The degree of consequentiality of particular objectives is commonly related in roughly direct proportion to the intensity of the coercion applied to secure an objective.

Id.

150. *Id.*

151. See *supra* note 72. See also Shipler, *supra* note 1, at A8, col. 3.

152. M. McDougal & F. Feliciano, *supra* note 26, at 180.

153. *Id.* at 183.

and about the relative probabilities of effective community intervention . . . ?"¹⁵⁴ Currently, a disparity of military power exists between the two states because it is widely believed that Israel possesses nuclear weapons.¹⁵⁵ However, no indications exist that Israel would use nuclear weapons in a first-strike.¹⁵⁶ Although Iraq was most likely preparing to produce nuclear weapons, it is doubtful that such weapons were available at the time of the attack on Osirak.¹⁵⁷ Furthermore, no evidence indicates that at the time of the raid Iraq possessed a delivery system which could penetrate Israeli air defenses.¹⁵⁸ Thus, it appears that an attack on Israel was not imminent. Nevertheless, the possibility that Iraq would acquire nuclear weapons and an effective delivery system in the future was not beyond the realm of possibility once Osirak became operational.

The impact of the achievement of the alleged aggressor state's objectives must next be identified in terms of values.¹⁵⁹ Certainly, one must accept the notion that the magnitude of the threat is a product of the greatest amount of damage it can reasonably create. The worst case scenario from the Israeli point of view would be the total obliteration of the state. The aspirations of Israeli society to achieve wealth, power, respect, health, well-being and perhaps even rectitude would be rendered meaningless.¹⁶⁰ One cannot be certain what would remain of the territory and population, nor can one predict with precision the extent of repercussions of such an attack.

154. *Id.* at 183-84. Throughout this stage of the analysis one must note the significance attached to expectations of participants regarding the technological capacities of others. *Id.*

155. See *supra* note 18 and accompanying text.

156. Although Israel has not signed the NPT, it has proposed an agreement which would establish the Middle East as a nuclear free zone. Israel argues that the Arab states may interpret the NPT as non-binding since they consider themselves in a state of war against Israel. The Arab states will not sign a regional treaty with Israel, since such an action would imply acceptance of Israel's right to exist as a state. Nossiter, *Israel in Policy Shift to Seek Mideast Ban on Nuclear Weapons*, N.Y. Times, Nov. 8, 1980, at A1, col. 5.

157. Plutonium cannot be produced at Osirak until the reactor is operational. For estimates on the plutonium capabilities of the Osirak reactor, see *Hearings, supra* note 39, at 88.

158. It is argued that Iraq possesses a delivery system, composed of Soviet ground to ground missiles. The article did not report whether this system could penetrate Israeli air space. Shipler, *supra* note 1, at A8, col. 2.

159. M. McDougal & F. Feliciano, *supra* note 26, at 190.

160. See *supra* note 119. "Open and extensive military violence inflicting substantial destruction upon both peoples and resources, the principal constituent bases of state power, clearly represents a prohibited intensity of coercion." M. McDougal & F. Feliciano, *supra* note 26, at 159.

The McDougal-Feliciano analysis would then direct a third party decisionmaker to determine whether the alleged aggressor state has committed an impermissible level of coercion.¹⁶¹ They argue that low-level coercion continuously exists in international relations, but that violent self-defense is only legitimate when utilized against coercion which would constitute an act of aggression or threat to the peace.¹⁶² It is unlikely that Iraq could be charged with aggression as it was defined by the General Assembly of the United Nations, because Iraq had not invaded Israel by force since 1973, and Israel did not prove before the Security Council that irregular armed forces (terrorists) had perpetrated damage within Israel at Iraq's behest.¹⁶³ Nevertheless, Iraq's government statements appear to be a direct violation of Article 2(4) of the United Nations Charter.¹⁶⁴ Not only has Iraq threatened to use force by calling for the bombing of Tel Aviv,¹⁶⁵ but it has indicated that it is producing nuclear weapons for use against a member of the world community.¹⁶⁶

Finally, one must determine whether the alleged aggressor state has accepted community standards to settle its dispute with its target state.¹⁶⁷ Had it been likely that this dispute could have been settled by peaceful means, the necessity of using highly intense coercive self-defense would have been drastically reduced. By promptly reporting this case to the Security Council, Iraq fulfilled an obligation imposed upon it by Article 51 of the U.N. Charter. It is clear, however, that Iraq chose not to use diplomatic means to settle its longstanding dispute with Israel.¹⁶⁸ Moreover, Iraq broke diplomatic relations with Egypt when that country signed a peace treaty with Israel and has been a leader of the Arab "steadfastness and confrontation front"¹⁶⁹ in oppos-

161. M. McDougall & F. FELICIANO, *supra* note 26, at 198.

162. *Id.* at 207-09.

163. G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974). Nevertheless, the resolution does state that the specified examples are not exhaustive. *Id.* at 143.

164. U.N. Charter art. 2(4) states: "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 . . ." *Id.*

165. See *supra* text accompanying note 68.

166. See *supra* text accompanying note 69.

167. M. McDougall & F. FELICIANO, *supra* note 26, at 203. "The significance of relative willingness to accept community intervention is principally derived from the indication it gives of the real as distinguished from the ostensible objectives sought by a participant." *Id.* at 205.

168. See *supra* notes 61-70 and accompanying text.

169. See Supplementary Material from the New York Times News Service and the Associated Press, Oct. 9, 1978. This summary deals with an Iraqi invitation to Syria's President Assad to attend an anti-Camp David summit in Baghdad. *Id.*

ing benign overtures toward Israel.¹⁷⁰ While Iraq was willing to report this raid to the Security Council, it did not show a willingness to settle its underlying dispute with Israel by peaceful means.

At this stage, it is relevant to examine the *proportionality* of the act claimed to be in self-defense.¹⁷¹ "Proportionality in coercion constitutes a requirement that responding coercion be limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives of self-defense."¹⁷² By so limiting the scope of self-defense, one can more effectively prevent its abuse. Israel's objectives must be clarified.¹⁷³ If the raid was perpetrated for economic reasons or to expand Israel's territory, it could certainly not be characterized as defensive. During the Security Council debate, Iraq's Minister of Foreign Affairs asserted that Israel was seeking to maintain a technological gap between itself and Iraq, perceiving Iraqi economic development to threaten Israeli occupation of Arab territories.¹⁷⁴ Such an argument is unpersuasive. It seems remote that Israel would risk reprisals and the condemnation it received merely to prevent a hostile state from developing economically. Moreover, it is unclear how Iraq's development could threaten Israel's ability to control occupied territories. Nor is it clear how the development of nuclear weapons would have benefited the development of the Iraqi economy.

In examining the proportionality of the act claimed to be in self-defense, the McDougal-Feliciano analysis leads to an examination of the consequences of the values being conserved.¹⁷⁵ The minimal level of public order demanded by the world community may be violated legitimately only in response to coercion that threatens the most fundamental values of the target state.¹⁷⁶ Nevertheless, the preservation of

170. *Id.*

171. M. McDougal & F. FELICIANO, *supra* note 26, at 241-42.

172. *Id.* at 242.

173. *Id.* at 243. McDougal and Feliciano state:

[T]he principle of proportionality is seen as but one specific form of the more general principle of economy in coercion and of a logical corollary of the fundamental community against changed destructive modes. Coercion that is grossly in excess of what, in a particular context, may be reasonably required for conservation of values against a particular attack, or that is obviously irrelevant or unrelated to this purpose, itself constitutes an unlawful initiation of coercive or violent change.

Id.

174. U.N. Doc. S/PV 2280, at 31 (1981).

175. M. McDougal & F. FELICIANO, *supra* note 26, at 222. The fact that a party is acting to conserve rather than to extend values is not dispositive on the matter of self-defense. The significance of those values is also relevant to the necessity aspect of the analysis. *Id.* at 224-25.

176. *Id.* at 226-27. Highly intense coercion may not be used against merely tortious acts. *Id.*

territorial integrity and political independence are sufficiently substantial to warrant an intensely coercive response in appropriate circumstances.¹⁷⁷ The type of response is a factor relevant to the proportionality of that response.¹⁷⁸ In order to determine whether the defensive act was proportional to the threat posed, the character of that response must be examined.¹⁷⁹ The Israeli raid was an armed attack upon the territorial integrity of another state. Unless justified as an exercise of self-defense, such an attack would meet the United Nations General Assembly's definition of aggression¹⁸⁰ and directly violate Article 2(4) of the U.N. Charter.¹⁸¹ Although the level of coercion was intense, the magnitude of Israel's act was limited. The bombing itself was completed within two minutes, and the attack was limited to one nuclear installation. Indeed, Israeli bombs did not damage a smaller nuclear facility nearby.¹⁸² Moreover, the attack was planned for a Sunday, when 100-150 foreign technicians were away from the plant and the loss of life was limited.¹⁸³

Therefore, when viewed upon the basis of necessity and proportionality, the raid upon Osirak constituted an act of self-defense, which Israel, as a sovereign state, had an inherent right to exercise. A reasonable necessity to act existed, and Israel plausibly could have perceived that Iraq was using the Osirak reactor to produce nuclear weapons in violation of its commitments under the Nuclear Non-Proliferation Treaty.¹⁸⁴ Historical circumstances and undenied statements by official organs of Iraq's government¹⁸⁵ could have led to a reasonable percep-

177. *Id.* at 227. “[A] finding that appropriate standards of consequentiality have been met may be most easily reached when the claimant shows the particular . . . values or interests threatened or attacked to be indispensable components of territorial integrity or ‘political independence.’” *Id.*

178. *Id.* at 228-29. The modality used in self-defense is indicative of the level of intensity of responding coercion. *Id.*

179. *Id.* It is noted that the nature of the response is one of several indicators of the intensity of responding coercion. The primary concern is the effect of responding coercion rather than its modality. *Id.*

180. G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974). The resolution places bombardment of the territory of another state within the definition of aggression. *Id.* art. 3(b), at 143. However, the resolution shall not be “construed . . . in any way . . . [a]s enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful.” *Id.* art. 6., at 144.

181. See *supra* text accompanying note 91.

182. Shipler, *supra* note 1, at A8, col. 1.

183. Gwertzman, *U.S. Says Air Strike May Violate Accord*, N.Y. Times, June 9, 1981, at A8, col. 5.

184. See *supra* notes 36-60 and accompanying text.

185. See *supra* notes 61-70 and accompanying text. See also *Hearings*, *supra* note 39, at 91-93.

tion of such a use of Osirak and an intention to bomb Israel. Furthermore, once the Osirak reactor became operational, a bombing raid could have exposed the nearby civilian population to significant amounts of radioactive material.¹⁸⁶ Although a surprise nuclear attack upon Israel was not imminent,¹⁸⁷ such an attack could have extinguished Israel's very existence as a polity within the world community.¹⁸⁸ Thus, the threat posed by Iraq was grave and, as previously stated, the defensive action did not extend beyond the scope of meeting that specific threat.¹⁸⁹ The United States delegation argued before the Security Council that Israel had not exhausted all of the diplomatic means at its disposal.¹⁹⁰ Yet, the failure of Iraq even to recognize Israel's right to exist as a state¹⁹¹ would have seriously hampered attempts to settle their dispute peacefully. Certainly the failure of states such as France and Italy to perceive the seriousness of Israel's concerns, in the light of the history of the region and public statements by the Iraqi government, facilitated low expectations of an effective response by the peacekeeping organs of the world community. As Representative Millicent Fenwick stated during hearings on this matter by the House of Representatives:

We cannot expect nations threatened by other nations to sit by and watch the progress that may result in their own destruction unless we have a family, the family of nations, ready to move, to intercede in some peaceful and negotiated and agreed upon way. Otherwise, it is a world without law and order. . . . We must . . . have a system that can be called upon to operate so that nations are not tempted to such extremes. . . .¹⁹²

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186. See *supra* note 6.

187. See *supra* notes 63-72.

188. See *supra* note 160 and accompanying text.

189. See *supra* notes 161-66 and accompanying text.

190. U.N. Doc. S/PV 2288, at 16 (1981). While testifying before a House Committee, Dr. Albert Carnesdale speculated as to Israel's decision not to defer the raid. See *Hearings*, *supra* note 39, at 50.

191. See *supra* text accompanying note 66.

192. Hearings, *supra* note 39, at 31 (comments by Rep. Millicent Fenwick). Shortly after the Cuban Missile Crisis, Professor McDougal wrote: "In a still primitively organized world in which expectations are low about the effective capability of the general community to protect its individual members, this right [self-defense] has been regarded as indispensable to the maintenance of even the most modest minimum order." McDougal, *supra* note 102, at 598.