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## Preserving the Third Temple: Israel's Right of Anticipatory Self-Defense Under International Law

Louis R. Beres

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# Preserving the Third Temple: Israel's Right of Anticipatory Self-Defense Under International Law

Louis René Beres\*

## ABSTRACT

*In this Article, Professor Beres discusses certain political tensions in the Middle East and the appropriateness of preemptive military action by Israel. He concludes that the ongoing hostilities and threatening overtures by Israel's enemies could give Israel sufficient basis pursuant to international law to conduct preemptive strikes. Upon reaching this conclusion, Professor Beres considers the level of force Israel should employ in various preemptive or counterretaliation scenarios. While the degree of preemption is debatable, the author believes that the preservation of Israel may require some preemptive action in the near future.*

## TABLE OF CONTENTS

I.	INTRODUCTION .....	112
II.	THE JUSTIFICATION FOR PREEMPTIVE MEASURES ...	115
III.	THE EFFECTS OF PALESTINIAN INDEPENDENCE .....	131
IV.	ISRAEL'S NUCLEAR STRATEGY .....	138
	A. <i>Nuclear Deterrence</i> .....	138
	B. <i>Nuclear Retaliation</i> .....	144
	C. <i>Nuclear Counterretaliation</i> .....	145
	D. <i>Nuclear Preemption</i> .....	145
	E. <i>Nuclear Warfighting</i> .....	146
V.	CONCLUSION .....	147

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## I. INTRODUCTION

"For what can be done against force without force?"<sup>1</sup>

As a forerunner of contemporary realists, Cicero understood the dilemma of peaceful intentions in a world driven by violence. Israel, enduring anxiously in the closing years of the twentieth century, has also understood this dilemma. Aware that the Third Temple—the current State of Israel—can turn to ashes, its leaders have known from the state's beginning in 1948 that national self-preservation can require preemption.

How could they know otherwise? Born in response to a crime that forever banishes hope in the promise of goodness, the Jewish State has been fashioned in fire and sustained in blood. Animated by what happens when peacemaking is expressed as weakness, Jerusalem's decision-makers have on occasion seized the initiative of military power, countering threats of yet another form of genocide with resort to anticipatory self-defense.

As this Article will explain, such resort can be distinctly law-enforcing. The Babylonians (ancestors of present-day Iraq) destroyed the First Temple and Commonwealth in 586 B.C. The Second Temple Commonwealth ended with Roman victory in the year 70 A.D. The Third Temple era, which began in 1948, will last only as long as Israel remains attentive to Cicero's warning<sup>2</sup> about force and remains prepared to act preemptively in a timely manner. Such attentiveness and preparation would be entirely consistent with the authoritative expectations of international law.

International law is not a suicide pact. Israel's overwhelming security

1. MARCUS TULLIUS CICERO, *CICERO'S LETTERS TO HIS FRIENDS* 78 (D.R. Shackleton Baley trans., 1978).

2. In another context, Cicero, in his speech in defense of Milo, says: "But if there be any occasion on which it is proper to slay a man—and there are many such—surely that occasion is not only a just one, but even a necessary one, when violence is offered, and can only be repelled by violence." And later in the same text:

[I]f our life be in danger from plots, or from open violence, or from the weapons of robbers or enemies, every means of securing our safety is honorable. For laws are silent when arms are raised, and do not expect themselves to be waited for, when he who waits will have to suffer an undeserved penalty before he can exact a merited punishment."

Speech of M.T. Cicero in Defense of Titus Annius Milo, in *SELECT ORATIONS OF M.T. CICERO* 177-78 (C.D. Yange trans., 1892). Although, strictly speaking, Cicero speaks not of anticipatory self-defense by states, but by endangered individuals, the argument not only applies to state action, but applies especially in that context.

problems<sup>3</sup> with Arab states and Iran<sup>4</sup> may compel Jerusalem to decide

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3. For detailed information on these problems by this author, see Louis René Beres, *Israeli Security and Self-Reliance After the Cold War: Geopolitical Imperatives, Strategic Considerations and Tactical Options*, Speech at the International Scholarly Conference, Security Regimes—Israel and Its Neighbors, Bar-Ilan Center for Strategic Studies (June 3, 1992); Louis René Beres, *The Real Bases of Middle East Instability*, MIDSTREAM, June-July 1992, at 9; Louis René Beres, *After the Scud Attacks: Israel, 'Palestine,' and Anticipatory Self-Defense*, 6 EMORY INT'L L. REV. 71 (1992); Louis René Beres, *After the Gulf War: Israel, Palestine, and the Risk of Nuclear War in the Middle East*, STRATEGIC REV., Fall 1991, at 48; Louis René Beres, *Israeli Security in a Changing World*, STRATEGIC REV., Fall 1990, at 11; *The Growing Threat of Nuclear War in the Middle East*, 12 JERUSALEM J. OF INT'L REL. 1 (1990). See also Aharon Levran, *Threats Facing Israel From Surface-to-Surface Missiles*, 19 IDF J. 37 (1990); *Moving in the Right Direction*, ISRAELI DEMOCRACY, Fall 1989, at 12 (interview with the then Defense Minister (now Prime Minister) Yitzhak Rabin); SHLOMO GAZIT & ZEEV EYTAN, *THE MIDDLE EAST MILITARY BALANCE 400* (1989); Gerald M. Steinberg, *The Middle East in the Missile Age*, 5 ISSUES IN SCI. AND TECH. 35 (1989). THE GRADUATE INSTITUTE OF INTERNATIONAL STUDIES PROGRAMME FOR STRATEGIC AND INTERNATIONAL SECURITY STUDIES, *ISRAELI SECURITY AND NUCLEAR WEAPONS*. (Geneva, Switzerland) (Occasional Paper No. 1/1990) [hereinafter PSIS OCCASIONAL PAPERS].

4. Iran is now a particularly great threat to Israel. That revolutionary Islamic state displays both the requisite capabilities (including unconventional weapons) and intentions vis-à-vis the Jewish State. Regarding capabilities, a number of authoritative sources state that Iran already has in place a number of nuclear weapons and is now acquiring new delivery systems ranging from ballistic missiles to nuclear-capable artillery. See, e.g., *Iran's Nuclear Weapons: Update II*, Task Force on Terrorism and Unconventional Warfare, House Republican Research Committee, U.S. House of Representatives (Apr. 30, 1992). See generally *The Fate of Nuclear Weapons in the Former Soviet Union*, CARNEGIE Q., Winter/Spring 1992, at 15; U.S. Senate Committee on Governmental Affairs, 3 PROLIFERATION WATCH 12 (1992); *ACTIVITIES TO PREVENT NUCLEAR PROLIFERATION*, H.R. Doc. No. 135, 102d Cong., 1st Sess. (1991) (Communication from the President of the United States Transmitting His Annual Report Reviewing All Activities of U.S. Government Departments and Agencies During Calendar Year 1990 Relating to the Prevention of Nuclear Proliferation, Pursuant to 22 U.S.C. § 3281). WARREN H. DONNELLY & ZACHARY S. DAVIS, *IRAN'S NUCLEAR ACTIVITIES AND THE CONGRESSIONAL RESPONSE* 13 (1992). Iran is currently receiving several billion dollars worth of arms from North Korea, China and Czechoslovakia. In March 1992 the CIA confirmed that Iran had spent \$2 billion on arms during the single fiscal year ending March 20, 1992. Iran and the Soviet Union made prior arms deals. Among Iran's major purchases from the USSR were two squadrons of MIG-29 combat aircraft, T-27 tanks, and three diesel-powered submarines. Presently, Iran is buying new generation weapons from Russia, which is honoring agreements signed in June 1989, between Iranian President Hashemi Rafsanjani and Mikhail Gorbachev. See Claude Van England, *Iran Steps Up Arms Purchases to Prop Military*, CHRISTIAN SCIENCE MONITOR, Apr. 20, 1992, at 1, 4. Regarding intentions, Iran expresses an overriding obligation to destroy Israel altogether, an obligation founded not in political differences (which are merely epiphenomenal) but on theological anti-Judaism. See, e.g., AYATOLLAH KHOMEINI,

once again between waiting for its enemies to strike first<sup>5</sup> and striking first itself.<sup>6</sup> From a strategic and tactical perspective, the choice of pre-emption<sup>7</sup> surely appears rational and cost-effective.<sup>8</sup> Significantly, inter-

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PROGRAM FOR THE ESTABLISHMENT OF AN ISLAMIC GOVERNMENT 1970; ISLAM AND REVOLUTION: WRITINGS AND DECLARATIONS OF IMAM KHOMEINI 127 (1981). See also ROBERT S. WISTRICH, ANTISEMITISM: THE LONGEST HATRED, 219 (1991). Peace with Israel threatens the life-blood of Islam. A fundamentalist publication, *al-Da'wa*, clearly and unambiguously proclaims the status of the Jew, and therefore of Israel: "The race [sic] is corrupt at the root, full of duplicity, and the Muslims have everything to lose in seeking to deal with them; they must be exterminated." GILLES KEPPEL, THE PROPHET AND PHARAOH: MUSLIM EXTREMISM IN EGYPT 112 (1985).

5. Should Israel decide to wait for its enemies to strike first, the Jewish State would likely maintain its traditional stance of disproportionately severe reactions to Arab aggression, reactions that represent an ironic inversion of the Jewish *lex talionis*. The Jewish Torah or biblical Pentateuch contains this law of exact retaliation—of "an eye for an eye, a tooth for a tooth"—in three separate passages: *Exodus* 21:23-25; *Leviticus* 24:17-21; and *Deuteronomy* 19:16-21. In contemporary international law, a state offended by another state's use of force can, if the offending state refuses to make amends, take "proportionate" reprisals. See *Naulilaa Arbitration*, 2 RIAA 1013 (1928); *Air Services Agreement Arbitration*, 16 RIAA 5 (1963), cited in INGRID DETTER DE LUPIS, THE LAW OR WARD 75 (1987). The United Nations Covenant on Civil and Political Rights of 1966 (Article 4) also contains evidence of the rule of proportionality. Similarly, the European Convention on Human Rights provides, in Article 15, that in time of war or other public emergency, contracting parties may derogate from the provisions, but only on the condition of rules of proportionality. The American Convention on Human Rights allows in Article 27(1) such derogations in "time of war, public danger or other emergency which threatens the independence or security of a party" on condition of proportionality.

6. In this connection, the Gulf War did not achieve neutralization of Iraqi nuclear potential. On October 7, 1991, more than seven months after conclusion of hostilities, United Nations inspectors discovered a complex of buildings that served as the nerve center of Saddam Hussein's covert nuclear weapons program, but had only been "lightly bombed" during the war. Here, at an installation called Al Atheer, about 40 miles south of Baghdad, Iraq planned—according to the report—"to design and produce a nuclear device." Paul Lewis, *U.N. Aides Discover Atom Arms Center Concealed by Iraq*, N.Y. TIMES, Oct. 8, 1991, at A1.

7. For the moment, SSMs (surface-to-surface missile) equipped with chemical warheads pose a major threat to Israel. Until it becomes possible to reliably intercept SSMs in flight, Jerusalem will have to focus on destroying them while they are still on the ground. Should this forceful option be undertaken as a preemptive strike in the near term, effective active defenses could not complement it. If exercised several years from now, however, "Arrow" missiles that are integrated into a multistage system for in-flight interception of surface-to-surface missiles could likely reinforce it.

8. Preemption has often figured importantly in Israeli strategic calculations. This is especially apparent in the wars of 1956 and 1967, and in the destruction of the Iraqi nuclear reactor in 1981. Significantly, the failure to preempt in October 1973 contributed to heavy Israeli losses on the Egyptian and Syrian fronts during the Yom Kippur war,

national law might also permit preemption. Indeed, subject to certain important constraints and conditions, the right of anticipatory self-defense is well established under international law.<sup>9</sup>

## II. THE JUSTIFICATION FOR PREEMPTIVE MEASURES

What does the plausible convergence of strategic<sup>10</sup> and jurisprudential assessments of preemption suggest about Israel's prospective consideration of striking first? Above all else, it suggests that Israel need not necessarily be deterred from appropriate forms of preemption through fear that its actions will be correctly described as criminal. Although, predictably, a substantial number of states will condemn Israel for aggression under any circumstances, Israel could authoritatively and effectively counter this charge—if its preemptive strikes meet the expectations of *jus ad bellum* (justice of war) and *jus in bello* (justice in war)<sup>11</sup>—by refer-

and—indeed—almost brought about Israeli defeat.

9. See Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597, 598-600 (1963) (acknowledging that prior to the U.N. Charter the right of anticipatory self-defense was customary international law); PHILIP C. JESSUP, A MODERN LAW OF NATIONS 166 (1950) (noting that the right of self-defense under customary international law included anticipatory actions against imminent threats).

10. The strategic assessment must now include the successor republics of the former Soviet Union, including nuclear-capable Ukraine, Belorussia, and (especially) Kazakhstan. Already, a massive hemorrhaging of smaller weapons has occurred. Cities have claimed the right to sell military equipment: Omsk is selling tanks and weapons, Ulyanovsk is selling four huge Antonov 124 military transports, similar to the U.S. Air Force C-5, and the republic of Kazakhstan is selling SU-24 fighter-bombers. In addition to Kazakhstan, the other five Muslim states to emerge from the wreckage of the Soviet Union will find lucrative weapons markets in Iran and the Arab world. Moreover, Iran has already bought, during April 1992, heavy military hardware from the non-Muslim republic of Ukraine. Iran has purchased this hardware, which includes missiles, in part with oil and gas. Some reports suggest that Iran has bought nuclear weapons from former Soviet republics. Kazakhstan alone, at this time, has more than 100 intercontinental ballistic missiles on its territory, in addition to an unknown number of tactical or battlefield nuclear weapons. See generally John J. Fialka, *Armed Forces of Former Soviet Union Are Fast Falling Apart, Analysts Say*, WALL ST. J., Apr. 13, 1992, at 20; Daniel Sneider, *Kazakhstan Seeks U.S. Pact For Further Nuclear Cuts*, CHRISTIAN SCI. MONITOR, Apr. 27, 1992, at 1.

11. According to the rules of international law, the international community must judge every use of force twice: once with regard to the right to wage war (*jus ad bellum*) and once with regard to the means used in conducting war (*jus in bello*). The aftermath of the Kellogg-Briand Pact of 1928 and the United Nations Charter have abolished all right to aggressive war. However, the long-standing customary right of self-defense remains, codified in Article 51 of the U.N. Charter. Similarly, subject to conformance, inter alia, with *jus in bello* criteria, certain instances of humanitarian intervention and collective security operations may also be consistent with *jus ad bellum*. The laws of

ences to international law.

The right of self-defense by forestalling an attack appears in Hugo Grotius' *The Law of War and Peace*.<sup>12</sup> Recognizing the need for protection against "present danger" and threatening behavior that is "imminent in a point of time," Grotius indicates that self-defense is permitted not only after an attack has already been suffered but also in advance, where "the deed may be anticipated."<sup>13</sup> Or, as he says a bit further on in the same chapter, "It be lawful to kill him who is preparing to kill. . . ." <sup>14</sup>

Emmerich de Vattel takes a similar position. In *The Law of Nations*, Vattel argues that it is lawful to resist and even to anticipate attacks by other nations so long as the aggression is truly forthcoming.<sup>15</sup>

Appropriately, in view of present concerns, both Grotius and Vattel

war, the rules of *jus in bello*, comprise (1) laws on weapons; (2) laws on warfare; and (3) humanitarian rules. Codified primarily at the Hague and Geneva Conventions, these rules attempt to bring discrimination, proportionality, and military necessity into belligerent calculations.

12. Hugo Grotius, *Of the Causes of War; and First of Self-Defense, and Defense of Our Property*, reprinted in 2 CLASSICS OF INTERNATIONAL LAW 168-75 (Carnegie Endowment Trust, 1925) (1625).

13. *Id.* at 173-74.

14. *Id.* at 177. Grotius' terminology raises an interesting related question—under what conditions, if any, might assassination be identified as a permissible form of anticipatory self-defense? Understood as tyrannicide, international law has sometimes accepted assassination as lawful (e.g., Aristotle's *Politics*; Plutarch's *Lives*, and Cicero's *De Officiis*). The argument that the right of tyrannicide may even qualify as peremptory (*jus cogens*) derives from several authoritative sources of international law identified at Stat. I.C.J. art. 38 (especially the "general principles of law recognized by civilized nations" and "the teachings of the most highly qualified publicists of the various nations. . . .") and—by extrapolation—from the decentralized, state-centric system of international law. On this second foundation of the peremptory right to tyrannicide, because international law creates a binding human rights regime without effective and centralized enforcement mechanisms, support for this regime must, on occasion, require the use of force by individuals within states. In the absence of this particular form of self-help, the expectations established by the entire corpus of the international law of human rights would have no meaningful likelihood of satisfaction.

15. Vattel states that:

The safest plan is to prevent evil, where that is possible. A Nation has the right to resist the injury another seeks to inflict upon it, and to use force and every other just means of resistance against the aggressor. It may even anticipate the other's design, being careful, however, not to act upon vague and doubtful suspicions, lest it should run the risk of becoming itself the aggressor.

Emmerich de Vattel, *The Right of Self-Protection and the Effects of the Sovereignty and Independence of Nations*, reprinted in 3 CLASSICS OF INTERNATIONAL LAW 130 (Carnegie Endowment Trust, 1916) (1758).

parallel the Jewish interpreters, although the latter speak more generally of interpersonal relations than of international relations in particular. The Torah contains a provision exonerating from guilt a potential victim of robbery with possible violence if, in self-defense, he struck down and, if necessary, even killed the attacker before he committed any crime.<sup>16</sup> In the words of the rabbis, "If a man comes to slay you, forestall by slaying him!"<sup>17</sup>

Grotius and Vattel both caution against abusing the right of anticipatory self-defense as a pretext for aggression,<sup>18</sup> but Israel—in its current configuration of ties to the Arab world—cannot possibly commit this

16. *Exodus* 22:1.

17. *Rashi; Sanhedrin* 72a.

18. See generally *Resolution on the Definition of Aggression*, G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp., No. 31, at 142, U.N. Doc. A/9631 (1975). For pertinent codifications of the criminalization of aggression, see U.N. CHARTER Art. 2, 4; *Declaration on the Non-use of Force in International Relations and Permanent Prohibition on the Use of Nuclear Weapons*, G.A. Res. 2936, U.N. GAOR, 27th Sess. Supp. No. 30, at 5, U.N. Doc. A/8730 (1972); *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess. Supp. No. 28, at 121, U.N. Doc. A/8028 (1971); *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, G.A. Res. 2131 (XX), U.N. GAOR, 20th Sess. Supp. No. 14, at 11, U.N. Doc. A/6014 (1966); *Resolution Affirming the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal*, G.A. Res. 95 (1), U.N. Doc. A/236 (1946); Charter of the International Military Tribunal, Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279; Kellogg-Briand Pact (Pact of Paris), Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 94 U.N.T.S. 57. See also Charter of the Organization of American States, April 30, 1948, chs. II, IV, V, 2 U.S.T. 2394, 119 U.N.T.S. 3 and Protocol of Amendment, Feb. 27, 1967, 21 U.S.T. 607 (known generally as the "Protocol of Buenos Aires"); Charter of the Organization of African Unity, May 25, 1963, arts. II, III, 479 U.N.T.S. 39; American Treaty on Pacific Settlement, April 30, 1948, 30 U.N.T.S. 55 (known generally as the "Pact of Bogota"); Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, 62 Stat. 1681, 121 U.N.T.S. 77 (known generally as the "Rio Pact"); Pact of the League of Arab States, art. 5, March 22, 1945, 70 U.N.T.S. 237; Convention on the Rights and Duties of States, Dec. 26, 1933, arts. 8, 10-11, 49 Stat. 3097, 165 L.N.T.S. 19 (known generally as the "Montevideo Convention"). For more on aggression, see DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND, adopted by the U.N. International Law Commission in 1954, 2 Y.B. Int'l L. Comm. 150 (1954); revised in 1987, 1988, and 1989. U.N. Doc. A/42/420 (1987), U.N. Doc. A/CN.4/404 (1987), U.N. Doc. A/43/539 (1988), U.N. Doc. A/CN.4/419 (1989), and U.N. Doc. A/44/150 (1989). See also *Declaration on the Right of Peoples to Peace*, G.A. Res. 39/11/ Annex, U.N. GAOR, 39th Sess. Supp. No. 51 at 22, U.N. Doc. A/39/L.14 (1984).



abuse. Because the entire Arab world, excepting Egypt,<sup>19</sup> considers itself in a condition of war with the Jewish State,<sup>20</sup> any Israeli preemption against its Arab enemies would, in the strictest legal sense, not be an act of anticipatory self-defense, but only one more military operation in an ongoing and protracted war.<sup>21</sup> It follows that such an operation's legal-

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19. Although Egypt is formally at peace with Israel, it remains a very cold peace indeed, what Major General (retired) David Ivri, Director-General of the Ministry of Defense, has called "a 15-year ceasefire." Commenting upon this assessment, former Defense Minister Moshe Arens told the Knesset Foreign Affairs and Defense Committee on April 14, 1992, that Egypt was decidedly not encouraging relations with Israel that would lead to peace "in the full sense of the word." He also referred to Israel-Egypt relations in the business, academic, cultural and tourist spheres as "very thin" because of Cairo's negative policy. *See Arens on Egypt Ties*, JERUSALEM POST (Int'l ed.), Apr. 25, 1992, at 4.

20. The agreements that put an end to the first Arab-Israeli War (1947-1949) were general armistice agreements negotiated bilaterally between Israel and Egypt on Feb. 24, 1949, 42 U.N.T.S. 251; Israel and Lebanon on Mar. 23, 1949, 42 U.N.T.S. 287; Israel and Jordan on April 3, 1949, 42 U.N.T.S. 303; and between Israel and Syria on July 20, 1949, 42 U.N.T.S. 327. Pursuant to these agreements, the Security Council, on August 11, 1949, issued a Resolution which, inter alia, "noted with satisfaction the several Armistice Agreements," and "[found] that the Armistice Agreements constitute an important step toward the establishment of permanent peace in Palestine and considers that these agreements supersede the truce provided for in Security Council resolutions 50 (1948) of May 29, and 54 (1948) of July 15, 1948. Security Council Resolution Noting the Armistice Agreements and Reaffirming the Order to Observe an Unconditional Cease Fire Pending a Final Peace Settlement, S.C. Res. 73, 1959, 4 U.N. SCOR, Aug. 11, 1949, Resolutions and Decisions of the Security Council 1949, at 8, 1965, U.N. Doc. S/1376, II, 1949. With the exception of Egypt, none of these armistice agreements has been superseded by an authentic peace treaty.

A general armistice is a war convention, an agreement, or contract concluded between belligerents. Such an agreement does not result in the termination of a state of war. The 1907 Hague Convention IV Respecting the Laws and Customs of War on Land stipulates in the Annex to the Convention that "An armistice suspends military operations by mutual agreement between the belligerent parties." (emphasis added). *See* Convention No. IV Respecting the Laws and Customs of War on Land, With Annex of Regulations, Jan. 26, 1910, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631, at Ch. V, Art. 36. The courts of individual states have also affirmed the principle that an armistice does not end a war. *See, e.g., Kahn v. Anderson*, 255 U.S. 1 (1920). Indeed, throughout history, armistices have normally envisaged a resumption of hostilities. It follows from this that since no treaties of peace obtain between Israel and the Arab states with which it negotiated armistice agreements in 1949 (again, with the prominent exception of Egypt), a condition of belligerency continues to exist between these states and Israel. For pertinent documents and commentary on Israel-Arab agreements, see ROSALYN HIGGINS, UNITED NATIONS PEACEKEEPING 1946-1967 (1969) (presently a study issued under the auspices of the Royal Institute of International Affairs).

21. At the conclusion of the recent Gulf War, the Bush administration announced plans to sell Saudi Arabia, a country of six million inhabitants, an arms package of \$24

ity<sup>22</sup> must be appraised exclusively in terms of its conformance with the international laws of war (*jus in bello*).<sup>23</sup> To identify such a preemptive operation as an act of aggression against another state that has already

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billion—including over 500 tanks, 48 F-15 fighter planes (increased to 72 in October 1992), Apache helicopter gunships, more than 30 Patriot batteries, tens of thousands of armored vehicles, multiple rocket-launchers and command/control systems. Rationalizing the Saudi demand for this vast arsenal by pointing to the “growing danger from Iran,” the Bush administration ignored that such United States arms can be used for aggression against Israel. Indeed, while a Saudi Arabia that joined in the coalition to defeat Saddam Hussein now appears benign, this monarchy has been busily compensating the Assad regime in Syria with billions of dollars in aid—money to be used entirely for Syria’s ongoing military buildup. Egypt, in addition to acquiring substantial military assets from the United States, is developing its own home-grown missile, the Saqr-80 (which can be launched from FROG-7 launchers), while Iran is deploying its domestically-produced Oghab missile. For more on Arab and Iranian militarization, see Mark A. Heller, *Coping with Missile Proliferation in the Middle East*, 35 ORBIS 15 (1991). During the last several months (May-October 1991), Pakistan has received new M-11 missiles from China; Brazil may have concluded a secret deal with the Libyan Air Force to provide technical assistance to service Libyan warplanes; China entered into a reactor project with Algeria that may well have nuclear-weapon related implications; China exported missile- or nuclear-weapons related technology to Egypt, Algeria, Libya, Syria, Saudi Arabia, Iran, and Pakistan; Iran tested a modified version of the Soviet SCUD-C intermediate range ballistic missile and has reportedly spent, since March 1990, at least \$200 million annually on a nuclear weapons program aided by Pakistan, Argentina, and China; and Libya has negotiated with North Korea for the purchase of a new IRBM system. UNITED STATES SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS, 2 PROLIFERATION WATCH 12 (1991).

22. Regarding such legality in an ongoing war begun by another state, we may recall the opinion of Grotius in his *Commentary on the Law of Prize and Booty*:

[I]t 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.

HUGO GROTIUS, *DE JURE PRAEDAE COMMENTARIUS* 96 (James Brown Scott ed. & trans., 1964).

23. On the main corpus of *jus in bello*, see Convention No. IV Respecting the Laws and Customs of War on Land, with Annex of Regulations, October 18, 1907, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631 (known commonly as the “Hague Regulations”); Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Oct. 21, 1906, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Oct. 21, 1906, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Oct. 21, 1906, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, Oct. 21, 1906, 6 U.S.T. 3516, 75 U.N.T.S. 287.

declared itself at war with Israel would be nonsense.<sup>24</sup>

Iran's "neutrality" during the Gulf War and its subsequent expropriation of 132 Iraqi planes that were flown for safety to several Iranian cities in the final phase of that war could especially justify Israeli preemption against certain Iranian hard targets.<sup>25</sup> Under current international law, Iran had no right to declare itself neutral. On August 2, 1990, the date of the invasion of Kuwait by Iraq, the United Nations Security Council adopted Resolution 660 condemning this act of aggression.<sup>26</sup> On November 29, 1990, the Security Council adopted Resolution

24. Under international law, the generic question of whether or not a state of war actually exists between states becomes somewhat ambiguous. Traditionally, nations held that a formal declaration of war was a necessary condition before "formal" war could be said to exist. Hugo Grotius, for example, divided wars into declared wars, which were legal, and undeclared wars, which were not. HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 317, 321 (A.C. Campbell trans., 1901). By the beginning of the twentieth century, the Hague Convention III codified the position that war exists only after a conclusive declaration of war by one of the parties. More precisely, this convention stipulated that hostilities must not commence without "previous and explicit warning" in the form of a declaration of war or an ultimatum. *See* Hague Convention III Relative to the Opening of Hostilities, 1907, art. 1, 33 NRGT. Currently, of course, declarations of war may be tantamount to declarations of international criminality (because of the criminalization of aggression by authoritative international law), and it could be a jurisprudential absurdity to tie a state of war to formal declarations of belligerency. It follows that a state of war may exist without formal declarations, but only if there is an armed conflict between two or more states or at least one of these states considers itself at war, or both. On the argument that war need not be formally recognized, see J. PICTET, *GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR* 20-21 (1958) ("no need for formal declaration of war, or for recognition of the existence of a state of war"); U.S. DEPT OF ARMY, *THE LAW OF LAND WARFARE, FIELD MANUAL* 27-10, paras. 8-9 (1956) (noting that in instances of armed conflict without declaration of war law of war applies); *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862) ("[W]ar may exist without a declaration on either side"); *see also* MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 971-113 (1961) (observing that legal status of war may be brought about by use of armed force).

25. The number of expropriated Iraqi planes, 132 aircraft, is much larger than was reported during the war. According to the Saudi newspaper, *Asharq Al-Awsat*, Iran confiscated \$1.2 billion worth of Iraqi planes. As another commentator reported,

Officials of Gulf countries who asked not to be identified said they understood that more than 100 of the Iraqi airplanes were military aircraft that are being absorbed into Iran's Air Force. . . . [T]he confiscated planes would provide the Iranian Air Force with a strength it has not seen since the Iraq-Iran War and the cutoff of American supplies in 1979.

Youssef M. Ibrahim, *Teheran to Seize the Planes Iraq Sent to Iran for Safety*, N.Y. TIMES, July 31, 1992, at A6.

26. S.C. Res. 660 (Aug. 2, 1990), *reprinted in* 29 I.L.M. 1325 (1990).

678, which authorized member states "to use all necessary means to uphold and implement Resolution 660 and all subsequent relevant resolutions and to restore international peace and security in the area."<sup>27</sup> Resolution 678 was the last in a series of twelve Security Council resolutions relating to the situation between Iraq and Kuwait.

No member of the United Nations may decide to remain neutral in a war in which the Security Council has found a particular state guilty of aggression. This denial of the customary right to neutrality has particular importance when the Security Council has called upon member states to support collective military measures. This means that an Iranian attitude of impartiality toward the belligerents was impermissible and that Iraqi armaments on Iranian territory are not legally immune from preemptive destruction. Because it has been the object of extraordinary Iranian threats, Israel—so long as it operates within the established rules of war—has a particular right to go after these planes in Iran.

Article 25 of the United Nations Charter supersedes traditional notions of neutrality under international law. It expects all members to give the organization every assistance in any action it takes and to refrain from any assistance to a state against which the United Nations has taken enforcement action. Article 25 further requires all members of the United Nations "to accept and carry out" the decisions of the Security Council. As for appropriate delegations of authority to the Security Council, Article 24 of the Charter determines that this fifteen-member body shall have "primary responsibility for the maintenance of international peace and security." Finally, Article 42 stipulates that the Security Council may, under certain conditions, "take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security," while Article 51 permits, but does not obligate, United Nations members to take part in "collective self-defense."

In law and in practice, Iran's curious affirmations of "neutrality" made that state a cobelligerent of Iraq.<sup>28</sup> By declaring itself "positively neutral" in the hostilities, President Rafsanjani effectively placed Iraq's attack on Kuwait on equal footing with United Nations military operations in the Gulf.

The implications of all this are substantial and far reaching. Lacking protection of the traditional law of neutrality, Iran could now be fair game for any Israeli military operation that is conducted in compliance with the rules of war concerning discrimination (noncombatant safety),

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27. S.C. Res. 678 (Nov. 29, 1990), *reprinted in* 29 I.L.M. 1565 (1990).

28. These affirmations involved the sheltering of an aggressor state's military aircraft.

proportionality (measured force), and military necessity.

Now, even if the state enemies of Israel had not declared a condition of belligerence with the Jewish State, a condition amplified by open calls for Israel's destruction,<sup>29</sup> Israel's preemptive action could be entirely justified. Israel, in the fashion of every state in the world legal system, is entitled to the right of self-defense. In an age of uniquely destructive weaponry, including ballistic missiles,<sup>30</sup> international law does not require a state to expose its citizens to annihilation.<sup>31</sup> This right of self-defense, as we learn from Vattel, gives rise to the "right to resist injustice."<sup>32</sup>

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29. There is, of course, nothing new about such calls concerning Israel's very existence. From the first, Arab states have regarded Israel as the institutionalized manifestation of multiple crimes, particularly colonialism, imperialism, and aggression. Indeed, often denounced as "an instrument of evil," constructed "on a foundation of evil," Israel is taken to be immutably criminal, irremediable, fit only for liquidation/extermination. See, e.g., Y. HARKABI, *ARAB ATTITUDES TO ISRAEL* 307-10 (Misha Louvish trans., 1972).

30. In early October 1991, Israel announced its agreement to join the Missile Technology Control Regime (MTCR) by the end of the year. Conceived in April 1987, MTCR seeks to control the transfer of highly sensitive missile technology from industrialized states to the Third World. By focusing on missiles carrying 500 kilograms payloads or more at ranges beyond 300 kilometers, MTCR seeks control of nuclear missiles. For more on the problem of proliferating ballistic missile technology, see Steve Fetter, *Ballistic Missiles and Weapons of Mass Destruction: What Is The Threat? What Should Be Done?*, *INTERNATIONAL SECURITY*, Summer 1991, at 5; Aaron Karp, *Ballistic Missile Proliferation*, in *STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, YEARBOOK 1990*; Martin S. Navias, *Ballistic Missile Proliferation in the Middle East*, 31 *SURVIVAL* 225 (1989); JANNE E. NOLAN, *TRAPPINGS OF POWER: BALLISTIC MISSILES IN THE THIRD WORLD* (1991); ROBERT D. SHUEY ET AL., *MISSILE PROLIFERATION: SURVEY OF EMERGING MISSILE FORCES* (1989).

31. In this connection, an Israeli nonnuclear preemption would reduce the risk of regional nuclear war. This conclusion follows from the assumption that if Israel waits for its enemies to strike first, these enemies may launch nuclear attacks, or—even if they strike first with conventional weapons—Israel may have no choice but to resort to nuclear retaliation. This would enhance the reasonableness/legality of Israeli nonnuclear preemption. Here, Jerusalem's commitment to anticipatory self-defense would be distinctly law-enforcing. No such defense, of course, exists regarding an Israeli nuclear preemption, which would, in all circumstances, be in violation of international law. Moreover, should Israel feel compelled to actually resort to nuclear war-fighting at some point, either after (1) enemy reprisals for Israel's conventional preemption cause the Jewish State to escalate to nuclear weapons; or (2) enemy chemical/biological/conventional first-strikes cause Israel to escalate to nuclear weapons, it would confront substantial problems under international law. Should certain enemy states launch nuclear first-strikes against Israel, Jerusalem could retaliate using nuclear weapons with fewer jurisprudential problems, but matters of law in such circumstances would assuredly be moot.

32. According to Vattel,

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).<sup>33</sup> Following this case, 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.<sup>34</sup> 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."<sup>35</sup>

In certain very limited and residual circumstances, assassination may be a permissible form of anticipatory self-defense. However, classical philosophical and jurisprudential arguments supporting assassinations are usually cast in terms of the tyrannicide motif.<sup>36</sup> Because it represents an alternative or addition to standard military forms of preemption, Israel could only undertake such killing when the danger posed to Israel

Justice is the foundation of all social life and the secure bond of all civil intercourse. Human society, instead of being an interchange of friendly assistance, would be no more than a vast system of robbery if no respect were shown for the virtue which gives to each his own. Its observance is even more necessary between Nations than between individuals, because injustice between Nations may be followed by the terrible consequences involved in an affray between powerful political bodies, and because it is more difficult to obtain redress. . . . An intentional act of injustice is certainly an *injury*. A Nation has, therefore, the right to punish it. . . . The right to resist injustice is derived from the right of self-protection.

3 EMMERICH DE Vattel, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* 135 (Charles G. Fenwick trans., 1916) (1758).

33. 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).

34. See *id.* at 191 (citing R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 89 (1938)).

35. See *id.* (citing 61 PARLIAMENTARY PAPERS (1843), reprinted in Jennings, *supra* note 34, at 89).

36. Cicero, citing approvingly to the Greeks, offers enthusiastic support for tyrannicide:

Grecian nations give the honors of the gods to those men who have slain tyrants. What have I not seen at Athens? What in the other cities of Greece? What divine honors have I not seen paid to such men? This is taken from Cicero's speech in defense of Titus Annius Milo, a speech offered on behalf of an instance of alleged tyrannicide committed by Milo, leader of Lanuvium.

Speech of M.T. Cicero in Defense of Titus Annius Milo, in *SELECT ORATIONS OF M.T. CICERO* 174, 208 (C.D. Yange trans., 1892).

meets the test of the *Caroline*. Thus, if the assassination were undertaken only to destroy the potential threat of an enemy, i.e., as a preventive action, it would not be permissible. If, however, the assassination were undertaken in anticipation of immediate enemy aggression, i.e., as a preemptive action, it could qualify as an instance of anticipatory self-defense.<sup>37</sup>

This standard, of course, presents several problems. First, in the real world, individuals may have difficulty making judgments concerning the immediacy of anticipated aggression. Second, even where such judgments are ventured, it can never be altogether clear whether the degree of immediacy is sufficient to invoke preemption rather than prevention. Third, in meeting the legal requirements of defensive intent, a state may have to act preventively rather than preemptively because waiting to allow a threat to become more immediate could have decisively negative strategic/tactical consequences. Finally, the actual state-preserving benefits that might accrue from assassination of enemy leaders hinge upon not waiting until the danger posed is instant, overwhelming, leaving no choice of means and no moment for deliberation.

Today, some scholars argue that the specific language of Article 51 of the United Nations Charter overrides the *Caroline* articulation of the customary right of anticipatory self-defense incidents.<sup>38</sup> In this view, Ar-

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37. Assessments of the lawfulness of assassination as anticipatory self-defense must also include comparisons with alternative forms of preemption. If, for example, the perceived alternative to assassination is large-scale use of force taking the form of defensive military strikes, a utilitarian or "balance of harms" criterion could surely favor assassination. Jerusalem may well have to make such a choice sometime soon, especially if the territories are transformed into a Palestinian state. Here, deprived of strategic depth, Israel could calculate that it had only three real options: (1) do nothing, rely entirely on deterrence, and hope that enemy states remain dissuaded from striking first; (2) strike preemptively with military force against selected hard targets in enemy states, and hope that persuasive intrawar deterrence prevents substantial reprisals, i.e., by compelling Israeli threats of unacceptably damaging counterretaliation; or (3) strike preemptively by assassination, and hope that this will reduce the overall threat to Israel without escalating into full-fledged military encounters. Although impossible to determine in the abstract, option (3) might well prove to be the most cost-effective and decent one available in certain circumstances.

38. See IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 272-75 (1963) (asserting that the United Nations Charter modified the international custom of anticipatory self-defense and that self-defense is justified only in response to an actual armed attack); Quincey Wright, *The Cuban Quarantine*, 57 *AM. J. INT'L L.* 546, 559-63 (1963) (interpreting Article 51 in conjunction with Article 33 to allow only a "peaceful means" of dispute resolution and a prohibition on the use of unilateral force until an actual armed conflict occurred); LOUIS HENKIN, *HOW NATIONS BEHAVE* 141-44 (2d ed. 1979) (arguing that the U.N. Charter restricts the traditional right of self-

ticle 51 fashions a new and far more restrictive statement of self-defense, one that relies on the literal qualification contained at Article 51 "if an armed attack occurs." This interpretation ignores that international law refuses to compel a state to wait until it absorbs a devastating or even lethal first strike before acting to protect itself.<sup>39</sup> The apparent weaknesses of the Security Council in offering collective security against an aggressor reinforces the argument against the restrictive view of self-defense. Moreover, both the Security Council and the General Assembly refused to censure Israel for its 1967 preemptive attack against certain Arab states, signifying implicit approval by the United Nations of Israel's particular resort to anticipatory self-defense.<sup>40</sup>

Before Israel could persuasively argue any future instances of anticipatory self-defense under international law, it would have to show that it had first sought to exhaust peaceful means of settlement. Even a broad view of the doctrine of anticipatory self-defense does not relieve a state of the obligations codified in Article 1 and in Article 2(3) of the United Nations Charter.<sup>41</sup> Strictly speaking, of course, these obligations should not bind Israel because of the condition of belligerency declared by its Arab enemies.<sup>42</sup> As a practical matter, however, the global community

defense to those situations where an armed attack has occurred); LELAND M. GOODRICH ET. AL., *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* 300-08 (3d ed. 1977) (advocating a restrictive interpretation of Article 51 under which self-defense is only justified in response to an actual armed attack).

39. Let us recall here Pufendorf's argument:

. . . 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.

2 SAMUEL VON PUFENDORF, *THE TWO BOOKS ON THE DUTY OF MAN AND CITIZENS ACCORDING TO NATURAL LAW* 32 (Frank Gardner Moore trans., 1927) (1682).

40. For pertinent resolutions of the Security Council, see T.M.C. ASSER INSTITUT, *RESOLUTIONS AND STATEMENTS OF THE UNITED NATIONS SECURITY COUNCIL 1946-1989*, at 456-578 (Karel C. Wellens ed., 1990).

41. Jewish religious law contains a similar imperative. "When thou comest near to a city to fight against it, then proclaim peace to it," proclaims *Deuteronomy* 20:10. For more complete examinations of war in the Jewish tradition, see Efraim Inbar, *War in Jewish Tradition*, 9 *JERUSALEM J. INT'L REL.* 83, 95-96 (1987).

42. Although it is generally believed that the peace treaty in force with Egypt con-



on the whole seems to have ignored this condition. It follows that Israel, if it decides upon future instances of "preemption," should demonstrate its prior efforts at peaceful settlement.<sup>43</sup> Such efforts, of course, are already a matter of record.

Interestingly, the origins of such advice have roots in ancient Israel. Grotius, citing to Deuteronomy in *The Law of Prize and Booty*, claimed that the Israelites were exempted from the issuance of warning announcements when dealing with previous enemies, what we might call today ongoing or protracted war. This is precisely the condition that currently exists between Israel and all Arab states except Egypt.<sup>44</sup>

Looking over the more than forty years of conflict between Israel and certain Arab states,<sup>45</sup> Israel itself has generally defended its resorts to

strains that state from joining with other Arab forces against Israel, this belief causes problems. The Israel-Egyptian Peace Treaty provides that the parties do not assert that the Peace Treaty prevails over other treaties or agreements or that other treaties or agreements prevail over the Peace Treaty. This means that the treaty with Israel does not prevail over the defense treaties that Egypt has concluded with Syria, and that Cairo—should it determine that Israel has undertaken aggression against Syria—could enter into belligerency against Israel on behalf of Damascus. Indeed, even if Syria were to commence hostilities against Israel to recover the Golan Heights, Egypt might abrogate its agreement with Israel and offer military assistance to Syria. Shortly after the signing of the Israeli-Egyptian Peace Treaty, then Egyptian Prime Minister Khalil stated that he would regard any attempt by Syria to recover the Golan-Heights as a defensive war, one that would bring into play the Egyptian-Syrian defense treaty despite the existence of the Israel-Egyptian Peace Treaty. For terms of the pertinent treaties, see Treaty of Peace, March 26, 1979, Egypt-Isr., Minute to art. VI(5), 18 I.L.M. 362, 392 and Joint Defense Agreement, Oct. 20, 1955, Syria-Egypt, 247 U.N.T.S. 117.

43. Unfortunately, Israel can never be sure with whom it should talk. In addition to the difficulties of making peace with hostile Arab states, Jerusalem faces great confusion in talking to the Palestinians.

44. The Israelites, recounts Grotius, had been commanded by God to "refrain from making an armed attack against any people without first inviting that people, by formal notification, to establish peaceful relations . . ." "Yet," he continues, "the Israelites . . . thought that this prohibition was inapplicable to many of the Canaanite tribes, inasmuch as they themselves had previously been attacked in war by the Canaanites.

"Hence," says Grotius, "we arrive at the following deduction":

Once the formality of *rerum repetitio* has been observed and a decree on the case in question has been issued, no further proclamation or sentence is required for the establishment of that right which arises in the actual process of execution. For [and this is especially relevant to modern Israel] in such circumstances, one is not undertaking a new war but merely carrying forward a war already undertaken. Thus the fact that justice has once been demanded and not obtained, suffices to justify a return to natural law. . . .

GROTIUS, *supra* note 22, at 102.

45. For an authoritative assessment of the SCUD toll from 39 missile attacks in the latest conflict, see *SCUD Toll: Summing Up the 39 Missile Attacks*, JERUSALEM POST

military force as measures of self-help short of war. For the most part, its defense of these actions has shifted the burden of jurisprudential responsibility for lawful behavior from the Arab states to Israel—an unfortunate shift because it focuses blame unfairly upon the Jewish State. Furthermore, Israel has sometimes identified its uses of military force as “reprisals,” thereby choosing a problematic concept under international law that compounds one legal mistake with another.<sup>46</sup> Under the current Charter system of international law, the right of reprisal essentially hinges upon self-defense.<sup>47</sup> Therefore, so long as Israel chooses to ignore or downplay the declared condition of war announced by its enemies as grounds for different legal justifications for resort to armed force, it should confine its rationale of military operations to the continuing right of self-defense. Because Israel now faces the threat not only of war, but of genocide, this argument is even stronger.

“Genocide” has a precise jurisprudential meaning. Codified at the Ge-

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(int'l ed.), Mar. 1, 1991, at 3. As indicated in this report, based on IDF-spokesman accounts: “One person killed by a missile; 12 additional deaths resulting indirectly from missile attacks. Nearly 200 persons injured in missile attacks. 1644 families were evacuated in Tel Aviv and Ramat Gan. 4095 buildings damaged; 3991 apartments and residential buildings, 331 public institutions, 17 educational institutions, and 54 businesses.” *Id.*

46. The United Nations Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States identifies the problem of reprisal as a rationale for the permissible use of force by states: “States have a duty to refrain from acts of reprisal involving the use of force.” See *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess. Supp. No. 28, at 121, U.N. Doc. A/8028 (1971), reprinted in 9 I.L.M. 1292, 1294 (1970). For the most part, one may deduce the prohibition of reprisals from the broad regulation of force in Article 2(4), the obligation to settle disputes peacefully in Article 2(3) and the general limiting of permissible force by states to self-defense. At the same time, a total ban on reprisals presupposes a degree of global cohesion that simply does not exist, and circumstances may clearly arise wherein the resort to reprisal as a form of self-help would be distinctly law-enforcing. This is especially the case in matters where reprisals are undertaken for prior acts of terrorism. See, e.g., Richard A. Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT'L L. 415-43 (1969). J. STONE, *AGGRESSION AND WORLD ORDER* 43, 94-98 (1958) (arguing for a continuing permissible role for reprisals under international law).

47. Although reprisal and self-defense are both forms of the same generic remedy, self-help, an essential difference lies in their respective aim or purpose. Coming after the harm has been absorbed, reprisals are punitive in character and cannot be undertaken for protection. Self-defense, on the other hand, intends to mitigate harm. For a useful and informed discussion of the distinction between reprisals and self-defense, see Derek Bowett, *Reprisals Involving Recourse to Armed Force*, in *INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE* 394 (Richard Falk et al. eds., 1985).

nocide Convention, a treaty which entered into force on January 12, 1951, it means any of a series of stipulated acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such. . . ."<sup>48</sup> The key to understanding and identifying genocide lies in the "intent to destroy." Genocide can take different forms. The perpetrators may transport victims to the gas or transport the gas to the victims. Either way, the effect is the same: intentional mass murder of defenseless civilian populations.<sup>49</sup>

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48. See Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature*, December 9, 1948, *entered into force*, January 12, 1951, 78 U.N.T.S. 277. Although the criminalizing aspect of international law that proscribes genocide-like conduct may derive from a source other than the Genocide Convention (e.g., it may emerge from customary international law and be included in different international conventions) international law clearly makes such conduct a crime. Even where the conduct in question does not affect the interests of more than one state, it becomes an international crime whenever it constitutes an offense against the world community *delicto jus gentium*. See Convention on the Political Rights of Women, *done* Mar. 31, 1953, 27 U.S.T. 1909, T.I.A.S. No. 8289, 193 U.N.T.S. 135 (entered into force for the United States, July 7, 1976); International Covenant on Economic, Social and Cultural Rights, *opened for signature*, Dec. 19, 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess. Supp. No. 16, at 49, U.N. Doc. A/6316 (1967), *reprinted in* 6 I.L.M. 360 (1967) (entered into force, Jan. 3, 1976); American Convention on Human Rights, *done* Nov. 22, 1969, entered into force, July 18, 1978, O.A.S. Treaty Series No. 36 at 1, O.A.S. Off. Rec. OEA/ser. L/V/II. 23, doc. 21 rev. 6 (1979), *reprinted in* 9 I.L.M. 673 (1970); International Covenant on Civil and Political Rights, *opened for signature*, Dec. 19, 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess. Supp. No. 16, at 52, U.N. Doc. A/6316 (1967), *reprinted in* 6 I.L.M. 368 (1967) (entered into force, Mar. 23, 1976). This Convention should be read in conjunction with the Protocol Relating to the Status of Refugees, adopted by the General Assembly on December 16, 1966, and *entered into force*, October 4, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. See also International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature*, Mar. 7, 1966, 660 U.N.T.S. 195, *reprinted in* 5 I.L.M. 352 (1966) (entered into force, Jan. 4, 1969); Declaration on the Granting of Independence to Colonial Countries and Peoples, Dec. 14, 1960, G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess. Supp. No. 16, at 66, U.N. Doc. A/4684 (1960); Convention Relating to the Status of Refugees, *done* July 28, 1951, *entered into force*, Apr. 22, 1954, 189 U.N.T.S. 137 European Convention for the Protection of Human Rights and Fundamental Freedoms, *done* Nov. 4, 1950, *entered into force*, Sept. 3, 1953, Europ. T.S. No. 5; Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948). The Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights (together with its Optional Protocol of 1976), and the International Covenant on Economic, Social and Cultural Rights—known collectively as the International Bill of Rights—serve as the touchstone for the normative protection of human rights.

49. Jurisprudentially, this includes "crimes against humanity." For definition of such crimes, see Agreement for the Prosecution and Punishment of the Major War

Today, Iran and several of the Arab states prepare for another major war with Israel,<sup>50</sup> one they hope will finally send the Jewish State into

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Criminals of the European Axis Powers and Charter of the International Military Tribunal, *done* Aug. 8, 1945, *entered into force*, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 (entered into force for the United States Sept. 10, 1945). The United Nations General Assembly affirmed the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal as Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, *adopted* by the U.N. General Assembly, Dec. 11, 1946, G.A. Res. 95(I), U.N. Doc. A/236 at 1144. This Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal (1946) was followed by General Assembly Resolution 177(II), adopted Nov. 21, 1947, directing the United Nations International Law Commission to "(a) Formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal, and (b) Prepare a draft code of offenses against the peace and security of mankind. . . ." See U.N. Doc. A/519 at 112 (1947). The principles formulated are known as the Principles of International Law Recognized in the Charter and Judgment of the Nuremberg Tribunal. Report of the International Law Commission, 2d session, U.N. G.A.O.R., 5th session, Supp. No. 12, at 11, U.N. Doc. A/1316 (1950).

50. Since the 1982 Lebanon War, Syrian forces have expanded as follows: an 80% increase in regular armed forces (from about 240,000 to approximately 400,000); a 50% increase in the number of armored and mechanized divisions (from six to nine); a 35% increase in the number of main battle tanks (from 3,200 to about 4,200); a 200% increase in the number of tactical ballistic missile launchers (from 33 to about 100); a 50% increase in the number of surface-to-air batteries (from 100 to about 150); a 45% increase in the number of combat aircraft (from 440 to approximately 650); a 150% increase in the number of attack helicopters (from 40 to about 100); a 40% increase in the number of missile attack craft (from 20 to 28); and an absolute increase in the number of submarines (from zero to three). These quantitative increases in Syrian military strength have been paralleled by increases in weapons quality. New and significant weapons systems that have entered service with Syrian forces since 1982 include SS-21 tactical ballistic missiles (range of 120 kilometers and a circle error of probability of 50 meters); Sepal shore-to-shore or shore-to-sea missiles (range of 300 kilometers); a new range of surface-to-air missiles (SAM), comprising the SAM-5, -11, -13 and -14, as well as improved versions of the SAM-6 and SAM-8 missiles; T-80, T-72M and T-74 main-battle tanks; BM-27 220-millimeter multiple rocket launchers; MiG-29 counterair fighters; AA-7 Acrid and AA-8 Aphid air-to-air missiles; new tactical C3I and electronic warfare systems (including DR-30 and UR-1 remotely-piloted drones); and, perhaps most important, chemical warfare delivery systems, including chemical warheads for tactical ballistic missiles. The combination of accurate ballistic missiles, the SS-21's in particular, and chemical warheads could provide Syria with a credible countervalue targeting strategy and with the capacity to hit Israeli military targets (counterforce) as part of a first-strike or retaliatory blow. For these details of the Syrian arms buildup and the expansion of Syrian military power, see Ahmed S. Khalidi & Hussein Agha, *The Syrian Doctrine of Strategic Parity*, in *THE MIDDLE EAST IN GLOBAL PERSPECTIVE 190-92* (Judith Kopper & Harold H. Saunders eds., 1991).

oblivion.<sup>51</sup> This desire is much more than a matter of heated rhetoric. Current preparations, especially those in Syria,<sup>52</sup> Lebanon, Iran, Libya, and Iraq,<sup>53</sup> are designed openly and unequivocally with the "intent to destroy" Israel once and for all.<sup>54</sup>

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51. For example, the Iraqi officials responsible for the last war (including Saddam Hussein) have yet to be apprehended and prosecuted according to the expectations of international criminal law. Authoritative sources of these expectations can be found in the 1973 Resolution on Principles of International Cooperation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, G.A. Res. 3074, U.N. GAOR Supp., 25th Sess. No. 30, at 78, U.N. Doc. A/9030 (1973). Other resolutions affirm that a refusal "to cooperate in the arrest, extradition, trial and punishment" of such persons is contrary to the United Nations Charter "and to generally recognized norms of international law." See, e.g., G.A. Res. 2840, U.N. GAOR, 26th Sess., Supp. No. 29, at 88, U.N. Doc. A/8429 (1971). See also G.A. Res. 3074, U.N. GAOR Supp., 28th Sess. No. 30, at 78, U.N. Doc. A/9030 (1973); G.A. Res. 96, U.N. Doc. A/64 at 188 (1946). As to the responsibility of states toward Geneva law in particular, the Geneva Conventions addresses the obligation of all signatories "to respect and to ensure respect" for the Conventions "in all circumstances." See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 1, 6 U.S.T. 3516, 75 U.N.T.S. 287 (1955). Common Article 146 of the Geneva Civilian Convention provides: "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed. . . grave breaches. . ." See *id.* at 6 U.S.T. 3616, art. 146, 75 U.N.T.S. 386. See also Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *opened for signature* by G.A. Res. 2391 (XXIII), Nov. 26, 1968, *entered into force* Nov. 11, 1970. .

52. Syria's ongoing interest in some kind of military force against Israel has been described as stemming from ". . . an apparently strong conviction that the struggle with Israel is no more a political or territorial dispute, but rather a clash of destinies affecting the fate and future of the Middle East." Ahmed S. Khalidi & Hussein Agha, *The Syrian Doctrine of Strategic Parity*, in *THE MIDDLE EAST IN GLOBAL PERSPECTIVE* 186 (Judith Kipper & Harold H. Saunders, eds., 1991). Moreover, Syria's approach to Israel has been "bound up with the view that force, whether active or passive, is the final arbiter of the conflict with Israel and the ultimate guarantor of any settlement in the area." *Id.*

53. Iraq has been an active enemy of Israel from the start. Baghdad sent significant numbers of expeditionary forces during the 1948 War of Independence, the 1967 Six Day War, and the 1973 Yom Kippur War. During the 1948 war, Iraqi forces entered Trans-Jordan and engaged Israeli forces in Western Samaria. In the aftermath of the 1967 war, Iraqi forces, which were again deployed in Jordan, remained there for more than two years. During the 1973 war Baghdad committed approximately one-third of its 95,000-man armed forces to assist Syria in its campaign against the IDF on the Golan Heights. For a comprehensive and authoritative prewar assessment of Iraq's threat to Israel, see Yonathan L., *Iraq: Regional Ambitions and Traditional Fears*, *IDF JOURNAL*, Summer 1989, at 56-62.

54. From the standpoint of international law, these preparations constitute planned aggression as well as genocide. In this connection, Article 2(4) of the U.N. Charter

Such "intent" is much more than a matter of perceived geopolitical necessity. It is, in its essence, a profoundly religious expectation. In Islam, the Prophet is said to have called for a Final Battle to annihilate the Jews. Mohammed reportedly said that "[t]he Hour, [of salvation] will not come until you fight against the Jews; and the stone would say, 'O Muslim! There is a Jew behind me; come and kill him.'"<sup>55</sup>

Active support in the Arab world for genocide against the Jews is already a matter of historical record. Even before the creation of the State of Israel, such support was displayed enthusiastically and openly during the Holocaust. On November 28, 1941, the Grand Mufti of Jerusalem, Haj Amin, met in Berlin with Adolph Hitler. The purpose of this meeting, which followed Haj Amin's organization of SS troops in Bosnia (where another form of "ethnic cleansing" is currently underway), was to ensure cooperation on "The Jewish Question." Haj Amin insisted that all Jews be sent to countries "where they would find themselves under active control, for example, in Poland, in order thereby to protect oneself from their menace and avoid the consequent damage."<sup>56</sup>

Noteworthy also is that neither Palestinians nor other Arabs have ever publicly criticized the Mufti's complicity in the Holocaust. During the 1950s and 1960s, Hitler remained an enormously popular figure in the Arab world. Arab responses in to the 1961 Eichmann trial in Jerusalem treated the Nazi mass murderer as a "martyr" and congratulated him often for having "conferred a real blessing on humanity" by enactment of the "final solution."<sup>57</sup>

### III. THE EFFECTS OF PALESTINIAN INDEPENDENCE

Overall, the situation is fraught not only with great danger<sup>58</sup> but also with considerable irony. Before Israel could even begin to move seriously

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states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. CHARTER art. 2(4).

55. See ARAB THEOLOGIAN ON JEWS AND ISRAEL: EXTRACTS FROM THE PROCEEDINGS OF THE FOURTH CONFERENCE OF THE ACADEMY OF ISLAMIC RESEARCH 51 (D.T. Green ed., 1976). See also ROBERT S. WISTRICH, ANTISEMITISM: THE LONGEST HATRED 230 (1991).

56. See JOAN PETERS, FROM THE IMMEMORIAL: THE ORIGINS OF THE ARAB-JEWISH CONFLICT OVER PALESTINE 436-37 (1984) (reproducing the Mufti's own account of his meeting with Hitler).

57. See WISTRICH, *supra* note 4, at 247. See also HARKABI, *supra* note 29, at 279.

58. Let us recall here that international law explicitly prohibits not only the use of force against the territorial integrity or political independence of any state except in self-

toward Palestinian independence as part of a two-state solution,<sup>59</sup> the Arab and Iranian regimes currently preparing for a genocidal war against the Jewish State would have to reverse those preparations. Israel could not possibly afford to confront the risks of another hostile Arab state on its borders unless its extant enemies moved toward regional arms control.<sup>60</sup> In the absence of a movement towards arms control, the creation of Palestine<sup>61</sup> could affect Israel's inclination to preempt a hostile move. Because of its diminished size, Israel's inclination to strike first at enemy hard targets would be especially high. Now deprived of its strategic depth, Israel could not hold out for as long as it could when Palestine was still the territories. Therefore, it is possible were it to come into existence, that a shift in nuclear strategy from deliberate ambiguity

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defense, but also the threat of force. In this connection, even in the absence of attacks upon Israel, the persistent threats made by certain Arab states and Iran may constitute a violation of the Article 2(4) prohibition on the threat of force.

59. Here one must recognize the jurisprudential fallacy in describing the territories as "occupied." On this matter, see Louis René Beres, *The West Bank is Not 'Occupied,'* BALTIMORE EVENING SUN, Sept. 20, 1990, at A17.

60. Significantly, as is obvious from recent events, inter-Arab violence has always been endemic in the Middle East and would surely undermine regional stability whatever Israel agreed to concerning the "Palestinian problem." For example, Egypt occupied Yemen for eight years. Morocco and Algeria are routinely engaged in armed confrontations. See *Moroccan, Algerian Leaders Meet*, FACTS ON FILE WORLD NEWS DIGEST, May 15, 1987, available in LEXIS, Nexis Library, Omni File (reporting on negotiations to end the 11-year war between Algerian-backed Polisario guerrillas and Moroccan forces in the Western Sahara). Libya has clashed with Egypt, Tunisia, and the Sudan. See AMERICA IN AFRICA, COUNCIL ON FOREIGN RELATIONS 658 (1981) available in LEXIS, Nexis Library, Omni File (discussing the American reaction to Colonel Qaddafi's "adventurism in Africa"). Finally, Saudi Arabia, which has recently purchased CSS2-class surface-to-surface missiles from China that could reach any part of the Middle East from Riyadh, finances Syrian arms acquisitions. See *China Resumes Missile Sales "to Raise Cash,"* FIN. TIMES, Mar. 28, 1990, at 6 (noting that the CSS2 has a range of 2,000 miles). Moreover, Arab states have been in conflict with non-Arab states in the region other than Israel. For example, Libya has launched invasions against Chad. See *Libya Raids Town of Aouzou Amid Chadian Victory*, Xinhua General Overseas News Service, Aug. 9, 1987, available in LEXIS, Nexis Library, Int'l File (detailing the skirmishes between Chad and Libya). Also, Syria has vowed to annex portions of Turkey; Iraq began the first Gulf War with postrevolutionary Iran, and the second Gulf War with its occupation of Kuwait.

61. The PLO, of course, has already declared itself a state. This declaration, however, does not satisfy the generally accepted criteria for statehood identified under international law. Those criteria include: control over a fixed and clearly defined territory; a population; a government; and the capacity to engage in diplomatic and foreign relations. See, e.g., Convention on Rights and Duties of States, done Dec. 26, 1988, 49 Stat. 3097, T.S. No. 881, 3 Bevans 145, 165 L.N.T.S. 19.

to disclosure would reduce the Israeli incentive to preempt, but only if Jerusalem were made to believe that as a result of this shift, Iran and the Arabs took Israel's nuclear threat more seriously.<sup>62</sup>

At this point, several problems must be considered. First, how would Israel's leadership actually know that taking the bomb out of the basement had improved its deterrence posture? To a certain extent, the credibility of Jerusalem's nuclear threats would be contingent upon the severity of different provocations. For example, it might be believable were Israel to threaten nuclear reprisals in response to provocations that endanger the very survival of the Jewish State, but it would almost certainly be unbelievable to threaten such reprisals for relatively minor territorial infringements or terrorist incursions.<sup>63</sup>

Furthermore, for Israel's nuclear deterrent to function successfully even after being removed from the basement, the arsenal would have to be secure from enemy preemptive strikes. Moreover, Israel must also be wary of what is called "decapitation," that is, losing the head of its military command and control system because of enemy first strikes. Should

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62. The question of deliberate ambiguity versus disclosure is the central theme of *SECURITY OR ARMAGEDDON: ISRAEL'S NUCLEAR STRATEGY* (Louis René Beres ed., 1986).

63. For current conventions in force concerning terrorism, see International Convention Against the Taking of Hostages, *adopted by* G.A. Res. 34/146, Dec. 17, 1979, U.N. Doc., A/34/36 (1983), GAOR, 34th Sess. Supp. No. 46, at 245; *entered into force* for the United States, Dec. 7, 1984; European Convention on the Suppression of Terrorism, *entered into force* Aug. 4, 1978, E.T.S. 90; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *adopted by* the U.N. General Assembly, Dec. 14, 1973, *entered into force* for the United States, Feb. 20, 1977, 28 U.S.T. 1975, T.I.A.S., No. 8532, *reprinted in* 13 I.L.M. 43 (1974); Convention for the Suppression of Unlawful Acts Against The Safety of Civil Aviation (Montreal Convention), Sept. 23, 1971, *entered into force* for the United States, Jan. 26, 1973, 24 U.S.T. 564; Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention), Dec. 16, 1970, *entered into force* for the United States, Oct. 14, 1971, 22 U.S.T. 1641; Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Convention), Sept. 14, 1963, *entered into force for the United States*, Dec. 4, 1969, 704 U.N.T.S. 219, 20 U.S.T. 2941; Vienna Convention on Diplomatic Relations, *done* Apr. 18, 1961, *entered into force for the United States*, Dec. 13, 1972, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95. On December 9, 1985, the U.N. General Assembly unanimously adopted a resolution condemning all acts of terrorism as "criminal." Never before had the General Assembly adopted such a comprehensive resolution on this question. Yet the issue concerning those particular acts that constitute terrorism was left largely unaddressed, excepting those acts such as hijacking, hostage-taking, and attacks on internationally protected persons that were criminalized by previous custom and conventions. See U.N. Res. on Terrorism, G.A. Res. 40/61 December 9, 1985, U.N. GAOR 40th Sess., Supp. No. 53, at 301, U.N. Doc. A/40/53 (1985).



Israel's enemies be unpersuaded by Jerusalem's move away from deliberate ambiguity, they might direct first strikes that could effectively immobilize Israel's order of battle.

A contrary argument about the effects of Palestine on Israel's inclination to preempt suggests that because of Israel's newly expanded vulnerability,<sup>64</sup> its nuclear deterrent would have more credibility than ever before. As a result, Jerusalem could more easily afford not to strike first than when it still administered the territories. In this situation the principal benefit of shifting from ambiguity to disclosure would seem to lie in an explicitly identified escalation ladder revealing a broad array of intended Israeli reprisals, ranging from limited conventional responses to measured nuclear strikes.

In weighing the different arguments concerning the effect of Palestine upon Israel's inclination to launch a preemptive action,<sup>65</sup> one must consider Israel's presumptions about the inevitability of war and its long-term expectations for Arab and Iranian vulnerability. Should Israel's leaders conclude that the creation of Palestine would make another major war inevitable, and that, over time, enemy vulnerability to Israel would diminish, then Jerusalem's inclination to strike first would be increased. To a certain extent, Israel's tactical judgments on preemption will be affected by antecedent decisions on nuclear strategy, namely decisions concerning countervalue versus counterforce objectives. Should it opt for nuclear deterrence based on assured destruction or countervalue, Jerusalem would likely choose a relatively small number of weapons that might be inaccurate. A counterforce strategy, on the other hand, would require a larger number of far more accurate weapons, ones that could destroy even the most hardened targets. To a certain extent, going for counterforce could make Israeli nuclear threats more credible. This conclusion is based on the assumption that because the effects of such warfighting weapons would be more precise and controlled, this type of

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64. This vulnerability would be even greater if transformation of the territories were accompanied by a return of the Golan Heights to Syria. Should Israel relinquish the territories and the Golan, all Israeli military airfields would be within range of modern conventional artillery and would be covered by enemy radar. Under such conditions, the Israeli Air Force might not even be able to get its planes off the ground. Furthermore, even if the new state of Palestine and the Golan were demilitarized, enemy tanks could cover the distance from the Jordan River to the pre-1967 border in three to four hours; in the Golan, this time would be reduced to about one hour.

65. The creation of Palestine is itself dependent on the profound changes underway in global power relations. On this matter, see Louis René Beres, *Israeli Security and Nuclear Weapons*, PSIS OCCASIONAL PAPERS, *supra* note 3.

weaponry would be more amenable to actual use.<sup>66</sup>

Yet, warfighting postures are likely to encourage preemption. If counterforce targeted nuclear weapons are ever fired, especially in a proliferated regional setting, the resultant escalation could still produce extensive countervalue exchanges. Indeed, even if they averted such escalation, the collateral effects of counterforce detonations could still be devastating.

One answer to Israel's needs in this regard may lie in counterforce nuclear weapons of very low yield. Although tactical weapons are likely to have destructive power generally comparable to the bomb dropped at Hiroshima, Israel could deploy sub-kiloton nuclear weapons. Drawing upon the distinctions offered recently by Thomas W. Dowler and Joseph S. Howard II, both weapons effects and theater force analysts at Los Alamos National Laboratory, these low yield weapons can be described as (1) "micronukes" (yield on the order of 10 tons or 20,000 pounds of high explosive); (2) "mininukes" (yield of about 100 tons); or (3) "tinynukes" (yield of about 1,000 tons).<sup>67</sup> These weapons could enhance Israeli security by bridging the gap between its conventional weapon capabilities, in which Israel's comparative advantage is steadily declining, and its higher-yield nuclear weapons, which it could not use without grievous casualties or potentially catastrophic escalation by Israel's enemies.

In making its nuclear choices, Israel will have to confront a paradox. Credible nuclear deterrence, which is essential to security and survival in a world made more dangerous by the creation of Palestine, would require "usable" nuclear weapons. If, after all, these weapons were obviously inappropriate for any reasonable objective, they would not deter.

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66. The term assured destruction refers to the ability of an attacked country to inflict an "unacceptable" degree of damage upon an attacker after absorbing any first strike. The term mutual assured destruction (MAD) describes a condition in which an assured destruction capability is possessed by opposing sides. Counterforce strategies are those that target an adversary's strategic military facilities and supporting infrastructure. Such strategies may be dangerous not only because of the "collateral damage" potentially produced, but also because of the heightened likelihood of first-strike attacks. In this connection, collateral damage refers to the damage done to both human and nonhuman resources as a consequence of strategic strikes directed at enemy forces or at military facilities. This "unintended" damage could involve large numbers of casualties and fatalities.

67. See Thomas W. Dowler & Joseph S. Howard II, *Countering the Threat of the Well-Armed Tyrant: A Modest Proposal for Small Nuclear Weapons*, 19 STRATEGIC REV. 34-40 (1991). Although the authors are concerned with United States nuclear strategy in the new security environment, I have adapted their thesis to Israeli needs and interests in the Middle East.

At the same time, the more usable the weapons became to enhance nuclear deterrence, it is more likely that, at one time or another, they will actually be fired. While this paradox seems to suggest the rationality of deploying the least-harmful forms of usable nuclear weapons, the fact that there would be no coordinated agreements with enemy states regarding deployable nuclear weapons points to a different conclusion—namely, that unless Israel calculates that the more harmful weapons would produce greater hazards for its own population as well as for the people of the target countries, there is no tactical benefit to opting for the least injurious usable weapons.<sup>68</sup>

All things considered, Israel, especially if confronted by a new state of Palestine, would be well-advised to do everything possible to prevent the creation of Arab and Iranian nuclear powers, including taking pertinent nonnuclear preemptive measures.<sup>69</sup> Bringing its own bomb out of the

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68. In its decisions concerning nuclear weapons, Jerusalem will have to look far beyond tactical military calculations toward long-term political considerations. Israel's leaders will then doubtlessly discover that the weight of international opinion, both official and public, is now more strongly arrayed against nuclear weapons than ever before, and that a world led by denuclearizing major powers would be enormously hostile to any first-use of nuclear arms in the Middle East. This statement does not imply that Jerusalem will likely reason that matters generating negative world public opinion should override expectations of national survival. The statement does suggest, however, that, given sufficient incentives, Israel's leaders will be anxious to do everything possible to avoid resorting to nuclear battles in the region.

69. On the "nuclear regime" under international law, including the antiproliferation measures, see Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles (INF Treaty), Dec. 8, 1987, U.S.-U.S.S.R., 88 DEP'T ST. BULL., FEB. 24, 1988; South Pacific Nuclear-Free Zone Treaty, Aug. 6, 1985, *reprinted in* 24 I.L.M. 1440; Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Treaty), Report of the Committee on the Peaceful Uses of Outer Space, U.N. GAOR, 34th Sess., Supp. No. 20, at 33, U.N. Doc. A/34/20 Annex II (1979); Final Act of the Conference on Security and Cooperation in Europe (Helsinki Accords), Aug. 1, 1975, Dep't State Pub. No. 8826 (Gen'l For. Pol. Ser. 298); Joint U.S.-U.S.S.R. Statement (Vladivostok Agreement), Apr. 29, 1974, U.S.-U.S.S.R., 70 DEP'T ST. BULL., JUNE 24, 1974, at 677; Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Underground Nuclear Weapon Tests, July 3, 1974, U.S.-U.S.S.R., 71 DEPT. ST. BULL., July 29, 1974, at 217; Protocol to the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, July 3, 1974, U.S.-U.S.S.R., 27 U.S.T. 1645; Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems (ABM Treaty), May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3435; Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on Certain Measures with Respect to the Limitation of Strategic Offensive Arms, May 26, 1972, U.S.-

basement is unlikely to serve any serious purpose unless Jerusalem were to conclude that Arab/Iranian intractability toward the Jewish State had become overt and overwhelming and that preparations for nuclearization in particular enemy states could no longer be stopped, even by Israeli preemptive strikes.<sup>70</sup> Under these very portentous conditions, Israel would require a very believable (and hence usable) nuclear deterrent, one that could be employed without igniting Armageddon for all regional belligerents and serve some damage-limiting military purpose (whatever the collateral effects) against enemy weapons (nuclear and nonnuclear) should deterrence fail.

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U.S.S.R., 23 U.S.T. 3462; Declaration of Basic Principles of Relations Between the United States of America and the Union of Soviet Socialist Republics, May 29, 1972, U.S.-U.S.S.R., 66 DEP'T ST. BULL., June 26, 1972, at 898; Treaty on the Non-Proliferation of Nuclear Weapons (NPT), *opened for signature* July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161; Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof (Seabed Arms Control Treaty), *opened for signature* Feb. 11, 1971, 23 U.S.T. 701, T.I.A.S. No. 7337, 955 U.N.T.S. 115; Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War Between the United States of America and the Union of Soviet Socialist Republics (Accident Measures Agreement), Sept. 30, 1971, 22 U.S.T. 1590; Agreement Between the United States of America and the Union of Soviet Socialist Republics on Measures to Improve the USA-USSR Direct Communications Link (Hot Line Modernization Agreement), Sept. 30, 1971, U.S.-U.S.S.R., 22 U.S.T. 1598; Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlateloco), Feb. 14, 1967, 634 U.N.T.S. 326; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (Outer Space Treaty), *opened for signature* Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205; Memorandum of Understanding Between the United States of America and the Union of Soviet Socialist Republics Regarding the Establishment of a Direct Communication Link (Hot Line Agreement), June 20, 1963, U.S.-U.S.S.R., 14 U.S.T. 825; Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (Partial Test Ban Treaty), Aug. 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43; (16) Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71. *See also* Treaty Between the United States of America and the Union of Soviet Socialist Republics and Protocol on Underground Nuclear Explosions for Peaceful Purposes, May 28, 1976, U.S.-U.S.S.R., 74 DEP'T ST. BULL., June 28, 1976, at 802; SALT II Treaty, June 18, 1979, U.S.-U.S.S.R., S. EXEC. DOC. Y, 96th Cong., 1st Sess., at 37 (1979).

70. The nuclear threat from Iran is discussed and underscored by Deputy Chief of General Staff Amnon Shahak in his interview with Alon Pinkas, *IDF is Better Than Ever*, JERUSALEM POST (int'l ed.), Apr. 25, 1992, at 2.

## IV. ISRAEL'S NUCLEAR STRATEGY

A. *Nuclear Deterrence*

The creation of Palestine, then, could have a dramatic effect on Israel's decision concerning anticipatory self-defense. Israel's existing nuclear weapons status and strategy would also likely influence this decision.<sup>71</sup> More precisely, should Jerusalem determine that Israel's nuclear arsenal is strong enough to support preemption by deterring hostile target states from retaliating, this status could encourage Israeli nonnuclear first strikes. If, however, Jerusalem were to calculate that these target states would be unimpressed by threats of Israeli nuclear counterretaliation, this status might not encourage Israeli first strikes.

It is questionable whether the precise form of Israel's nuclear strategy would make a difference in these circumstances. If Israel relies upon nuclear weapons not to deter enemy first strikes, but to support its own

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71. A substantial body of literature presently exists that deals with Israel's nuclear weapons status and strategy. *See, e.g.*, SHYAM BHATIA, *NUCLEAR RIVALS IN THE MIDDLE EAST* (1988); MITCHELL REISS, *WITHOUT THE BOMB: THE POLITICS OF NUCLEAR NONPROLIFERATION* (1988); WARREN H. DONNELLY, *ENR, ISRAEL AND NUCLEAR WEAPONS* 14 (GRS Issue Brief) (Mar. 13, 1989); SHAI FELDMAN, *ISRAELI NUCLEAR DETERRENCE: A STRATEGY FOR THE 1980S* (1982); ROBERT HARKAVY, *SPECTRE OF A MIDDLE EASTERN HOLOCAUST: THE STRATEGIC AND DIPLOMATIC IMPLICATIONS OF THE ISRAELI NUCLEAR WEAPONS PROGRAM* (1977); FUAD JABBER, *ISRAEL AND NUCLEAR WEAPONS: PRESENT OPTIONS AND FUTURE STRATEGIES* (1971); RODNEY W. JONES, *SMALL NUCLEAR FORCES* (1984); PETER PRY, *ISRAEL'S NUCLEAR ARSENAL* (1984); PIERRE PEAN, *LES DEUX BOMBES* (1982); AVNER YANIV, *DETERRENCE WITHOUT THE BOMB: THE POLITICS OF ISRAELI STRATEGY* (1987). Shlomo Aronson, *Nuclearization of the Middle East*, *JERUSALEM Q.*, Winter 1977, at 2; Uri Bar-Joseph, *The Hidden Debate: The Formation of Nuclear Doctrines in the Middle East*, 5 *J. STRATEGIC STUD.* 205 (1983); Yair Evron, *The Relevance and Irrelevance of Nuclear Options in Conventional Wars: The 1973 October War*, 7 *JERUSALEM J. INT'L REL.* 143 (1984); Alan Dowty, *Israel and Nuclear Weapons*, 22 *MIDSTREAM* 7 (1976); Alan Dowty, *Nuclear Proliferation: The Israeli Case*, 22 *INT'L STUD. Q.* 79 (1978); Efraim Inbar, *The Israeli Basement—With Bombs or Without?*, *CROSSROADS*, Winter/Spring 1982, at 8; Steven J. Rosen, *Nuclearization and Stability in the Middle East*, *JERUSALEM J. INT'L REL.* 1 (1976); SECURITY OR ARMAGEDDON: ISRAEL'S NUCLEAR STRATEGY (Louis René Beres ed., 1986). Three important books on the subject, published in Hebrew, are: YAIR EVRON, *ISRAEL'S NUCLEAR DILEMMA* (1987); HUMANITY IN THE SHADOW OF THE BOMB (Avner Cohen ed., 1987); DAVID ISH SHALOM, *HORROR AND HOPE* (1987). Additional useful bibliography can be found in DONNELLY, *supra*, at 13-14. Donnelly also provides a very informative chronology, beginning with Israel's bombing of the Iraqi reactor on June 7, 1981, and concluding with Israeli-Norwegian consultation on Norwegian heavy water supplied to Israel on December 15, 1988.

conventional preemptive attacks, then it would have to choose between continued ambiguity (implicit threats) and disclosure (explicit threats). The question remains as to how Israel should best choose between its options.

More than anything else, the answer lies in Jerusalem's confidence that its adversaries already acknowledge Israel's nuclear capability. If this confidence runs high, Israel has no valid reason to take the bomb out of the basement. If, however, such confidence were low, the move to disclosure would assuredly be rational, especially because: (1) the provocation occasioned by the end of deliberate ambiguity would be unimportant after the onset of Israeli first strikes; and (2) the predictably critical reaction by the United States would be less significant for Israel in the post-Cold War strategic environment.

The general belief throughout the Middle East and the rest of the world is that Israel has a nuclear arsenal and that Israel's enemies share this assumption. The most critical question about Israel's nuclear deterrent, therefore, is not one of capability, but one of willingness. How likely is it that Israel, after launching nonnuclear preemptive strikes against enemy hard targets, would respond to enemy reprisals with nuclear counterretaliation?

To answer this question, Israel's decisionmakers will have to put themselves into the shoes of various enemy leaders. They must ask themselves whether these leaders would calculate that they can retaliate against Israel without producing nuclear counterretaliation. In asking this question, Israel's leaders will assume, of course, a nonnuclear retaliation against Israel. A nuclear retaliation, should it become technically possible, would assuredly invite a nuclear counterretaliatory blow.

What will Israeli leadership conclude? This depends, in turn, upon their view of Arab/Iranian reciprocal judgments about Israel's pertinent leaders. Do these judgments suggest an Israeli leadership that believes it can gain the upper hand with nuclear counterretaliation? Or do they suggest an Israeli leadership that believes such counterretaliation would bring upon Israel intolerable levels of harm and destruction? Also, depending on how they interpret Israel's authoritative perceptions, the enemy decisionmakers will either accept or reject the cost-effectiveness of a nonnuclear retaliation against Israel. Therefore, Israel has an interest in communicating the following strategic assumption to its enemies: that Israel would be acting rationally by responding to enemy nonnuclear reprisals to Israeli preemptive attacks with nuclear counterretaliation. The plausibility of this assumption would be enhanced considerably if

enemy reprisals involved chemical or biological weapons.<sup>72</sup>

All these calculations, of course, assume rationality. In the absence of calculations that compare the costs and benefits of strategic alternatives, what will happen in the Middle East is only a matter of conjecture. Significantly, the prospect of irrational judgments in the region is increasingly likely, especially as the influence of Islamic fundamentalism spreads to Arab leadership elites.

Throughout the Islamic world<sup>73</sup> fundamentalists are now challenging incumbent regimes, competing for power, and calling for a new assertiveness against Israel.<sup>74</sup> Unlike more moderate Moslems, these fundamentalists are disinterested in political compromise and are willing, in many cases, to place the obligations of "submission" (Islam in Arabic means submission to the will of God) above the requirements of personal

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72. As we have seen, Israel already faces a very serious chemical threat. In spite of the Conference on Chemical Weapons Use held in Paris, January 7-11, 1989, this threat continues to grow.

73. In considering this "Islamic world," one must not fail to include Saudi Arabia. Although long regarded by Washington as a "moderate Arab" state (one that has no strong and active opposition to Israel), Saudi Arabia did precede every other Muslim and Arab state in its open expression of virulent antisemitism. Even before World War II, King Abd al Aziz ibn Sa'ud deplored "the strange hypnotic influence which the Jews, a race accursed by God according to His Holy Book, and destined to final destruction and eternal damnation," appeared to exercise over his people. Foreign Office File 371/20822 E 7201/22/31, reproduced and elucidated by ELIE KEDOURIE, *ISLAM AND THE MODERN WORLD AND OTHER STUDIES* 71 (1980). See also WISTRICH, *supra* note 4, at 232. Curiously, Ibn Sa'ud's strong hatred of the Jews paralleled the Christian core of antisemitism: "Our hatred for the Jews dates from God's condemnation of them for their persecution and rejection of Isa (Jesus Christ), and their subsequent rejection later of His chosen Prophet" See *id.* On another occasion, King Sa'ud informed a British visitor to his court: "Verily, the word of God teaches us, and we implicitly believe it, that for a Muslim to kill a Jew, or for him to be killed by a Jew, ensures him an immediate entry into Heaven and into the august presence of God Almighty." *Id.* King Feisal, in the tradition of his father, was known for distributing copies of *The Protocols of the Elders of Zion* (for which the Arab world is the largest global market today) to all visiting dignitaries. King Feisal also gave a copy to Secretary of State Henry Kissinger, who is Jewish.

74. See Barbara Crossette, *U.S. Official Calls Muslim Militants a Threat to Africa*, N.Y. TIMES, Jan. 1, 1992, at A3 (quoting Isaz Gilanijan, an Islamic scholar and adviser to Pakistani Prime Minister Nawaz Sharif, that Islam's resurgence is occurring in economically weak societies); Youssef M. Ibrahim, *Algeria and Tunisia Intensify Anti-Fundamentalist Efforts*, N.Y. TIMES, Dec. 19, 1991, at A10 (reporting that Algeria and Tunisia fear attempted overthrows of their governments by Islamic fundamentalists); Yehudit Ronen, *Libya's Fundamentalist Challenge*, JERUSALEM POST, Apr. 11, 1990, at 1 (describing the growing fundamentalist threat to Colonel Qaddafi's regime in Libya).

or collective survival.<sup>75</sup> Moreover, their power grows daily as a number of Arab states are increasingly unable to surmount substantial social, medical, and economic problems.<sup>76</sup>

In Egypt, the palpable reassertion of Muslim piety is directed toward a day when all irreligious leaders are deposed and the *Ummah* (total community of Muslims) is united under a universal Caliphate, a fully legitimate government ruled by an elected leader of irreproachable integrity. Whereas Iran's religious faith is drawn primarily from the minority Shi'a branch of Islam, Egypt's fundamentalists look forward to an alliance with over 130 million Sunni Muslims in the rest of the Middle East and North Africa (there are now nearly 1 billion Muslims in the world).<sup>77</sup> This kind of alliance, led by the so-called *Jaamat Islamiya* (Islamic societies) and including *Al-Jihad* (Holy War), could lead to a position of "no compromise" with infidels,<sup>78</sup> especially if it is heavily informed by the Manichean type dualism of Sayyid Qutb.<sup>79</sup>

Yet, the Egypt-Israel Peace Treaty could fail even if Muslim radicals fail to overthrow Egyptian President Mubarak. Similarly, the late Egyptian President Sadat was always careful to maintain that the Treaty was "founded on Islamic rules, because it arises from a position of strength, after the holy war and victory Egypt achieved on 10th Ramadan 1393 [October 1973]."<sup>80</sup> These "Islamic rules," moreover, derive from Mohammed's truce with the Jews. The rules are, therefore, "only a temporary expedient," and are "far from accepting either the Jewish claim to

75. See Libya's Challenge, *supra* note 75 (quoting Colonel Qaddafi's characterization of fundamentalists as "mad dogs" and "more dangerous than cancer and AIDS").

76. See Chris Hodges, *Tunisia Cracks Down Harder on Muslim Militants*, N.Y. TIMES, Jan. 20, 1992, at A3 (describing the Tunisian government's measures to control the fundamentalist movement and referencing similar struggles in Egypt, Morocco, and Algeria).

77. See *Iran Rafsanjani and Khomeini Speak on Islam's World Role at Dawn Anniversary*, BBC Summary of World Broadcasts, Feb. 4, 1992, available in LEXIS, Nexis Library, Int'l File (describing the role of Islam from the Iranian point of view); *Mecca Clashes Highlight Differences Among Moslems*, REUTERS LIBRARY REPORT, Aug. 1, 1987, available in LEXIS, Nexis Library, Int'l File (noting the different countries in which Sunni and Shi'a Moslems predominate).

78. Islam has historically sought to establish a world public order based on divine legislation and enforced by the *jihād*. The *jihād* is the Islamic *bellum justum* and is the very basis of Islam's relationships with other nations. For an authoritative study of Islam and international law, see *THE ISLAMIC LAW OF NATIONS: SHAYBANI'S SIYAR* (Majid Khadduri trans., 1966).

79. See EMMANUEL SIVAN, *RADICAL ISLAM: MEDIEVAL THEOLOGY AND MODERN POLITICS* (1985) (discussing the philosophy and ideology of Sayyid Qutb). Qutb, born in 1906, was a leading ideologue of the Brotherhood who was hanged by Nasser in 1966.

80. See WISTRICH, *supra* note 4, at 231.



nationhood or legitimate historical roots for a Jewish State in Palestine."<sup>81</sup> Therefore, it goes without saying that a pact with an illegitimate State of Israel can never be binding upon Egypt.

Should Egypt's fundamentalists succeed in assassinating Mubarak and replacing him with their own brand of authentic religious leadership, even tactically mandated ties to Israel would then surely be rejected. Together with the disappearance of "palace *ulema*," an ironic designation of learned men who do not faithfully devote themselves to the study of the Holy Law of Islam (because they reflect the timidity, servility, and pseudo-religiosity of a corrupt establishment), a political victory by the fundamentalist preachers would remove even the veneer of dialogue with Israel. Because Muslim activists regard even tactical and conditional acceptance of the Jewish State as a contradiction to Islam and as a negation of Egypt's Islamic identity, such a victory would bring long-term enmities far out into the open.<sup>82</sup>

The problem of Islamic fundamentalism is already an internal problem for Israel. Although fundamentalists ordinarily view Palestinian nationalism as contrary to Islamic universalism, they are increasingly trying to gain control of the Palestinian resistance, both in Israel proper and in the territories. In calling for an escalation of the uprising and a denunciation of all compromise with Israel, the groups Hamas and Hezbollah see only one strategy of confrontation: the formation of underground groups serving as military units to strike at Israeli interests. In a memorandum offered to the Palestine National Council dated April 6, 1990, and reported in *The Jerusalem Post* on April 21, 1990, Hamas demanded that PNC Chairman Sheikh Abdul Hamid As-sayih confirm the military option and that he considered *jihad* the proper way to liberate Palestine and achieve independence.<sup>83</sup> Should the West Bank and Gaza Strip become Palestine, groups such as Hamas and Hezbollah would likely wield enormous power and could possibly act as surrogates for Iran or those Arab states hostile to Israel.<sup>84</sup>

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81. *Id.*

82. See Israel Altman, *Islamic Movements in Egypt*, 10 JERUSALEM Q. 87 (1979); EMMANUEL SIVAN, *RADICAL ISLAM: MEDIEVAL THEOLOGY AND MODERN POLITICS* 52 (1985).

83. See Nissim Rejwan, *Hamas: 'From the Sea to the River,'* JERUSALEM POST, Dec. 19, 1990, at 1 (reporting on the conditions contained in the April 6, 1990 memorandum).

84. Indirectly, via its Hezbollah surrogates in southern Lebanon, Iran is already actively engaged with Israeli forces. Directly, and in partial collaboration with Libya, Iran is procuring substantial numbers of long-range missiles with chemical warheads. Moreover, it continues to seek a nuclear weapons capability.

To the extent that Israel might one day believe that it is confronted with irrational enemies, particularly enemies with highly destructive weapons in their arsenals, its incentive to preempt could become overwhelming. In fact, should Israel believe that these enemies hold nuclear weapons,<sup>85</sup> it might even (rationally) decide to launch a nuclear preemption against these weapons. This would appear to be the only case in which a rational Israeli preemptive strike could be nuclear.

Israel's enemies should understand from this discussion that conditions exist wherein Jerusalem might decide to actually use its nuclear weapons. These conditions concern the intolerable prospect of total defeat. Faced with imminent destruction of the Third Temple, Israel's leaders would almost certainly do whatever is needed to survive, including resorting to nuclear retaliation, nuclear counterretaliation, nuclear pre-

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Iran's developing capabilities, therefore, are threatening to the safety of Israel. What about Iran's intentions, however? The April 1992 elections, in which voters elected their first post-revolutionary parliament composed primarily of moderate reformers, seemed to suggest that President Hashemi Rafsanjani might move Iran toward more "mainstream" foreign relations. Yet the new parliament has remained staunchly committed to keeping Iran as a doctrinaire Islamic state and has assuredly not made any conciliatory moves toward Israel ("the Zionist enemy").

From October 19-22, 1992, the prior parliament of the Islamic Republic of Iran sponsored the "International Conference to Support the Islamic Revolution of Palestine." The conference opened with Iranian President Rafsanjani's declaration of Iran's willingness to send troops to war against Israel and included such delegates as Damascus-based Ahmed Jibril of the Popular Front for the Liberation of Palestine-General Command; "Colonel" Abu Mussa, Head of the anti-Arafat faction of Fatah (also based in Damascus); Sheikh Tamimi and Dr. Fathi Shakaki, leaders of Islamic Jihad; Hamas representative Ibrahim Rusheh; and, of course, Hezbollah. Every delegate signed all twenty-eight resolutions issued at the conference, including a call for the "elimination of the Zionist existence" (Resolution #3), and affirmed "the need for an all-out *jihād* against the Zionist regime" (Resolution #22).

85. International law views any use of nuclear weapons by an insurgent group as a serious violation of the laws of war. Article 3, common to the four Geneva Conventions of August 12, 1949, and the two protocols to the conventions bring to bear these laws upon nonstate participants in world politics. Protocol I makes the law concerning international conflicts applicable to conflicts fought for self-determination, those fought against alien occupation and against colonialist and racist regimes. A product of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts that ended on June 10, 1977, this protocol, which was justified by the decolonization provisions of the United Nations Charter and by resolutions of the General Assembly, brings irregular forces within the full scope of the law of armed conflict. Protocol II, also additional to the Geneva Conventions, concerns the protection of victims of noninternational armed conflicts. Hence, this protocol applies to those armed conflicts that are not covered by Protocol I and that take place within the territory of a state between its armed forces and dissident armed forces.

emption, and nuclear warfighting.<sup>86</sup>

### B. *Nuclear Retaliation*

Should an enemy state or alliance of states launch a nuclear first-strike against Israel, Jerusalem would certainly respond with a nuclear retaliatory strike to the greatest extent possible. If enemy first-strikes were to involve other forms of unconventional weapons (chemical or biological weapons, for example), Israel might launch a nuclear reprisal. The probability of this type of reprisal depends in large measure upon Jerusalem's expectations of follow-up aggression and on its associated calculations of comparative damage limitation. If Israel absorbed a massive conventional attack, a nuclear retaliation could still be an option, especially if: (a) Israel's leaders perceived that the aggressors had nuclear or other unconventional weapons in reserve; or (b) Israel's leaders believed that nonnuclear retaliations could not prevent destruction of the Third Temple. A nuclear retaliation by Israel could be ruled out only in

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86. For assessments of nuclear weapons under international law, see NUCLEAR WEAPONS AND INTERNATIONAL LAW (Istvan Pogany ed., 1987); *The Illegality of Nuclear Weapons: Statement of the Lawyer's Committee on Nuclear Policy*, 8 ALTERNATIVES 291-96 (1982); GEOFFREY BEST, HUMANITY IN WARFARE (1980); RICHARD FALK ET. AL., NUCLEAR WEAPONS AND INTERNATIONAL LAW (1981); JAMES TURNER JOHNSON, JUST WAR TRADITION AND THE RESTRAINT OF WAR (1981); Daniel J. Arbess, *The International Law of Armed Conflict in Light of Contemporary Deterrence Strategies: Empty Promise or Meaningful Restraint?*, 30 MCGILL L.J. 736-44 (1945); Francis A. Boyle, *The Criminality of Nuclear Weapons*, booklet 27, at 13 (Nuclear Age Peace Foundation, 1991); Ian Brownlie, *Some Legal Aspects of the Use of Nuclear Weapons*, 14 INT'L & COMP. L.Q. 437 (1965); Francis A. Boyle, *The Relevance of International Law to the 'Paradox' of Nuclear Deterrence*, 80 NW. U. L. REV. 1407-48 (1986); John H.E. Fried, *The Nuclear Collision Course: Can International Law Be of Help?*, 14 DEN. J. INT'L L. & POL'Y 97-120 (1985); John H.E. Fried, *First Use of Nuclear Weapons—Existing Prohibitions in International Law*, BULL. PEACE PROPOSALS 21-29 (1981); Matthew Lippman, *Nuclear Weapons and International Law: Towards a Declaration on the Prevention and Punishment of the Crime of Nuclear Humanicide*, 8 LOY. L.A. INT'L & COMP. L.J. 183-234 (1986); Elliott L. Meyrowitz, *The Opinions of Legal Scholars on the Legal Status of Nuclear Weapons*, 24 STAN. J. INT'L L. 111-77 (1987); John Norton Moore, *Nuclear Weapons and the Law: Enhancing Strategic Stability*, 9 BROOK. J. INT'L L. 263-68 (1983); Eugene V. Rostow, *The Great Nuclear Debate*, 8 YALE J. WORLD PUB. ORD. 87-102 (1981); James A. Stegenga, *Nuclearism and International Law*, 4 PUB. AFF. Q. 69-80 (1990); Ellery C. Stowell, *Laws of War and the Atomic Bomb*, 39 AM. J. INT'L L. 784-88 (1945); Elbert D. Thomas, *Atomic Bombs in International Society*, 39 AM. J. INT'L L. 736-44 (1945); Burns Weston, *Nuclear Weapons and International Law: Illegality in Context*, 13 DEN. J. INT'L L. & POL. (1983); Burns H. Weston, *Nuclear Weapons Versus International Law: A Contextual Reassessment*, 6 MCGILL L.J. 543-90 (1983).

circumstances in which enemy aggression were clearly conventional, "typical," (i.e., consistent with previous instances of Arab attacks in degree and intent), and hard-target directed.

### C. *Nuclear Counterretaliation*

Should Israel feel compelled to preempt enemy aggression with conventional weapons, the target state's response would largely determine Jerusalem's next moves. If the target responded in a nuclear fashion, Israel would assuredly resort to nuclear counterretaliation. If the target's retaliation involved chemical or biological weapons, Israel might also feel pressed to take the escalatory initiative (again, depending upon its judgments of enemy intent and calculations of essential damage limitation). Should the enemy response to Israel's preemption be limited to hard-target conventional strikes, the Jewish State would not likely move on to nuclear counterretaliations. If, however, the enemy conventional retaliation were all-out and directed toward civilian populations as well as toward military targets, an Israeli nuclear counterretaliation could not be ruled out. Apparently, 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 jurisprudential limits of military necessity, and accompanied by explicit and verifiable assurances of nonescalatory intent.

### D. *Nuclear Preemption*

Israel will likely never decide to launch a preemptive nuclear strike. Although circumstances might arise when such a strike would be perfectly rational (that is, when the prospective benefits of the strike would outweigh the prospective costs), it is implausible that Israel would allow itself to reach these circumstances. Moreover, unless the nuclear weapons involved were used in a fashion consistent with the authoritative expectations of the laws of war, which are the limits of discrimination, proportionality, and military necessity, this form of preemption would clearly represent an egregious violation of international law. Even if such consistency were possible, the psychological and political impact on the world community would be negative and far-reaching. It follows that Israel would use nuclear preemption only when: (a) Israel's enemies acquired nuclear or other unconventional weapons judged capable of destroying the Third Temple, (b) these enemies had made clear that their intentions paralleled their capabilities; (c) these enemies were believed ready to begin a "countdown to launch"; and (d) 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).

### E. *Nuclear Warfighting*

Should nuclear weapons be introduced into a conflict between Israel and its enemies, whether by the Jewish State or by an Arab/Iranian foe, nuclear warfighting, at one level or another, would ensue. This would hold true as long as: (a) enemy first-strikes against Israel do not destroy Jerusalem's second-strike nuclear capability; (b) enemy retaliations for Israeli conventional preemption do not destroy Jerusalem's nuclear counterretaliatory capability; (c) Israeli preemptive strikes involving nuclear weapons do not destroy Arab/Iranian second-strike nuclear capabilities; and (d) Israeli retaliation for enemy conventional first-strikes does not destroy Arab/Iranian nuclear counterretaliatory capability. Therefore, from an examination of Israel's strategic requirements, Jerusalem should now seek to ensure the likelihood of categories (a) and (b) above, and the unlikelihood of categories (c) and (d). This means, among other things, that Israel should strengthen the hard-target kill capacity of its survivable nuclear forces.

What, exactly, would a nuclear war mean? Even the most limited nuclear war could signal catastrophe.<sup>87</sup> The immediate effects of the war-head explosions—thermal radiation, nuclear radiation, and blast damage—could cause wide swaths of death and devastation. Victims would suffer flash and flame burns. Retinal burns could occur in the eyes of persons located several hundred miles from the explosion. People could be crushed by collapsing buildings or torn by flying glass. Others could fall victim to raging firestorms and conflagrations. Fall-out injuries would include whole-body radiation injury produced by penetrating, hard gamma radiation, superficial radiation burns produced by soft radiations, and injuries produced by deposits of radioactive substances within the body.

In the aftermath of a nuclear conflict, any medical facilities that might still exist would be stressed beyond endurance. Water supplies could become unusable as a result of pervasive contamination. Housing and shelter could be unavailable for the survivors. Transportation and communication could break down to almost prehistoric levels, and overwhelming

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87. A large body of literature deals with the expected consequences of a nuclear war. For works by this author, see, for example, *SECURITY OR ARMAGEDDON: ISRAEL'S NUCLEAR STRATEGY* (1986); *REASON AND REALPOLITIK: U.S. FOREIGN POLICY AND WORLD ORDER* (1984); *MIMICKING SISYPHUS: AMERICA'S COUNTERVAILING NUCLEAR STRATEGY* (1983); *APOCALYPSE: NUCLEAR CATASTROPHE IN WORLD POLITICS* (1980).

food shortages could become the rule for at least several years.

Because the countries involved would have entered into war as modern industrial economies, their networks of highly interlocking and interdependent exchange systems might now be shattered. Emergency fire and police services could be decimated altogether. Systems dependent upon electrical power might cease to function. Severe trauma would occasion widespread disorientation and psychological disorders for which there might be no therapeutic services.

With the passage of time, many of the survivors could expect an increased incidence of degenerative diseases and various kinds of cancer. Survivors might also expect premature death, impairment of vision, and a high probability of sterility. Among the survivors of Hiroshima, for example, an increased incidence of leukemia and cancer of the lung, stomach, breast, ovary, and uterine cervix has been widely documented.<sup>88</sup>

None of the above discussion is meant to suggest that an Israeli first-strike would give rise to nuclear war. On the contrary, Israel's resort to nonnuclear preemption might be the optimal way to prevent nuclear war. Indeed, unless Jerusalem's regional adversaries soon begin to cease their persistent and lawless threats to Israel's existence, the nonnuclear preemption resort may be the Jewish State's only reasonable alternative to possible annihilation.

## V. CONCLUSION

*Plus ça change, plus c'est la même chose.* The more things change, the more they remain the same. Despite its extraordinary steps to preserve the Third Temple, the State of Israel remains subject to grave threats of harm. Indeed, in the fashion of the First and Second Temples, Israel could even face extinction.

To prevent this fate and to preserve the Third Temple, Israel can resort to the protections afforded by anticipatory self-defense under international law. Mediating between survival and chaos, these protections offer the Jewish State an essential opportunity to confront force with force, not to initiate war but to prevent oblivion. Although, in the best of all possible worlds, preemption would be unnecessary and therefore illegal, that world does not yet exist. Therefore, as long as Israel's expression of anticipatory self-defense is prompted by imminent dangers of a

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88. See OFFICE OF TECHNOLOGY ASSESSMENT, *THE EFFECTS OF NUCLEAR WAR* (1979) (describing the health consequences of nuclear war); COMMITTEE FOR THE COMPILATION OF MATERIAL ON DAMAGE CAUSED BY THE ATMOIC BOMBS IN HIROSHIMA AND NAGASAKI, *THE PHYSICAL, MEDICAL AND SOCIAL EFFECTS OF THE ATMOIC BOMBINGS* (1981) (documenting the short- and long-term effects of the attacks).

considerable magnitude and is executed in conformance with expectations of discrimination, proportionality,<sup>89</sup> and military necessity,<sup>90</sup> the preemption option could be manifestly lawful.

A passage in the *Odyssey* speaks of two gates, one of horn and one of ivory. Through the ivory gate false dreams pass to humankind, and through the gate of horn go only the true and prophetic dreams. At this moment in its precarious history, Israel may be tempted by the ivory gate, choosing to base preservation of the Third Temple upon fanciful visions of regional solidarity and good intentions (a temptation encouraged, to be sure, by the global community as a whole). As we have seen, however, Israel would be better off to pass instead through the gate of horn, preparing to use military force selectively and preemptively in order to endure. Without rejecting the peace process, this decision might occasion greater pain in the short run, but it would base preservation of the Third Temple upon altogether sober assessments of *Realpolitik* and would affirm, rather than reject, the normative obligations of international law.

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89. Regarding assassination as such an expression, particularly in regard to enemy heads of state, it could endanger the fragile structure of international stability and comity. Such forms of preemption could undermine or even destroy the normally functioning constraint of interstate reciprocity in international law. Whereas states ordinarily refrain from assassinations to protect their own leaders and public officials, a reversal of this customary restraint, and therefore, an expanded willingness to kill counterparts in other states, could unleash a chain reaction of transnational assassinations and a substantial breakdown of diplomatic relations. These facts notwithstanding, circumstances do exist in which the prospective costs to a state of refraining from assassination would greatly exceed the prospective gains. Admittedly, calculation of these costs is inherently subjective, but a fixed and flat Israeli rejection of assassination per se would likely mean absorption, on occasion, of substantial military harms, or tolerance of genocide or related crimes against humanity. Therefore, the reciprocity breakdown consequences of loosened rules on assassination must normally inhibit the killing of officials in other states. However, when states judge the expected costs of refraining from assassination to exceed these consequences, assassination could represent the rational option. Jurisprudentially, this utilitarian calculation expresses the principle of proportionality in international law.

90. Pufendorf provided an early expression of limits under the law of war:

As for the force employed in war against the enemy and his property, we should distinguish between what an enemy can suffer without injustice, and what we cannot bring to bear against him, without violating humanity. For he who has declared himself our enemy, inasmuch as this involves the express threat to bring the worst of evils upon us, by that very act, so far as in him lies, gives us a free hand against himself, without restriction. Humanity, however, commands that, so far as the clash of arms permits, we do not inflict more mischief upon the enemy than defense, or the vindication of our right, and security for the future, require.

See SAMUEL PUFENDORF, 2 ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW 139 (Herbert F. Wright trans., 1927).