Part 1 The Cold War Era (1945–89), 28 Israel’s Airstrike Against Iraq’s Osiraq Nuclear Reactor—1981

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(p. 329) 28 Israel’s Airstrike Against Iraq’s Osiraq Nuclear Reactor—1981

I. Facts and Context

On 7 June 1981, a team of eight F-16 and six F-15 fighter jets of the Israeli air force carried out an airstrike on Iraqi territory. The target of the attack was the ‘Osiraq’ nuclear reactor at the Tuwaitha research centre near Baghdad. The Osiraq reactor was one of two research reactors being built pursuant to a French–Iraqi framework agreement and subsequent contracts. The two-minute airstrike—which had been carried out before the reactor was loaded with 1.5 kg of enriched uranium, to be supplied by the French—effectively destroyed the $275 million Osiraq reactor. Four persons, including one French technician, were killed in the attack. Both the UN Security Council (UNSC) and the UN General Assembly (UNGA) formally condemned the operation.

II. The Positions of the Main Protagonists and the Reaction of Third States and International Organizations

The Osiraq raid marked the first deliberate destruction of a nuclear reactor and the first time a country openly attacked the nuclear facilities of another. Israel justified its conduct as a case of so-called ‘anticipatory’ self-defence. To support this position, it drew attention to the hostile attitude of Iraq, which had refused to recognize Israel’s right to exist and remained technically at war with Israel. In an open challenge to the existing non-proliferation regime, Israel moreover claimed that, notwithstanding International Atomic Energy Agency (IAEA) monitoring, the reactor was designed to produce atomic bombs. In spite of this, the raid was widely condemned throughout the international community.

On 8 June 1981, the day after the attack, Israel reported to the UNSC that it had destroyed the Osiraq reactor, which ‘despite its camouflage, [was] designed to produce atomic bombs. The target for such bombs would be Israel’. According to Israel, ‘Iraq President Saddam Hussein had stressed that the reactor was being constructed against Israel (although it was later demonstrated that this quote was taken out of context)’. Furthermore, Israel submitted that the reactor would soon be completed and be put into operation. Confronted with a mortal danger to the people of Israel progressively arising’, Israel had chosen to act in defence of its citizens. Israel stressed that, had the airstrike been postponed until after the reactor would have become operational and ‘hot’, this would have ‘brought about a massive, radioactive, lethal fallout over the city of Baghdad, and tens of thousands of its innocent residents would have been hurt’. The letter also emphasized that the operation had been timed for Sunday in order to avoid loss of life among the foreign experts employed at the reactor. In subsequent UN meetings, Israel emphasized that Iraq had consistently refused to recognize Israel’s right to exist and declared itself to have been in a state of war with Israel since 1948. Israel further insisted that, in spite of the officially ‘peaceful’ nature of Iraq’s nuclear programme, Iraq was in reality seeking to obtain nuclear weapons. To substantiate its accusations, Israel referred to statements by Iraqi officials stressing the need for the Arab states to produce an atomic bomb. It also drew attention to, inter alia, Iraq’s refusal (vis-à-vis France) to be supplied with alternative combustibles for the reactor other than weapons-grade nuclear fuel, as well as to the fact that Iraq had no need for nuclear energy given its abundant oil supplies. While acknowledging that Iraq was a party to the nuclear Non-Proliferation Treaty (NPT) and that its nuclear reactors had been inspected periodically by the IAEA, Israel insisted that there were serious loopholes in the non-proliferation safeguards system that could easily be exploited by a country, such as Iraq, determined to obtain a nuclear weapon. As Israel’s ‘public and diplomatic efforts’, including calls for a nuclear-weapon-free zone in the Middle East, went unheeded, the Osiraq reactor was about to go ‘hot’—making it impossible to attack it without blanketing Baghdad with massive radioactive fallout—Israel had acted to protect the lives of its citizens. In particular, in destroying the reactor, Israel had exercised ‘its inherent and natural right to self-defence, as
Bellum and the Power of Precedent

1 Introduction: The Jus Contra Liby—1986

2 The Caroline Incident—1837

3 T.N. the Soviet Intervention in the Congo—1960 and 1964

4 The Indian Intervention in the Congo—1961

5 The Cuban Missile Crisis—1962

6 The Gulf of Tonkin Incident—1964

7 The US Intervention in the Dominican Republic—1965

8 The Six Day War—1967

9 The Intervention in Czechoslovakia—1968

10 The Gulf of Tonkin Incident—1962

11 The US Intervention in the Congo—1960

12 The Six Day War—1967

13 The Intervention in Czechoslovakia—1968

14 The US Intervention in the Congo—1960

15 The Indian Intervention into East Pakistan—1971

16 The Yom Kippur War—1973

17 Teheran’s Intervention in Cyprus—1974

18 The Mayaguez Incident—1975

19 The Erbil Fire—1976

20 The Larme Incident—1975

21 The Vietnamese Intervention in Cambodia—1970

22 The Ugandan-Tanzanian War—1978–79

23 Operation Lanka—1978

24 The Lebanon War—1982

25 The Soviet Intervention in Afghanistan—1979–88

26 The US Hostage Rescue Operation in Iran—1980

27 The Iran-Iraq War—1980–88

28 Israel’s Arikats Against Iraq’s Osirak Nuclear Reactor—1981

(a) Facts and Context
(b) The Positions of the Main Protagonists and the Reaction of Third States and International Organizations
(c) Questions of Legality

29 The US Intervention in Nicaragua—1981–88

30 The Falklands/Malvinas War—1982

31 South African Incursions into Lesotho—1982

32 The Intervention of the United States and other Eastern Caribbean States in Grenada—1983

33 The Israeli Raid Against the PLO Headquarters in Tunis—1985

34 The Killing of Qadhafi’s Brother by Israeli Commandos in Tunis—1985

35 The US Strikes Against Libya—1986

36 The US Intervention in Panama—1989

Further Material

References

(p. 331) UN Charter: Referring to the Caroline affair and quoting scholars such as Waldock, Bowett, Schwert, and McDougall, Israel took the view that the right of self-defence did not require a state to suffer the first, and possibly fatal, blow. According to Israel, the concept of self-defence had ‘broadened with the advance of man’s ability to wreak havoc on his enemies. Consequently, the concept took on new and far wider application with the advent of the nuclear era’. Thus, Israel argued, the ‘concepts of “armed attack” had to be read in conjunction with the present-day criteria of speed and power, and placed within the context of the circumstances surrounding nuclear attack’. Iraq, for its part, strongly condemned the ‘clear-cut act of premeditated aggression’ committed against it, stressing that: [p. 401] The attack carried out by Israel against Iraq is clearly an act of aggression in accordance with the provisions of the Charter as expounded on in the Definition of Aggression in General Assembly resolution 3314 (XXIX). The Israeli allegation that it acted in legitimate self-defence is totally unfounded, in fact and in law.

What is more, throughout a series of debates within the UNSCF and the UNIA, third states levelled the Israeli arguments to the ground. One after the other, member states pointed out that the target being attacked was a peaceful research facility, and that, contrary to Israel itself—which had refused to accede to the NPT and was widely believed to have clandestinely acquired nuclear weapons—Iraq was a party to the NPT and had always complied with the IAEA inspection regime. Of considerable importance were the positions of France, which had been closely involved in the construction of the facility, and of the IAEA. France firmly rejected the Israeli allegations that the reactor was intended to produce atomic bombs, insisting instead that its sole purpose was scientific research. France dismissed as groundless Israeli allegations pertaining to the risk of diversion of enriched uranium and the production of plutonium. It stressed that Iraq had

References

(p. 332) entered into all the necessary implementation agreements with the IAEA and that France itself had also made sure ‘that no measure would be neglected to guarantee the use of the supplies [of nuclear fuel] for exclusively peaceful purposes’. IAEA Director-General Elkind affirmed before the Security Council that the two Iraqi reactors had been subject to periodical inspections, and that these inspections had revealed that no nuclear material had been diverted from peaceful purposes. The last inspection had taken place in January 1981. Another inspection had been scheduled to take place later in June 1981. The IAEA stressed that, due to the design of the facility and the fuel elements, diversion of fuel elements for non-peaceful purposes would have been easily detected. In addition, it was asserted, contrary to what Israel had argued, the IAEA was well aware of the existence of a vault under the Osirak reactor, and that this space could not be used to produce plutonium.

Numerous UN members stressed that all states—including oil-producing states—had the right to develop nuclear technology for peaceful purposes. Several, including the United States, insisted that if Israel had had doubts about the peaceful nature of Iraq’s nuclear programme, it should have pursued peaceful measures, for instance, by raising the matter before the Security Council or the IAEA. Israel’s attack on a reactor subject to IAEA inspections was widely deemed to undermine the international non-proliferation regime (a view shared by the IAEA itself). Dozens of states denounced Israel’s conduct as a (premeditated) act of aggression, or at least as a serious violation of the UN Charter. All states intervening in the debates condemned the strike—albeit that the United States offered a rather mild rebuke (essentially condemning Israel’s failure to exhaust peaceful means).

Interestingly, several UN members explicitly discarded Israel’s invocation of the right of self-defence. Thus, the suggestion that self-defence could be exercised ‘preventively’ against future, non-imminent threats, was widely denounced. Numerous states from all regions warned that such a broad reading of the right of self-defence had no basis in

References

(p. 333) international law; that it would leave it up to states themselves to decide at their discretion whether recourse to force was suited to tackle a hypothetical security threat; and that it would replace the Charter rules with the ‘law of the jungle’. Because of the ‘obvious dangers’ involved, the European Community, for instance, refused to accept that Article 51 should be interpreted more widely ‘to allow a pre-emptive strike by one State against what it alleges to be the nuclear-weapon development programme of another, potentially hostile, State’. Sweden, like many others, agreed that the proposed interpretation of self-defence meant that the concept could be extended ‘almost limitless’ to include all conceivable future dangers, subjectively defined.

A number of states intervening in the debates acknowledged (explicitly or implicitly) the permissibility of some form of anticipatory self-defence, but were quick to stress that Israel’s actions did not meet the imminence requirement. The United Kingdom noted that ‘there was no instant or overwhelming necessity for self-defence’. Sierra Leone similarly declared that ‘the plea of self-defence is untenable where no armed attack has taken place or is imminent’. Comparable statements were made, for instance, by the representatives of Niger and Oman.

Several others insisted that Israel’s defence claim had to be rejected, since the exercise of the right of self-defence was contingent upon the occurrence of an (actual) armed attack, and no such attack had taken place. According to China, for example, the Charter was ‘precise and clear: the right to self-defence can be exercised only if an armed attack

References

(p. 334) occurs against a Member of the United Nations’. In a similar vein, Mexico, stressed that ‘it is inadmissible to invoke the right to self-defence when no armed attack has taken place’.

On 12 June 1981, the Board of Governors of the IAEA adopted a resolution ‘strongly condemning’ Israel for its premeditated and unjustified attack on the Iraqi nuclear research centre, which is covered by Agency safeguards, while expressing its concern over the harm caused by the Israeli strike to the IAEA safeguards regime. One week later, the Security Council unanimously adopted Resolution 487 (1981), which ‘strongly condemned’ the military attack by Israel in clear violation of the Charter, ‘condemned upon Israel to refrain in the future from any such acts or threats thereof’, labelled the attack ‘a serious threat to the entire safeguards regime of the IAEA’, and ‘fully recognized’ the inalienable sovereign right of … all States … to develop their economy and industry for peaceful purposes. On 13 November 1981, the
III. Questions of Legality

Having examined the justifications put forward by Israel and the reaction of third states at the UN level, the present section further examines the legality of the Israeli operation and its treatment in legal doctrine. The analysis first focuses on the anticipatory self-defence argument which Israel itself put forward (section 1). Subsequently, section 2 explores alternative justifications that have been suggested in legal scholarship, such as the argument that the raid against the Osiraq reactor did not amount to a breach of Article 2(4) of the UN Charter.

1. The right of self-defence

According to D’Amato, international scholars were ‘near unanimously’ in agreeing that Israel’s Osiraq raid violated international law.\(^{51}\) Israel’s self-defence claim indeed met with little sympathy in legal doctrine. A distinction can be made between those scholars insisting that Article 51 of the UN Charter permits the exercise of self-defence only if one were to accept Israel’s claim that Iraq was seeking to obtain nuclear weapons and that it was nearing that goal (notwithstanding the fact the strike was premeditated, further indicating that the threat was not imminent).\(^{52}\) Fischer, while nonetheless dismissive of anticipatory self-defence, similarly emphasized that the strike was premeditated, and that Israel itself had acknowledged that Iraq would not have been able to obtain nuclear weapons until 1985 at the earliest.\(^{53}\) On a different note, Fischer also observes that expert opinions were divided as to the risk of exposure to radioactive fall-out for the inhabitants of Baghdad in case the strike had been postponed until after the reactor became operational.\(^{54}\)

Nydell’s analysis is somewhat different. Contrary to the previous authors, Nydell appears to accept that Israel credibly believed that Iraq sought to obtain nuclear weapons and that it had the nuclear material, the knowledge, and the technological equipment to do so.\(^{55}\) In addition, he argues that Israel had no reasonable expectation that it could peacefully prevent Iraq from developing a nuclear arsenal.\(^{56}\) While acknowledging that Israel had relied on unfounded or misquoted Iraqi statements, Nydell further finds that Iraq was openly committed to the destruction of Israel.\(^{57}\) In spite hereof, Israel acted, not in order to prevent an imminent (nuclear) attack against it, but rather to prevent Iraq ‘from obtaining substantial political and military power in the future’.\(^{58}\) Nydell thus arrives at the same conclusion as the aforementioned authors, notably that Israel’s raid could not qualify as anticipatory self-defence ‘because the action was taken before an imminent threat was posed’.\(^{59}\)

A rare example of a scholar embracing Israel’s broad ‘preventive’ self-defence claim,\(^{56}\) Kaplan has nonetheless argued that, ‘[a]lthough a surprise nuclear attack upon Israel was not imminent’, Israel plausibly could have perceived that Iraq was using the Osiraq reactor to produce nuclear weapons and that it had the intention to bomb Israel.\(^{60}\) Since such an attack—even if not imminently forthcoming—could have extinguished Israel’s very (p. 336) existence, the threat posed by Iraq was grave, and Israel’s ‘defensive action did not extend beyond the scope of meeting that specific threat’.\(^{61}\)

In the end, it is hardly surprising that Israel’s self-defence claim has been widely dismissed in legal doctrine.\(^{62}\) First, as suggested before, legal doctrine has long been divided on the question as to whether international law permits anticipatory self-defence at all. The present author, for one, finds unconvincing the argument that, notwithstanding the clear text of Article 51 of the UN Charter (which refers to the right of self-defence ‘if an armed attack occurs’), a pre-existing customary right of anticipatory self-defence has survived the adoption of the UN Charter.\(^{63}\) This is not to say that Article 51 of the UN Charter prohibits states from ‘interfering’ an armed attack that has been set in motion, even if its consequences have not yet materialized.\(^{64}\) Yet, it does suggest that, for mere threats of attack to trigger the right of self-defence, it must be demonstrated by reference to convincing evidence in case-war state practice that the ‘anticipatory self-defence’ thesis has gradually come to be accepted.\(^{65}\)

Second, even if one accepts the permissibility of anticipatory self-defence as a matter of principle, this doctrine has traditionally been construed along the lines of the Caroline doctrine, as being confined to situations where there is an overwhelming necessity, ‘leaving no choice of means and no moment for deliberation’.\(^{66}\) Crucial in this context is the need for an ‘imminent’ armed attack.\(^{67}\) While an impending surprise nuclear attack might well qualify in this context,\(^{68}\) such imminent attack was manifestly lacking in the present case. This is so even if one were to accept Israel’s claim that Iraq was seeking to obtain nuclear weapons and that it was nearing that goal (notwithstanding the fact that Israel’s allegations were contradicted by the IAEA and by France, and discounting the fact that several of its statements were proven wrong or misleading). Indeed, the mere development of a nuclear weapons programme by another state cannot simply be equated to an imminent threat of an armed attack.\(^{69}\)

As former US Legal Adviser Taft recognized in 2003—

References

(p. 337) a piece defending the legality of the 2003 Iraq war—‘[o]ne may not strike another merely because the second might someday develop an ability and desire to attack it’.\(^{70}\) It is worth recalling in this context that, even if the Security Council has occasionally labelled the proliferation of nuclear, chemical, and biological weapons a threat to international peace and security,\(^{71}\) there is de facto no rule in general international law which prohibits a state from developing and/or possessing nuclear weapons per se.\(^{72}\) Moreover, from a military-strategic perspective, nuclear weapons are in principle not offensive weapons, but rather ‘safety devices’ intended to deter large-scale attacks against the possessing state. Put differently, states presumably do not seek to acquire nuclear weapons to carry out concrete attacks, but rather to

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shift the strategic and geopolitical balance to their advantage. Every Head of State is aware that a first use of nuclear weapons would not only make it a pariah in the international community, but would most likely entail a massive military response. In Charter terms then, the fight against nuclear proliferation comes within the framework of collective security, rather than that of self-defence.

2. Alternative legal bases

If Israel’s self-defence claim must be rejected, some scholars have sought alternative legal bases to defend the legality of the Osiraq raid. D’Amato, for instance, while dismissing the anticipatory self-defence plea, suggested that the Israeli strike did not qualify as a use of force against Iraq’s ‘territorial integrity or political independence’ in the sense of Article 2(4) of the UN Charter. Since Israel’s purposes did not go beyond the destruction of the nuclear reactor, the argument goes, Iraq’s territory remained integral, and its political independence was not compromised. D’Amato’s argument nonetheless flies in the face of accepted wisdom—corroborated by the travaux préparatoires of Article 2(4) of the UN Charter—and the ICJ’s Corfu Channel Case—that Article 2(4) encompasses a broad, all-inclusive prohibition, which also extends to more small-scale operations that do not lead to any form of territorial loss or to regime change.

Alternatively, a few scholars—including, most prominently, Yoram Dinstein—have argued that the Israeli operation could be justified by the technical ‘state of war’ which characterized the relations between Israel and Iraq at the time of the events. However, as others have rightly observed, this argument must again be rejected. The ‘state of war’ is a concept that is not recognized in the UN Charter and, consequently, cannot prevail over the prohibition on the use of force. When two states are not (or no longer) actually engaged in active hostilities (bringing into play the law of armed conflict), the mere absence of a peace treaty or formal armistice does not mean that Article 2(4) of the UN Charter does not apply between them. As Quigley notes, ‘[t]he view taken consistently by the international community, including the U.N. Security Council has been that actions by Israel and the Arab states against each other are to be assessed against the broader standards of the U.N. Charter on use of force and self-defence.’ This approach is confirmed by the treatment of the Osiraq raid. Thus, Israel did not claim that the ‘state of war’ with Iraq meant that Article 2(4) of the UN Charter was inapplicable, but instead sought to frame its actions as an exercise of the right of self-defence. In the debates at the UN, no state regarded the existence of a ‘state of war’ as a credible legal basis to justify a recourse to force, and some explicitly discarded the possibility that it did.

Inasmuch as none of the alternative arguments put forward in legal doctrine provide a credible legal basis, it must be concluded that the Osiraq raid constituted a violation of international law, and, more specifically, infringed the prohibition on the use of force.

IV. Conclusion: Precedential Value

Israel’s airstrike against the Osiraq reactor constituted the first time a country openly attacked another state’s nuclear facilities. As the attack was directed against facilities that were subject to IAEA monitoring, it also constituted an open challenge to the existing non-proliferation regime. A number of scholars have suggested that, while the reactor was

References

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(p. 339) ostensibly used for peaceful purposes, the raid may actually have had the paradoxical effect of strengthening the nuclear ambitions of the Arab states. By contrast, when in the aftermath of the 1990–91 Gulf War UN inspectors discovered a complex of buildings serving as Saddam Hussein’s covert nuclear weapons programme, some scholars saw this as a vindication of Israel’s erstwhile position.

When assessing the precedential value of the Osiraq raid, the key question is to what extent the universal condemnation of the raid amounts to a principled rejection of the legality of anticipatory self-defence by the international community. One possible interpretation is that the widespread disapproval was simply due to the apparent lack of evidence that Iraq was developing a nuclear weapons programme, and should accordingly not be taken for a rejection of anticipatory self-defence. This account is, however, incomplete.

As discussed above, it is clear that, in defending its actions before the UN bodies, Israel deliberately put forward a novel and expansive reading of the right of self-defence, departing from the traditional interpretation of anticipatory self-defence along the lines of the Caroline formula. According to Israel, the doctrine of anticipatory self-defence had to be adapted ‘with the advent of the nuclear era’. In particular, it had to be adjusted to take into account ‘the present-day criteria of speed and power’. The Israeli argument bears striking similarities to a plea formulated more than two decades later, when the Bush administration published its 2002 US National Security Strategy, asserting that:

[w]e must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries … The greater the threat … the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack.

Just as the international reaction to the Bush administration’s attempt to broaden the doctrine of anticipatory self-defence to cover certain ‘non-imminent’ threats was widely negative, Israel’s attempt to carve out an exception from the ‘imminence’ requirement in the nuclear context met with strong opposition at the UN level. To paraphrase Abram Chayes’ comments on the 1962 Cuban missile crisis, the general feeling was that Israel’s concept of ‘preventive’ self-defence would essentially make the occasion for action in self-defence ‘a question for unilateral national decision that would not only be formally unreviewable, but not subject to intelligent criticism either’. In other words: it would open the door to the ‘law of the jungle’. Israel’s Osiraq raid is not the only case of a military intervention inspired by another state’s alleged attempt to clandestinely obtain military weapons. Nor is it the only example of an air strike against a presumed nuclear facility. As is well-known, in 2003, the United States led a coalition of the willing into Iraq, resulting in the overthrow of Saddam (p. 340) Hussein, primarily because Iraq was suspected of developing weapons of mass destruction (WMD) in contravention of the Security Council resolutions adopted in the wake of the 1990–91 Gulf War.

Interestingly, in spite of the adoption of the aforementioned US National Security Strategy only one year earlier, the United States did not justify the intervention as a case of (anticipatory) self-defence—as Israel did in 1981—but instead sought to claim (unconvincingly) that the intervention was authorized by pre-existing Security Council resolutions. The allegations pertaining to Saddam Hussein’s WMD programme later turned out to be incorrect. In September 2004, the Iraq Survey Group declared that it had not ‘found evidence that Saddam possessed WMD stocks in 2003’. Again, in September 2007, Israel carried out an airstrike in Syria (Operation Orchard), which

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anonymous sources suggested destroyed a presumed nuclear facility. While the features of the strike appear to resemble those of the 1981 Osirak raid, it is worth observing that Israel did not report the strike to the Security Council as a case of anticipatory self-defence. Instead, it refused to publicly comment on the nature or target of the operation, and refrained from offering any legal justification.

It follows from the Osirak precedent that concerns that another state may be developing or acquiring nuclear weapons (or other weapons of mass destruction) cannot, of themselves, trigger other states’ right of self-defence. Indeed, while the threat of WMD proliferation should not be underestimated, the proper way to address it is through multilateral negotiations, the IAEA, and the UNSC. To carve out a broad right of ‘preventive’ self-defence vis-à-vis nuclear threats—as Israel unsuccessfully pleaded in 1981—would essentially accord powerful states a blanket cheque to decide unilaterally which states would be permitted to develop nuclear weapons and which would not—all while maintaining and upgrading their own nuclear arsenals. Such approach is hard to reconcile with the acknowledgment by US President Obama, in his 2009 Cairo speech, that “[n]o single nation should pick and choose which nations hold nuclear weapons.”

On a final note, the question remains to what extent the Osirak raid constitutes a relevant precedent affirming the legality or illegality of anticipatory self-defence in response to ‘imminent threats of attack. Given the fact that no imminent threat existed and that (p. 341) not a single state expressed support for the raid, it is hard to see how the raid could plausibly qualify as a useful precedent affirming the permissibility of anticipatory self-defence (as some have nonetheless suggested). At the same time, and in all fairness, the broad condemnation of the raid should not automatically be equated to a principled rejection by states of the doctrine of anticipatory self-defence.

First, it may well be that, in light of the assurances of the IAEA and the lack of compelling proof put forward by Israel, to paraphrase the ICJ’s Nicaragua case, many states found that “the lawfulness of a response to the imminent threat of armed attack had not been raised”, and accordingly chose not to express themselves on that issue. Second, it is recalled that several states explicitly or implicitly accepted the exercise of self-defence in reaction to ‘imminent’ threats of armed attack (see above). Others, by contrast, appeared to insist that the exercise of self-defence presupposed the occurrence of an actual armed attack. In the end, the only conclusion that can safely be drawn from the UN debates (apart from the categorical rejection of ‘preventive’ self-defence) is that they reveal a crack in states’ opinio juris when it comes to the legality of anticipatory action in response to ‘imminent’ threats.

References


2 For a detailed overview of the French–Iraqi cooperation, see: Fischer (n 1) 147–51.

3 Ibid 149, 151.

4 Nydell (n 1) 461. Note: in September 1980, shortly after the outbreak of the Iran–Iraq war (see Chapter 27, ‘The Iran-Iraq War—1980–1988’ by Andrea de Guttuy in this volume), two planes unsuccessfully attacked the Iraqi nuclear installations. While the attacks were carried out by planes bearing Iranian markings, it was speculated that the raid was a covert operation by Israel. Ibid 461, note 10. Reference can also be made to prior events in France. In April 1979, the core of the reactor destined for Iraq was destroyed by an explosion thought by some to be the work of the Israeli secret service. And in June 1980, an Egyptian technician working for the Iraqi nuclear programme was assassinated in Paris. Fischer (n 1) 155.

5 Letter dated 8 June 1981 from the Permanent Representative of Israel to the United Nations addressed to the President of the Security Council (8 June 1981) UN Doc S/14510.

6 See, eg, UNSC Verbatim Record (16 June 1981) UN Doc S/PV.2284 [59] (Iraq). See also n 54.

7 UN Doc S/14510 (n 5).

8 Although the Israeli letter stressed that “[n]o foreign experts were hurt”, one French technician was later reported to have been killed during the attack.

9 See UNSC Verbatim Record (12 June 1981) UN Doc S/PV.2280 [55]–[117]; UN Doc S/PV.2284 (n 6) [84]–[88]; UNSC Verbatim Record (15 June 1981) UN Doc S/PV.2288 [38]–[96], [188]–[195]; UNGA Verbatim Record (11 November 1981) UN Doc A/36/PV.52 [30]–[71]; UNGA Verbatim Record (12 November 1981) UN Doc A/36/PV.55 [181]–[182].

10 UN Doc S/PV.2280 (n 9) [59]–[67]; UN Doc S/PV.2284 (n 6) [85]; UN Doc S/PV.2288 (n 9) [79].

11 UN Doc S/PV.2280 (n 9) [73].

12 Ibid [449], [78].

13 UN Doc S/PV.2284 (n 6) [84].

14 See, in particular, UN Doc S/PV.2288 (n 9) [62]–[75] (Israel drew attention to various “loopholes”, including, eg, the need for advance notice for routine inspections, the fact that inspectors are always accompanied by representatives of the state concerned, the possibility to block inspections for a certain period, etc).

15 UN Doc S/PV.2280 (n 9) [93], [108]–[109]; UN Doc S/PV.2288 (n 9) [95].

16 UN Doc S/PV.2280 (n 9) [97].

17 UN Doc S/PV.2288 (n 9) [80]. On the Caroline incident, see further Chapter 2 The Caroline Incident—1837 by Michael Wood in this volume.

18 UN Doc S/PV.2280 (n 9) [96]–[100]. [58] (referring to the right of self-defence ‘as preserved’ in Article 51 of the UN Charter); UN Doc S/PV.2288 (n 9) [81]–[84]; UN Doc A/36/PV.52 (n 9) [63]–[64].

Footnotes:
41 [80] (Chile).


42 Presaging the peaceful nature of Iran’s nuclear programme see, eg, UN Doc S/PV.2280 (n 9) [147] (Algeria), [196]–[197] (Jordan); UN Doc S/PV.2281 (n 24) [9] (Kuwait), [33] (India), [50] (Cuba), [66] (Pakistan), [82] (Bulgaria); UN Doc S/PV.2282 (n 24) [20]–[25] (Uganda), [48]–[56] (France), [65] (German Democratic Republic), [83] (Spain); UN Doc S/PV.2283 (n 24) [18]–[23] (Ireland), [66] (Soviet Union), [84]–[86] (Egypt), [169] (Mongolia), [178] (Zambia); UN Doc S/PV.2284 (n 6) [11], [14] (Niger), [34] (Philippines), [45] (Yemen); UN Doc S/PV.2285 (n 24) [9]–[10] (Morocco), [118] (Bangladesh), [140] (Poland); UN Doc S/PV.2286 (n 24) [7] (Italy); UN Doc S/PV.2287 (n 24) [52] (Indonesia), [53] (Malaysia).

43 UN Doc S/PV.2282 (n 24) [48]–[54] (France).

44 Ibid [50]–[53] ("To conclude this technical aspect, it would be absurd for a country wishing to manufacture a nuclear bomb to build a reactor such as the Tamuz reactor to get material for military purposes. As everybody knows, there are simply ways to make plutonium for making plutonium, for example."); ibid [54].

45 UN Doc S/PV.2280 (n 9) [6]–[15] (IAEA).

46 Ibid [13]. In a similar vein, it was asserted that the refurbishing of the core of the reactor with a view to producing plutonium would have been easily detected. ibid [14].

47 ibid [15].

48 See, eg, UN Doc S/PV.2280 (n 9) [57]–[140] (Iraq), [133] (Turksia); UN Doc S/PV.2281 (n 24) [33] (India), [46]–[48] (Cuba); UN Doc S/PV.2282 (n 24) [95] (Spain); UN Doc S/PV.2283 (n 24) [47] (Czechoslovakia), [122] (Romania); UN Doc S/PV.2284 (n 9) [29] (Philippines), [38] (Panama); UN Doc S/PV.2285 (n 24) [123] (Bangladesh); UN Doc S/PV.2286 (n 24) [71] (Guyana), [30], [39] (Somalia); UN Doc S/PV.2287 (n 24) [9] (Nicaragua), [43] (Sri Lanka); UN Doc S/PV.2288 (n 9) [124] (Mexico). Note: some countries drew attention to the fact that oil is a depletable, non-renewable energy source, implying that oil-producing countries might also have a vested interest in pursuing nuclear energy.

49 See, eg, UN Doc S/PV.2282 (n 24) [95] (Japan); UN Doc S/PV.2283 (n 24) [149] (Sierra Leone); UN Doc S/PV.2284 (n 6) [8] (Philippines); UN Doc S/PV.2285 (n 9) [30], [157] (United States).

50 See, eg, UN Doc S/PV.2280 (n 9) [49] (Iraq); UN Doc S/PV.2282 (n 24) [55] (France), [66] (German Democratic Republic), [106] (United Kingdom); UN Doc S/PV.2282 (n 24) [15] (Ireland), [37] (Yugoslavia); UN Doc S/PV.2284 (n 6) [50] (Yemen); UN Doc S/PV.2286 (n 24) [7] (Italy); UN Doc S/PV.2287 (n 24) [20] (Indonesia); UN Doc S/PV.2288 (n 9) [18]–[19] (IAEA), [121]–[122] (Mexico).

51 See, eg, UN Doc S/PV.2280 (n 9) [48], [51] (Iraq), [153]–[154] (Algeria), [178] (Sudan), [186] (Jordan); UN Doc S/PV.2281 (n 24) [7] (Kuwait), [30]–[31] (India), [44] (Cuba), [66]–[67] (Pakistan), [84] (Bulgaria); UN Doc S/PV.2282 (n 24) [21] (Uganda), [64] (German Democratic Republic), [98] (China); UN Doc S/PV.2283 (n 24) [32] (Soviet Union), [98] (Egypt), [114] (Romania), [138] (Vietnam), [150] (Siera Leone), [166] (Mongolia); UN Doc S/PV.2284 (n 6) [22] (Philippines), [42] (Yemen), [82] (Syria); UN Doc S/PV.2285 (n 24) [17] (MoroccO), [97] (Czechoslovakia), [112] (Bangladesh), [135] (Poland), [148] (Islamic Group); UN Doc S/PV.2286 (n 24) [10] (Guyana), [27]–[28] (Somalia), [49] (Turkey); UN Doc S/PV.2287 (n 24) [9] (Nicaragua), [20] (Indonesia); UN Doc S/PV.2288 (n 9) [112] (Mexico).

52 See, eg, UN Doc S/PV.2286 (n 24) [4] (Philippines, speaking on behalf of the Association of South-East Asian Nations).

53 UN Doc S/PV.2287 (n 9) [30], [157]. UNGA Verbatim Record (12 November 1981) UN Doc A/36/PV.54 [20].

54 See, eg, UN Doc S/PV.2280 (n 9) [157]–[160] (Algeria); see also (n 9) [157]. The new theory of “preventive” aggression is the negation of law and morality ... [9] would be in danger of spontaneously setting itself up as judge, party and policeman in respect to another country,” (98) (Iraq); UN Doc S/PV.2283 (n 24) [32]–[33]; ibid [13] (Sudan); [9] (the definition of self-defence would replace the basic principle of the Charter ... by a virtually unlimited concept of self-defence against all possible future dangers, subjectively assessed’), [46] (Yugoslavia), [63]–[64] (Soviet Union), [117] (Romania), [146]–[149] (Siera Leone), [167] (Mongolia); UN Doc S/PV.2284 (n 6) [28] (Philippines), [47]–[48] (Yemen), [64]–[65] (Syria); UN Doc S/PV.2286 (n 24) [15]–[16] (Guyana), [31] (Somalia); UN Doc S/PV.2287 (n 24) [9] (Nicaragua); UN Doc S/PV.2288 (n 9) [115] (Mexico), [141] (Uganda); UN Doc A/36/PV.53 (n 22) [121] (Syria), [131], [142] (China), [152] (Turkey); UN Doc A/36/PV.54 (n 37) [2] (India), [95] (German Democratic Republic), [39] (Austria), warning that the doctrine ‘would replace the legitimacy of defence against armed aggression ... by an unlimited and uncontrolled concept of armed retaliation against all possible future dangers on the basis of a very subjective and unilateral assessment of those dangers’), [40] (Turkey), [96] (Bulgaria), [79] (Soviet Union); UN Doc A/36/PV.55 (n 9) [24]–[32] (United Arab Emirates), [39]–[40] (Oman), [52] (Romania); UNGA Verbatim Record (13 November 1981) UN Doc A/36/PV.56 [4] (Guyana), [92] (Spain), [86] (Chile).

55 UN Doc A/36/PV.53 (n 22) [92].

56 UN Doc A/36/PV.56 (n 38) [119].

57 UN Doc S/PV.2282 (n 24) [106].

58 UN Doc S/PV.2283 (n 24) [147]–[149].
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In a similar vein, see, eg, Quigley (n 68) 441. Drawing attention to the relevance of a second-strike capability, see Nolte and Randelshofer (n 71); ‘the limitation on the possibility of anticipatory self-defence embodied in Art. 51 is compatible with the strategy of nuclear powers only as long as States are able to defend themselves against a pre-emptive strike launched against them. Should this so-called second-strike capability fall away, the limitation on the possibility of anticipatory self-defence would not be removed, but its observance by States would nevertheless likely be diminished.’


See, eg, UNSC Res 1540 (28 April 2004) UN Doc S/RES/1540.

See, eg, Ruth Wedgewood, ‘The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-defence’ (2003) 97 American Journal of International Law 576, 585. Note: the ICI previously held that ‘[t]here is in neither customary nor conventional international law any comprehensive prohibition of the threat or use of nuclear weapons as such’. Legality of the threat or use of nuclear weapons, Advisory Opinion [1996] ICJ Rep 226, 266. A fortiori, one might add that there is no comprehensive prohibition of the possession of such weapons (save in respect of states that have ratified the 2017 Treaty on the Prohibition of Nuclear Weapons).

Consider, eg, Contisleeza Rice, ‘Promoting the National Interest’ (2000) 79(1) Foreign Affairs 45, 61 (suggesting that if Iraq or North Korea were to acquire WMD, ‘their weapons will be unusable because any attempt to use them will bring national obliteration’). In a similar vein: Robert S McMahon, ‘The Military Rule of Nuclear Weapons: Perceptions and Misperceptions’ (1983–84) 62 Foreign Affairs 59, 79 (‘[u]nuclear weapons serve no military purpose whatsoever. They are totally useless – except to deter one’s opponent from using them’).

Further: Philip Bobbitt, Terror and Consent: The Wars for the Twenty-First Century (Penguin 2008) 6: ‘It is now possible for the U.S. to determine within seconds the origin of any ballistic missile launch within an accuracy of ten meters. The leadership of a State that ordered such an attack would face the certainty of an immediate and annihilating retaliatory response.’

D’Amato, ‘Israel’s Air Strike Against the Osiraq Reactor: A Retrospective’ (n 1) 585. According to D’Amato, the Israeli action was legal under international law, but Israel nonetheless owed monetary compensation to Iraq for the actual damage to the nuclear facility and for the four lives that were lost (ibid 584, note 2). In a later article, D’Amato instead adopts the view that the Osiraq raid was permissible under international law because ‘Israel acted as a proxy for the international community’. See: D’Amato (n 50) 262. The reader is nonetheless left to wonder how this argument finds a basis in positive law.


Corfu Channel (Albania v United Kingdom) [1949] ICJ Rep 35.

See, eg, Ian Brownlee, International Law and the Use of Force by States (OUP 1963) 265–68; Einstain (n 68) 90; Albrecht Randelshofer and Oliver Ditr, ‘Article 2(4)’ in Bruno Simma, Daniel-Enasiku Khan, Georg Nolte, and Andreas Paulus (eds), The Charter of the United Nations: A Commentary vol 2 (3rd edn, OUP 2012) 215 (with references to note 79); observing that this is the ‘dominant view’; Rays (n 52) 56–57.


Fischer (n 1) 162; Mallison and Mallison (n 1) 433; D’Amato (n 51) 261–62. See also US Senate (n 1) 37–38; Michel: ‘The United States consistently has denied that such assertions of belligerency give the Arab states any right to use force beyond the right of self-defense recognized in the U.N. Charter. We think the same reasoning would apply to Israel’) and 239 (Moore).

It is worth recalling in this context that Article 3 of the UN General Assembly Definition of Aggression clarifies that the provision applies ‘regardless of a declaration of war’. Annex b UNGA Res 314 (XXII) (14 December 1944) UN Doc A/RES/314 (XXII).

Quigley (n 68) 444.

The existence of a state of war was mentioned only as a subsidiary argument, to demonstrate the threat allegedly posed by Iraq. See, eg, UN Doc S/PV.2288 (n 8) 79. It may also be noted that, in relation to the 1951 conflict between Egypt and Israel on the right of passage through the Suez Canal, Israel explicitly rejected the possibility of invoking belligerent rights on the basis of a technical state of war, as did most of the UN Security Council members. See, eg, UNSC Verbatim Record (26 July 1951) UN Doc S/PR.549 [32], [40]–[41] (Israel); UNSC Verbatim Record 16 August 1951) UN Doc S/PV.552 [21], [33] (France).

See UN Doc S/PV.2280 (n 9) [22] (United Arab Emirates); [49] (Algeria); UN Doc S/PV.2288 (n 9) [116] (Mexico); UN Doc A/36/PV.52 (n 22) [24] (Iraq); UN Doc A/39/PV.56 (n 38) [18]–[19] (Algeria).

In this sense, see, eg, Mallison and Mallison (n 1) 443; Fischer (n 1) 167 (according to Fischer, it wasn’t until after the strike that President Saddam Hussein called for support to the Arab States so that they might acquire nuclear weapons as a counterweight to Israel’s nuclear capacity (ibid 152)).


UN Doc S/PV.2288 (n 9) 85.

UN Doc A/36/PV.52 (n 9) 63.


See Rays (n 52) 322–42; Nolte and Randelshofer (n 71) 1423.


See Chapter 38 by Erika de Wet in this volume.


See further Chapter 50 “Israeli Air Strikes in Syria—2003 and 2007” by Lindsay Moir in this volume.

Note: Syria denied that it was engaged in a covert nuclear weapons programme and instead claimed that the target was a disused military building. See: Identical letters dated 9 September 2007 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council (10 September 2007), UN Doc S/2007/537 (condemning the Israeli actions as “aggression”).

Note: this did not prevent the non-aligned movement from ‘condem[n]ing’ the Israeli attack against a Syrian facility on September 6, 2007 which constitutes a flagrant violation of the UN Charter’. See 16th Summit of Heads of State or Government of the Non-Aligned Movement, Tehran, Islamic Republic of Iran, 26–31 August 2012 (31 August 2012) NAM2012/Doc.1/Rev.2, [176].


