

1-1-2010

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Recommended Citation

Behnam Gharagozli, *War of Words or a Regional Disaster: The (Il)Legality of Israeli and Iranian Military Options*, 33 HASTINGS INT'L & COMP. L. REV. 203 (2010).

Available at: https://repository.uchastings.edu/hastings_international_comparative_law_review/vol33/iss1/5

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War of Words or a Regional Disaster? The (Il) Legality of Israeli and Iranian Military Options

By BEHNAM GHARAGOZLI*

Israel is a “germ of corruption” that will be “removed soon.”¹

— *President Mahmoud Ahmadinejad*

“Two thousand kilometers.”²

— *Former IDF Chief of Staff, Dan Halutz on how far Israel would go to stop Iran’s nuclear program. Two thousand kilometers is the distance between Iran and Israel.*

I. Introduction

The above two quotes are a microcosm of the current war of words between Israel and the Islamic Republic of Iran. As the intensity of the verbal exchanges between the two rivals grows, so does the importance of analyzing the current Israeli-Iranian enmity. This note sets out to answer two questions: (1) Whether Israel has the right to attack Iran out of self-defense, and reciprocally; (2) whether Iran has the right to attack Israel out of self-defense.

While the first question has been on the minds of many policymakers in the West for quite some time, few have seriously considered the second. Understandably, many readers may be

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1. Ahmadinejad: Israel Is a Germ of Corruption That Will Be Removed, Haaretz, Aug. 20, 2008, <http://www.haaretz.com/hasen/spages/1013733.html>.

2. Israel v. Iran, Economist, Jan. 19, 2006, available at http://www.economist.com/World/mideast-africa/displayStory.cfm?story_id=5420675.

taken aback by a work that even poses such a question. Many readers may be baffled by the notion that the Islamic Republic of Iran, a state seen by many as a pariah in the Middle East and the West, might have a right to self-defense against a United States ally. It is for this very reason that this paper will analyze the question. To be genuinely objective in evaluating the current rivalry between the two regional powers in the Middle East, it is necessary to pose the question on both sides. This paper will argue that while neither side may legally invoke the right of preemption or Article 51 self-defense, there is ample evidence to suggest that Iran has more reason to fear an Israeli conventional attack on its nuclear installations than Israel has to fear an Iranian nuclear attack on its civilian population.

This note is divided into four parts. Part I introduces the reader to the standard of review. Specifically, this section will identify the legal requirements an acting nation-state must satisfy in order to launch an attack under the right of preemption and/or Article 51. In discussing the right of preemption, the reader may find it interesting that the right in fact did not begin with the Bush Doctrine. Rather, the right of preemption originated out of an incident between the United States and Great Britain more than a century and a half before the Bush Doctrine. Part I will also discuss the relevant criticisms lodged at the current Bush Doctrine (which seeks to loosen the requirements of traditional preemption), and whether Iran or Israel may cite the Bush Doctrine to justify a preemptive strike.

Part II will provide the reader with a brief background of the relations between Israel and Iran ever since the overthrow of Mohammad Reza Shah Pahlavi. This will put the current enmity into its proper context, and demonstrate that the rivalry grew out of geopolitical realities rather than a shift in ideologies.

Part III will evaluate Israel's right to self-defense against Iran under both the theory of preemption and Article 51. The right of preemption analysis will focus on the prospect of an Iranian nuclear attack on Israel³ while the Article 51 analysis will focus on

3. Although Iran is capable of launching a conventional attack against Israel with its Shahab III missiles, an extensive analysis of whether this threat is "imminent" is not required as Iran has had these missiles for at least ten years now (see *infra* section IV) and has not used them against Israel. Iran has not, however, had a nuclear capability. If Iran does come to possess a nuclear weapon, however,

responding to Iran's funding of Hezbollah and Hamas. In spite of Iran's aggressive rhetoric, ongoing nuclear program, and support of Hezbollah and Hamas, this paper concludes that Israel may not legally strike Iran under the Caroline Affair or Article 51.

Part IV will discuss perhaps the most controversial issue of this work: The question of an Iranian right of self-defense against Israel. The right of preemption will be analyzed with respect to preventing an Israeli air assault on Iran's nuclear reactors⁴ while the Article 51 analysis will focus on Israel's funding of Iranian opposition groups and its recent covert war against Iran. Applying the same standard as in Part III, this paper argues that in spite of Israel's express and aggressive rhetoric, support for Iranian opposition groups, reports of assassinations of Iranian scientists, attempts to acquire the esoterically requisite military wherewithal to attack Iran's facilities and the performance of military exercises to prepare for such an attack against Iran, Iran may not conduct a legal preemptive or Article 51 attack against Israel.

II. Setting the Standard of Review

A. *Right of Self-defense Under Article 51*

All members of the United Nations enjoy rights and privileges (as well as responsibilities) under the United Nations Charter ("Charter"). As such, Article 51 of the Charter provides that "[n]othing 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."⁵ Therefore, to attack out of traditional self-defense, a nation-state must have suffered an

it may pose an imminent threat against Israel. The same reasoning applies reciprocally as to why an Iranian conventional attack against Israel's nuclear reactors is not needed as Israel has had nuclear capabilities for decades now. See Trita Parsi, *Israel's 'Auto-pilot' Policy on Iran*, ASIA TIMES ONLINE, Dec. 8, 2007, http://www.atimes.com/atimes/Middle_East/IL08Ak01.html.

4. While Israel is also capable of attacking Iran with nuclear weapons, such a threat is likely not "imminent" as Israel has had this capability for several decades now and has not used it against Iran. However, the development of an Iranian nuclear weapon would be a change in the status quo that may alter the dynamics of the rivalry in which Israel may pose an imminent threat to Iran in Israel's desire to prevent Iran from attaining nuclear capabilities. Interview with Ron Hassner, Assistant Professor of Political Science, University of California, Berkeley (2008).

5. U.N. Charter art. 51.

"armed attack."⁶

The International Court of Justice ("ICJ") in *Nicaragua v. United States* held that an "armed attack" does not include "assistance to rebels in the form of the provision of weapons or logistical or other support," but it did, however, note that an armed attack also includes "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, who carry out acts of armed force against another State of such gravity as to amount to [an actual armed attack conducted by regular forces]."⁷

B. Legalizing Preemption: The Caroline Affair

Defining the standard of when a State may invoke the right of preemption is a bit difficult as the right finds no explicit endorsement in any treaty. To establish the right, we must therefore look to customary international law, which "consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way."⁸ Custom is thus created by state practice and accompanying *opinio juris* (state acceptance of that practice as a legal obligation).⁹

The right of preemptive strike was accepted as custom as early as the nineteenth century and arose out of the *Caroline* Affair. The *Caroline* Affair laid out two requirements for anticipatory self-defense: (1) Imminent necessity; and (2) proportionality.

In 1837, a group of Canadian rebels seeking to democratize Canada were forced to flee to Navy Island and establish headquarters there.¹⁰ Using the steamboat *SS Caroline* ("Caroline"), the Americans supplied the rebels with men, arms and other supplies.¹¹ To end such support, the British reacted by seizing the *Caroline* overnight, setting it on fire and casting it adrift over Niagara Falls, killing two men in the process.¹² Subsequent to the incident, tensions rose between the United States and Britain, and

6. *Id.*

7. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

8. SHABTAI ROSENNE, PRACTICE AND METHODS OF INTERNATIONAL LAW 55 (1984).

9. *Id.*

10. MICHAEL BYERS, WAR LAW 53 (2006).

11. *Id.* See generally Louis-Philippe Rouillard, *The Caroline Case: Anticipatory Self-Defence in Contemporary International Law*, 1(2) MISKOLC J. INT'L L. 104-20 (2004), available at <http://www.uni-miskolc.hu/wwwdrint/20042rouillard1.htm>.

12. Byers, *supra* note 10, at 53.

diplomatic letters were exchanged between the British Prime Minister, Lord Ashburton and the U.S. Secretary of State, Daniel Webster.¹³ Webster wrote that the use of force in self-defense could be justified in situations “in which the necessity of that self-defense is instant, overwhelming, leaving no choice of means and no moment of deliberation.”¹⁴ Additionally, Webster declared that nothing “unreasonable or excessive” could be done in self-defense.¹⁵

To show imminent necessity, the nation-state invoking the right must show that “the use of force by the other [S]tate was imminent and that there was essentially nothing but forcible action that would forestall such attack.”¹⁶ To demonstrate that the force was reasonable and not excessive, the force conducted out of self-defense must be proportional to the danger the State seeks to avoid.¹⁷ A State is justified only in using the amount of force that is necessary to deter an attack.¹⁸

Since the Caroline Affair, governments throughout the international community have come to accept the two criteria of imminent necessity and proportionality as the parameters of a new international right of anticipatory self-defense.¹⁹

C. *Anticipatory Self-defense Survives the U.N. Charter*

Treaties are “instruments binding at international law [that are] concluded between international entities”²⁰ To be considered a treaty, the contracting parties must have intended to create legal rights and duties; the agreement must be concluded by states or international organizations with treaty-making authority; must be

13. *Id.*

14. *Id.* at 54.

15. *Id.*

16. Anthony Clark Arend, *International Law and the Preemptive Use of Military Force*, 26(2) THE WASH. QUARTERLY 89, 91 (2003), available at <http://www.twq.com/03spring/docs/03springarend.pdf>.

17. *Id.* at 91.

18. Joel R. Paul, *The Bush Doctrine: Making or Breaking Customary International Law?*, 27 HASTINGS INT'L L. & COMP. L. REV. 457, 464 (2004).

19. Roxana Vatanparast, *International Law Versus the Preemptive Use of Force: Racing to Confront the Specter of a Nuclear Iran*, 31 HASTINGS INT'L L. & COMP. L. REV. 783, 787 (2008); International Military Tribunal (Nuremberg), Judgment and Sentences (Oct. 6, 1946), reprinted in 41 AM. J. INT'L L. 172, 205 (1947).

20. U.N. Treaty Collection, Treaty Reference Guide, at 3, available at <http://untreaty.un.org/English/guide.pdf> (last visited Jan. 13, 2009).

governed by international law; and must generally be in written form.²¹

Although the right of anticipatory self-defense finds no specific endorsement in any treaty, it is important to determine whether the general provisions of the Charter allow nation-states in the post-Charter era to invoke the right. Article 2(4) of the Charter indicates that there is a presumption against the use of force.²² Specifically, it states that U.N. Member States must "refrain . . . from the threat or use of force against the territorial integrity or political independence of any [S]tate."²³ Article 2(3) demands that all States "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."²⁴

The prohibition against the use of force, however, is not absolute. The Charter provides for two explicit exceptions to the prohibition: (1) Force authorized by the U.N. Security Council, and (2) force used in self-defense.²⁵ As such, Article 51 indicates that the Charter "shall [not] impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations."²⁶

Whether the right of anticipatory self-defense that arose out of the Caroline Affair survived the Charter depends upon one's interpretation of Article 51. On the one hand, it has been argued that Article 51 requires that an act of self-defense by a Member State only occur after an armed attack is carried out against that State.²⁷ This restrictive interpretation goes on to declare that the Charter supercedes rights of self-defense that existed before the Charter (i.e., anticipatory self-defense).²⁸

A more liberal reading of Article 51 argues that because it uses the phrase "inherent right of . . . self-defense," it seems to implicitly adopt the pre-Charter right of self-defense such as preemptive strike as long as they have a basis in customary international law.²⁹

21. *Id.*

22. U.N. Charter art. 2, para. 4.

23. *Id.*

24. *See id.* para. 3.

25. *See id.* art. 51.

26. *Id.*

27. Byers, *supra* note 10, at 73.

28. *Id.*

29. *Id.*

Former U.N. Secretary-General Kofi Annan has declared that States "retain" the inherent right of self-defense under the Charter.³⁰ The more prevailing view indicates that "anticipatory self-defense is permissible but traditionally has required the existence of an imminent threat."³¹ Those that support the right of anticipatory self-defense insist that invoking the right is "limited by the requirements of necessity and proportionality set out in the *Caroline* case."³²

State practice has also supported the more liberal reading of Article 51. The Israeli attack on the Egyptian Air Force at the commencement of the 1967 War provides one such example as it was not condemned by the U.N. Security Council or most States.³³ Further, judges of the ICJ have rejected the conservative interpretation. Judge Higgins argues that "[t]here is . . . nothing in the text of Article 51 that . . . stipulates that self-defence is available only when an armed attack is made by a State."³⁴ Judge Buergenthal asserts that the U.N. Charter, "in affirming the inherent right of self-defence does not make its exercise dependent upon an armed attack by another State."³⁵

It should be noted, however, that advocates of both interpretations of Article 51 agree that under the Charter, a "unilateral preemptive force without an imminent threat is clearly unlawful."³⁶ This note adopts the more liberal reading of Article 51 to include not only the right of self-defense in response to an "armed attack" but also the right of anticipatory self-defense.

30. Kofi Annan, The Secretary-General Address to the General Assembly, New York (Sept. 23, 2003), available at <http://www.un.org/webcast/ga/58/statements/sg2eng030923.htm>.

31. Steven C. Welsh, *Preemptive War and International Law*, CENTER FOR DEF. INFO., Dec. 5, 2003, <http://www.cdi.org/news/law/preemptive-war.cfm>.

32. Arend, *supra* note 16, at 96.

33. For a description of the international reaction to the Israeli strike, see Rosalyn Higgins, *The Attitude of Western States Towards the Legal Aspects of the Use of Force*, THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 435, 442-43 (A. Cassese ed., 1986) (contrasting the reactions to the 1967 attack on Egypt and the 1981 attack on Osirak).

34. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 215 (July 9).

35. *Id.* at 242.

36. Arend, *supra* note 16, at 89.

D. Neither Side May Invoke the Bush Doctrine

In 2002, the Bush Administration attempted to revise the standard for anticipatory self-defense. Pointing to the need to adapt the right of preemptive use of force to be able to combat today's adversaries³⁷ and address the new threats of weapons of mass destruction ("WMDs") and terrorism,³⁸ President Bush advocated "confronting the worst threats before they emerge."³⁹ Under the Bush Doctrine, the preventive use of force is valid and necessary in light of the new threats that the world faces.⁴⁰ The Bush Doctrine can appropriately be characterized as the "preventive" use of force doctrine as it condones the use of force without the showing of an imminent threat. The Bush Doctrine has also been called a preventive doctrine rather than a preemptive doctrine, because the Bush Doctrine advocates that a State should strike when the threat is distant as it may be more difficult to eliminate the threat once it is more imminent.⁴¹ As argued below, however, it is apparent that the Bush Doctrine is not only unnecessary and dangerous as a matter of public policy, but is also illegal.

1. The Bush Doctrine is Unnecessary and Dangerous

The international concern for WMDs and terrorism, although worrisome, is not sufficient to justify relaxing the traditional international law requirements set out in the *Caroline* Affair. WMDs are not a novel problem that the international community has simply ignored. In fact, as early as 1899, a treaty on poison gas was established.⁴² The United Nations has been creating institutions to address nuclear weapons since the 1950s (i.e., the International Atomic Energy Agency).

It has also been convincingly argued that relaxing the traditional requirements for preemptive strike would ironically

37. See GlobalSecurity.org, National Security Strategy Report - September 2002, <http://www.globalsecurity.org/military/library/policy/national/nss-020920.htm> (last visited Sept. 22, 2009).

38. Arend, *supra* note 16, at 89.

39. George W. Bush, Former President of the United States, Commencement Address at the United States Military Academy in West Point, New York (June 1, 2002), available at <http://www.dartmouth.edu/~govdocs/docs/iraq/060102.pdf>.

40. Byers, *supra* note 10, at 75.

41. George E. Bisharat, *Facing Tyranny with Justice: Alternatives to War in the Confrontation with Iraq*, 7 J. GENDER RACE & JUST. 1, 46 (2003).

42. Byers, *supra* note 10, at 75.

make the world a more dangerous place.⁴³ The Bush Doctrine creates broad rights of preemptive, or more accurately, preventive use of force. Such rights create uncertainties in three crucial areas: (1) Who would decide whether a potential threat justifies the use of force in self-defense; (2) whether the preemptive use of force would merely create the pretense for “opportunistic military intervention[s]”; and (3) whether the same broad rights would apply to all countries as customary international law requires.⁴⁴

These concerns stem at least partially from the fact that the United States, the creator of the Bush Doctrine, has itself been in violation of the Nuclear Non-Proliferation Treaty (“NPT”) in its efforts to “develop battlefield nuclear weapons designed to . . . destroy dangerous chemicals and weapons.”⁴⁵ The Bush Doctrine makes it difficult to determine the threshold required under international law for the use of force.⁴⁶ After all, if mere possession of nuclear weapons suffices to justify the use of force against a sovereign State, then would not India have the right to preemptively strike Pakistan and vice versa?⁴⁷ Could not various States throughout the world preemptively target the United States, Great Britain, France, China and Russia, as they all have nuclear weapons?⁴⁸ If the Bush Doctrine were to be declared customary international law, the right would be available to every sovereign State, not just the ones of the United States’ choosing. As such, it is clear that the Bush Doctrine would at the very least open a Pandora’s box, and at worst provide the foundation for utter chaos throughout the international community.

The United Nations has supported these views. In 2004, the U.N. Secretary General’s High Level Panel on Threats, Challenges, and Change, along with a group of former prime ministers, foreign ministers, and ambassadors, all expressed disapproval of the Bush Doctrine:

The short answer is that if there are good arguments for preventive military action, with good evidence to support them,

43. *Id.*

44. *Id.* at 76.

45. *Id.* at 75.

46. *Id.*

47. See Richard Falk, *The New Bush Doctrine*, THE NATION, July 15, 2002, <http://www.thenation.com/doc/20020715/falk>.

48. *Id.*

they should be put to the Security Council, which can authorize such action if it chooses For those impatient with a response, the answer must be that, in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action . . . to be accepted. Allowing one to so act is to allow all.⁴⁹

2. *The Bush Doctrine is Illegal*

The Bush Doctrine essentially seeks to replace the existing customary international law of preemption.⁵⁰ Currently, there is no such widespread acceptance of the Bush Doctrine throughout the international community nor is there any treaty endorsing it. Therefore, the Bush Doctrine is illusory at best and illegal at worst.

As Professor Joel Paul has persuasively argued:

Two of the fundamental requirements of any international legal doctrine are that it must first be applicable to all parties, and second, it cannot derogate from the essential state structure of the international legal system. If the Bush Doctrine is read as a non-reciprocal rule - that the U.S. alone may prevent war by attacking other states that are developing weapons of mass destruction - then it is not a doctrine of law, it is simply a unilateral assertion of power. Conversely, if the Bush Doctrine is read as conferring on all states the authority to act to prevent war, then every state's territorial sovereignty is threatened, and no practical limit on violence is retained: Pakistan is as justified as India in attacking its neighbor to prevent a possible future use of nuclear weapons; Iran, Iraq, Israel and Syria have license to attack each other to prevent the acquisition of weapons technologies. Such a rule would be wholly incompatible with the fundamental principle of minimizing violence. For the Bush Doctrine to be accepted as law, its proponents must articulate some limiting principle other than non-reciprocity.⁵¹

The flaws of the Bush Doctrine are perhaps best exemplified by Iranian-Israeli relations. The need to comply with international law

49. The Secretary-General, *A More Secure World: Our Shared Responsibility*, Report of the Secretary General's High Level Panel on Threats, Challenges, and Change, 190-91, delivered to the General Assembly, U.N. Doc A/59/565 (Dec. 2, 2004), available at <http://www.un.org/secureworld>.

50. To do this, the Bush Doctrine would have to obtain sufficient state practice and accompanying *opinio juris*.

51. Paul, *supra* note 18, at 458.

is especially imperative here. If either Iran or Israel refuses to do so, it will contribute to destabilization in the region and weaken the force of international law. It follows then that neither Iran nor Israel may invoke the Bush Doctrine to justify a preemptive strike against the other under international law. As a result, this paper will apply the traditional requirements for preemptive strike⁵² as the standard of review.

III. A Brief Background of Iranian-Israeli Relations

A. *The Cold War Era*

When the Shah of Iran was overthrown, Ayatollah Ruhollah Khomeini maintained the Shah's regional ambitions but planned to use Islam as the means of achieving them (i.e., exporting the Islamic revolution).⁵³ Despite the anti-Zionist rhetoric of Khomeini's revolutionary regime, Israel felt that it could not afford to lose Iran as an ally and in fact maintained its doctrine of periphery to check its Arab neighbors and the Soviet threat.⁵⁴ Israel even provided Iran with weapons throughout the Iran-Iraq war and convinced the United States to do the same.⁵⁵ Iran's policy towards Israel seemed to be "rhetorical opposition to Israel but practical collaboration."⁵⁶

B. *Post-Cold War*

With the rise of Israel's Labor Party to power, Prime Minister Yitzhak Rabin began to depict Iran as a threat in order to advance

52. The traditional requirements include a demonstration that the use of force by the other state is imminent and that essentially nothing but forcible action that would forestall such an attack (imminent necessity).

53. TRITA PARSİ, *TREACHEROUS ALLIANCE: THE SECRET DEALINGS OF ISRAEL, IRAN AND THE U.S.* 87 (2007).

54. Interview by Trita Parsi with Israel's former Minister of Finance Dan Meridor, Tel Aviv, (Oct. 27, 2004); Samuel Segev, *The Iranian Triangle* (New York: Free Press, 1988), 4; Gary Sick, *October Surprise* (New York: Random House, 1991), 61-63; Israel Shahak, "How Israel's Strategy Favors Iraq over Iran," *Middle East International*, March 19, 1993, 19; Interview by Trita Parsi with Yossi (Joseph) Alpher, former Mossad official and senior advisor to Ehud Barak, Tel Aviv, (Oct. 27, 2004); Joseph Alpher, "Israel and the Iraq-Iran War," in *The Iraq-Iran War: Impact and Implications*, ed. Efraim Karsh (New York: St. Martin's, 1989), 157-159.

55. Parsi, *supra* note 53, at 95; Phone interview by Trita Parsi with Nader Entessar, (Jan. 25, 2005); Sick, *supra* note 54, at 114, 200.

56. ANOUSHIRAVAN EHTESHAMI, *AFTER KHOMEINI* (New York: Routledge, 1995), 131.

his "New Middle East" ambitions in which Israel would play a central role in regional affairs in the Middle East.⁵⁷

Iran, fearing isolation, opposed the Oslo peace process partly as a result of being excluded.⁵⁸ While the American Israel Public Affairs Committee ("AIPAC") successfully lobbied the Clinton Administration and Congress to halt all U.S. trade with Iran, Israel itself never did.⁵⁹ It was subsequently discovered that Israel's trade with Iran after the U.S. trade ban not only continued but included a weapons trade.⁶⁰

Then Iranian President Khatami attempted to improve relations with the European Union and the United States. Meanwhile, then Israeli Prime Minister Benjamin Netanyahu grew worried about Iran's nuclear program and began to demonize Iran.⁶¹ Succeeding Netanyahu, then Prime Minister Ehud Barak's Administration rejected Khatami's offers to initiate dialogue.⁶² Throughout the second intifada, Iran provided only vocal support to Palestinian resistance groups such as Islamic Jihad but refused to support them monetarily or militarily.⁶³

In 2003, Iran offered Israel a plan in which the two states would respect each other's spheres of influence and stay out of each other's hair.⁶⁴ If the United States and Israel reversed their isolation policy on Iran, Tehran would modify its behavior on several key issues, including Israel.⁶⁵ Iran would significantly moderate its position on the Israeli-Palestinian conflict by adopting a "Malaysian" or "Pakistani" profile; that is, it would be an Islamic State that would not recognize Israel, would occasionally criticize Israel, but would completely avoid confronting or challenging Israel, either directly or via proxies.⁶⁶ Under the agreement, "Iran would also pressure

57. Parsi, *supra* note 53, at 159-61.

58. *Id.* at 175.

59. *Id.* at 185-89.

60. *Id.* at 210.

61. *Id.* at 206-07.

62. *Israel Rejects Talks with Iran: Former FM*, XINHUA (China), Sep. 26, 2000.

63. Parsi, *supra* note 53, at 221-22.

64. *Id.* at 250-51.

65. Interview with Masoud Eslami, Iranian Foreign Ministry, in Tehran, Iran (Aug. 23, 2004), in Parsi, *supra* note 54, at 175.

66. Interview with Mahmoud Sariolghalam, Professor, Shahid Beheshti Univ., Adviser to Iranian Nat'l Sec. Advisor, in Tehran, Iran (Aug. 2004), in Parsi, *supra*

groups such as Hezbollah to refrain from provoking Israel.”⁶⁷

As Parsi asserts, “[I]n return, Israel would cease to oppose a U.S.-Iran rapprochement and would recognize Iran’s role in the region, while the United States would also end its policy of isolating Iran, and accommodate a key Iranian role in the security of the Persian Gulf.”⁶⁸ Israel rejected the Iranian offer, reasoning that Iran did not have an interest in Israel, but was only seeking to improve relations with the United States, after which it would continue to counter Israel.⁶⁹

In 2007, Mohamed ElBaradei, head of the International Atomic Energy Agency (“IAEA”) reported that Iran was operating “3,000 uranium-enriching centrifuges capable of producing fissile material for nuclear weapons.”⁷⁰ However, the IAEA has also said that Iran had operated its centrifuges “well below their capacity,” and that “it had not discovered any evidence that Iran was enriching to the level that would produce bomb-grade fuel.”⁷¹ Further, Mr. ElBaradei reported that there was simply no evidence of Iran developing nuclear weapons.⁷² The CIA has also asserted that it would take Iran a decade to develop nuclear weapons if it sought to do so.⁷³

IV. An Israeli Strike Against Iran Would Be Illegal

A. *Israel Bears the Burden of Proof to Demonstrate Legality*

The ICJ has held that it “is a general principle of law, confirmed by the jurisprudence of this Court, that a party which advances a

note 53, at 173.

67. Parsi, *supra* note 53, at 251.

68. *Id.*

69. Interview by Trita Parsi with Menashe Amir, head of the Israeli Radio’s Persian Service, in Jerusalem, (Oct. 24, 2004).

70. Mark Mazzetti, *U.S. Finds Iran Halted Its Nuclear Arms Effort in 2003*, N.Y. TIMES, Dec. 4, 2007, available at http://www.nytimes/2007/12/04/world/middleeast/04intel.htm?_r=1&sq=iran&st=cse.

71. William J. Broad, *The Thin Line Between Civilian and Military Nuclear Programs*, N.Y. TIMES, Dec. 5, 2007, available at <http://www.nytimes.com/2007/12/05/world/middleeast/05weapons.html?ref=Washington&p>.

72. David Krieger, *Preventing War Against Iran*, NUCLEAR PEACE FOUND., Feb. 16, 2007, http://www.wagingpeace.org/2007/02/16_krieger_prevtningwar_against_iran.htm.

73. *Id.*

point of fact in support of its claim must establish that fact.”⁷⁴ In order to later justify a preemptive or Article 51 strike against Iran, the burden of proof would be on Israel’s shoulders to prove that it had met the applicable legal requirements at the time of the attack.

B. Israel is Unable to Satisfy the Imminent Necessity Requirement to Preemptively Strike Iran

The Deputy National Security Advisor under former Prime Minister Ehud Barak has stated sarcastically, “[r]emember . . . the Iranians are always five to seven years from the bomb. Time passes but they’re always five to seven years from the bomb.”⁷⁵ Iran’s controversial nuclear program is perhaps the most often-cited justification for an Israeli (and American) preemptive strike on Iran.⁷⁶ Given Israel’s Operation Opera in 1981 that destroyed Saddam’s Osirak nuclear reactor and Operation Orchard that targeted a Syrian nuclear reactor on September 6, 2007, it is only natural to see a few parallels with the present study.

1. Iran’s Nuclear Program Does Not Create an Imminent Necessity.

Because Israel’s Operation Opera was severely condemned by the international community⁷⁷ and Operation Orchard was mostly met with silence,⁷⁸ Israel cannot cite to those instances as justification for a legal preemptive attack on Iran’s nuclear facilities. The Iranian nuclear program and Iran’s claimed ability to reach Israel in a missile attack⁷⁹ does not provide Israel with sufficient justification to meet the imminent necessity requirement for the following four reasons.

74. Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), 2008 I.C.J. (May 23), available at <http://www.icj-cij.org/docket/files/130/14492.pdf>.

75. Parsi, *supra* note 3.

76. JEROME R. CORSI, *ATOMIC IRAN: HOW THE TERRORIST REGIME BOUGHT THE BOMB AND AMERICAN POLITICANS* (WND BOOKS 2005); ALAN M. DERSHOWITZ, *PREEMPTION: A KNIFE THAT CUTS BOTH WAYS*, 174-89 (W.W. NORTON & COMPANY 2006).

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

78. Richard Weitz, *Israeli Airstrike in Syria: International Reactions*, CNS, Nov. 1, 2007, <http://cns.miis.edu/stories/071101.htm>.

79. Zahra Hosseinian, *Iran Test-Fires New Missile, Israel Within Reach*, REUTERS, Nov. 12, 2008, <http://www.reuters.com/article/topNews/idUSTRE4AB1WG20081112?feedType=RSS&feedName=topNews>.

First, Iran is a signatory to the NPT⁸⁰ and under Article IV, Paragraph 1 has the inalienable right to “develop research, production and use of nuclear energy for peaceful purposes . . . in conformity with Articles I and II of [the NPT].”⁸¹ In 2003, Iran signed an additional protocol that allows IAEA inspectors “access to individuals, documentation relating to procurement, dual use equipment, certain military owned workshops and research and development locations.”⁸² Under the NPT, “non-nuclear weapons states are allowed to acquire nuclear technology for civil purposes [while committing] themselves not to build a bomb,”⁸³ and agreeing to international inspections of their facilities.⁸⁴

As of the writing of this note, there is no hard evidence that Iran has violated its treaty obligations under the NPT.⁸⁵ Although the Iranian nuclear program accelerated in the late 1990s, after two and a half years of intrusive inspections, the IAEA was not able to find evidence of an Iranian nuclear weapons program. However, the IAEA has not been able to confirm that the Iranian program is entirely peaceful.⁸⁶ The IAEA has been conducting inspections on Iranian facilities since 2002.⁸⁷ It has not found evidence that Iran possesses nuclear weapons,⁸⁸ or has enriched the amount of

80. Federation of American Scientists, Signatories and Parties to the Treaty on the Non-proliferation of Nuclear Weapons, <http://www.fas.org/nuke/control/npt/text/npt3.htm> (last visited Jan 14, 2009).

81. Treaty on the Non-proliferation of Nuclear Weapons, July 1, 1968, 729 U.N.T.S. 161, available at <http://www.iaea.org/Publications/Documents/Infcircs/Others/infcirc140.pdf> (last visited Jan. 12, 2009).

82. Int'l Atomic Energy Agency [IAEA], *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, ¶ 1, IAEA Doc. Gov/2005/87 (Nov. 18, 2005), available at <http://www.iaea.org/Publications/Documents/Board/2005/gov2005-87.pdf>.

83. Paul Reynolds, *The American Hostility Towards Iran*, BBC NEWS, Feb. 1, 2007, <http://news.bbc.co.uk/2/hi/americas/6291091.stm>.

84. David Krieger, *International Law and Nuclear Disarmament*, NUCLEAR AGE PEACE FOUND., Feb. 2006, http://www.wagingpeace.org/articles/2006/02/00_krieger_iran-law-disarmament.htm.

85. Vatanparast, *supra* note 19, at 798. For a more extensive analysis on the IAEA's evidence of Iran's nuclear program, please see Vatanparast's article in full.

86. See IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, IAEA Doc. GOV/2006/14 (February 4, 2006), available at <http://www.iaea.org/Publications/Documents/Board/2006/gov2006-14.pdf>.

87. Arms Control Association: Fact Sheets, <http://www.armscontrol.org/factsheets/Iran-IAEA-Issues.asp> (last visited Jan. 12, 2009).

88. Jason Ditz, IAEA: No Proof Iran Has Nuclear Weapons Program, ANTIWAR,

uranium or plutonium necessary to build a bomb.⁸⁹ While IAEA inspectors have found some evidence indicative of Iran's intentions of developing nuclear weapons, Mr. ElBaradei has qualified these findings by indicating that "there's a big difference between acquiring the knowledge for enrichment and developing a bomb."⁹⁰

Because Iran has not been found to have violated the NPT, Iran has the right to enrich uranium to acquire a full nuclear fuel cycle for peaceful purposes under the NPT.⁹¹ Further, Iran announced in January 2008 that it would cooperate with the international community on its nuclear program.⁹²

Claims that Iranian uranium enrichment must be for weapons capability because of Iran's rich oil reserves⁹³ ignore the empirical evidence of Iran's energy output and consumption. During the Shah's regime, Iran consumed 800,000 barrels of the six million barrels of oil it produced each day, and exported the rest for profit.⁹⁴ Today, Iran consumes two million barrels of the four million barrels it produces each day.⁹⁵ The reason for the increase in consumption can be attributed to Iran's population doubling in the past thirty years.⁹⁶ Because oil exports make up a substantial amount of revenue for Iran, it makes sense to offset its own oil consumption

Sept. 17, 2009, <http://news.antiwar.com/2009/09/17/iaea-no-concrete-proof-iran-has-nuclear-weapons-program>.

89. See William J. Broad & Elaine Sciolino, *Report Raises New Doubts on Iran Nuclear Program*, N.Y. TIMES, Nov. 16, 2007, available at <http://www.nytimes.com/2007/11/16/world/middleeast/16nuke.html?r=1&scp=85&sq=iran&st=nyt&oref=login>; see also Dafna Linzer, *Strong Leads and Dead Ends in Nuclear Case Against Iran*, WASH. POST, Feb. 8, 2006, available at <http://www.washingtonpost.com/wpdyn/content/article/2006/02/07/AR2006020702126.html>.

90. Lee Glendinning, *Iran 'Six Months From Mass Uranium Enrichment'*, GUARDIAN, Feb. 20, 2007, <http://www.guardian.co.uk/world/2007/feb/20/iran.leeglendinning>.

91. ANTONY H. CORDESMAN & KHALID R. AL-RODHAN, *IRAN'S WEAPONS OF MASS DESTRUCTION: THE REAL AND POTENTIAL THREAT* 66 (2006).

92. Steven Lee Myers, *Bush Urges Unity Against Iran*, N.Y. TIMES, Jan. 14, 2008, available at <http://www.nytimes.com/2008/01/14/world/middleeast/14prexy.html?r=1&scp=28&sq=iran&st=nyt&oref=login>.

93. Corsi, *supra* note 76, at 37-38; David Isenberg, *The Fuel Behind Iran's Nuclear Drive*, ASIA TIMES, Aug. 24, 2005, http://www.atimes.com/Middle_East/GH24Ak02.html.

94. YouTube: Dariush Zahedi, *Emergency Summit to Prevent War With Iran*, <http://www.youtube.com/watch?v=UbtSkLn3qVw> (last visited Jan. 12, 2009).

95. *Id.*

96. *Id.*

with nuclear energy so that it may enjoy more oil profits.

Further, Iran, unlike Israel, has signed the NPT. The majority of the parties to the treaty believe that Iran has a right to uranium enrichment under Article IV of the NPT as evinced by the 144 countries in the Non-Aligned Movement issuing a statement on May 30, 2006, which upheld Iran's right to uranium enrichment.⁹⁷ Although some argue that if Iran is serious about negotiations over its nuclear program it should simply give up its centrifuges,⁹⁸ such an argument ignores the fact that Iran has the right to have these centrifuges to produce nuclear energy. Denying Iran such a right would alter the terms of the treaty, which many non-nuclear countries would likely be hesitant to accept unless the nuclear countries live up to their commitment under Article VI of the treaty and begin dismantling their own nuclear arsenals.⁹⁹

Second, Israel's reliance on the "point of no return" theory is misplaced. According to some Israeli officials, once Iran learns how to enrich uranium in large quantities and to high degrees, it will have passed a "point of no return" where Iran will have acquired the necessary know-how, after which it will be next to impossible to stop Tehran from going nuclear. According to nonproliferation experts, this concept is an arbitrary measure used for political purposes.¹⁰⁰ John Wolfsthal, a former senior Energy Department official, explains that the "'point of no return' concept is not a valid one, and the voices in America and in Israel using it to push for a quick solution are misleading."¹⁰¹ He goes on to assert that the concept is a "made-up term by those who want immediate action."¹⁰²

Third, Iran, who has proven to be a rational player in its dealings with Israel,¹⁰³ realizes that weaponizing its nuclear

97. Mark Heinrich, *Iran: No Global Consensus Against It Despite Pressure*, REUTERS, June 14, 2006, available at http://www.redorbit.com/news/general/538138/iran_no_global_consensus_against_it_despite_pressure/index.html.

98. Corsi, *supra* note 76, at 56.

99. Heinrich, *supra* note 97; Parsi, *supra* note 53, at 267.

100. Marc Perelman, *U.S. Pursues Diplomacy on Iran Nukes*, FORWARD, Jan. 27, 2006, <http://www.forward.com/articles/1554>.

101. *Id.*

102. *Id.*

103. Telephone interview by Trita Parsi with Efraim Halevy, former Mossad boss (June 17, 2006).

program would not be beneficial in the long run. In fact, "[a]s long as the Middle East is kept as free as possible from nuclear weapons, Iran will enjoy a conventional supremacy vis-à-vis its neighbors because of its size and resources."¹⁰⁴ If Iran weaponizes its nuclear program, "it will risk sparking a nuclear arms race [throughout the region] that may lead small states such as Bahrain and Kuwait to opt for a nuclear capability as well."¹⁰⁵ In a nuclear Middle East, "Iran will lose its conventional [regional] superiority."¹⁰⁶ It is in fact partly these dynamics that motivated Iran and Egypt to join forces in the 1970s to keep the Middle East a nuclear-free zone.¹⁰⁷

Additionally, there are indicators suggesting that Tehran does not seem to feel as though it needs a nuclear deterrent against Israel. As Iran's U.N. Ambassador Javad Zarif explains, "[f]rom the government's perspective, weapons of mass destruction would not constitute a deterrence against Israel. We have other deterrences that work better."¹⁰⁸ One of the deterrences is Iran's asymmetric capabilities in Lebanon, of which "[t]he effectiveness . . . was demonstrated during the Israeli-Hezbollah war in the summer of 2006."¹⁰⁹ As will be demonstrated below, however, the degree of control that Iran holds over Hezbollah is far from absolute.

Fourth, it is important to distinguish between actual armament from the capacity to arm. While Israel has not been able to prove that Iran is seeking the former, there is a good amount of evidence from neutral sources indicating that Iran is interested in the latter. ElBaradei has suggested that Iran's preferred option is to have the capability to make weapons without having to do so.¹¹⁰ He has mentioned that Iranians know that mastering uranium enrichment is "a deterrent" in and of itself and that "they don't need a weapon [because enrichment] sends a message." Qualifying his comments, the IAEA director went on to argue:

104. Parsi, *supra* note 53, at 269.

105. *Id.*

106. *Id.*

107. *Id.*

108. Interview by Trita Parsi with Javad Zarif, former Iran Ambassador, U.N., (April 1, 2004).

109. Parsi, *supra* note 53, at 269.

110. Interview by Margaret Warner with Gen. Mohamed ElBaradei, Director, IAEA, in Wash. D.C. (Mar. 18, 2004), *available at* http://www.pbs.org/newshour/bb/international/jan-june04/elbaradei_3-18.html.

[W]hat I mean is . . . if you have an enrichment program or a reprocessing program, which means you can produce uranium . . . you are really sending a message that we know how to do it, should we decide to make a weapon. We don't need . . . to develop a weapon, but I am telling you—you know, the world, my neighbors, that I can do it.¹¹¹

2. *Proving Iran's Capability to Weaponize its Nuclear Program Does Not Satisfy the Imminent Necessity Prong*

Standing alone, a capability is not a threat.¹¹² To prove a genuine threat, and certainly to prove an imminent threat, Israel must demonstrate capability in addition to intention.¹¹³ In other words, Israel must show that Iran will use nuclear weapons against Israel if Iran becomes a nuclear power. Many have come to take it for granted that Iran wishes to destroy Israel and will do so at the first opportunity. Some have even gone so far as to argue that Iran is "committed to the destruction of the Jewish state and there is nothing in the record to contradict that impression."¹¹⁴ However, a careful analysis of Iran's true intentions towards Israel soundly disproves such claims.

There is no question that Iran has adopted harsh rhetoric against Israel after the fall of the Shah. When coupled with Iran's nuclear program and Shahab III missile, which can reach Israel,¹¹⁵ such harsh words have understandably not been taken lightly. However, Iranian rhetoric against Israel does not necessarily manifest Iran's true intentions.

As a side note, the Shahab III missile was developed as a result of Iran's desire to "fix [a] hole in their defenses" when it realized that it was vulnerable to Iraq's ballistic missiles throughout the Iran-Iraq war¹¹⁶ rather than out of a motivation to eliminate Israel. Further, Iranian leadership has explicitly pointed out that development of the Shahab III missile has "always been a defensive

111. *Id.*

112. Vatanparast, *supra* note 19, at 800.

113. *See id.*

114. Corsi, *supra* note 76, at 56.

115. Charles P. Vick, *Shahab-3, 3A/ Zelzal-3*, GLOBALSECURITY.ORG, Feb. 15, 2007, <http://www.globalsecurity.org/wmd/world/iran/shahab-3.htm>.

116. Parsi, *supra* note 53, at 144.

strategy.”¹¹⁷ Despite ten years of having this capability,¹¹⁸ Iran has not used this missile against Israel.

One statement that has stood out is President Mahmoud Ahmadinejad's foolish declaration that the Israeli regime “must be eliminated from the pages of history.”¹¹⁹ This statement rightfully drew quite a bit of controversy given its clearly provocative nature. However, for reasons pointed out below, it should not be interpreted to mean that the Islamic Republic of Iran seeks to destroy Israel.

When confronted to explain the true intentions of the Islamic Republic regarding Israel, Ahmadinejad noted that the solution to the Israeli-Palestinian problem should be a popular referendum rather than an Iranian military attack against Israel.¹²⁰ Further, there have been arguments regarding the accuracy of the translation. In fact, Persian language experts from across the political spectrum argue that what Ahmadinejad actually said was “this regime that is occupying Jerusalem must vanish from the page of time.”¹²¹

Further, the statement should be viewed in its proper context in order to appropriately understand its meaning. As Professor Virginia Tilley argues:

[Ahmadinejad] was being prophetic, not threatening. He was citing Imam Khomeini, who said this line in the 1980s (a period when Israel was actually selling arms to Iran, so apparently it was not viewed as so ghastly then). Mr. Ahmadinejad had just reminded his audience that the Shah's regime, the Soviet Union, and Saddam Hussein had all seemed enormously powerful and immovable, yet the first two had vanished almost beyond recall and the third now languished in prison. So, too, the “occupying regime” in Jerusalem would someday be gone. His message was,

117. Interview by Trita Parsi with Mahmood Sariolghalam, Professor, Shahid Beheshti University in Tehran (Aug. 18, 2004).

118. Vick, *supra* note 115.

119. Mahmoud Ahmadinejad, Iranian President, Speech at World Without Zionism Conference in Tehran (Oct. 28, 2005), *available at* <http://www.memri.org/bin/articles.cgi?Page=archives&Area=sd&ID=SP101305>.

120. Mahmoud Ahmadinejad, President of Iran, Speech at Columbia University (Sept. 24, 2007), *available at* <http://www.globalresearch.ca/index.php?context=va&aid=6889>.

121. Virginia Tilley, *Putting Words in Ahmadinejad's Mouth*, COUNTERPUNCH, Aug. 28, 2006, <http://www.counterpunch.org/tilley08282006.html>.

in essence, "This too shall pass."¹²²

Professor Tilley goes on to assert that the phrase "eliminating the occupying regime" should not be understood as the "destruction of Israel."¹²³ The word "[r]egime" refers to governance, not populations or cities. 'Zionist regime' is the government of Israel and its system of laws, which have annexed Palestinian land and hold millions of Palestinians under military occupation."¹²⁴

Dr. Jerome Corsi points to other indications of Iranian hostility towards Israel. Dr. Corsi claims that even former Iranian President Khatami has threatened to attack Anglo-Saxon civilization: "Our missiles are now ready to strike at their civilization, and as soon as the instructions arrive from Supreme Leader Khamenei, we will launch our missiles at their cities and installations."¹²⁵ A close look at the source Dr. Corsi uses to support this contention, however, indicates that former President Khatami never uttered the statement. Rather, it was a Revolutionary Guard Intelligence theoretician who was criticizing Khatami's attempts to find common ground with the West.¹²⁶ As will be demonstrated below, there is insufficient evidence that Khamenei, who actually has authority over the armed forces of Iran (unlike the Revolutionary Guard Intelligence theoretician, Khatami, or Ahmadinejad), will order such an attack. Dr. Corsi's misquote is quite irresponsible as it has been cited by other scholars such as Alan Dershowitz as justification for an Israeli preemptive strike on Iran.¹²⁷

To help justify a preemptive Israeli strike on Iran, Dershowitz argues that Ali Akbar Hashemi Rafsanjani, said to be the number two man in Iran,

has threatened Israel with nuclear destruction, boasting that an Iranian attack would kill as many as five million Jews [and] that even if Israel retaliated by dropping its own nuclear bombs, Iran would probably lose only fifteen million people, which he said would be a small 'sacrifice' from among the billion Muslims in the

122. *Id.*

123. *Id.*

124. *Id.*

125. Corsi, *supra* note 76, at 42.

126. The Middle Eastern Res. Inst., *Iran's Revolutionary Guard Official Threatens Suicide Operations*, (May 28, 2004), <http://www.memri.org/bin/articles.cgi?Page=archives &Area=sd&ID=SP72304>.

127. Dershowitz, *supra* note 76, at 175.

world.¹²⁸

Dershowitz, however, ignores the fact that the Iranian government has insisted that Israel had “distorted the statements by Head of Iranian Expediency Council Ali Akbar Rafsanjani.”¹²⁹ It is also important to point out that his remarks were “immediately met with a barrage of harsh criticism from Iranians.”¹³⁰ Further, in looking at Rafsanjani’s actual statements, one does not find an express threat against Israel. Rafsanjani was quoted to have said,

If a day comes when the world of Islam is duly equipped with the arms Israel has in possession, the strategy of colonialism would face a stalemate because application of an atomic bomb would not leave anything in Israel but the same thing would just produce damages in the Muslim world.¹³¹

While Rafsanjani’s calculations may be morbid, they do not threaten Israel with a first strike attack. He uses the word “stalemate,” which makes it more likely that the statement should be interpreted to mean that Israel will no longer have a nuclear umbrella over the Middle East if Iran has a nuclear weapon, more so than that Iran will attack Israel if Iran comes to possess a nuclear weapon.

Dershowitz and Corsi have also pointed to Khamenei’s statement declaring that “[w]e must have two bombs ready to go in January [2005] or you are not Muslims”¹³² to support the contention that Israel must preemptively strike Iran.¹³³ The fact that Iran has neither attacked Israel nor obtained a nuclear weapon after four years have passed since the “deadline” demonstrates the dangers of taking rhetoric at face value. It also reminds us of the rash thinking that led to the premature U.S. invasion of Iraq based on the theory of possession of WMDs that turned out to be false. These indications reinforce the necessity to reject presumptions of the

128. *Id.*

129. *Iran Denies Willing to Nuke Down Israel*, IRAN PRESS SERV., http://www.iran-pressservice.com/articles_2001/dec_2001/israel_iran_nule_threat_301201.htm (last visited Feb. 21, 2009).

130. *Id.*

131. *Rafsanjani Says Muslim Should Use Nuclear Weapon Against Israel*, IRAN PRESS SERV., Dec. 14, 2001, http://www.iran-press-service.com/articles_2001/dec_2001/rafsanjani_nuke_threats_141201.htm.

132. Corsi, *supra* note 76, at 19; Dershowitz, *supra* note 76, at 175 (citing *Iranian Leader Wants Nukes in 4 Months*, WORLDNETDAILY, Oct. 02, 2004, http://www.wnd.com/news/article.asp?ARTICLE_ID=40723).

133. See generally Corsi, *supra* note 76; Dershowitz, *supra* note 76, at 174-89.

"mad mullah" complex and analyze the issue more critically.

To ascertain true intentions, it is necessary to look beyond mere rhetoric and focus on the actions behind them. Many are quick to forget that "[f]or years, Israel remained willing to do business with Iran, even though the mullahs in Tehran were screaming for an end to the Zionist entity."¹³⁴ In fact, when "Iranian leaders [were calling] for Israel's destruction in the 1980s, Israel and the pro-Israel lobby in Washington lobbied the United States not to pay attention to the Iranian rhetoric . . . [even though] Iran's revolutionary Islamist zeal . . . in the 1980s" was at least as harsh as it is today.¹³⁵ Also in the 1980s, Iran bought 80% of its weapons from Israel to fight Saddam Hussein's Iraq.¹³⁶ Between 1980 and 1983 alone, Iran bought over \$500 million worth of arms from Israel.¹³⁷

It has generally been the peaceful Iranian rhetoric that has been supported by Iranian actions. President Khatami's Administration declared that "[w]e don't seek hostilities with anyone."¹³⁸ Following this remark, the Khatami Administration, with the full backing of the Supreme Leader Ayatollah Ali Khamenei, offered Israel a deal in which Iran would (1) significantly moderate its position on the Israeli-Palestinian conflict, (2) completely avoid confronting or challenging the Jewish State, and (3) would pressure groups such as Hezbollah to refrain from provoking Israel; in return for Israel (1) ceasing its opposition to an U.S.-Iran rapprochement, and (2) recognizing Iran's role in the region.¹³⁹ Rather than seizing this opportunity, Israel rejected the offer.¹⁴⁰ Meanwhile, the

134. Clyde Haberman, *Israel Focuses on the Threat Beyond the Arabs – in Iran*, N. Y. TIMES, Nov. 8, 1992, available at <http://www.nytimes.com/1992/11/08/weekinreview/the-world-israel-focuses-on-the-threat-beyond-the-arabs-in-iran.html?scp=2&sq=Israel&st=nyt>.

135. Parsi, *supra* note 53, at xi.

136. Nader Entessar, *Israel and Iran's National Security*, 4 J. S. ASIAN & MIDDLE E. STUD. 8 (2004).

137. Parsi, *supra* note 53, at 107.

138. Interview by Dr. Hooshang Amirahmadi with Ambassador Thomas R. Pickering, 2 AIC INSIGHT. 1, 9 (2004), available at <http://www.american-iranian.org/pubs/aicinsight/insightsept04.pdf>.

139. Interview by Trita Parsi with Masoud Eslami of the Iranian Foreign Ministry, Tehran, (Aug. 23, 2004); Interview by Trita Parsi with adviser to the Iranian National Security Advisor, (August 2004), Tehran; Interview by Trita Parsi with Iranian Foreign Ministry official, Tehran, (August 2004).

140. Parsi, *supra* note 53, at 256; Interview by Trita Parsi with Menashe Amir, head of Israeli Radio's Persian Service, Jerusalem, (October 24, 2004).

neoconservatives in Washington and hard-liners in the Israeli government "redoubled their efforts to convince the White House to target Iran."¹⁴¹

This behavior begs the question as to why Iran has adopted such harsh rhetoric towards Israel. To answer this question, one must look at the geopolitical realities that Iran faces. Iran has used anti-Israeli rhetoric mainly to gain popularity in the Arab street¹⁴² and to ensure regime survival.¹⁴³ The revolutionaries reasoned that "[t]he more anti-Israeli Iran appeared, the more sympathy it would win among the Arab populations and the more difficult it would be for the Arab governments to challenge and oppose Iran."¹⁴⁴ Reva Bhalla supports this analysis, noting that "Iran is trying to boost its standing in the region by embarrassing moderate Arab governments." She goes on to argue that,

[i]t basically makes Iran stand apart from the Arab regimes. And note that the Arab regimes are the most silent on this issue. Most are quite happy seeing Hamas contained, [they] really have no problem with the Palestinians being contained in the region by the Israelis. It's that huge disconnect between what you hear in the Arab street and what you see being actually discussed within these regimes. And so Iran is trying to exploit that.¹⁴⁵

It is imperative to recognize that "Iranian slogans were rarely followed up with concrete actions."¹⁴⁶ Further, "Iran is not driven by an obsession to destroy Israel, but by its determination to preserve its regime and establish itself as a strategic regional power, vis-à-vis both Israel and the Sunni Arab states."¹⁴⁷

The recent 2008-2009 Israeli invasion of Gaza exemplifies the argument that Iran's anti-Israeli rhetoric is mere talk and not a

141. Parsi, *supra* note 53, at 251-52.

142. Parsi, *supra* note 53, at 101 ("[T]he Arab street" refers to the Arab populations that are not members of the ruling elite.").

143. *Id.*

144. *Id.* at 102.

145. Gary Thomas, *Controversy Arises Over Alleged Hamas-Iran Ties*, available at <http://www.voanews.com/english/archive/2009-01/2009-01-06-voa47.cfm?CFID=125871072&CFTOKEN=29245882&jsessionid=6630790bf221c82ea82bc537c1f2e2524244>.> (last visited Feb. 11, 2009).

146. Parsi, *supra* note 53, at 221.

147. Shlomo Ben-Ami, *The Basis for Iran's Belligerence*, HAARETZ, Sept. 7, 2006, <http://www.haaretz.com/hasen/spages/759731.html>.

manifestation of its true intentions. Khamenei declared that "anyone killed while defending Palestinians in Gaza against Israeli attacks would be considered a martyr" but curiously refused to contribute troops to assist Hamas with the excuse that Iran's "hands are tied."¹⁴⁸ Iran's stance, although ideological at first glance, is in fact driven by geopolitical interests. Former President Rafsanjani pointed out that if ideology were the main concern of the Islamic Republic of Iran, Iranians would have supported the Muslim Chechens against the Russian Federation but did not do so because it was not in Iran's interests.¹⁴⁹

Even Ahmadinejad's most aggressive comments regarding Israel stem from strategic motivations rather than an obsession to destroy Israel. Ahmadinejad's camp has "argued that Iran should enlarge the conflict and make Israel a critical and visible part of the international debate on Iran's nuclear program."¹⁵⁰ Indeed, "[b]y putting into question issues Israel had managed to settle over the past twenty years, Ahmadinejad's camp hopes to win the discontented Arab street and reveal the weakness of the pro-U.S. Arab regimes, which would be pressured and embarrassed."¹⁵¹ As noted earlier, it was hardly to demonstrate an intention to destroy Israel.

Ahmadinejad's rhetoric serves yet another purpose. By focusing the Iranian public's attention on Israel, it distracts Iranians from domestic issues that have plagued Iran for quite some time. Such issues include the lack of political transparency, a weak and inefficient economy, the lack of opportunity for youth, and rampant corruption. Ahmadinejad's remarks then, serve more to promote regime survival rather than to destroy Israel.¹⁵²

Finally, Iran has behaved in a relatively rational manner when conducting its foreign affairs. An Iranian nuclear attack against Israel then, would be very much out of character.¹⁵³ This is so for

148. *Iran Bans Volunteers From Fighting Israel*, ASSOCIATED PRESS, Jan. 8, 2009, available at <http://www.cbsnews.com/stories/2009/01/08/ap/middleeast/main4708005.shtml>.

149. Phone interview by Trita Parsi with Abbas Maleki, Iranian deputy foreign minister in the early and mid-1990s, Geneva, (Jan. 27, 2005).

150. Parsi, *supra* note 53, at 264.

151. *Id.*

152. Interview with Professor Dariush Zahedi, Berkeley, Cal. (Sept. 28, 2005).

153. Parsi, *supra* note 53, at 270.

three reasons. First, Iran understands that there is no way it could take out Israel's second-strike capabilities, and that such an attack would expose Iran to a fierce Israeli nuclear retaliation¹⁵⁴ from the air, sea and/or land.¹⁵⁵ Second, such an attack would certainly damage Jerusalem, the third holiest city in Islam, which would completely undermine Iran's legitimacy as an Islamic State.¹⁵⁶ Third, an Iranian nuclear attack on Israel would likely kill more Palestinians than Israelis and would cripple Iran's reputation as the champion of the Palestinian cause, which it has used to win the Arab street as argued above.¹⁵⁷

3. *Claims That Iran Wishes to Murder All Jews are Unfounded*

Many top Israeli officials, including President Shimon Peres and Prime Minister Netanyahu, have compared the current Iranian regime to the genocidal Nazi regime of the 1930s and have even gone so far as to argue that Iran is preparing for another Holocaust.¹⁵⁸ Various scholars have concurred with these statements.¹⁵⁹ This has been one of Israel's primary justifications for pursuing such a hostile stance towards Iran. However, Israel has not produced nearly enough evidence to suggest that this is really true especially given the fact that the largest Jewish community in the Middle East resides in Iran (with the obvious exception of Israel).¹⁶⁰ The Iranian government has taken official steps to protect

154. *Trita Parsi: Israel and Iran: Irresolvable Conflict?*, ISRAEL POL'Y F., June 7, 2006, available at <http://hnn.us/roundup/comments/26427.html> (last visited Jan. 25, 2009); See e.g., John J. Mearsheimer & Stephen M. Walt, *THE ISRAEL LOBBY AND US FOREIGN POLICY* 72 (2007).

155. See Dershowitz, *supra* note 76, at 183; Peter Beaumont & Conal Urquhart, *Israel Deploys Nuclear Arms In Submarines*, GUARDIAN, Oct. 12, 2003, <http://www.guardian.co.uk/world/2003/oct/12/israel1>; Jericho 3, http://www.missilethreat.com/missiles/theworld/id.58/missile_detail.asp (last visited Feb. 18, 2009); F-16 Falcon, <http://www.cdi.org/nuclear/database/isnukes.html#f16> (last visited Feb. 18, 2009).

156. Zahedi, *supra* note 94.

157. *Id.*; See You Tube: Dariush Zahedi, *Speech in Berkeley, Part 2*, <http://www.youtube.com/watch?v=U0dhBwMPYI0&feature=related> (last visited Sept. 29, 2009).

158. Anshel Pfeffer, *Peres: Fight Terror – Reduce Global Dependence On Oil*, HAARETZ, May 5, 2008, <http://www.haaretz.com/hasen/spages/980926.html>; *Netanyahu: Iran Preparing Another Holocaust*, NEWSMAX, Nov. 14, 2006, <http://archive.newsmax.com/archives/ic/2006/11/14/133625.shtml>.

159. See e.g. Corsi, *supra* note 76.

160. Frances Harrison, *Iran's Proud But Discreet Jews*, BBC, Sept. 22, 2006,

the Iranian Jewish community as seen in Khomeini issuing a *fatwa*¹⁶¹ declaring that Jews in Iran are to be protected.¹⁶²

The Iranian government has kept its promise of protecting its Jewish population. Iran's forty synagogues, Hebrew schools, the Jewish library, Jewish hospitals and cemeteries have not been touched by the Iranian government.¹⁶³ In fact, Maurice Mohtamed, the Jewish member of the Iranian parliament, has been quite outspoken in his condemnation of Ahmadinejad's comments on the Holocaust.¹⁶⁴ Haroun Yashayaei, chairman of Iran's Jewish Council, has been similarly critical of Ahmadinejad's statements.¹⁶⁵ Additionally, few Iranian Jews take Ahmadinejad's anti-Israel rhetoric seriously and they point to the fact that little has changed for Iranian Jews under his administration.¹⁶⁶

Further, Ayatollah Khamenei has forbidden all Iranian officials, including Ahmadinejad, from repeating Ahmadinejad's spiteful Holocaust denying remarks.¹⁶⁷ Khamenei's ban manifested itself during Ahmadinejad's visit to New York to address the U.N. General Assembly in 2006¹⁶⁸ and during Ahmadinejad's speech at Columbia University in 2007.¹⁶⁹

In sum, Israel has no hard evidence to demonstrate that Iran is preparing to renew a Nazi Holocaust. It is particularly important to not take Israeli accusations at face value as Israel's credibility has suffered greatly in the past several decades. Suspicion of Israeli credibility is based off of a few cases in particular.¹⁷⁰ First, Israel

http://news.bbc.co.uk/2/hi/middle_east/5367892.stm.

161. An Islamic religious decree.

162. Barbara Demick, *Iran: Life of Jews Living in Iran*, FOUND. FOR THE ADVANCEMENT OF SEPHARDIC STUD. AND CULTURE, <http://www.sephardicstudies.org/iran.html> (last visited Sept. 1, 2009).

163. Parsi, *supra* note 53, at 9.

164. Ewen MacAskill, Simon Tisdall, & Robert Tait, *Iran's Jews Learn to Live with Ahmadinejad*, GUARDIAN, June 27, 2006, <http://www.guardian.co.uk/world/2006/jun/27/iran.ewenmacaskill>.

165. Sadeq Saba, *Iran Jews Express Holocaust Shock*, BBC, Feb. 11, 2006, http://news.bbc.co.uk/2/hi/middle_east/4705246.stm.

166. See Harrison, *supra* note 160.

167. Parsi, *supra* note 53, at 265.

168. Anderson Cooper, News Correspondent, CNN, Transcript of 360 Degrees aired on Sept. 21, 2006, <http://transcripts.cnn.com/TRANSCRIPTS/0609/21/acd.01.html>.

169. Ahmadinejad, *supra* note 120.

170. These instances do not necessarily demonstrate that Iranian credibility is

concealed its nuclear weapon production throughout the 1960s.¹⁷¹ More recently, Israel, as a result of mounting evidence, has had to admit that it did indeed use white phosphorous in its 2008-2009 invasion of the Gaza Strip despite having had categorically denied doing so initially.¹⁷²

Further, Israel's justifications for its 2008-2009 invasion of the Gaza Strip have been seriously questioned not only by critics of Israeli foreign policy but also by top officials such as Brigadier General (Ret.) Shmuel Zakai, a former commander of the IDF's Gaza Division, Dov Weisglass, Ariel Sharon's senior adviser, Ephraim Halevy, the former head of Mossad and Sharon's national security adviser, and Anthony Cordesman, one of the most reliable military analysts of the Middle East, and a friend of Israel.¹⁷³

Given such weighty evidence to the contrary, Israel's baseless claims that Iran is a genocidal regime are not sufficient to justify an Israeli preemptive strike against Iran.

4. The Danger That Iran Will Share a Nuclear Weapon With Terrorist Groups is Extremely Remote

Even accepting the fact that Iran will not directly launch a nuclear attack against Israel, there is still the issue of whether Iran will use non-state actors to launch such an attack if Iran became a nuclear power.¹⁷⁴ At most, however, this is an overstated danger for two reasons. First, not only has Iran refused to share its chemical or biological weapons with groups such as Hezbollah, "Tehran has fully grasped the meaning of the signal—if any of Iran's proxies

necessarily greater or lesser than Israeli credibility. It is beyond the scope or objective of this paper to explore which side is more trustworthy. The author points out these instances that put Israeli credibility into question merely to point out that Israel's arguments proposing an attack on Iran should pass a level of scrutiny before being accepted as necessarily true. As will be evident below, the question of whether Iran may invoke the right of preemption against Israel shall undergo the same level of scrutiny.

171. *Should Israel Give Up Its Nukes?*, L.A. TIMES, June 9, 2008, available at <http://articles.latimes.com/2005/dec/09/opinion/oe-bisharat9>; see generally, Seymour M. Hersh, *THE SAMSON OPTION* (1991).

172. *Israel admits using white phosphorous in attacks on Gaza*, TIMESONLINE, Jan. 24, 2009, http://www.timesonline.co.uk/tol/news/world/middle_east/article5575070.ece.

173. Henry Siegmen, *Israel's Lies*, London Review of Books, January 29, 2009, available at http://www.lrb.co.uk/v31/n02/sieg01_.html.

174. Mearsheimer, *supra* note 154, at 72.

attack Israel with a nuclear warhead, Israel would destroy Iran.”¹⁷⁵ Iran “could never be sure the transfer would remain undetected or that they would not be blamed and punished afterward.”¹⁷⁶

Second, if Iran were to share a nuclear weapon with non-state actors, such groups would no longer have to rely on Iran for support. Iran would effectively lose a great deal of influence over these non-state actors. Given Iran’s tendency “to view all other actors as potential competitors” and its ambition “to become the region’s undisputed power,” it is unlikely that Iran’s “Machiavellian” leadership would “commit such an irrevocable and devastating mistake” as to share such sensitive technology with non-state actors.¹⁷⁷ If such an exchange were to occur, Iran “would no longer control how the weapons might be used and they could never be certain that [Israel or the United States] would not incinerate them if either country merely suspected that [Iran] had provided terrorists with the ability to carry out [a] WMD attack.”¹⁷⁸

5. *There is Insufficient Evidence to Link Iran to Terrorist Attacks Against Israel*

Although many point to the tragic 1994 bombings of the headquarters of the Argentine-Israeli Mutual Association in Buenos Aires as evidence of Iranian-funded terrorism against Israel, there was insufficient evidence to convict anyone of the attack. In fact, the Israelis privately “recognized that despite Iran’s support of Palestinian rejectionist groups such as Hamas and the Islamic Jihad . . . Iran wasn’t the root of the terror that Israel endured” in the spring of 1994.¹⁷⁹ However, the Rabin government, who was at the time engaged in peace talks with the Palestinians, recognized that pursuing peace would be next to impossible if Israel simultaneously accused Palestinians of committing terrorism. Iran, although only partially responsible, was a convenient target to demonize.¹⁸⁰

Terrorist attacks in Israel in the Spring of 1996 exemplify this point. Between February 25 and March 4, four major terrorist attacks hit the cities of Tel Aviv, Jerusalem and Ashkelon, killing

175. Parsi, *supra* note 53, at 270.

176. Mearsheimer, *supra* note 154, at 72-73.

177. Parsi, *supra* note 53, at 270-71.

178. Mearsheimer, *supra* note 154, at 73.

179. Parsi, *supra* note 53, at 179.

180. *Id.* at 180.

fifty-nine Israeli civilians. Then Prime Minister Shimon "Peres immediately placed the blame on Tehran . . . [even though Hamas] publicly claimed responsibility and gave the reason for the bombings as vengeance for the Israeli assassination of Yehya Ayyash, a high-ranking Hamas operative."¹⁸¹ In fact, two years later, President Khatami condemned terrorism against Israelis in an interview with CNN.¹⁸²

6. *The Presence of Alternative Means of Addressing the Conflict Prevents Israel from Demonstrating Imminent Necessity*

Despite the harsh rhetoric, Iran has been quite persistent in opening up to diplomacy to resolve the nuclear issue in particular and the tensions with Israel in general. For example, Ali Larijani, the former nuclear negotiator, has said that Iran is willing to give reassurances that no nuclear material would be diverted to a weapons program, although he (rightfully) insisted that Iran has the right to enrich uranium under the NPT.¹⁸³ Further, Israel has persistently rejected Iranian offers of diplomacy regarding issues like Iran's nuclear program. Examples include the Barak government rejecting Iranian overtures in 2000,¹⁸⁴ and more importantly, Iran's offer to Israel in 2003 as mentioned above.

Not only would an Israeli preemptive strike be illegal as a result of failing to satisfy the imminent necessity requirement, such a strike poses three practical complications. First, in addition to the Israeli Air Force's current inability to reach and successfully destroy Iran's known facilities, there is also the problem of dealing with potentially unknown nuclear sites.¹⁸⁵ Even in a perfect military operation, "Iran will likely retain its nuclear capability" as "the bombing campaign would at best set back the Iranian program no more than five years" and provide "Tehran with the opportunity to legitimately withdraw from the [NPT]."¹⁸⁶ After withdrawing from

181. *Id.* at 193.

182. *Transcript of Interview with Iranian President Mohammad Khatami*, CNN, Jan. 7, 1998, <http://www.cnn.com/WORLD/9801/07/iran/interview.html>.

183. *Iran Defiant on Nuclear Programme*, BBC NEWS, Feb. 20, 2007, http://news.bbc.co.uk/2/hi/middle_east/6378289.stm.

184. Parsi, *supra* note 53, at 218.

185. Seymour Hersh, *The Coming Wars*, THE NEW YORKER, JAN. 24, 2005, available at http://www.newyorker.com/archive/2005/01/24/050124fa_fact.

186. Parsi, *supra* note 53, at xiii.

the NPT, Iran will still retain its nuclear know-how of the enrichment process unless the Israeli air strike manages to take out all of Iran's nuclear scientists.¹⁸⁷

Second, not only would such a strike result in enormous civilian casualties, it would also fail in neutralizing the Iranian nuclear program. Because it is a Jewish state, Israel would have a particularly difficult time justifying its likely killing of Iranian Jews in such an attack as Iran has the largest Jewish population in the Middle East outside of Israel.¹⁸⁸

Third, Iran's response to such an attack would prove disastrous for both Israeli and U.S. interests. If attacked, Iran is capable of striking against both U.S. and Israeli interests primarily through intervention in Iraq, encouraging Hezbollah to attack Israel and closing off the Strait of Hormuz, which would cut off two-fifths of the global oil supply and cause a crippling global recession.¹⁸⁹

C. Iran's Support of Hezbollah and Hamas Does Not Provide Israel the Right to Strike Iran Under Article 51

Some claim that because terrorist groups such as Hezbollah and Hamas are merely Iranian proxies that carry out the Islamic Republic's will, Israel should be afforded the right to strike Iran.¹⁹⁰ This argument is without merit for two reasons: (1) Hezbollah and Hamas are not mere proxies of Iran; (2) the demonstration of Iranian support for such groups is, standing alone, insufficient to justify an Article 51 defense.

1. Hezbollah and Hamas Are Not Mere Proxies of Iran

Hezbollah and Hamas are not mere proxies of Iran but are rather independent organizations. Although the degree of control Iran wields over Hezbollah is not likely to be absolute,¹⁹¹ it is a card that Iran can and has played.¹⁹² One should be careful, however, not

187. *Id.*

188. *The Jews of Iran*, JEWISH VIRTUAL LIBR., <http://www.jewishvirtuallibrary.org/jsource/anti-semitism/iranjews.html> (last visited Sept. 10, 2009).

189. Zahedi, *supra* note 94.

190. See generally, Corsi, *supra* note 76; Dershowitz, *supra* note 76, at 174-89.

191. William O. Beeman, *Examining Iran's ties to Hezbollah*, IN THESE TIMES, Aug. 15, 2006, <http://www.inthesetimes.com/article/2790>.

192. ROBERT GRACE & ANDREW MANDELBAUM, UNDERSTANDING THE IRAN-HEZBOLLAH CONNECTION, U.S. INST. OF PEACE, <http://www.usip.org/resources/>

to overstate Iran's influence over Hezbollah as its control has been "steadily declining since approximately 1996."¹⁹³ While financial support "does continue to come 'from Iran,' to support Hezbollah,"¹⁹⁴ it is not clear how much of this comes from the Iranian state and how crucial these Iranian funds are to Hezbollah's survival.¹⁹⁵ In fact, "Hezbollah has taken on a life of its own. Even if all Iranian financial and logistical support were cut off, Hezbollah would not only continue, it would thrive."¹⁹⁶

Iranian-Hamas ties are even more obscure. Some Israeli officials argue that Iranian ties with Hamas are so strong that Iran has not only trained and armed Hamas fighters but that Iran could have penetrated the Israeli cordon around the Gaza Strip to provide arms to Hamas in the 2008-2009 conflict.¹⁹⁷ Such allegations are controversial, however, as George Joffe, a Middle East expert has noted, "Quite how Iran could have maintained those sorts of contacts seems to me very difficult to understand."¹⁹⁸ Others have characterized the relationship as "more theatrical than practical," as whatever aid Iran gives to Hamas pales in comparison to Saudi Arabian aid to Hamas.¹⁹⁹

2. *Proof of Iranian Support is Insufficient as a Matter of Law to Justify an Article 51 Self-defense Strike*

Even if Iranian-Hezbollah and Iranian-Hamas links are strong, Israeli demonstration of Iranian support for these groups is not sufficient to provide Israel with the justification to invoke Article 51 self-defense against Iran. Some may be tempted to argue that Iran's support of these groups is an act of war. The logical extension of such an argument is that Israel must respond to an attack that has already transpired rather than preempt one that is likely to happen.

understanding-iran-hezbollah-connection (last visited Sept. 10, 2009).

193. Beeman, *supra* note 191.

194. *Id.*

195. *Id.*

196. *Id.*

197. Gary Thomas, *Controversy Arises Over Alleged Hamas-Iran Tie*, VOICE OF AM., Jan. 6, 2009, <http://www.voanews.com/english/archive/2009-01/2009-01-06-voa47.cfm?CFID=125871072&CFTOKEN=29245882&jsessionid=6630790bf221c82ea82bc537c1f2e2524244>.

198. *Id.*

199. *How Iran Fits in*, THE ECONOMIST, Jan. 17, 2009, http://www.economist.com/world/mideast-africa/displaystory.cfm?story_id=12959539.

Although these groups have engaged in open conflict with Israel, their actions cannot be attributed to Iran.

The evidence, even when viewed in the light most favorable to Israel, merely demonstrates that Iran provides assistance to these groups in the form of weapons or logistics. Nevertheless, Iranian fighters have not carried out acts of severe armed force against Israel amounting to an actual armed attack conducted by regular forces.²⁰⁰ Iran's actions then, do not qualify as an "armed attack" against Israel under Article 51 as interpreted in the ICJ's *Nicaragua* opinion. Therefore, Israel lacks the grounds to invoke the right of Article 51 self-defense against Iran.

V. An Iranian Attack Against Israel Would Be Illegal

A. *Iran Bears the Burden of Proof to Demonstrate Legality*

Pursuant to the rule established above,²⁰¹ if Iran wishes to conduct a preemptive or Article 51 strike against Israel, the burden of proof is on Iran's shoulders to prove that it has met the legal requirements.

B. *Iran Is Unable to Satisfy the Imminent Necessity Requirement to Justify a Preemptive Attack*

Although Iran has threatened retaliation if attacked, Iran has not explicitly made any arguments to support a preemptive strike against Israel.²⁰² It is for this reason that this section will differ from the previous in that it will analyze *potential* arguments that Iran could make to support a preemptive strike against Israel. Applying the same level of scrutiny as above demonstrates that Iran is unable to make a case to invoke the right of preemption against Israel.

1. *Israel's Threats of Overt Military Action Against Iran's Nuclear Sites Do Not Create Imminent Necessity*

In examining Iran's case regarding imminent necessity, it is interesting to note that Israel's threats towards Iran have been far

200. Military and Paramilitary Activities, *supra* note 7.

201. A party which advances a point of fact in support of its claim must establish that fact.

202. See *Iran Threatens to Retaliate Against US, Israel if Attacked*, VOICE OF AM., Jul. 12, 2008, <http://www.voanews.com/bangla/archive/2008-07/2008-07-12-voa9.cfm>.

more direct than Iran's threats towards Israel. In fact, Israeli officials have clearly and unambiguously warned that Israel may resort to preemptive force against Iran's nuclear reactors.²⁰³

Unlike Iran, Israel's conduct has seemed to conform with its rhetoric. In 2007, a secret Israeli plan to strike Iranian nuclear reactors at Natanz with nuclear bunker busters was disclosed to the media.²⁰⁴ The report had the caveat that the nuclear-tipped bunker-busters would only be used if a conventional attack was ruled out and if the United States declined to intervene.²⁰⁵ In June 2008, Israel conducted a major military exercise that U.S. officials speculated was a kind of dress rehearsal for a potential bombing attack on Natanz.²⁰⁶

Not only has Israel demonstrated an intention to strike Iran's nuclear facilities, it has also sought out the capabilities to do so. In the past year, Israel has requested from the United States two pertinent pieces of military equipment: (1) new Boeing 767 refueling jets that would be required to reach Iran by air;²⁰⁷ and (2) bunker-buster bombs that would be required to take out Iranian underground nuclear facilities.²⁰⁸ These are the same bunker-buster bombs that the abovementioned 2007 Natanz plan demanded.

The above threats seem conditional. Skeptics may argue that if Iran does not wish to suffer an Israeli attack on its nuclear facilities, it should simply refrain from weaponizing its nuclear program and maintain it for peaceful purposes only. Such skeptics would go on

203. Parsi, *supra* note 53, at 283 (discussing Project Daniel); Anne Gearan, *Israel on Iran: Anything it Takes to Stop Nukes*, ASSOCIATED PRESS, July 27, 2009, available at http://www.huffingtonpost.com/2009/07/28/israel-on-iran-anythingi_n_245953.html.

204. Uzi Mahnaimi & Sarah Baxter, *Revealed: Israel Plans Nuclear Strike On Iran*, SUNDAY TIMES, Jan. 7, 2007, <http://www.timesonline.co.uk/tol/news/world/article1290331.ece>.

205. *Id.*

206. *Israel Military Exercise May Be Rehearsal for Attack on Iran Nuclear Facility*, NAT'L TERROR ALERT, June 20, 2008, <http://www.nationalterroralert.com/updates/2008/06/20/israel-military-exercise-may-be-rehearsal-for-attack-on-iran-nuclear-facility/>.

207. See Yaakov Lappin, *U.S. Rejects Barak's Boeing 767 Request*, THE JERUSALEM POST, August 20, 2008, <http://www.jpost.com/servlet/Satellite?pagename=JPost%2FJPArticle%2FShowFull&cid=1219218601145>.

208. See Amos Harel & Aluf Benn, *Israel Asks U.S. for Arms, Air Corridor to Attack Iran*, HAARETZ, September 11, 2008, <http://www.haaretz.com/hasen/spages/1019989.html>.

to argue that because Iran does not wish to have a nuclear weapon but more likely the capability to build one, then there is no cause for concern.

However, Israel has clearly expressed that it will not tolerate Iran to have such a capability. The Bush Administration's attempts to reach an equitable solution with Iran that would allow them the rights to enrich uranium for peaceful purposes as provided by the NPT while preventing them from weaponizing is an excellent case in point. In 2005, AIPAC fiercely opposed the Bush Administration's expressed support for a proposal that would permit Iran to continue its nuclear development as long as enrichment took place in Russia.²⁰⁹ At a frank briefing on Capitol Hill, an Israeli senior diplomat explained that there is no kind of inspections regime that would make the Israelis feel comfortable with an Iranian *civilian* nuclear program.²¹⁰ The only guarantee acceptable to Israel, he went on, is "the debilitation of Iran's industrial base." The diplomat topped his explanation off with a warning that if the United States does not take quick action on Iran, Israel "may have to go it alone," suggesting that Israel might try to destroy Iran's nuclear facilities itself.²¹¹

As we did earlier in analyzing the Iranian threat towards Israel, we must look at more logical reasons behind Israel's behavior rather than accept Israeli rhetoric at face value. Israel will not take a threat to its nuclear monopoly in the Middle East lightly. Even an Iran that does not have nuclear weapons but merely the capabilities to build them "will significantly damage Israel's ability to deter militant Palestinian and Lebanese organizations."²¹² A nuclear capable Iran "would undermine Israel's military supremacy [in the Middle East] and prevent it from dictating the parameters of peace and pursuing unilateral peace plans."²¹³ "A nuclear Iran could force Israel to accept territorial compromises with its neighbors" and deprive Israel of its ability to negotiate from a position of strength.²¹⁴

209. Ron Kampeas, "With Time Short on Iran Nukes, AIPAC Criticizes Bush Approach," JTA, December 2, 2005, available at <http://regimechangeiran.blogspot.com/2005/12/with-time-short-on-iran-nukes-aipac.html>.

210. *Id.*

211. *Id.*

212. Parsi, *supra* note 53, at 272.

213. *Id.*

214. *Id.*

As a geopolitical matter, "Israel simply would not be able to afford a nuclear rivalry with Iran and continued territorial disputes with the Arabs at the same time."²¹⁵

In addition, if Iran were to master the fuel cycle, Washington may be pressured into recognizing Iran as a regional power.²¹⁶ Iran would thereby gain strategic significance in the Middle East at Israel's expense.²¹⁷ Such a U.S.-Iranian rapprochement is precisely what Israel has worked tirelessly to prevent for over a decade due to geopolitical concerns.²¹⁸

As a side note, it is interesting to point out that Israeli threats towards Iran have not only been towards Iran's nuclear program but have encompassed Iran's regime as well. Israeli envoy Uri Lubrani, for example, attempted to convince the Clinton Administration to finance a coup d'état in Iran.²¹⁹

Although the evidence tends to show an Israeli intention to target Iran's nuclear reactors, there is insufficient evidence to demonstrate that Israel is capable of carrying out such an attack. Therefore, Iran is unable at this time to prove imminence. Specifically, the "Israeli Air Force still lacks the capability to take out all of Iran's known nuclear facilities."²²⁰ Although it is possible that Israel may wish to launch an attack that would merely set Iran's nuclear program back a few years, it is not entirely clear that Israel has the capability to do this either given its attempts to purchase the Boeing 767 refueling jets.²²¹

Further, although the 2008 military exercises in the Mediterranean demonstrated that Israel could reach Natanz, without a place to land safely and refuel, such an operation without the Boeing 767 jets is currently impossible. Although Israel could conduct a nuclear strike against Iran, there is not enough evidence to show that a precision attack against Iran's nuclear facilities is currently possible given Israel's attempts to purchase the requisite

215. *Id.*

216. *Id.*

217. *Id.*

218. *See generally* Parsi, *supra* note 53.

219. *Id.* at 197.

220. *Id.* at 278.

221. This is of course operating on the assumption that Israel would not wish to purchase such equipment if it already had the capability of launching a desired attack with its existing arsenal.

parts from the United States. Because Iran is not able to show that Israel has the capability of carrying out such a strike against Iran, Iran cannot satisfy the imminent necessity requirement.

2. Israel's Support of Iranian Opposition Groups Does Not Rise to the Level of Imminent Necessity

Reliable evidence indicates that Israel has been training Kurdish separatist movements as a means of targeting Iran.²²² Israel could use Kurdistan for "intelligence gathering and infiltration of northwestern Iran, just as Iran was using Lebanon's southern border to do the same in Israel."²²³ There is also reason to believe that Israel supports the Mujahedin-e Khalq ("MKO"), an Iranian opposition group that has been designated as a terrorist organization by both the Islamic Republic of Iran and the United States.²²⁴ These acts do not create imminent necessity for two reasons: (1) evidence regarding the extent and nature of the support is spotty especially with respect to the MKO; (2) the mere provision of arms and logistical support does not constitute an "armed attack" under international law.

With respect to the first point, although it is clear that the Rabin Administration permitted the MKO to use two Israeli satellites to beam its TV broadcasts into Iran,²²⁵ it is not clear whether Israel has supported the MKO militarily. Especially given MKO's recent decline with the U.S. military disarming the group in its main base in Iraq,²²⁶ Israel's support of the group does not rise anywhere near the level of imminent necessity as the threat the groups poses to Iran at this point is not likely to be formidable.

As for the support of Kurdish separatist groups, Iran being a direct target is at this point speculative. There is not nearly enough evidence to suggest that the threat that Israel's support of these

222. Magdi Abdelhadi, *Israelis 'Train Kurdish Forces'*, BBC, Sept. 20, 2006, http://news.bbc.co.uk/2/hi/middle_east/5364982.stm (citing BBC TV programme *Newsnight*).

223. Parsi, *supra* note 53, at 239.

224. Scott Ritter, *Iraq, Iran, and WMDs*, ZNET, Jan. 29, 2007, <http://www.zmag.org/znet/viewArticle/2183>.

225. *Who Pays for Rajavi's Satellite Programs?*, IRAN INTERLINK, May 4, 2005, <http://www.iran-interlink.org/files/News3/May05/interlink040505.htm>.

226. Charles Recknagel, *Iraq: U.S. Forces Disarm Armed Iranian Opposition Fighters*, GLOBALSECURITY.ORG, May 14, 2003, <http://www.globalsecurity.org/wmd/library/news/iraq/2003/05/iraq-030514-rfel-154305.htm>.

groups has towards Iran's safety and territorial sovereignty warrants a preemptive strike against Israel.

Second, as the analysis in the previous section regarding Iran's support of Hezbollah and Hamas demonstrates, the mere provision of weapons and logistical support does not constitute an "armed attack" in international law. For the same reasons that Iranian support of Hezbollah and Hamas do not create an Israeli right to strike Iran, Israeli support of Iranian opposition groups does not create an Iranian right to strike Israel.

3. Reports of an Israeli Covert War Against Iran Are Insufficient to Support a Preemptive Strike

In February 2009, U.S. intelligence sources revealed that Israel has "launched a covert war against Iran as an alternative to direct military strikes against Iran's nuclear program."²²⁷ Experts say that Israel "is using hitmen, sabotage, front companies and double agents to disrupt the regime's illicit weapons project."²²⁸ In fact, "Mossad was rumored to be behind the death of Ardeshire Hassanpour, a top nuclear scientist at Iran's Isfahan uranium plant, who died in mysterious circumstances from reported 'gas poisoning' in 2007."²²⁹ In response, Iran has announced the arrests "of alleged spies in an attempt to discourage double agents."²³⁰

This covert war, however, cannot legalize an Iranian preemptive strike against Israel. There is insufficient state practice to support the claim that covert operations provide a government with the justification to launch an overt strike in response. Further, an overt Iranian attack against the Israeli mainland would not be proportional. Counter intelligence measures are sufficient to deter Israeli covert attempts to sabotage the Iranian nuclear program. Additionally, an overt Iranian attack on Israel would likely be ineffective at stopping the covert war. An Iranian preemptive attack on Israel based on the Israeli assassination (or attempted and alleged assassinations) of Iranian nuclear scientists would be illegal.

227. Philip Sherwell, *Israel Launches Covert War Against Iran*, TELEGRAPH, Feb. 16, 2009, <http://www.telegraph.co.uk/news/worldnews/middleeast/israel/4640052/Israel-launches-covert-war-against-Iran.html>.

228. *Id.*

229. *Id.*

230. *Id.*

4. *Alternative Means of Resolution Prevent Iran From Establishing Imminent Necessity*

In addition to an inability of showing Israeli capability, Iran lacks the evidence to conclusively prove that alternative means of resolving the dispute would necessarily prove fruitless. This prevents Iran from showing that the Israeli intention to attack Iran imminently needs to be prevented. While it is true that Israel has repeatedly rejected Iranian talk offers, there is insufficient evidence to prove that talks are impossible and that the use of force is imminently necessary. This is especially so given the new White House leadership of President Barack Obama. Insisting on open dialogue with Iran,²³¹ President Obama may be able to promote a diplomatic resolution between the two countries. Although the likelihood of a finding a diplomatic solution is unclear, the fact that it presents a viable option for Iran is sufficient to prevent Iran from meeting its burden of imminent necessity through the absence of alternative means of resolution.

Similar to an Israeli preemptive strike on Iran, an Iranian preemptive strike on Israel would pose practical complications in addition to being illegal. As stated earlier, an Iranian attack would not neutralize Israel's second-strike capabilities. If attacked, Israel would more than likely exercise such second-strike capabilities to the fullest extent. A horrific regional conflict would certainly follow in which the United States may feel compelled to intervene.

C. *Israel's Covert War Does Not Provide Iran the Right to Strike Israel Under Article 51*

It is also helpful to analyze Iran's right under Article 51 in responding to this covert war. Unlike the support that the two sides are providing to each other's opposition groups, which as mentioned above falls outside of the accepted international threshold of an "armed attack," Israel is sending its own agents into Iran to carry out armed attacks (at least with respect to the alleged assassinations) rather than providing support to other groups that wish to do so. However, Iran does not have the right to invoke Article 51 self-defense against Israel in light of these facts. The ICJ in *Nicaragua* indicated that a State sending "armed bands, groups,

231. *Obama Says Ready to Talk to Iran*, REUTERS, Jan. 27, 2009, <http://www.reuters.com/article/vcCandidateFeed1/idUSTRE50Q23220090127>.

irregulars or mercenaries, which carry out acts of armed force against another State" is an "armed attack" *only if* these acts of armed force "amount to an actual armed attack conducted by regular forces 'or its substantial involvement therein.'"²³²

At this time, the evidence does not shed enough light on the covert war for Iran to demonstrate that Israel has committed an "armed attack" against Iran. Specifically, it is not clear whether the covert war rises to the level of an armed attack that would be conducted by regular forces. The covert war does not provide Iran the basis to invoke Article 51 self-defense against Israel directly although Iran certainly has the right to engage in counter intelligence measures against foreign agents in Iran. Especially because this option provides a viable alternative to resolving the dispute, Iran may not invoke Article 51 self-defense against Israel on these grounds.

VI. Conclusion

After analyzing the conflict on both sides, it is clear that: (1) Israel cannot satisfy its burden of proof to carry out a legal preemptive or Article 51 strike against Iran; and (2) Iran cannot satisfy its burden of proof to carry out a legal preemptive or Article 51 strike against Israel. However, the above analysis indicates some interesting findings. The reader should recall that to prove the necessity requirement, a nation-state must demonstrate both intent and capability to the point where an attack is so imminent that nothing short of forcible action could forestall the attack.

Israel cannot meet its burden of showing an imminent necessity because there is insufficient evidence to show that Iran intends to launch an attack against Israel. Iran, on the other hand, although similarly unable to meet the imminent necessity requirement, comes closer to demonstrating an Israeli intent to attack Iran than Israel does to show an Iranian intent to attack Israel. While Iran fails to satisfy the capability subsection of the necessity requirement (as they lack nuclear weapons and particularly nuclear weapons that could reach Israel), it is interesting to note that Iran has a greater reason to fear an Israeli attack on its nuclear installations than Israel has to fear an Iranian nuclear attack on its population. This conclusion demonstrates the necessity of analyzing a conflict from

232. Military and Paramilitary Activities, *supra* note 7.

both sides to truly uncover the objective dynamics.

The reader should be mindful of the ultimate conclusions as well as the limits of the sub-conclusion discussed in the previous paragraph. The ultimate conclusion regarding Iran's right of preemption against Israel is plain and simple: Because Iran is unable to satisfy the requirements of preemption, any preemptive attack it launches against Israel would not only be a flagrant violation of international law but just downright foolish. The above analysis merely indicates that Iran comes closer to meeting the isolated intent subcategory of the imminent necessity requirement than Israel does in its case against Iran. It is imperative to understand that even if Iran were to fully meet the intention requirement, it would be unable to meet the capability requirement (in that it would be unable to eliminate Israel's capabilities of striking Iran). Further it is difficult to imagine a scenario where the practical realities of the situation would suggest that such a preemptive attack would be reasonable and thus meet the proportionality prong. Moreover, it would have to show that alternative means of resolving the dispute would be fruitless and that immediate action would have to be taken to prevent an Israeli strike.

The Caroline Affair and Article 51 did not establish a continuum of when a nation-state may invoke the right of preemptive strike against another nation-state. Rather, it set out a threshold of two requirements, both of which must be met in order to invoke the right. The fact that Iran comes closer to meeting one of these prongs does not suggest that an Iranian preemptive strike against Israel would be any less illegal than an Israeli preemptive strike on Iran. Because both fail to meet the standard, neither may legally invoke the right.

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