ANTICIPATORY SELF-DEFENSE AND THE ISRAELI-IRANIAN CRISIS: SOME REMARKS

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I. INTRODUCTION

Few contemporary issues of international security are more prominent than the dilemma posed by Iranian efforts to develop a nuclear weapon. For its part, Iran insists that its nuclear program is exclusively for peaceful purposes.[1] Nevertheless, the United Nations, through a number of Security Council and International Atomic Energy Agency (IAEA) actions, has found Iran in breach of its responsibilities.[2] Israel, along with most of the world, is convinced that beyond simply violating IAEA directives, Iran is developing nuclear weapons, and Israel is one of the main, if not *the* main target.[3]

In a September 2012 speech to the United Nations, Israel's Prime Minister, Benjamin Netanyahu, voiced "his fear that Iran would use a nuclear bomb to eliminate his nation."[4] According to Netanyahu, "[b]y next spring, at most by next summer at current enrichment rates, [Iran] will have finished the medium enrichment and move on to the final stage"

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1. *Implementation of the NPT Safeguards Agreement and Relevant Provisions of Security Council Resolutions in the Islamic Republic of Iran*, Report of the Director, International Atomic Energy Agency, IAEA Doc. GOV/2012/55, para 9, (Nov. 16, 2012), http://www.iaea.org/Publications/Documents/Board/2012/gov2012-55.pdf (last visited Feb. 23, 2013).

2. *Id.* §§ A, B, L.

3. *See generally, Iran's Nuclear Program (Nuclear Talks, 2012)*, N.Y. TIMES, Updated Nov. 16, 2012, at A1, *available at* http://topics.nytimes.com/top/news/international/countriesandterritories/iran/nuclear_program/index.html (last visited Feb. 23, 2013) (emphasis added).

4. *At UN General Debate, Israeli Leader Calls for 'Red Line' for Action on Iran's Nuclear Plans,* UN NEWS CENTER, Sept. 27, 2012, http://www.un.org/apps/news/story.asp?NewsID=43088&Cr=general+debate&Cr1= (last visited Feb. 23, 2013).

needed to produce a weapon.[5] He said that a "red line should be drawn right here . . . [b]efore Iran gets to a point where it's a few months away or a few weeks away from amassing enough enriched uranium to make a nuclear weapon."[6]

The United States (U.S.) has long asserted that it will not tolerate a nuclear-armed Iran. President Obama reiterated in October of 2012 his unequivocal declaration that "as long as [he is] president of the United States Iran will not get a nuclear weapon."[7] Thus, preventing Iran from getting a nuclear weapon appears to be a nonnegotiable cornerstone of the President's policy. In addition, he points out that Iran has said that it wants to "see Israel wiped off the map" and insistes that "if Israel is attacked, America will stand with Israel."[8]

These plain-spoken pronouncements suggest that the President is prepared to use any means, including military force, to prevent Iran from acquiring a nuclear weapon. That said, while America will "stand with Israel" if it is attacked, it is not clear what precisely the U.S. would do if Israel had not been attacked, *per se*, but nevertheless perceived itself at risk—if, for example, Iran reached the enrichment thresholds that Prime Minister Netanyahu sees as "red lines."[9] If such red lines are reached, it would seem that Israel, if not the U.S. as well, would advance the military option even if an actual weapon had not been assembled and deployed.

Importantly, the President maintains that a nuclear Iran would be not just a threat to Israel, but also to U.S. national security.[10] But it further appears that, at least for now, he is satisfied with pursuing a "policy of applying diplomatic pressure and potentially having bilateral discussions with the Iranians to end their nuclear program."[11] He also seems optimistic about the effectiveness of sanctions, as he has argued that Iran's economy is "in a shambles."[12] He asserts that:

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5. *Id*.

6. *Id*.

7. *2012 Presidential Debate: President Obama and Mitt Romney's remarks at Lynn University on Oct. 22*, WASH. POST, Oct. 23, 2012 (transcript) (Remarks of President Barack Obama), http://www.washingtonpost.com/politics/decision2012/2012-presidential-debate-president-obama-and-mitt-romneys-remarks-at-lynn-university-on-oct-22-running-transcript/2012/10/22/be8899d6-1c7a-11e2-9cd5-b55c38388962_story.html (last visited Feb. 23, 2013) [hereinafter Presidential Debate].

8. *Id*.

9. *Id*.

10. *Id*.

11. *Id*.

12. Presidential Debate, *supra* note7.

> [The administration] organized the strongest coalition and the strongest sanctions against Iran in history, and it is crippling their economy. Their currency has dropped 80 percent. Their oil production has plunged to the lowest level since they were fighting a war with Iraq 20 years ago. So their economy is in a shambles.[13]

While sanctions have certainly harmed the Iranian economy,[14] implementing truly draconian restrictions has proven difficult, as many countries are dependent upon Iranian oil. Accordingly, the U.S. was recently obliged to renew waivers for Iran's top oil buyers,[15] even as Iran continued to defy international mandates. If sanctions fail, and the "red lines" are crossed, the question then arises, what would be the legal basis for taking military action?

Since the establishment of the United Nations, member countries have agreed to forgo the use of force, or threat of the use of force, against another state.[16] There are two exceptions to this prohibition: 1) if the Security Council authorizes military force under Chapter VII of the Charter;[17] or 2) if necessary as an act of self-defense.[18]

As to the Security Council option, it is very unlikely any resolution authorizing a use of force against Iran for the development of a nuclear weapon will be forthcoming. For example, Russian foreign minister Sergei Lavrov indicated to reporters in late October 2012 that Russia will block

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13. *Id*.

14. *See, e.g.*, Farnaz Fassihi and Jay Solomon, *In Iran's Factories and Shops, Tighter Sanctions Exact Toll*, WALL STREET JOURNAL, Jan. 3, 2013, *available at* http://online.wsj.com/article/SB10001424127887324595904578120250597512768.html (last visited Feb. 23, 2013).

15. Timothy Gardner & Roberta Rampton, *U.S. Extends Waivers on Iran Sanctions to India, China*, REUTERS, Dec. 7, 2012, *available at* http://www.reuters.com/article/2012/12/07/us-usa-iran-sanctons-idUSBRE8B615M20121207 (last visited Feb. 23, 2013).

16. U.N. Charter art. 2, ¶ 4 provides: "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."

17. *See*, *e.g.*, U.N. Charter art. 42, which provides:

> Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

18. *See*, *e.g.*, Jeffrey H. Smith & John B. Bellinger III, *Providing a Legal Basis to Attack Iran*, WASH. POST (Sept. 27, 2012), *available at* http://articles.washingtonpost.com/2012-09-27/opinions/35497254_1_military-force-president-obama-iran (last visited Feb. 23, 2013).

any resolution that "could be interpreted as authorizing military action against Iran."[19] In addition, many observers believe that China would also likely exercise a veto against military action.[20]

As a result. any military action that might be taken against Iran would have to be justified under a theory of self-defense. Article 51 of the UN Charter provides that:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[21]

The obvious problem here is that the Charter seems to require not just the crossing of some "red line" or even the acquisition of a nuclear weapon, but rather an "armed attack." While Israel has not been the victim of a nuclear attack, at least one commentator insists that Israel has, indeed, been the victim of an "armed attack" attributable to Iran.

Professor Alan Dershowitz of Harvard Law School, argues that Israel already has the legal right to attack Iran by claiming that Iran directed the 1992 attack on Israel's embassy in Argentina, as well as alleging that more recently, Iran was supplying weapons to Hamas.[22] According to Dershowitz, the "law of war does not require an immediate military response to an armed attack," and adds, "[t]he nation attacked can postpone its counterattack without waiving its right."[23]

Professor Dershowitz's argument is not sustainable as a matter of international law. In the 1986 *Nicaragua* case, the International Court of Justice (ICJ) found that the provision of arms to nonstate actors did not amount to an "armed attack" against the victim nation, and also concluded

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19. *Russia to Veto any UN Motion on Iran*, NOVINITE.COM (Oct. 23, 2012), *available at* http://www.novinite.com/view_news.php?id=144421 (last visited Feb. 23, 2013).

20. Smith, *supra* note 18.

21. U.N. Charter art. 51.

22. Alan Dershowitz, *Israel Has the Right to Attack Iran's Nuclear Reactors Now*, HUFFINGTON POST, (Apr. 16, 2011) *available at* http://www.huffingtonpost.com/alan-dershowitz/israel-has-the-right-to-a_b_836764.html (last visited Feb. 23, 2013).

23. *Id*.

that even certain kinds of armed clashes ("frontier incidents") did not qualify either.[24]

In addition, the ICJ made it clear that *necessity* and *proportionality* were essential elements to the exercise of lawful self-defense. Notwithstanding Professor Dershowitz's claims to the contrary, there is utterly no authority or precedent for the notion that resurrecting a more than twenty-year-old incident involving an embassy attack would sustain a finding of the requisite "necessity" to support a self-defense strike on major nuclear facilities.

Dershowitiz offers another rationale. He argues that Iran has "publicly declared war on Israel by calling for it 'to be wiped off the map.'"[25] Among the problems with this argument is the simple fact that not even the most bellicose of officials in both Israel and Iran are contending that a state of war exists between the nations, notwithstanding the hostility of the rhetoric. Thus, neither the self-defense nor the state of war theory espoused by Professor Dershowitz is sufficiently supported by the facts.

Another legal academic, Anthony D'Amato of Northwestern University, takes a somewhat different tack in arguing the legality of a military operation against Iran.[26] He says that if Iran is constructing nuclear weapons, it is "enough" for him that "Iran says it wants to push the Israelis into the sea."[27] Under those circumstances, he contends, "it can hardly be said" that Israel and the U.S. would be violating international law if they took the "initiative to block" Iran's acquisition of a nuclear device. According to D'Amato:

> [Action against Iran] can only be preserving international law for future generations . . . . In order to preserve international law we have to defend it once in a while. I think we have to defend it against rogue states or states that have expressed hostile intentions, like Iran and like North Korea. The only reasonable

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24. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14, 94, (June 27, 2012), *available at* http://www.icj-cij.org/docket/index.php?sum=367&code=nus&p1=3&p2=3&case=70&k=66&p3=5 (Last visited Feb. 23 2013).

25. *Experts Mull Legality of Strike on Iran*, WORLD NEWS, (Feb. 23, 2013) *available at http://www.upi.com/Top_News/World-News/2012/04/12/Experts-mull-legality-of-strike-on-Iran/UPI-79071334277960/* (Last visited Feb. 23 2013).

26. *Id*.

27. *Id*.

> thing to do is to take those weapons out. Remove that threat and the world is going to be safer.[28]

Little in Professor D'Amato's approach aligns with existing understandings of use of force law in the post-UN Charter era. Instead, he appears to embrace the concept of "illegal but justified" to legitimize an attack on Iran. Generally speaking, the "illegal but justified" concept has been raised in the past, especially in the context of humanitarian interventions. However, Professor Anthea Roberts of the London School of Economics points out that even in the often sympathetic setting of a humanitarian crisis, the concept "is ultimately not a sustainable position in international law [because] it will come to be recognized as an exception to the prohibition on the use of force."[29] Such concerns are warranted, as she explains:

> The "illegal but justified" approach also shifts the focus away from questions of legality and towards questions of legitimacy. Attempting to completely divorce legality and legitimacy can ossify the law and undermine its relevance, which increases the risk of self-serving exceptionalism. Relying on legitimacy as an independent justification for action is also problematic because legitimacy is underdefined and open to manipulation by powerful actors.[30]

Consequently, advocates of the use of force against Iran must assess the appropriateness of such a course of action not based on the "illegal but justified" theory, but rather within the context of the anticipatory self-defense doctrine.

II. ANTICIPATORY SELF-DEFENSE

What exactly is meant by anticipatory self-defense? In answering that vital question, it may be helpful to understand what the term does *not* mean. Professor Sean Murphy reminds us that *anticipatory* self-defense is not the

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28. *Id.*

29. Anthea Roberts, *Legality vs Legitimacy: Can Uses of Force be Illegal but Justified?*, in HUMAN RIGHT, INTERVENTION, AND THE USE OF FORCE 212 (P. Alston, E. Macdonald, eds., Oxford University Press, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1518290 (last visited Feb. 23, 2013).

30. *Id.*

same as *preemptive* self-defense.[31] He points out that anticipatory self-defense "refers to the use of armed coercion by a state to halt an imminent act of armed coercion by another state (or non-state actor operating from that other state)."[32] Preemptive self-defense, he tells us, is different:

> Preemptive self-defense is used to refer to the use of armed coercion by a state to prevent another state (or non-state actor) from pursuing a particular course of action which is not yet directly threatening, but which, if permitted to continue, could result at some future point in an act of armed coercion against the first state.[33]

Action constituting *preemptive* self-defense so defined requires a Security Council resolution. The *anticipatory* self-defense doctrine can, however, justify unilateral action. Authority for anticipatory self-defense is not literally set forth in the text of the U.N. Charter. Indeed, because of the absence of an explicit textual endorsement of anticipatory self-defense, many experts do not accept its legitimacy.[34]

However, as noted above, Article 51 does provide in relevant part that "[n]othing in the present Charter shall impair *the inherent right* of individual or collective self-defence . . . ."[35] Among those that do believe in the legality of anticipatory self-defense, they usually argue it is derived from Article 51's reference to the "inherent" right of self-defense.

Where is this "inherent" right sourced? Most scholars point to the 1837 *Caroline* incident as the most important event admitting the doctrine.[36] The *Caroline* was a boat used to transport supplies to Canadian rebels. Despite her being moored in U.S. territory, British forces entered the U.S., boarded the vessel, killed an American crewman, set the ship on fire, and sent it over Niagara Falls. In the ensuing diplomatic uproar, the British claimed their action was justified in self-defense. Daniel Webster, then Secretary of State, addressed this claim in a response to the British Ambassador.

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31. Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 703–04 (2005), http://lsgs.georgetown.edu/programs/nlp/preventivewar/Villanova%20Preemption%20Article%20Final.pdf (last visited Feb. 23, 2013) (emphasis added).

32. *Id.* at 703.

33. *Id.* at 704.

34. *See*, *e.g.*, SHIRLEY V. SCOTT, ANTHONY JOHN BILLINGSLEY, & CHRISTOPHER MICHAELSEN, INTERNATIONAL LAW AND THE USE OF FORCE 136 (2010) (referencing the "doubtful status of the legality of anticipatory self-defense").

35. U.N. Charter, at art. 51 (emphasis added)

36. KINGA TIBORI-SZABO, ANTICIPATORY ACTION IN SELF-DEFENCE 72–75 (2011).

Webster conceded that a "just right of self-defense attaches always to nations as well as to individuals, and is equally necessary for the preservation of both." When "clear and absolute necessity" warrants it a state, Webster contends, can use force in self-defense. Moreover, Webster's further articulation that the necessity for self-defense must be "instant, overwhelming, leaving no choice of means, and no moment for deliberation" has come to define the prerequisites for anticipatory self-defense.[37]

Although some authorities nevertheless continue to claim that "the dominant view amongst states and international lawyers is that anticipatory self-defense is not permissible under international law,"[38] it is difficult to find any state that unequivocally and publicly asserts that it knowingly will forego the opportunity to use force to avert the blow of an armed attack it knows it will imminently and inevitably receive. It may be such blunt reality that prompted the Secretary General of the United Nations to declare in a 2005 report:

> Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened.[39]

For its part, the U.S. State Department cited this statement and said "the United States welcomed the report's . . . recognition of a right of anticipatory self-defense in appropriate circumstances."[40] As a result, whatever theories or objections academics and others may have, it appears now that most states (albeit not without dispute) accept the legitimacy of anticipatory self-defense.

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37. *Id*. at 75 (sourcing Daniel Webster quotes).

38. *See*, *e.g.*, James Mulcahy and Charles O. Mahony, *Anticipatory Self-Defense: A Discussion of the International Law*, 2 HANSE L. REV. 231, 233 (2006), *available at* http://www.hanselawreview.org/pdf4/Vol2No2Art06.pdf (last visited Feb. 23, 2013).

39. U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights For All*, ¶ 124, U.N. Doc. A/59/2005 (Mar. 21, 2005).

40. U.S. DEP'T OF STATE, REPORT BY THE SECRETARY OF STATE TO THE CONGRESS FOR THE YEAR 2006, PARTICIPATION IN THE UNITED NATIONS, Part 5, at 138 (2006).

III. THE QUESTION OF IMMINENCE

The difficulty in applying anticipatory self-defense is determining exactly what "imminent" means, and whether reasonably reliable facts exist in a particular situation to support an imminence finding. The U.S. has long taken a somewhat aggressive interpretation as to this prerequisite of a fully justified act of anticipatory self-defense. In the 2005 version of the U.S.'s official Standing Rules of Engagement (SROE),[41] for example, U.S. forces are permitted to take action in self-defense not only when victimized by a hostile act, but also when faced with "hostile intent."[42] Hostile intent is defined as:

> The threat of imminent use of force against the United States, U.S. forces or other designated persons or property. It also includes the threat of force to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital USG property.[43]

In turn, "imminent use of force" is defined rather expansively. Specifically, the SROE states:

> g. Imminent Use of Force. The determination of whether the use of force against U.S. forces is imminent will be based on an assessment of all facts and circumstances known to U.S. forces at the time and may be made at any level. Imminent does not necessarily mean immediate or instantaneous.[44]

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41. U.S. ARMY, OPERATIONAL LAW HANDBOOK ch. 5, app. A (2012) [hereinafter OPERATIONAL LAW HANDBOOK] (republished from Chairman of the Joint Chiefs of Staff, Chairman of the Joint Chiefs of Staff Instruction, No. CJCSI 3121.01B, Standing Rules of Engagement(SORE)/Standing Rules for the Use of Force for US Forces (2005)).

42. *Id*. at ¶ 6b(1). The SROE states:

> Self-Defense. Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by a unit commander as detailed below, military members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent. When individuals are assigned and acting as part of a unit, individual self-defense should be considered a subset of unit self-defense. As such, unit commanders may limit individual self-defense by members of their unit. Both unit and individual self-defense includes defense of other U.S. Military forces in the vicinity.

43. *Id.* at ¶ 3f.

44. *Id.* at ¶ 3g.

Nevertheless, although arguably the U.S. is already more flexible on the temporal requirement of the anticipatory self-defense doctrine than other nations, it is possible that it is evolving towards an even more expansive reading. In a 2011 speech, John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, discussed the greater flexibility with respect to the imminence requirement in the context of terrorist threats:

> We are finding increasing recognition in the international community that a more flexible understanding of "imminence" may be appropriate when dealing with terrorist groups . . . . Over time, an increasing number of our international counterterrorism partners have begun to recognize that the traditional conception of what constitutes an "imminent" attack should be broadened in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations.[45]

Mr. Brennan's reference to "modern-day capabilities, techniques, and technological innovations" is significant in the context of the terrible potential of nuclear weapons. It is certainly true that these weapons have enjoyed something of a special status in international law. William Boothby points out in his treatise *Weapons and the Law of Armed Conflict* that their use is not governed by the Protocols to the Geneva Conventions[46] that otherwise comprehensively regulate the means and methods of war.[47] Indeed, Boothby notes that other than the Treaty on the Nonproliferation of Nuclear Weapons, no treaty "either prohibits or restricts the development, stockpiling, transfer, possession, or use of such weapons, or threats to use them."[48]

In its 1996 case about nuclear weapons, the ICJ also seemed to accord them special status. In a lengthy opinion the ICJ generally lambasts the weapons, and concludes that "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable to armed

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45. John O. Brennan, Assistant to the President for Homeland Sec. and Counterterrorism, Remarks at the Harvard Law School Program on Law and Security: Strengthening Our Security by Adhering to Our Values and Laws (Sep. 16, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an (last visited Feb. 23, 2013).

46. PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF AUG. 12, 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I), art. 57, ¶ 2(b), Dec. 12, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978). Although the U.S. is not a party to Protocol I, parts of it are considered customary international law.

47. WILLIAM H. BOOTHBY, WEAPONS AND THE LAW OF ARMED CONFLICT, 215–20 (2009).

48. *Id*. at 220.

conflict, and in particular the principles and rules of humanitarian law."[49] Yet, the ICJ concedes that the "Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a state would be at stake."[50]

All of this seems to suggest that the world community recognizes that these weapons are distinctive, and that special considerations apply to them. This might suggest that given their unique potential to put the "very survival of the state" at risk, more flexibility as to the meaning of "imminence" might be applicable where they constitute an existential threat to the target state. As the experience of the U.S. and the Soviet Union militaries during the Cold War amply demonstrates, these weapons can be mated to delivery platforms such as missile systems that are capable of being launched on very short notice. Once launched, it can be extremely difficult or impossible to defend against them.[51]

At the same time it must be recalled that there is "no rule in general international law which prohibits a State from developing and/or possessing nuclear weapons, per se."[52] Moreover, as a matter of international law, it appears that a nuclear weapons program at its very nascent stage does not qualify as an "imminent" threat, even when it may be plain that the developing state may very well intend to use the weapons against another state.[53] This is one reason why Israel's 1981 attack against Iraq's Osirak reactor as it was nearing operational status earned universal condemnation—to include that of the United States—in U.N. Security Council Resolution 487[54] despite assertions of self-defense by Israel.[55]

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49. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996, I.C.J. 226 (July 8, 1996).

50. *Id*; *see also* BOOTHBY, *supra* note 477, at 221.

51. However, the U.S. and Israel conduct an annual exercise aimed at countering the threat of ballistic missiles. *See* Jim Garamone, *U.S. Partners with Israel for Exercise Austere Challenge*, AMERICAN FORCES PRESS SERVICE (Oct. 17, 2012), http://www.defense.gov/news/newsarticle.aspx?id=118239 (last visited Feb. 23, 2013).

52. TOM RUYS, "ARMED ATTACK" AND ARTICLE 51OF THE UN CHARTER 359 (2010).

53. Some take a different perspective. One author points out that in a 1981 Congressional hearing concerning the Osirak raid Professor John Norton Moore "noted that the effort to strike the reactor before it went critical must also be taken into consideration and, even if were two to five years before the Iraqis could product a bomb: '*Then I think that the action might well be legal*.'" Lt. Col. Uri Shoham, *The Israeli Aerial Raid Upon the Iraqi Nuclear Reactor and the Right of Self-Defense*, 109 MIL. L. REV. 191, 222 (1985) (emphasis in original; citations omitted).

54. S.C. Res. 487, ¶ 36 U.N. SCOR, 36th Sess., 2288th mtg, UN Doc. S/RES/487 (1981).

55. *See* Shoham, *supra* note 53.

In any event, the best publicly available estimates seem to suggest that Iran would have enough enriched uranium to produce enough "fissile material for 2 nuclear weapons by late 2013 or early 2014."[56] Of course, merely possessing a nuclear weapon is only part of the process, as there must be a delivery platform. In that regard, Iran's ballistic missile program may be able to produce a medium-range missile capable of striking Israel, although an intercontinental ballistic missile capable of striking the U.S. seems to be some years distant.[57]

Importantly, however, the mere possession of nuclear weapons and the means of delivering them is not, in any event, alone sufficient to justify an act of anticipatory self-defense, even taking into account the gravity of the nuclear threat. While the facts need not necessarily show that an attack is actually under way as some have argued,[58] and the threat need not be "immediate or instantaneous," the evidence still must show something more than capability and deep animosity before an attack based on anticipatory self-defense could be legally justified. One need only reference the Cold War between the U.S. and the Soviet Union to appreciate that such conduct can exist for literally decades without an attack occurring.

Discerning the Iranian calculus about the actual use of a nuclear device, especially in the face of official denials of any intent to acquire the weapons, is difficult. Still, there is no reason to assume Iran will fail to take into account Israel's military capabilities in the decision-making process. This is especially so when experts estimate that with "80 or 90" nuclear weapons—along with the missiles, planes, and submarines to deliver them—Israel has an overwhelming advantage in terms of its nuclear capability.[59] Quite obviously, for the foreseeable future Israel would be able to deliver a crushing retaliatory blow in the event the Iranians chose to use the one or two weapons it is believed they might be able to acquire by 2014. Even rogue regimes that possess nuclear weapons recognize the risk to their existence posed by powers with a vastly superior arsenal, and exercise restraint accordingly.[60] In short, the required element of

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56. Maseh Zarif, *The Iranian Nuclear Program: Timelines, Data, and Estimates V5.0*, AEI IranTracker, Nov. 23, 2012, *available at* http://www.irantracker.org/nuclear-program/zarif-timelines-datea-estimates-november-23-2012.

57. *See generally*, STEVEN A. HILDRETH, CONG. RESEARCH SEV., R42849, IRAN'S BALLISTIC MISSILE AND SPACE LAUNCH PROGRAMS (2012).

58. *See*, *e.g.,* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 190–92 (4th ed. 2005) (discussing "interceptive self-defense").

59. Eric Niiler, *What's Up With Israel's Nukes Nuclear Program*, DISCOVERY NEWS, Oct 4, 2012, http://news.discovery.com/tech/israel-iran-nuclear-weapons-121004.html (last visited Feb. 23, 2013).

60. North Korea would be an example of this phenomenon.

imminence to support the necessity for an anticipatory self-defense attack does not appear to currently exist.

IV. ANTICIPATORY COLLECTIVE SELF-DEFENSE

Even if one is among those who accept the legitimacy of anticipatory self-defense, and also further believes that sufficient facts exist to support an imminent threat to Israel, there is nevertheless the additional question as to whether anticipatory *collective* self-defense is extant in international law. In other words, to what extent can America "stand with Israel" where the threat of Iranian attack does not directly imperil the U.S.? Again, the text of Article 51 of the U.N. Charter provides no specific authority. Rather, it confines collective self-defense to circumstances where an armed attack has already occurred. Accordingly, if anticipatory *collective* self-defense exists at all, it must—like anticipatory self-defense itself—be contained within the "inherent" concept of self-defense.

Professor George Walker argues forcefully that it does.[61] In his seminal 1998 article, Walker asserts that the "concept of anticipatory collective self-defense has existed for nearly two centuries, including the fifty years during which the Charter has been in force, and this form of joint response by states appears to have attained the status of a customary norm."[62] Indeed, Walker contends that the self-defense right the U.N. Charter negotiators intended as "inherent" in Article 51 "included a right to anticipatory collective self-defense."[63]

Most scholars who accept the legitimacy of anticipatory self-defense seem to agree. For example, the *Tallinn Manual on the International Law of Cyber Warfare*,[64] a document produced by an international group of experts, explicitly provides for both anticipatory self-defense[65] and collective self-defense.[66] Regarding collective anticipatory self-defense, the commentary to Rule 16 provides: "Both the victim-State *and the State providing assistance* must be satisfied that there is an *imminent* (Rule 15) or on-going armed attack."[67] In short, a non-victim state may provide

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61. *See generally* George K. Walker, *Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said,* 31 CORNELL INT'L L.J. 321 (1998).

62. *Id.* at 324–25.

63. *Id.* at 351–52.

64. NATO COOPERATIVE CYBER DEFENCE CENTRE OF EXCELLENCE, THE TALLINN MANUAL ON THE INTERNATIONAL LAW OF CYBER WARFARE, (Michael N. Schmitt ed., 2012), *available at* http://www.ccdcoe.org/249.html (last visited Feb. 23, 2013).

65. *Id*. at Rule 15.

66. *Id.* at Rule 16.

67. *Id*. (emphasis added).

assistance to a victim as long as an attack is *imminent*—a clear endorsement, it seems, of collective anticipatory self-defense.

More broadly, Dr. Kinga Tibori-Szabo, author of the recent treatise *Anticipatory Action in Self-Defense*, opines:

> [T]here is no (modern-time) instance of state practice for collective anticipatory self-defense, so we cannot talk about an *explicit* "customary right" to collective anticipatory self-defense. That does not mean, however, that there could not be a lawful exercise of such a right. Customary law acknowledges collective self-defense as well as anticipatory self-defense . . . . The collective nature of the anticipatory action should not bear on its legality.[68]

Additionally, Mr. Hays Parks, one of the world's leading law of armed conflict experts, likewise concludes that a right of collective anticipatory self-defense exists in international law, and points to the U.S. Standing Rules of Engagement as an expression of that view.[69] Those rules provide:

> Collective Self-Defense. Defense of designated non-U.S. military forces and/or designated foreign nationals and their property from a hostile act *or demonstrated hostile intent*. Only the President or SecDef may authorize collective self-defense.[70]

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68. E-mail from Dr. Kinga Tibori-Szabo to Charles J. Dunlap, Jr., Professor of Law Duke University School of Law (Sept. 26, 2012, 3:36 PM EST) (on file with author). Dr. Tibori-Szabo's full commentary is as follows:

> [T]there is no (modern-time) instance of state practice for collective anticipatory self-defense, so we cannot talk about an *explicit* "customary right" to collective anticipatory self-defense. That does not mean, however, that there could not be a lawful exercise of such a right. Customary law acknowledges collective self-defense as well as anticipatory self-defense.
>
> According to the majority opinion, collective self-defense, as such, only requires an armed attack against one state. If other states wish to aid the attacked state in exercising self-defense, they can do so, as long as the attacked state agrees.
>
> The same reasoning should apply in case of anticipatory self-defense. If a state considers, on the basis of the available information (interpreted in good faith) that it is the object of an imminent attack, it could use its window of opportunity to request help from its allies.
>
> The legality of such an endeavour would thus depend on meeting the requirements of anticipatory self-defense by the state that feels in danger. The collective nature of the anticipatory action should not bear on its legality.

69. OPERATIONAL LAW HANDBOOK, *supra* note 41, at ch. 5 app. A.

70. *Id*. ¶ 3c (emphasis added).

Thus, from the American perspective, U.S. forces can act in collective anticipatory self-defense if the designated foreign entity faces *demonstrated hostile intent*, and the President or the Secretary of Defense authorizes it.

Still, some scholars disagree, and not just those who believe that anticipatory self-defense does not exist at all in the post-Charter era. Professor Scott Silliman of Duke Law School, maintains that while an inherent right to anticipatory self-defense can be fairly read into Article 51, *collective* anticipatory self-defense cannot.[71] Because the *Caroline* case, the formative event of the concept of anticipatory self-defense, did not have a collective element, it cannot be said, he maintains, that there is any *inherent* right to collective anticipatory self-defense.[72]

V. CONCLUDING OBSERVATIONS

As this brief examination illustrates, there do not yet appear to be adequate facts to support the legality of a strike on Iran, either from constructs that allege that an armed attack against Israel has already occurred, or from the perspective of anticipatory self-defense. An even more puzzling question is what legal authority President Obama would rely upon to authorize a strike against Iranian facilities in the event Iran acquired a nuclear weapon (or was about to do so), yet did not act in a manner that demonstrated intent to actually launch an attack. Again, the mere possession of a weapon is not, *ipso facto*, violative of international law in a way that would authorize the use of force.

Additionally, though beyond the scope of this essay, it is relevant to note that many—if not most—authorities question whether a use of force that complies with the dictates of anticipatory self-defense law—that is, it is proportionate and discriminate—would have anything more than a "limited chance of operational success."[73] Yet it is also true that airstrikes, for example, do appear to have something of a record of success. In his book about the Iraq War, Thomas Ricks reports that experts believe that the U.S.'s 1998 airstrikes against Iraq's weapon's development facilities effectively ended their ambition to acquire nuclear arms.[74]

Regardless, if force is eventually used, it will be vitally important for the U.S. and Israel to have not only firm legal grounds conceptually, but also a clear, *publicly disclosable* set of supporting facts. Given the terrifying potential of nuclear weapons, Israel's tragic history of the

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71. E-mail from Professor Scott Silliman to Charles J. Dunlap, Jr., Professor of Law Duke University School of Law (Sept. 24, 2012, 6:41 PM EST) (on file with author).

72. *Id.*

73. Ruys, *supra* note 52, at 363.

74. THOMAS RICKS, FIASCO, 20–22 (2006) (citing David Kay).

Holocaust, as well as Iran's inflammatory—and profoundly unwise—pronouncements challenging Israel's right to exist, the world may be ready to accept an aggressive interpretation of what constitutes an imminent threat of an actual attack, but the absence of *any* such evidence would likely be found unacceptable.

In a world in which the spread of technology permits a growing number of nations to wreak terrible destruction on an opponent, it is more important than ever to insist upon observance of the law, especially when doing so is the best hope of preventing the unnecessary use of force and all the unintended consequences it can entail.[75] It is not in either Israel's or the United States' interest to take any actions that would undermine the rule of law. To date, the legal case justifying a strike has yet to be made.

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75. *See*, *e.g.*, Zbigniew Brzezinski, *Iran Should Be Key Topic at Hearings*, WASH. POST, Jan. 3, 2013, http://www.washingtonpost.com/opinions/zbigniew-brzezinski-iran-should-be-key-topic-at-senate-hearings/2013/01/03/5dbc3324-5519-11e2-8b9e-dd8773594efc_story.html. Brzezinski writes that "five potential implications for the United States of an additional and self-generated war deserve close scrutiny":

> How effective are U.S. military strikes against Iranian nuclear facilities likely to be, with consequences of what endurance and at what human cost to the Iranian people?
>
> What might be Iran's retaliatory responses against U.S. interests, and with what consequences for regional stability? How damaging could resulting instability be to European and Asian economies?
>
> Could a U.S. attack be justified as in keeping with international standards, and would the U.N. Security Council—particularly China and Russia, given their veto power—be likely to endorse it ?
>
> Since Israel is considered to have more than 100 nuclear weapons, how credible is the argument that Iran might attack Israel without first itself acquiring a significant nuclear arsenal, including a survivable second-strike capability, a prospect that is at least some years away?
>
> Could some alternative U.S. strategic commitment provide a more enduring and less reckless arrangement for neutralizing the potential Iranian nuclear threat than a unilateral initiation of war in a combustible regional setting?