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I. Introduction

"Just wars," according to Grotius, "arise from our love of the innocent."1 Recognizing this, the State of Israel — now facing the growing threat of unconventional aggression2 from Iran3 — may

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1. See HUGO GROTIIUS, THE LAW OF WAR AND PEACE 70 (William Whewell trans., 1853) (1625). Grotius is generally recognized as the founder of modern international law.
soon have to consider exercising the preemption option. This option, founded upon the imperative to protect its innocent civilian populations from new forms of genocide, could surely meet the test of a "just war."
II. The Danger from Iran

Israel faces substantial danger of unconventional attack from Iran. In a few short years, or sooner, this danger could include nuclear attack. The sources of this danger lie in the Teheran regime's development of chemical, biological and nuclear weapons and in its fundamentally theological/political commitment to destruction of the Jewish State. This congruence of capabilities and intentions portends a uniquely major war in the Middle East.

In addition to its ongoing purchase of nuclear infrastructure from China, North Korea and Russia, Iran has an ambitious, indigenous nuclear program. Centered at ten widely dispersed sites, this program begins at Tabriz, in the north, continues through the large installation at Isfahan, and concludes in the nuclear facility at Busheir on the Persian Gulf. Named the "Death Program" by Iran, it receives much of its direction from Pakistan. According to the distinguished Israeli observer Arie Stav: "Abdel

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8. A tactical problem for Israel from the standpoint of preemption.

Kader Khan, responsible for the development of the Pakistani Bomb, is chief adviser to the Iranian Nuclear Energy Commission, and Iranian technicians receive their training in Islamabad." To a considerable extent, the problem lies in religion.

Theologically, any sort of peace settlement with Israel is seen as an intolerable affront to Islam and a negation of Iran’s Islamic identity. As for territorial compromise over “Palestine,” this, too, is out of the question. Because a Muslim land in the heart of dar al-Islam can be ruled properly only by Muslim authority, Israel’s “usurpation” of any Arab land must be met with jihad. Described by the current Islamic regime in Teheran as a poisonous growth in the Middle East, Israel is approached as a malignancy, not because of its particular policies, but because it is a Jewish state. Short of ceasing to exist, there is absolutely nothing Israel can do to achieve peace with Iran.

To implement its genocidal strategy against Israel, Iran is already at war with the Jewish State. This war is in the form of an insurgency utilizing the Hezbollah terrorist organization in the Bekaa. Representing the active terror arm of Iran, Hezbollah is an extremist Islamic force animated exclusively by the path of armed struggle.

10. Id.
11. Id.
12. The dar al-Islam, the abode of Islam, is discussed in great detail in ROBERT S. WISTRICH, ANTISEMITISM: THE LONGEST HATRED 222-305 (1991). Here it is essential to understand that Iran’s hatred of Israel derives from alleged and irremediable historical misdeeds of Jews against Islam, the revival of the blood libel by Muslims, Islamic denunciations of the Talmud and the carefully contrived demonic image of a ruthless, oppressive Jewish State. Promulgated by fundamentalist terror groups such as Hamas and Islamic Jihad, this hatred makes no distinctions between Jews, Judaism, and Israel. All are seen, as Wistrich points out, “as part of a global conspiracy to create an alien body in the heart of the Muslim world . . . .” Id. at 223.
13. Jihad, or holy war, is discussed widely in WISTRICH, supra note 12, at ch.16. For fundamentalist Muslims, Wistrich points out, “. . . peace with Israel was and still remains nothing less than a poison threatening the life-blood of Islam, a symptom of its profound malaise, weakness and decadence.” Id. at 227.
14. In this part of Lebanon, Islamic terror groups, aided by Syria and Iran, exert constant military pressure on Israel’s northern borders.
Iran is also behind the marked escalation of Hamas terrorism against Israeli targets. Although, historically Iran has favored the Palestinian Islamic Jihad, a staunchly pro-Shiite organization, a distinct tilt toward Hamas took place after the 1991 Gulf War. Moreover, Hamas has been exploring new avenues of cooperation with Hezbollah, with the latter now establishing a Hamas liaison office in southern Lebanon.

For Iran, however, terrorist attacks upon Israel are only the opening salvo of a much greater war, a "softening" strategy that weakens the Jewish State for subsequent direct assault. Such assaults, if Iran is left unchecked, could exhibit chemical, biological or even nuclear forms of aggression. Because massive and unconventional first-strikes against Israel could prevent an unacceptably damaging reprisal, Israel may have little choice but to strike first in its own essential defense.

III. Strategic and Tactical Considerations of an Israeli Preemption

But would preemption by Israel be strategically and tactically cost effective? This, of course, would depend upon a number of critical variables, including: (a) expected probability of Iranian first-strikes; (b) expected disutility of Iranian first-strikes;\(^15\) (c) expected schedule of Iranian unconventional weapons deployment; (d) expected efficiency of Iranian active defenses over time;\(^6\) (e) expected efficiency of Israeli active defenses over time; (f) expected efficiency of Israeli hard-target counterforce operations over time;

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16. Israeli judgments concerning preemption must take into account, inter alia, Iranian anti-tactical ballistic missile (ATBM) developments. If, for example, such developments should permit Iran to intercept a pertinent fraction of Israeli offensive missiles, Israel's cost-benefit calculations on preemption could be transformed significantly. Correspondingly, should Israel's own ATBM developments suggest optimism about interception reliability, the cost-effectiveness of an Israeli preemption would likely be enhanced.
(g) expected reactions of other regional enemies (e.g., Syria); and (h) expected world community reactions to Israeli preemptions.17

Reduced to its essential dimensions, Israel’s dilemma is this: Should it plan for anticipatory self-defense18 attacks against Iranian unconventional forces at all,19 and, if it should, precisely when should these attacks be mounted? Where it is assumed that Iran will only be adding to its chemical, biological and nuclear arsenals, and that these additions will make effective Israeli preemptions more and more problematic? Rational strategy would seem to compel Jerusalem to act defensively as soon as possible.20

17. The expected world community reactions to an Israeli preemption against Iran could play a major role in Jerusalem’s decisional calculations. If, after all, these reactions would likely be very hostile — as indeed, they are apt to be in the midst of a so-called “Peace Process” — Israel would have some good reason not to preempt. This is especially the case with regard to probable negative reactions from Washington, as Israel depends so heavily upon American support and security guarantees.

18. See also, HUGO GROTIUS, COMMENTARY ON THE LAW OF PRIZE AND BOOTY (1604):

Now, as Cicero explains, this [justification for preemption] exists whenever he who chooses to wait [for formal declarations] will be obliged to pay an unjust penalty before he can exact a just penalty; and, in a general sense, it exists whenever matters do not admit of delay. Thus it is obvious that a just war can be waged in return, without recourse to judicial procedure, against an opponent who has begun an unjust war; nor will any declaration of that just war be required . . . . For—as Aelian says, citing Plato as his authority—any war undertaken for the necessary repulsion of injury, is proclaimed not by a crier nor by a herald but by the voice of Nature herself.


19. The customary right of anticipatory self-defense has its modern origins in the Caroline incident, which concerned the unsuccessful rebellion of 1837 in Upper Canada against British rule (a rebellion that aroused sympathy and support in the United States). See Beth M. Polebaum, National Self Defense in International Law: An Emerging Standard For a Nuclear Age, 59 N.Y.U. L. REV. 187, 190-91 (1984) (noting that the Caroline case transformed the right to self-defense from an excuse for armed intervention into a legal doctrine). Following this incident, the serious threat of armed attack has generally justified militarily defensive action. In an exchange of diplomatic notes between the governments of the United States and Great Britain, then United States Secretary of State Daniel Webster outlined a framework for self-defense that did not require an actual attack. See id. at 191; R.Y. Jennings, The Caroline and McLeod Cases, 32 AM. J. INT’L L. 82, 89 (1938). Here the framework permitted military response to a threat so long as the danger posed was “instant, overwhelming, leaving no choice of means and no moment for deliberation.” See id.; 61 PARLIAMENTARY PAPERS (1843), reprinted in Jennings, supra, at 89.

20. This is because any undue delay could impair Israel’s tactical capacity for preemptive action. What this means is that incremental Iranian dispersion of unconventional weapons assets would make it progressively more difficult for
If, however, it is assumed that there will be no significant enlargement or deployment of Iranian unconventional weapons over time, this may suggest a diminished rationale for Israel to strike first. Critical considerations here would include Israeli assumptions about Iranian rationality, expectations about costs to Israel of Iranian aggression in the near term; comparisons of costs to Israel of Iranian near-term aggression with those of Iranian reprisals to Israeli preemption; and projected efficacy over time of Israeli and Iranian ATBM operations.

More than any other factor, expected rationality of Iranian decision-makers will figure in Israeli judgments on the preemption option. If, after all, these leaders were expected to strike at Israel with unconventional forces irrespective of anticipated Israeli counterstrikes, deterrence, by definition, would be immobilized. This means that Iranian strikes could be expected even if Iran understood that Israel had “successfully” deployed its own nuclear weapons in altogether survivable modes, that Israel’s weapons were Israel to destroy pertinent targets without incurring unacceptable risks of chemical/biological/nuclear retaliation. It is conceivable, of course, that Israel’s preemption window of opportunity is already closed. If this is the case, Israel’s only remaining security hopes are contingent upon successful deterrence and upon the absence of irrational decision-makers in Teheran.

21. These expectations refer to particular harms predicted to accrue to Israel from Iranian aggression in the next several years. If such harms were predictably “low,” Israel’s incentive to preempt would likely also be “low.” If, however, such harms were predictably “high,” Israel’s preemption imperative would likely be correspondingly “high.”

22. Should Israel decide to preempt Iranian attacks with conventional strikes, Teheran’s response would largely determine Jerusalem’s next moves. If this response were in any way nuclear, Israel would assuredly resort to nuclear counterretaliation. If this retaliation were to involve chemical and/or biological weapons, Israel might also feel pressed to take the escalatory initiative. Should the Iranian response to Israel’s nonnuclear preemption be limited to hard-target conventional strikes, it is most unlikely that the Jewish State would move on to nuclear counterretaliations. If, however, the Iranian conventional retaliation were all-out and directed toward civilian populations as well as to military targets, an Israeli nuclear counterretaliation could not be ruled out. It would appear that such a counterretaliation could be ruled out only if the enemy conventional retaliation were entirely proportionate to Israel’s preemption, confined exclusively to Israeli hard targets, circumscribed by the legal limitations of military necessity and accompanied by explicit/validated assurances of nonescalatory intent.

23. This refers to comparative expectations concerning capacity to intercept incoming ballistic missiles. Moreover, such comparisons of efficacy must be projected over time, as Israeli judgments could be affected by differential and incremental development of ATBM operations. For example, if Israel expected Iranian ATBM capabilities to increase more rapidly than its own ATBM capabilities, this could enhance Israel’s incentive to preempt.
altogether capable of penetrating Iranian active defenses, and that
Israel's leaders were altogether willing to retaliate.24

IV. The Problem of Reliance Upon Nuclear Deterrence

To fully understand the risks of Israeli reliance upon nuclear
weapons for deterrence, one must first understand the inherent
logic of that method of producing national security. To deter
enemy attack, in this case by Iran, Israel must be able to prevent
that enemy, by threat of an unacceptably damaging reprisal, from
deciding to strike.25 Here, security would be sought by convincing
the prospective attacker that the costs of a considered attack will
exceed the expected benefits. Assuming that Israel's enemies (1)
always value self-preservation more highly than any other prefer-
ence or combination of preferences; and (2) always choose
rationally between alternative options, they will, barring accidental
or unauthorized firings, always refrain from attacking an Israel that
is believed willing and able to deliver an appropriately destructive
response.

Two factors must communicate such a belief. First, in terms
of ability, there are two essential components: payload and delivery
system. It must be successfully communicated to the prospective
attacker by Israel that the Jewish State's firepower, and the means
of delivering that firepower, are capable of wreaking unacceptable
levels of retaliatory destruction after a first-strike attack. This
means that Israel's retaliatory forces must appear sufficiently
invulnerable and sufficiently elusive to penetrate the prospective
attacker's active and civil defenses. It need not be communicated
to the potential attacker that such firepower and/or the means of
delivery are superior. The capacity to deter need not be as great
as the capacity to win.

The second factor of communication for Israel is willingness.
How may Israel convince potential attackers that it possesses the

24. The perceived willingness to retaliate is ordinarily essential to credible
deterrence. Hence, if Israel were to face only rational adversaries, their
perception of substantially invulnerable Israeli retaliatory (including nuclear)
forces and of Israeli decision-makers willing to unleash these forces, would deter
them from striking first. If, however, Israel were to face irrational adversaries,
such as might possibly be expected in Iran, even such perceptions of Israeli force
invulnerability and decisional willingness could fail to deter.

25. This is the very essence of nuclear deterrence. For more on such
deterrence in general, and in regard to Israel in particular, see LOUIS RENÉ
BERES, APOCALYPSE: NUCLEAR CATASTROPHE IN WORLD POLITICS (1980);
BERES, supra note 15.
resolve to deliver an unacceptably destructive retaliation? The answer to this question lies, in part, in the demonstrated strength of the commitment to carry out the threat. Israel can enhance the credibility of its threat by committing itself in advance to threat fulfillment.

Here, a number of possibilities come immediately to mind. One such possibility would involve the announcement of an automatic system of nuclear reprisal, a firing procedure whereupon computerized measures of particular thresholds of destruction suffered by Israel would generate, without direct human intervention, predetermined levels of nuclear retaliation. Such a “doomsday device,” however, would carry with it enormous and intolerable risks of computer or mechanical failure and associated risks of enemy first-strikes. It does not warrant serious consideration.

Another more plausible and promising possibility could involve open announcement of nuclear capability, a shift away from “deliberate ambiguity” that would identify distinctly “usable” forces. With such an announcement, a prospective attacker, newly aware that Israel could retaliate without generating intolerably high levels of civilian harms would be more likely to believe Israel’s nuclear threats.

Significantly, taking the bomb out of the “basement” would also strengthen the ability component of Israel’s nuclear deterrence. Operational benefits of disclosure would probably accrue from deliberately-released information about dispersion, multiplication and hardening of nuclear weapon systems and about certain other pertinent technical features of Israel’s nuclear weapon systems. By removing doubts about Israel’s nuclear force capabilities, an end to deliberate ambiguity could enhance Israeli nuclear deterrence.

26. See BERES, supra note 15 and accompanying text.
28. One way Israel might actually remove the bomb from the basement would involve open testing of nuclear weapons. Significantly, in the aftermath of the Cold War and the pre-Gulf War indifference of the United States to Iraqi and Pakistani nuclearization, such testing might well be at minimal political cost. Within the government of Israel, the policy of “deliberate ambiguity” was first questioned after the Yom Kippur War, in 1976, when Moshe Dayan called for the deployment of an overt nuclear force. See generally Louis René Beres, Israel’s Bomb in the Basement: A Second Look, ISRAEL AFF. (1996).
29. Id.
Strictly speaking, removing the bomb from the Israeli base-
ment would not constitute an irrevocable advance commitment
to threat fulfillment. After all, it is entirely conceivable that an
“announced” bomb would still not be used and that the shift from
deliberate ambiguity would be little more than an elaborate bluff.
Nevertheless, it is altogether likely that such a shift would reflect
a genuine sense of strategic urgency in Israel, and that Israel’s
adversaries, especially Iran, would judge it accordingly.

These, then, are the basic features of “deadly logic,” the
system of security through deterrence upon which Israel may
choose to depend. It is, however, a system that should provide
little cause for complaisance in Jerusalem because the ingredients
of a credible nuclear deterrence posture are extraordinarily
complex and problematic.

A nuclear weapons capability, defined to include nuclear
explosives, associated delivery vehicles, and supporting infrastruc-
ture, does not necessarily imply a credible deterrence posture. In
fact, there exists no automatic connection between the two. In
spite of the enormous devastation that nuclear weapons are capable
of inflicting, threats of their retaliatory use will not always be be-
lieved. The persuasiveness of a retaliatory threat rests not only
upon the anticipated level of destruction, but also on the perceived
willingness or resolve to carry it out. Such willingness, as just
seen, may not always be a feature of Israel’s nuclear threat.

Another problem of Israeli reliance upon nuclear deterrence
calls the appearance of secure retaliatory forces. A secure
Israeli retaliatory force is an essential precondition of “assured
destruction.” Yet, there is no reason to believe that a would-be

30. The question of the “bomb in the basement” is examined exhaustively in Beres, supra note 28, at 242.
31. This means that such removal would not amount ipso facto to improved nuclear deterrence. See supra note 28 and accompanying text.
32. Whether or not a shift from ambiguity to disclosure would actually enhance Israeli deterrence, would also depend on several other complex factors, including the types of weapons involved, the reciprocal calculations of Iranian leaders, the effects upon rational decision-making processes by these leaders and the effects on both Israeli and Iranian command, control and communications operations. If, for example, bringing Israel’s bomb in the basement out into the light were to result in Iranian predelegations of launch authority and/or new launch-on-warning procedures, the likelihood of unauthorized and/or accidental wars, including in the future, nuclear wars could be increased.
33. See generally Beres, supra note 28 and accompanying text.
34. Id.
35. Id.
36. Id.
attacker will always be prepared to make such a judgment.\textsuperscript{37} Significantly, however accurate or inaccurate the attacker's judgment turns out to be regarding the vulnerability of Israel's retaliatory forces, the decision to attack would signify the failure of Israeli deterrence.\textsuperscript{38} Here, Israel's deterrent would prove unsuccessful even though the Jewish State had actually possessed a secure nuclear weapons capability.

A more immediate problem, of course, is that this capability might not be sustainable. Because of its notably small size, Israel might not be able to secure its nuclear forces within the limited parameters of the country's green lines.\textsuperscript{39} Recognizing this, Israel is apt to explore all available opportunities for sea-basing a portion of its nuclear deterrent forces.\textsuperscript{40} But even such prudent efforts at strengthening deterrence will not safeguard Israel from enemies that do not conform to the rules of rationality in world politics.\textsuperscript{41} Faced with such enemies, Jerusalem's deterrence logic would, by definition, be immobilized, leaving few reasonable alternatives to prompt preemption against menacing hard targets. If Israel's enemies cannot be deterred then preemption may be the only alternative to being attacked.

Faced with an irrational adversary in Iran, Israel would have no choice but to abandon reliance on traditional models of nuclear deterrence.\textsuperscript{42} Here, preemption would become obligatory;\textsuperscript{43} the

\begin{itemize}
  \item \textsuperscript{37} Id.
  \item \textsuperscript{38} Beres, supra note 28 and accompanying text.
  \item \textsuperscript{39} The green lines refer to Israel's pre-June 5, 1967, eastern border delineated in the armistice agreements with Syria and Jordan, and its southern border with the Gaza Strip in the armistice agreement with Egypt in the aftermath of the War of Independence. The border line was colored green on the original maps drawn up at Rhodes. \textit{See generally id.}
  \item \textsuperscript{40} This is because nuclear weapons deployed at sea provide significant opportunities for more secure basing and reduced vulnerability. \textit{Id.}
  \item \textsuperscript{41} Deterrence depends always on the assumption of rationality. \textit{Id.}
  \item \textsuperscript{42} In considering the operation of nuclear deterrence and associated matters of nuclear strategy, including preemption, it is vital to recall that such operation impacts and determines the adequacy of pertinent international law. For example, the adequacy of international law in preventing nuclear war in the Middle East will depend not only upon certain treaties, customs and general principles, but also upon the success or failure of particular country strategies in the region. If Israeli strategy should reduce the threat of nuclear war, either because of successful forms of nuclear deterrence or because of essential nonnuclear preemptive strikes, such strategy must be considered an essential component of international law. \textit{Id.}
  \item \textsuperscript{43} Such preemptions would almost certainly be undertaken with conventional (i.e., nonnuclear) weapons. It is extremely improbable that Israel would ever decide to launch a preemptive nuclear strike. Although circumstances could arise wherein such a strike would be perfectly rational, it is (hopefully) implausible that
\end{itemize}
only questions would center on matters of timing, targeting, and configuration of ordnance. Needless to say, the initial judgment concerning Iranian definitions of "unacceptable damage" would have to be made with great care. There is no room for error on this judgment.

V. Preemption and International Law

Let Israel heed no "expert opinion" that such preemptive attacks would be in violation of international law. International law is not a suicide pact! Today, especially, in an age of unique-

Israel would allow itself to reach these dire circumstances. Moreover, unless the nuclear weapons involved were used in a fashion consistent with the authoritative norms of the laws of war, this form of preemption would clearly represent an egregious violation of international law. And even if such consistency were possible, the psychological and political impact on the world community would be uniformly negative and far-reaching. It follows that an Israeli nuclear preemption could be expected only: (a) where Iran had acquired nuclear and/or other unconventional weapons judged capable of destroying the Third Temple; (b) where Iran had made clear that its intentions paralleled its capabilities; (c) where Jerusalem believed that Israeli nonnuclear preemptions could not achieve needed minimum levels of damage-limitation (i.e., levels consistent with preservation of the Third Temple). \textit{Id.}

44. Such definitions will be critical to successful deterrence. Beres, \textit{supra} note 28 and accompanying text.

45. Let us recall here Pufendorf's argument in \textit{On the Duty of Man and Citizen According to Natural Law}:

\ldots where it is quite clear that the other is already planning an attack upon me, even though he has not yet fully revealed his intentions, it will be permitted at once to begin forcible self-defense, and to anticipate him who is preparing mischief, provided there be no hope that, when admonished in a friendly spirit, he may put off his hostile temper; or if such admonition be likely to injure our cause. Hence, he is to be regarded as the aggressor, who first conceived the wish to injure, and prepared himself to carry it out. But the excuse of self-defense will be his, who by quickness shall overpower his slower assailant. And for defense, it is not required that one receive the first blow, or merely avoid and parry those aimed at him.

ly catastrophic weaponry, the law of nations does not require

46. There now exists a huge literature dealing with such weaponry and with the expected consequences of a nuclear war. For works on these consequences by this author, see BERES, supra note 25 and accompanying text; MIMICKING SISYPHUS: AMERICA'S COUNTERVAILING NUCLEAR STRATEGY (1983); REASON AND REALPOLITIK: U.S. FOREIGN POLICY AND WORLD ORDER (1984); BERES, supra note 15 and accompanying text.

For many years, Israel has sought to survive by utilization of diplomatic remedies. In January 1993, Israel became a charter signatory of the Chemical Weapons Convention (CWC), while Egypt, Syria and most other states in the area rejected the Treaty. Israel ratified the Limited Test Ban Treaty in 1964. It is a member of the International Atomic Energy Agency (IAEA) and has safeguard agreements for several minor facilities. It has consistently supported the idea of a Nuclear Weapons Free Zone for the Middle East (MENWFZ), and on September 13, 1993, it signed a formal peace agreement with the Palestine Liberation Organization.

In 1987, the United States and six other industrialized states formed the Missile Technology Control Regime (MTCR). Nevertheless, MTCR did nothing to prevent Iraq from upgrading its Scud-B missiles, with technology and assistance from such


48. For those who might seek even more specific guidance under international law, it can be argued persuasively that because a state of war exists between Israel and Iran (at Iran's insistence), the Jewish State does not even need to meet the requirements of anticipatory self-defense. Instead, as there can be no authentic "first strike" in an ongoing belligerency, an Israeli attack would need only to fulfill the expectations of the laws of war, i.e., the rules of discrimination, proportionality and military necessity. A legal state of war can exist between two states irrespective of the presence or absence of ongoing hostilities between national armed forces. The principle affirming that the existence of a legal state of war depends upon the intentions of one or more of the states involved, and not on "objective" phenomena, is known variously as the "state of war" doctrine, "de jure war," "war in the legal sense," and "war in the sense of international law."

49. See infra note 57-61 and accompanying text.

51. Id.
52. Id.
53. Id.
55. See Steinberg, supra note 50.
signatories as Germany, Great Britain, and the United States.\footnote{Id.} Moreover, as Gerald M. Steinberg points out, U.S. policies may already have impacted Israeli capabilities adversely:

In 1990, after the U.S. Congress enacted the Missile Technology Control Act, creating penalties for foreign firms that violate MTCR guidelines, the Bush administration's first target was not North Korea, Syria, Iran or Iraq, but Israel. Under the threat of sanctions, Israel has been forced to accept the terms of the MTCR with no comparable limits on the threat which Israel faces. Moreover, Israel has also been excluded from receiving any of the benefits that go with membership in the MTCR system. No sanctions were imposed on Germany and other Western European states that allowed shipments of missile technology to Iraq.\footnote{Id.}

A structural aspect of MTCR that is problematic for Israel is its definition of nuclear-capable missiles. The MTCR focuses narrowly on those missiles having a range of at least 300 km and a payload capability of at least 500 kg.\footnote{Id.} In the Middle East, however, enemy states are very close together, making shorter-range missiles strategically significant.

For Israel, arms control remedies are fraught with intolerable risk. Although the Jewish State is assuredly committed to the control of force through law,\footnote{Id.} it must temper this commitment with an overriding obligation to survive. No diplomatic agreement that would place the Third Temple\footnote{This is especially apparent since the implementation of the Oslo Accords.} in jeopardy could conceivably be binding.\footnote{A jurisprudential theory, following Hegelian ideas, is that any treaty obligation may be terminated unilaterally following changes in conditions that make performance of the treaty injurious to fundamental rights, especially the rights of existence, self-preservation and independence. These rights have been summarized in law as "rights of necessity." See Arie E. David, The Strategy of Treaty Termination 19 (1975); Law of Treaties, 29 AM. JUR. INT'L L. 666, 1100 (1935).} The overriding importance of survival under international law was even recognized by Thomas Jefferson.

\footnote{See GERALD M. STEINBERG, ARMS CONTROL AND ISRAELI NATIONAL SECURITY: A REALISTIC APPROACH 8 (1993).}
Thomas Jefferson, who was familiar with Epicurus, Cicero, and Seneca, as well as with Voltaire, Montesquieu, Holbach, Helvetius, and Beccaria, wrote as follows about limits to obligation under international law:

The Moral duties which exist between individual and individual in a state of nature, accompany them into a state of society and the aggregate of the duties of all the individuals composing the society constitutes the duties of that society towards any other, so that between society and society the same moral duties exist as did between the individuals composing them while in an unassociated state, their maker not having released them from those duties on their forming themselves into a nation. Compacts then between nation and nation are obligatory on them by the same moral law which obliges individuals to observe their compacts. There are circumstances however which sometimes excuse the non-performance of contracts between man and man; so are there also between nation and nation. When performance, for instance, becomes impossible, non-performance is not immoral. So if performance becomes self-destructive to the party, the law of self-preservation overrules the laws of obligation to others.62

_Pacta sunt servanda!_ — States must comply in good faith with their treaty obligations. The problem with this peremptory norm of international law is that it reflects altogether erroneous assumptions about cooperation and comity in world affairs. Such assumptions are especially erroneous in the Middle East.

The state of nations, within which international law operates, remains a state of nature. Since the end of the Thirty Years War

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62. _See_ Thomas Jefferson, *Opinion on the French Treaties*, in *The Political Writings of Thomas Jefferson* 113-14 (Merrill D. Peterson ed., 1993). Later, Jefferson concludes: “As every treaty ought to be made by a sufficient power, a treaty pernicious to the state is null, and not at all obligatory; no governor of a nation having power to engage things capable of destroying the state, for the safety of which the empire is trusted to him. The nation itself, bound necessarily to whatever its preservation and safety require, cannot enter into engagements contrary to its indispensable obligations.” *Id.* at 115.

and the resulting Peace of Westphalia in 1648, the states in world politics have coexisted uneasily without a specially-created world government. As a result, each state, in the final analysis, continues to depend upon expressions of national power in order to survive. Without such expressions, which are at the heart of what is commonly known as Realpolitik, weaker states can endure only at the pleasure of the strong. For Israel, weakness could produce genocide.

VI. The Legacy of Osiraq

This understanding, that weakness could produce genocide, is not unprecedented for the Jewish State. On June 7, 1981, Israeli fighter-bombers destroyed Iraq's Osiraq nuclear reactor before it was ready to go "on line." At that time, the global community reaction was overwhelmingly negative. Even the U.N. Security Council, in Resolution 487 of June 19, 1981, indicated that it

64. See generally LOUIS RENÉ BERES, 1 PEOPLE, STATES AND WORLD ORDER (1981).
65. Id.
66. Id.
"strongly condemns" the attack and that "Iraq is entitled to appropriate redress for the destruction it has suffered."70 Yet, Israel certainly did not act illegally at Osiraq. Its inherent right to anticipatory self-defense was especially compelling. Faced with mass destruction weapons in the hands of an enemy state, an unwillingness to preempt would have carried high risks of annihilation.71 Thus, Israel did not commit aggression at Osiraq. Iraq has always insisted that a state of war exists with the "Zionist entity."72 It follows that because aggression cannot be committed against a state with which a country is already at war, Jerusalem could not possibly have been guilty of such a "crime against peace."73

Israel did not violate international laws of war at Osiraq. Fourteen Israeli aircraft took part in the raid, eight F-16 Falcons, each carrying two 1000-kilogram bombs and six F-15 Eagles serving as escort planes.74 The reactor was completely destroyed, without civilian casualties and before any radiation dangers existed.75 Unlike Iraq's thirty-nine Scud attacks on Israel during the Gulf War,76 which were designed expressly to harm innocent civilians, Israel's raid on Osiraq was conceived for the protection of civilians.

Since the establishment of the State of Israel in 1948, Iraq has been openly committed to destroying the Jewish State. Baghdad

joined several other Arab states attacking Israel on the very day of its declared independence. But while Egypt, Lebanon, Jordan, and Syria proceeded to sign armistice agreements with Israel in 1949, Iraq always steadfastly insisted upon a permanent state of belligerency.

All things considered, Israel's defensive strike against an enemy state preparing for extermination warfare was distinctly law-enforcing. In the absence of a centralized enforcement capability, international law must rely upon the willingness of individual states to act on behalf of the entire global community. This is exactly what took place on June 7, 1981, when, with surgical precision, Jerusalem's fighter-bombers precluded an Iraqi nuclear option.

77. Iraq also sent expeditionary forces during the Six Day War (1967) and the Yom Kippur War (1973). During the 1948 War, Baghdad's forces entered TransJordan and engaged Israeli forces in Western Samaria. After the 1967 War, Iraqi forces, then deployed in Jordan, remained there for more than two years. During the 1973 War, Baghdad committed about one-third of its then 95,000 man armed forces to assist Syria in its campaign against the IDF on the Golan.

78. Egypt and Jordan have now both entered into formal treaties of peace with Israel. Regarding Egypt, however, contrary to widespread belief, its treaty does not constrain Cairo from joining with other Arab states against the Jewish State. A minute to Article VI, paragraph 5, of the Israel-Egypt Peace Treaty provides that it is agreed to by the parties that there is no assertion that the Peace Treaty prevails over other treaties or agreements, or that other treaties or agreements prevail over the Peace Treaty. See TREATY OF PEACE, Egypt-Israel, Mar. 26, 1979, Minute to Art. VI (5), 18 I.L.M. 362, 392.


80. This is manifest even today with Iraq's explicit commitment to remain outside the Middle East Peace process.

81. This conclusion is necessarily implied by the premises; i.e., it is the inevitable deduction from the structural context of world law.

VII. Conclusion

"In the end," says the poet Goethe, "we depend upon creatures of our own making." Understood in terms of Israel's security options vis-à-vis Iran, the poet's wisdom suggests a willingness to consider all strategic options, including life-saving, and ultimately law-enforcing, forms of preemption. Aware that the Jewish State remains embedded in "protracted conflict," and that little hope can be expected from the vaunted peace process, Jerusalem must be prepared to look everywhere, all at once. In the fashion of Janus, a god of another ancient enemy, Israel must now look in all directions simultaneously, poised always for diplomatic options, but prepared also to strike first, lawfully, in essential self-defense.

83. From an aphorism by the great German poet.
84. The idea of Israel as a state embedded in "protracted conflict" is hardly new. Yitzhak Rabin coined the term "dormant war" in the 1960s to describe Israel's situation when not engaged in active hostilities. Amnon Rubinstein, the leader of the centrist Shinui Party, wrote: "It is Israel's fate to live in a hostile world that refuses to accept her and to see her as part of the Middle East reality." Moshe Arens, a Likud leader and former defense minister, regarded the Middle East as a region where war was endemic. For Ariel Sharon, a long-term enduring peace for Israel was "nothing but a dream." Similarly, Yuval Neeman, the leader of the Tehiya Party, regarded Middle East wars as a product of historical conditions similar to those that had existed in Europe for hundreds of years. Neeman and other, therefore, were arguing that Israel must reconcile itself to a situation of protracted or unending war, at least for the foreseeable future. On these views, see Efraim Inbar, Attitudes Toward War in the Israeli Political Elite, 44 MIDDLE E.J. 431-45 (1990).
85. Janus was the ancient Roman god of doors and gates; hence, of all beginnings. His symbol is the double-faced head, Janus is usually represented with two heads placed back-to-back so that he might look in two directions simultaneously.