

JUST WAR DOCTRINE AND NUCLEAR WEAPONS: A CASE STUDY OF A PROPOSED ATTACK ON IRAN'S NUCLEAR FACILITIES FROM AN AMERICAN AND ISRAELI PERSPECTIVE

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*'[W]e tried Japanese as war criminals because of the sneak attack on Pearl Harbor. . . . [A surprise strike,] far from establishing our moral strength . . . would, in fact, alienate a great part of the civilized world by behaving in a manner wholly contrary to our traditions, by pursuing a course of action that would cut directly athwart everything we have stood for during our national history, and condemn us as hypocrites in the opinion of the world.'*¹

I. INTRODUCTION

The perception that the United States of America could impose its military and political will on the rest of the world enjoyed slightly more than a decade of prominence after the end of the Cold War in 1991. During this period, the United States of America and its allies had multiple foreign policy accomplishments, such as stopping Saddam Hussein's occupation of Kuwait² and ending ethnic cleansing in Bosnia-Herzegovina³ and Kosovo⁴. It appeared that in a unipolar world, America's place was secure as the "world's policeman."⁵ In this regard, the Al-Qaeda terrorist attacks of September 11, 2001 did little to change this perception of the world, and the threat from Islamic terrorism became yet another malady afflicting the

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¹ ERNEST R. MAY & PHILIP D. ZELIKOW, *THE KENNEDY TAPES: INSIDE THE WHITE HOUSE DURING THE CUBAN MISSILE CRISIS* 121 (Harvard Univ. Press 1997) (quoting George W. Ball, the Under Secretary of State during the Cuban Missile Crisis). Robert F. Kennedy also made frequent references to Pearl Harbor during the deliberations over what kind of response would be appropriate to the Soviet build-up in Cuba. Robert Kennedy's qualms were not with the use of force in general, but rather with the use of unnecessary force since the Soviets should be given a chance to pull back from Cuba. *Id.* at 189.

² Andrew W. Rosenthal, *War in the Gulf: The President; Bush Halts Offensive Combat; Kuwait Freed, Iraqis Crushed*, N.Y. TIMES, Feb. 28, 1991, at A1.

³ Raymond Bonner, *Bosnian Serb Leader Signals Acceptance of Peace Plan*, N.Y. TIMES, Nov. 25, 1995, § 1, at 3.

⁴ John M. Broder & Jane Perlez, *Crisis in the Balkans: Washington; In Washington, Wary Reaction but also Relief*, N.Y. TIMES, June 4, 1999, at A1.

⁵ Nicholas D. Kristof, *Why Do They Hate Us?*, N.Y. TIMES, Jan. 15, 2002, at A1.

world, deserving of the “War on Terror” title,⁶ and was largely acknowledged as America and its allies’ justified responsibility to prosecute.⁷ The United Nations has approved some of these uses of force (e.g., Desert Storm),⁸ but has failed to do so in other situations (e.g., NATO’s bombing campaign in Kosovo).⁹ In the face of aggression or genocide, if the United Nations refused to approve the use of force, the internal machinations of the Security Council’s veto system could be seen as the cause of obstruction for the otherwise legitimate use of force.

However, in the run up to the Iraq War in 2003 (“Iraq War”), the justness of America’s cause was in serious doubt by America’s allies, large segments of America’s population, and the world community. Although many had little desire to defend a tyrant like Saddam Hussein, the Bush Administration’s arguments for war were based upon scant or unreliable evidence. Although a smoking gun in the mind of the war planners, to the rest of the world community, the evidence indicating an immediate threat was clearly lacking. In fact, even longtime American allies like France and Germany decided not to support the war effort.

After disregarding the failure of “Old Europe” to take action against Saddam Hussein, the Bush Administration, along with a handful of allies, notably the United Kingdom, overthrew Saddam Hussein’s regime and occupied Iraq, after which it became clear that the evidence upon which the war was initially justified was severely lacking. In fact, not a single Weapon of Mass Destruction (“WMD”) or evidence of any plans to produce or acquire WMDs was ever discovered by allied forces in Iraq.

In his State of the Union address in 2002, President Bush included Iran along with Iraq and North Korea in his self-proclaimed “Axis of Evil.” Since the overthrow of the Saddam Hussein regime in Iraq, President Bush has been anything but subtle in shifting his focus of attention from Iraq to Iran and the purported Iranian nuclear weapons program. Many of the same arguments that the Bush Administration made about Iraq are again being made against Iran. However, one of the consequences of the intelligence failure leading up to the Iraq War is that not only does the world community distrust the Bush Administration, but America’s intelligence agencies are actively seeking to dissociate themselves from any future attack on Iran’s nuclear facilities out of fear of being used as political pawns in the same way that they were in the lead up to the Iraq War.

In Section II of this Note, I intend to explain the international laws governing the use of force, most notably Article 51 of the United Nations Charter (“Charter”), which requires an armed attack before one can legitimately exercise the use of force in self-defense. In Section III, I will evaluate Just War Doctrine, including its history, the reasons why it is the

⁶ *A Nation Challenged; President Bush’s Address on Terrorism Before a Joint Meeting of Congress*, N.Y. TIMES, Sept. 21, 2001, at B1.

⁷ Niall Ferguson, *The War on Terror Is Not New*, N.Y. TIMES, Sept. 20, 2001, at A2.

⁸ S.C. Res. 678, ¶ 2, U.N. Doc. S/RES/678 (Nov. 29, 1990).

⁹ See Press Release, Security Council, Security Council Rejects Demand for Cessation of Use of Force Against Federal Republic of Yugoslavia, U.N. Doc. SC/6659 (Mar. 26, 1999), available at <http://www.un.org/News/Press/docs/1999/19990326.sc6659.html>.

appropriate decision-making tool, and its modern applications, including the Iraq War. Through these case studies, the spectrum of Just War Doctrine will be analyzed, and a test to judge future uses of force will be illustrated. In Section IV, the arguments supporting an attack on Iran's nuclear facilities will be evaluated under this test from both an American and an Israeli perspective. I will conclude that the proposed use of force against Iran is preventive in nature and, as such, would be an unjust use of force, since it is not certain that Iran is trying to acquire nuclear weapons. However, even if Iran were attempting to acquire nuclear weapons or has already acquired them, it would be unjust to use force to strike Iran for two reasons: (1) there are other alternatives—such as serious diplomacy—that have not only a chance of ending Iran's pursuit of nuclear technology, but also a fairly good chance at ending decades of antagonism and hostility between America and Iran; and (2) if Iran were to acquire a nuclear weapon, there is little reason to assume that Iran cannot be deterred from using these weapons. From the Israeli perspective, there is less room for error, and, despite the unjust nature of any attack, there may be other arguments legitimizing an Israeli strike on Iran. However, given the recent history of Israel's relations with the theocratic regime in Iran, these alternative arguments may not be sufficient to legitimize an attack.

II. THE UNITED NATIONS CHARTER AND INTERNATIONAL LAW

The Charter, drafted after the Second World War, was created with the express purpose of saving “succeeding generations from the scourge of war . . . [by establishing] conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.”¹⁰ To accomplish this goal, Article 2(4) states, “[a]ll 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.”¹¹ As the integral component of modern international law, the Charter has been interpreted to generally prohibit the use of force,¹² rather than just prohibiting types of force, such as those that violate territorial integrity or political independence,¹³ like a territorial conquest or the overthrow of a government.

¹⁰ U.N. Charter Preamble.

¹¹ U.N. Charter art. 2, para. 4.

¹² *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 35 (Apr. 9) (holding unlawful the clearance of unlawful mines by the U.K. in Albanian territorial waters).

¹³ Compare IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 265–68 (Oxford Univ. Press 1963) (noting that the phrase “against the territorial integrity and political independence of any state” was inserted as an effort to augment the prohibition, rather than limit it only to those uses of force not annexing territory or harming the political independence of a state), with JULIUS STONE, *AGGRESSION AND WORLD ORDER: A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION* 95 (Univ. of Cal. Press 1958). Stone labels as dubious the proposition that the “positive injunction of Article 2(3) to settle disputes by peaceful means carries with it so revolutionary a negative implication as the absolute prohibition of the use of force for the vindication of rights, even when no other means exists.” *Id.* Stone also questions why, “if Article 2(3) really imported such a blanket prohibition of the use of force, why should the draftsmen have felt it necessary to follow it immediately with a very much more limited prohibition...?” *Id.*

A. VARYING INTERPRETATIONS OF JUSTIFIABLE “SELF-DEFENSE” UNDER THE CHARTER

Although the use of force is generally prohibited under the Charter, states have retained the right to use force in self-defense—a right that they held in customary international law prior to the Charter’s ratification. To this end, Article 51 of the Charter states that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence *if an armed attack occurs* against a Member of the United Nations[.]”¹⁴ Thus, while the Charter preserves a state’s right to self-defense, it limits its scope by conditioning the use of force on the occurrence of an “armed attack.”¹⁵

Many jurists, international relations theorists, and political actors have tried to delineate when the use of force is legally justifiable as an act of “self-defense.” These individuals disagree about how likely the occurrence of the initial aggressor’s attack must be, and they tend to fall into three groups: (1) the “strict constructionist” group, which believes that states cannot respond with force in self-defense unless an initial armed attack has *already occurred*; (2) the advocates of “preemptive” self-defense, who believe force is legal under the Charter when the threat of armed attack is *imminent*; and (3) the advocates of “preventive” self-defense (or “Realist theorists,” hereafter referred to as “Realists”), who believe the use of force is appropriate when an attack is *likely* to occur.

Under the strict constructionist school of thought, scholars hold that states cannot respond with the use of force in self-defense unless an initial armed attack has already occurred. For this group, the likelihood of an armed attack by the initial aggressor must be *certain* to occur, as retaliatory force is not legally authorized by the Charter unless the initial attack has already occurred or been initiated. They argue that those who would permit preemptive or preventive self-defense are relying on “inconclusive pieces of evidence”¹⁶ that “would replace a clear standard with a vague, self-serving one, and open a loophole large enough to empty the rule.”¹⁷ The strict constructionists are bolstered by the fact that the wording of Article 51 is intentionally restrictive, and the phrase “armed attack” was preferred over the extremely broad word, “aggression,” which is used in other parts of the Charter, but was not fully defined until 1974.¹⁸ Their school of thought is also lent credence by a UN Secretary-General panel report affirming its view, stating “if there are good arguments for preventive

¹⁴ U.N. Charter art. 51 (emphasis added).

¹⁵ *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, para. 176, 249 (June 27) (holding that an intervention or force below the threshold of an “armed attack” does not allow for the right of self-defense).

¹⁶ BROWNLIE, *supra* note 13, at 278.

¹⁷ LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 121 (Martinus Nijhoff Publishers 1995). Put more colorfully, “[i]n a world which is hard pressed to stop aggressive war, it makes little sense to open a loophole large enough to accommodate a tank division.” John Quigley, *A Weak Defense of Anticipatory Self-Defense*, 10 *TEMP. INT’L & COMP. L.J.* 255, 257 (1996).

¹⁸ YORAM DINSTEIN, *WAR, AGGRESSION AND SELF DEFENCE* 183–84 (Cambridge Univ. Press 4d ed. 2005).

military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to.”¹⁹

On the other hand, although strict constructionists view any preemptive or preventive self-defense as illegal under the Charter, they admit that there can be other sources driving decision making processes—such as international moral norms—that may justify the attack. Under these circumstances, the international community “will eventually condone [the act of self-defense that is unauthorized under the Charter] or mete out lenient condemnation.”²⁰ Thus, for strict constructionists, a defensive use of force could be a violation of the Charter, but could be otherwise justified under international law as consistent with moral norms.

Other actors, such as the advocates of preemptive self-defense, believe that the defensive use of force is legal under the Charter when the attack by the initial aggressor is *imminent*. This school of thought justifies its position on policy grounds, observing that if an armed attack were required before a lawful response could be taken, “[m]embers [of the United Nations] would be required to submit abjectly and without respite to any and all wrongs which do not involve ‘armed attack on a Member’ within Article 51.”²¹ On the other hand, they do not go as far as to authorize the defensive use of force when the threat of attack is merely *likely* (as the Realists do), because they doubt a state’s ability to predict non-imminent armed attack.²²

Advocates of preemptive self-defense support their interpretation of the Charter by relying on customary international law prior to, and at the time of, the Charter’s ratification. Most notable is the international acceptance of the American response to the *Caroline* incident. In the *Caroline* incident, British forces, in 1837, seized and burned a ship located in an American port that they claimed had been used and might be used again to supply weapons to Canadian insurgents, before subsequently sending it careening over the Niagara Falls, killing two American citizens in the process. U.S. Secretary of State Daniel Webster responded that self-defense is lawful in those “cases in which the ‘necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.’”²³

¹⁹ U.N. High-Level Panel on Threats, Challenges & Change, *A More Secure World: Our Shared Responsibility*, ¶ 190, U.N. Doc. A/59/565 (Dec. 2, 2004), available at <http://www.un.org/secureworld/report.pdf>. One of the reasons that this panel was established was to

“consider the ‘early authorization of coercive measures,’ . . . [since] unless the United Nations could find a way to act preemptively or even preventively, member states would simply take matters into their own hands.” Anne-Marie Slaughter, *Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform*, 99 AM. J. INT’L L. 619, 625 (2005).

²⁰ ANTONIO CASSESE, *INTERNATIONAL LAW* 310–11 (Oxford Univ. Press 2d ed. 2005).

²¹ STONE, *supra* note 13, at 97. Stone states that this view is not impossible, but questions whether it is the only possible or even the most likely view of the text “and whether in the light of the absurdities and injustice to which it would lead, it must not be regarded as an incorrect one.” *Id.*

²² See Quincy Wright, *The Prevention of Aggression*, 50 AM. J. INT’L L. 514, 529 (1956) (“Preventive war, when the danger is in any degree speculative or remote, constitutes aggression under . . . the Charter[.]”).

²³ Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842), in 2 JOHN BASSETT MOORE, *A DIGEST OF INTERNATIONAL LAW* 412 (1906).

Webster's response to the *Caroline* incident, and the international community's acceptance of it, seems to suggest that, in 1837, customary international law authorized the defensive use of force when the aggressor's attack was imminent. In response to this argument, strict constructionists note that customary international law at the completion of the Charter in 1945 was different and less flexible than in 1837. On the other hand, advocates of preemptive self-defense are bolstered by the fact that the International Military Tribunal reaffirmed Webster's formulation of self-defense at the 1945 Nuremberg Trials, suggesting that preemptive defensive force may have been authorized by customary international law when the Charter was completed.²⁴

Finally, a third group of scholars believe that *preventive* self-defense must be acceptable under the Charter in the age of modern weaponry because if a state were required to know an attack was *imminent* before responding in self-defense, states would be unable to respond quickly enough to protect their populations. For example, speaking at the time of the Cuban Missile Crisis, President John F. Kennedy proclaimed that:

We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation's security to constitute maximum peril. Nuclear weapons are so destructive and ballistic missiles are so swift, that any substantially increased possibility of their use or any sudden change in their deployment may well be regarded as a definite threat to peace.²⁵

Later, in 2002, President Bush advanced his own theory of preventive self-defense in a report to the U.S. Congress on national security.²⁶ He argued that states were authorized under evolving customary international law—not the Charter—to act defensively against “rogue states” that possessed WMDs.²⁷ Although the President's report based this evolving right of self-defense on recent international events, the Bush Doctrine has been largely discredited as a workable theory as a result of the total and complete intelligence failures leading up to the Iraq War.

The United Nations leadership has adopted the strict constructionist view as the correct interpretation.²⁸ It is less clear, however, whether it is the most reasonable, the most commonly accepted, or the most morally justified interpretation.²⁹ Despite the arguments to the contrary, the UN's own affirmation of the strict constructionist view places threatened states in

²⁴ International Military Tribunal (Nuremberg), *Judgment and Sentences*, reprinted in 41 AM. J. INT'L L. 172, 205 (1947) (holding that the German invasion of Norway designed to prevent an Allied invasion failed the imminence requirement).

²⁵ John F. Kennedy, Radio and Television Report to the American People on the Soviet Arms Buildup in Cuba (Oct. 22, 1962).

²⁶ White House, *The National Security Strategy of the United States of America* 15 (Sept. 2002).

²⁷ *Id.*

²⁸ See *A More Secure World*, *supra* note 19.

²⁹ The ruling in *Military and Paramilitary Activities in and against Nicaragua* envisioned a counterattack as a sequel to an armed attack, but passed no judgment on “the issue of the lawfulness of a response to the imminent threat of armed attack.” 1986 I.C.J. 14, para. 194. While this may indicate that the only source capable of a “hard law” interpretation of the Charter is unsure as to Article 51's exact definition, it can be predicted that the I.C.J. would hold similarly to the UN Secretary-General's panel's finding. See *A More Secure World*, *supra* note 19.

the dangerous, if not suicidal³⁰ conundrum of either violating international law by striking first or awaiting the first attack.³¹ If the state were to choose the former and protect itself, that state would then be in the disconcerting and unenviable situation of being condemned, regardless of the reasonableness or morality of the action. However, in general, it is clear that the international community looks upon preventive strikes as a violation of Article 51, as shown by the strong condemnation directed at Israel after bombing Iraq's Osirak nuclear reactor in 1981.³² At the very least, especially in the aftermath of the Iraq War, the world community will look upon preemptive or preventive attacks with suspicion, although a preemptive strike will appear to be more legitimate than a preventive strike in the current climate.

B. OTHER REQUIREMENTS OF "SELF-DEFENSE" UNDER THE CHARTER: NECESSITY AND PROPORTIONALITY

In spite of disagreement about the *likelihood* of the initial aggression, Article 51 clearly requires all defensive attacks to be "necessary" and "proportional." The "necessity" requirement stated is to ensure that a peaceful resolution is not possible.³³ Proportionality, on the other hand, mandates not that a counterattack is the mirror image of the first attack, but rather that it achieves a result proportionate to the threat.³⁴ Put another way, "proportionality points at a symmetry or an approximation in 'scales and effects' between the unlawful force and the lawful counter-force."³⁵

The *Oil Platform* case brought to the International Court of Justice ("I.C.J.") by Iran against America in 1996 can be used as an illustration of the proportionality requirement. In response to the laying of a mine in the Persian Gulf, American forces attacked three Iranian offshore oil platforms and destroyed Iranian frigates and other naval vessels.³⁶ Before dismissing the case for lack of jurisdiction, the I.C.J. held, *obiter dictum*, that even if the United States could prove that the mine was laid from one of the offshore oil platforms, it would not have been proportionate to attack the Iranian ships as well.³⁷

III. JUST WAR DOCTRINE

Just War Doctrine is a system of military ethics, which provides that the use of force can be morally justified under specific circumstances.

³⁰ "International law is not a suicide pact." Louis René Beres, *On International Law and Nuclear Terrorism*, 24 GA. J. INT'L & COMP. L. 1, 31 (1994).

³¹ "Today it is more likely to be foolish, if not suicidal, for a state . . . to wait until the first attack." Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT'L L. 599, 602 (2003).

³² S.C. Res. 487, ¶ 1, U.N. Doc. S/RES/487 (June 19, 1981). The attack was a "clear violation" of the Charter of the United Nations.

³³ DINSTEIN, *supra* note 18, at 237. See also Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391 (1993).

³⁴ See *supra* text accompanying note 23; MOORE, *supra* note 23, at 409–14.

³⁵ DINSTEIN, *supra* note 18, at 237 (citation omitted).

³⁶ *Oil Platforms (Iran v. U.S.)*, 1996 I.C.J. 803, 805 (Dec. 12).

³⁷ *Id.*

Although it began as a Christian theological principle, Just War Doctrine has been incorporated into the Western intellectual and political tradition and is no longer a purely religious doctrine. Most significantly, the concept of having a “justified” reason to resort to force is employed in almost every decision making process, even though not every modern application of the use of force meets the criteria of a “just war.”

A. HISTORY OF JUST WAR DOCTRINE

The first formulation of Just War Doctrine was created by St. Augustine in the waning days of the Roman Empire. Prior to this formulation, the two competing philosophies relating to the use of force were the absolute pacifism found in certain passages of The New Testament³⁸ and the Roman Empire’s imperial imperative to expand the empire and conquer enemies. In response to the invading “barbarian” hordes of the fourth century, St. Augustine wrote “it is . . . with the desire for peace that wars are waged[.]”³⁹ St. Augustine noted that it would be just to prevent those men who intentionally interrupt the peace in order to bring about a peace more to their liking, even though those men have no hatred of peace.⁴⁰ Thus, according to St. Augustine, it would be justified for a Christian to take part in a war waged in self-defense, and it would be just to prevent another from waging a preventive war.

In the Middle Ages, St. Thomas Aquinas claimed that a war “with the object of securing peace”⁴¹ could be justified if it was necessary for the achievement of a just cause, fought with the right intention, and waged by a sovereign authority.⁴² Although the Thomistic definition refined the Augustinian doctrine, little had changed: a sovereign entity’s task was to protect its subjects and, in doing so, must wage war only with the proper intent of promoting good or defeating evil and with just cause, requiring the use of force to be necessary. More generally, Aquinas argued, “those who are attacked . . . should be attacked because they deserve it on account of some fault.”⁴³

In the 17th century, Dutch legal scholar Hugo Grotius presented a more legalistic definition of Just War Doctrine. Grotius allowed for preemptive strikes, but cautioned that the danger must be immediate and that fear alone would not justify a preemptive attack.⁴⁴ Therefore, it would be unjustifiable “to take up arms in order to weaken a rising power, which, if it grew too strong, might do us harm.”⁴⁵

³⁸ “Do not resist an evil person. If someone strikes you on the right cheek, turn to him the other also.” *Matthew* 5:39 (NIV).

³⁹ SAINT AUGUSTINE, *THE CITY OF GOD*, bk. XIX, ch. 12, at 687 (Marcus Dods trans., The Modern Library 1993).

⁴⁰ *Id.*

⁴¹ 3 SAINT THOMAS AQUINAS, *SUMMA THEOLOGICA*, pt. II-II, question 40, art. 1, at 1354 (Fathers of the English Dominican Province trans., Christian Classics 1981) (1911).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See JAMES TURNER JOHNSON, *JUST WAR TRADITION AND THE RESTRAINT OF WAR: A MORAL AND HISTORICAL INQUIRY* (Princeton Univ. Press 1981).

⁴⁵ 2 HUGO GROTIUS, *ON THE LAW OF WAR AND PEACE*, bk. II, ch. XXII (A.C. Campbell trans., Oxford Univ. Press 1925).

Despite the lofty goals of Just War theorists, by the time of the early 20th century, Just War Doctrine was not seriously discussed.⁴⁶ What began as a way to justify only those wars necessary to secure the peace,

had grown to justify centuries of Crusades against Muslims and Baltic pagans, internal and domestic Crusades against dissidents like the Albigensians, wars of reconquest against breakaway Protestant kingdoms, systematic atrocities against Jews, and wars of expansion against indigenous peoples in the New World, Africa, and Asia. In short . . . Just War theory was discredited by its loopholes and the self-serving uses to which it had been put for the better part of a millennium[.]⁴⁷

Although the Catholic Church had never repudiated Just War Doctrine, Michael Walzer is commonly credited with reviving the doctrine as a philosophical and political concept with applications for the modern world.⁴⁸ In Walzer's view, "[n]uclear weapons explode the theory of just war."⁴⁹ As Just War Doctrine had been modified periodically since the time of St. Augustine, Walzer attempted to make it more applicable to a modern world rife with less responsible leaders who increasingly acquire the most dangerous of weapons. Each modern war becomes increasingly more deadly on account of these weapons, leading to the reasonable assertion that Just War Doctrine must be revitalized with regards to the changing technology and military capabilities of our time. With this in mind, I will venture to argue for a limited warfare intended to prevent what is perceived as "rogue states" acquiring WMD.

War is judged twice.⁵⁰ Medieval writers divided war into two parts: *jus ad bellum* and *jus in bello*.⁵¹ *Jus ad bellum*, the focus of this paper, refers to whether the reasons for using force are justified,⁵² while *jus in bello* refers to the justness of the means of fighting.⁵³ Though relevant to a proposed strike on Iranian nuclear capabilities, *jus in bello* is not entirely relevant to the present inquiry, because the collateral damage inherent in bombing radiological material will have already been considered if it is justified to eliminate Iran's nuclear reactors under *jus ad bellum*. Thus, the conclusion that it would be permissible to strike the Iranian nuclear reactors would take into account that the radiation from the destroyed reactor would seriously injure or kill nearby civilians.

B. WHY JUST WAR DOCTRINE IS THE APPROPRIATE TOOL FOR THE JUSTIFICATION OF SELF-DEFENSE

The Charter's temporal requirement of an "armed attack" prior to a subsequent use of force in self-defense defies reasonable standards of self-

⁴⁶ Jonathan A. Bush, "The Supreme . . . Crime" and Its Origins: The Lost Legislative History of the Crime of Aggressive War, 102 COLUM. L. REV. 2324, 2330 (2002).

⁴⁷ *Id.*

⁴⁸ MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS (Basic Books 4th ed. 2006) (1977) [hereinafter WALZER].

⁴⁹ *Id.* at 282.

⁵⁰ *Id.* at 21.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

preservation. While the UN Security Council could step in and authorize a preemptive strike prior to an imminent aggressive armed attack, the highly politicized nature of Security Council veto powers ensures that an immobilized Security Council will likely never legitimize a preemptive attack in self-defense. Thus, even if a state were to detect an imminent armed attack and have the time to take the matter to the Security Council, the chances of gaining authority to preempt the attack would be extremely low. This is the view taken by Michael Walzer, who states:

The UN Charter was supposed to be the constitution of a new world, but . . . things have turned out differently. To dwell at length upon the precise meaning of the Charter is today a kind of utopian quibbling. And because the UN sometimes pretends that it already is what it has barely begun to be, its decrees do not command intellectual or moral respect [The UN is] a paper world, which fails at crucial points to correspond to the world the rest of us still live in.⁵⁴

Although the Charter is by no means a pacifist document, strict interpretation of Article 51 requiring a state to absorb an armed attack before retaliating brings the international system perilously close to this philosophy. As should have been anticipated by the UN after the explosion of two atomic bombs in Hiroshima and Nagasaki, requiring a state to absorb an attack first is in some cases suicidal. The extremeness of this example is irrelevant; the danger of this philosophy is that states acting justly, but in contravention of the Charter, will be condemned and punished.

An even more pressing concern is the use force in what is described as preemptive self-defense, but is actually preventive self-defense, a form of Realism intended to acquire a strategic advantage or a monopoly on power or resources. The point then, of Just War Doctrine, is to “expose the hypocrisy of soldiers and statesmen who publicly acknowledge [the immorality of fighting unjust wars] . . . while seeking in fact only their own [strategic] advantage.”⁵⁵ The basis of thinking of war in terms of Just War Doctrine rather than in terms of Realism may not be entirely clear to those uninformed. The primary reason is that “[f]or as long as men and women have talked about war, they have talked about it in terms of right and wrong.”⁵⁶ For those who subscribe to the Realist school of thought, the maxim, *inter arma silent leges* (in times of war, the law falls silent) has been a guiding principle. Yet, as Walzer indicates, “[t]he language we use to talk about . . . war is so rich with moral meaning that it could hardly have been developed except through centuries of argument. . . . [We use words such as] aggression, self-defense, appeasement, cruelty, ruthlessness, atrocity, massacre—all these words are judgments, and judging is as common a human activity as . . . fighting.”⁵⁷

⁵⁴ WALZER, *supra* note 48, at xx–xxi (Preface). See also John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 741 (2004) (arguing that international law has “never effectively restrained the use of force between nations”).

⁵⁵ WALZER, *supra* note 48, at xxiii (Preface).

⁵⁶ *Id.* at 3.

⁵⁷ *Id.*

Walzer illustrates his argument against Realism through Thomas Hobbes's translation of Thucydides's *History of the Peloponnesian War*, which eventually became Hobbes's argument in the *Leviathan*.⁵⁸ In Thucydides's *History*, the negotiation between Athenian generals and Melian magistrates demonstrates the crux of the Realist argument:

They that have odds of power exact as much as they can, and the weak yield to such conditions as they can get. . . . If . . . [the powerful] do not conquer when they can, they only reveal weakness and invite attack[.]⁵⁹

Thus, according to Hobbes's translation, the Athenians' expansion of their empire by force was necessary due to the perception that an empire not expanding was inherently weak. Yet, as Walzer indicates, this "evades the moral question of whether the preservation of the empire was itself necessary."⁶⁰ Although this may seem a ridiculous question to those in the present who view ancient history as the history of empires expanding and contracting, it appears that there were indeed legitimate questions in ancient Athens as to whether the empire was necessary or whether the goals of the Athenians were being accomplished sufficiently by the empire in its current form or whether these goals could be accomplished through other means.⁶¹

Ultimately, Realists will always argue that "what we conventionally call inhumanity [in war] is simply humanity under pressure."⁶² Yet, the justness of modern wars must be argued in terms of Just War Doctrine for the simple reason that the President of the United States or another responsible national leader would never justify an armed attack with the express purpose of securing precious resources, expanding spheres of influence, or subduing a non-ally nation that could be likely contained or dealt with peacefully. Indeed, the modern president or national leader that attempted to convince his nation that blood is worth its price in oil would likely receive scant popular support and would probably face removal from office. For these very reasons, all modern justifications for preventive war are veiled in terms of threats, sometimes real and, at other times, imagined. However, the true purpose of eliminating a possibility that the future balance of power will be upended remains unspoken.

C. MODERN APPLICATIONS OF JUST WAR DOCTRINE

1. *Preemptive War: The 6-Day War*

In May of 1967, Soviet officials issued reports, immediately rejected as false by the United Nations, that Israeli forces were massing on the Syrian border.⁶³ Despite the UN's rejection of these reports, Egyptian ally forces were placed on maximum alert and began to amass in the Sinai Desert to

⁵⁸ *Id.* at 4.

⁵⁹ *Id.* at 5.

⁶⁰ *Id.* at 8.

⁶¹ See WALZER, *supra* note 48, at 8.

⁶² *Id.* at 4.

⁶³ *Id.* at 82.

prevent Israel from threatening an attack on Syria.⁶⁴ Egypt expelled the United Nations Emergency Force from Sinai and the Gaza Strip, continued its buildup of forces, and thereafter announced that the Straights of Tiran, the entrance to Israel's southern port of Eilat, would be closed to Israeli shipping.⁶⁵ To further compound the threat of war facing Israel from Egypt and Syria, Jordanian and Iraqi armed forces were placed under the command of Egypt. Lastly, Egyptian President Nasser proclaimed that if there was war, the Egyptian goal would be the total destruction of Israel.⁶⁶

On June 5, 1967, the Israeli Air Force launched a surprise attack on the still grounded Egyptian Air Force and proceeded to defeat the rest of the Egyptian armed forces as well as the Syrian, Jordanian, and Iraqi armies.⁶⁷ Israeli Air Force Commander, Motti Hod, in giving the order to attack, commanded his squadrons to "soar at the enemy, destroy him and scatter him throughout the desert so that Israel may live, secure in its land, for generations."⁶⁸ The Israeli intent was not to prevent an upheaval in the balance of power caused by the massive alliance and buildup of Arab forces. Hod and other Israeli politicians viewed themselves as acting justly in preempting certain, future Arab attack aimed at destroying the state of Israel.

Yet, by all accounts, the Egyptian Air Force was not in the air and on its way to strike Israel.⁶⁹ Under the *Caroline* incident formulation, a preemptive attack must be akin to a reflex reaction in order to be justified. However, to paraphrase an argument made by proponents of preventive self-defense, the world had changed since the 19th century: instead of ground forces or boats engaged in combat, 20th century warfare had jet airplanes, rockets, and WMDs. Under such circumstances, a reflex action requirement is more than unreasonable; it is suicidal.

In addition, evidence indicates that the Egyptians were not planning to attack Israel.⁷⁰ According to Walzer, Nasser probably would have been satisfied with the indefinite closing of the Straights of Tiran, the maintenance of Arab armies on all of Israel's borders, and a weakening of the Israeli economy resulting from keeping its reservist-based army at the ready.⁷¹ Then the situation would either have been resolved diplomatically, with the Arab nations exacting significant concessions to reflect their improved strategic position, or Israel would be forced to attack first.⁷² As Walzer indicates, Israel's response was not a necessity, according to the Webster formulation, but was nevertheless justified since "an Israeli

⁶⁴ *Id.*

⁶⁵ *Id.* at 83. As a result of the 1956 Suez War, the Straights of Tiran were recognized as an international waterway and any subsequent blockade would constitute an act of war. Although the Egyptian blockade was not the start of the fighting, one could make an argument that this was the start of the war, though this would be a legalist, rather than a moral argument.

⁶⁶ *Id.*

⁶⁷ MICHAEL B. OREN, *SIX DAYS OF WAR: JUNE 1967 AND THE MAKING OF THE MODERN MIDDLE EAST* 170 (Oxford Univ. Press 2002).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ WALZER, *supra* note 48, at 83.

⁷¹ *Id.*

⁷² *Id.* at 84.

decision to allow Nasser his victory [would have been more than a shift in the balance of power;] . . . [i]t would have opened Israel to attack at any time[.]” because the threat of war remained as a result of the failed Israeli attempts to resolve the situation diplomatically.⁷³ In Walzer’s view, the situation had changed from legitimate military buildup, to a state of perpetual threat of war.

Walzer concludes that force used in preemptive self-defense is justified “in the face of threats of war, whenever the failure to . . . [exercise force] would seriously risk . . . [a state’s] territorial integrity or political independence.”⁷⁴ Thus, Walzer argues that instead of considering the justness of a preemptive war based upon the imminence of the aggressive attack, one should be concerned with what constitutes a “sufficient threat” justifying a nation to strike first.⁷⁵ According to Walzer, a sufficient threat requires: (1) a manifest intent to injure; (2) active preparation that makes the intent a positive danger; and (3) a situation where waiting to eliminate the threat magnifies the risk.⁷⁶ Taking the emphasis away from imminence, Walzer upends the traditional legalist debate between preemption and prevention, creating “blurred” lines between the traditional paradigms.⁷⁷ Under the legalist framework supplied by Webster, physical imminence, rather than theoretical threat, divided just preemption from unjust prevention. However, under Walzer’s definition of preemption, justifiable preemption overlaps with the prevention spectrum and incorporates those attacks that may not be physically imminent but which can be judged serious threats. In order to make the debate more compatible with the realities of modern warfare, the definition of preemption must be extended to match Walzer’s, with the definition of prevention limited to those circumstances that do not meet the requirements of preemption. Ultimately, though, the controversy between the strict constructionists and those who would allow for preemptive or preventive self-defense under the Charter is limited to what the Charter legalizes and has no bearing upon the justness or unjustness of a proposed action.

2. *Preventive War: Iraq War*

The Iraq War reveals the uncertainty of war-time decisions and sheds light on the theory of preventive war as an unjust use of force. Proponents of this theory argue that preventive war is unjust because the future danger “is not only distant but speculative, whereas the costs of a preventive war are near, certain, and usually terrible.”⁷⁸ Not only were no WMDs found in Iraq, but any hope of establishing a stable, free Iraq in the post-Saddam Hussein era has been dashed by armed insurgencies and Al-Qaeda-affiliated terrorist groups, as well as ethnic cleansing. In addition, the known monetary costs of the war have been astronomical, while the loss of

⁷³ *Id.*

⁷⁴ *Id.* at 85.

⁷⁵ *Id.* at 81.

⁷⁶ WALZER, *supra* note 48, at 81.

⁷⁷ *See id.* at 85.

⁷⁸ MICHAEL WALZER, *ARGUING ABOUT WAR* 147 (Yale Univ. Press 2006) [hereinafter *ARGUING ABOUT WAR*].

life has been unimaginably devastating for both American and Iraqi forces. Thus, despite the varied arguments regarding preemptive war as a last resort, “no sufficient reason for making [preventive war] . . . the first [resort]” seems to exist.⁷⁹

The Iraq War cannot be viewed in historical isolation. In 1991, at the behest of the United Nations, President George H. W. Bush Sr. expelled Iraqi forces from occupied Kuwait, but allowed Saddam Hussein to remain in power in Iraq.⁸⁰ However, Hussein did not have unburdened control over all of Iraq. His actions were constrained by two “no-fly” zones in Northern Kurdish Iraq and Southern Shi’ite Arab Iraq.⁸¹ A policy of containment was also put in place involving “military forces, building up ground facilities in Kuwait, running intelligence operations in Kurdish areas, flying warplanes over much of . . . [Hussein’s] territory, and periodically pummeling Iraqi military and intelligence facilities with missiles and bombs.”⁸² Although there were certainly inadequacies with the implementation of these measures, notably its comparison to creating a “slow boil” that Hussein learned to live with, the measures were deemed successful in containing Hussein from further aggression both within and outside of Iraq.⁸³ American enforcement of the containment policy led to the use of force in 1994, 1996, and additionally in 1998, in response to Hussein’s reluctance to cooperate with weapons inspectors.⁸⁴ The 1998 attack, codenamed Operation Desert Fox, “‘actually exceeded expectations’” and containment appeared to be functioning as an effective tool to dislodge Hussein from power.⁸⁵ Anthony Zinni, a now-retired General, noted that the United States had contained Hussein:

[H]is military [had shrunk] . . . to less than half its size from the beginning of the Gulf War until the time I left command, not only shrinking in size, but dealing with obsolete equipment, ill-trained troops, dissatisfaction in the ranks, a lot of absenteeism. We didn’t see the Iraqis as a formidable force. We saw them as a decaying force.⁸⁶

This “decaying force” was further contained by the newly elected President George W. Bush Jr., who approved attacks on an Iraqi military station in early 2001.⁸⁷ Thus, on the eve of the Al-Qaeda terrorist attacks of September 11, 2001, Iraq was effectively restrained by the policy of containment.

Just four days after the terrorist attacks, the Deputy Secretary of Defense, Paul Wolfowitz, who had previously advocated regime change in Iraq instead of containment,⁸⁸ presented three targets in the new “War on

⁷⁹ *Id.*

⁸⁰ THOMAS E. RICKS, *FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ 5* (The Penguin Press 2006) [hereafter *FIASCO*].

⁸¹ *Id.* at 13.

⁸² *Id.* at 12.

⁸³ *Id.* at 13.

⁸⁴ *Id.* at 18–19.

⁸⁵ *Id.* at 19.

⁸⁶ *FIASCO*, *supra* note 80, at 13.

⁸⁷ *Id.* at 13, 26.

⁸⁸ *Id.* at 23–24.

Terrorism,” one of which was Iraq.⁸⁹ President Bush initially rejected this assessment and the proposal to change the regime in Iraq.⁹⁰ However, the failure to predict the September 11, 2001 terrorist attacks created doubts about whether the intelligence community underestimated the potential threat emanating from Hussein’s alleged WMD programs and suspected cooperation with Al-Qaeda terrorists.⁹¹

One of the main problems with preventive force is its speculative and uncertain evaluation of a future threat. The lack of understanding of this risk is exemplified by Donald Rumsfeld’s impatience with the American intelligence community. On September 25, 2001, Rumsfeld met with Charlie Holland, the head of U.S. Special Operations Command, in order to plan a response to the attacks.⁹² Holland listed numerous suspected Al-Qaeda targets, such as training camps in Africa and the Philippines and an arms shipment site in Somalia.⁹³ When asked by Rumsfeld how soon the attacks were to be launched on these sites, Holland responded that there were no plans to do so due to the lack of actionable intelligence.⁹⁴ Rumsfeld responded by asking, “What is ‘actionable intelligence’? . . . Is there such a type of intelligence that is ‘inactionable’?”⁹⁵

Rumsfeld’s impatience underscores a fundamental problem with preemptive and preventive warfare, namely the concept of a puzzle versus a mystery.⁹⁶ A puzzle is something that can be discovered if only there were more evidence leading one towards the answer.⁹⁷ For example, “Osama bin Laden’s whereabouts are a puzzle. We can’t find him because we don’t have enough information.”⁹⁸ Whether Hussein had WMDs was a puzzle that could have been solved with more information gathered by the intelligence community. Thus, more information can lead one to a factual answer to a puzzle.

A mystery, on the other hand, does not have a factual answer.⁹⁹ A mystery cannot be solved, but rather requires judgment, analysis, and an “assessment of uncertainty.”¹⁰⁰ How Iraq would look after the invasion was a mystery.¹⁰¹ One could not have known for sure how Iraq would turn out, but one could have made educated guesses on the basis of military intelligence, past history, and an evaluation of risk and uncertainty. Likewise, if the puzzle as to Hussein’s WMD program had been solved and it had been confirmed that he had possessed biological, chemical, or nuclear weapons or had attempted to produce them, it would have still been a mystery as to whether he would have used them against his enemies or

⁸⁹ *Id.* at 30.

⁹⁰ *Id.* at 31.

⁹¹ *Id.* at 32.

⁹² FIASCO, *supra* note 80, at 32.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Malcolm Gladwell, *Open Secrets: Enron, Intelligence, and the Perils of Too Much Information*, THE NEW YORKER, Jan. 8, 2007.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

would have used them solely as a means of defense under the theory of Mutually Assured Destruction (“MAD”). Mysteries, unfortunately, often do not have satisfying conclusions.¹⁰² Thus, under this hypothetical, one could have only guessed as to Hussein’s next move on the basis of an evaluation of risk and uncertainty.

Despite the fact that Al-Qaeda was behind the September 11, 2001 terrorist attacks, and not Hussein, the Pentagon began to formally consider an attack on Iraq in November 2001.¹⁰³ In December 2001, Judith Miller, the Pulitzer Prize-winning journalist, published an article in the New York Times detailing an Iraqi defector’s account of Hussein’s secret WMD facilities.¹⁰⁴ Although this story began the drive to war against Iraq, it was based upon fabrications and none of the alleged secret facilities have ever been found.¹⁰⁵ Then, in his 2002 State of the Union address, President Bush declared the existence of an axis of evil—made up of Iraq, Iran, and North Korea—which was threatening “the peace of the world” by allying with terrorist groups and developing WMDs.¹⁰⁶ Having chosen a target, President Bush soon thereafter gave a speech on what was to be deemed the Bush Doctrine: the adoption of preventive warfare as government policy.¹⁰⁷ In using the term preemptive, rather than preventive, to describe the adoption of preventive warfare, President Bush effectively blurred the lines between what Just War theorists view as justified preemption and unjustified prevention.

Nearly every claim made about Hussein before the Iraq War—that he was producing WMDs and that he had allied with Al-Qaeda—would prove false once American forces invaded and occupied Iraq. These were puzzles, not mysteries, which had factual answers and could have been solved. The media debate about invading Iraq lasted from August 2002 until March 2003, when American planes began the bombing campaign of the war.¹⁰⁸ During the course of these seven months, the Bush Administration’s public justifications for war were fundamentally different from what the intelligence indicated.¹⁰⁹ At first, leading Republicans both privately and publicly pressured the Bush Administration against attacking Iraq.¹¹⁰ This criticism was quickly silenced when on August 26, 2002, Vice President Dick Cheney announced that “there is no doubt” that Iraq had WMDs and was preparing to use them “against our friends, against our allies, and against us.”¹¹¹ Cheney had rendered a factual answer to a puzzle although the evidence indicated otherwise. It was not surprising that Cheney had come to this conclusion, considering the way he formulated a “burden of proof” before undertaking a preventive (in the administration’s words, preemptive) use of force: “If there’s a one percent chance that Pakistani

¹⁰² Gladwell, *supra* note 96.

¹⁰³ FIASCO, *supra* note 80, at 32.

¹⁰⁴ *Id.* at 35.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 116.

¹⁰⁹ FIASCO, *supra* note 80, at 46.

¹¹⁰ *Id.* at 47–48.

¹¹¹ *Id.* at 49.

scientists are helping al Qaeda build or develop a nuclear weapon, we have to treat it as a certainty in terms of our response. . . . It's not about our analysis, or finding a preponderance of evidence. . . . It's about our response."¹¹²

Thus, Cheney dissociated American uses of force in anticipation of an unconfirmed future threat from both available evidence and from any conception of justice. As to the distinction between puzzles and mysteries, the One Percent Doctrine holds that it does not even matter what the answer is to the puzzle or that there even is a puzzle, because our fears justify our actions.¹¹³

When Zinni heard Cheney's pronouncement that there was "no doubt" as to Hussein's WMD, he "nearly fell of his chair."¹¹⁴ Zinni later stated that as a general, he had "watched the intelligence and never—not once—did . . . [the intelligence] say, '[Hussein] . . . has WMD[s].'" In response to Cheney's claim, Zinni consulted the intelligence again and the intelligence backing up Cheney's claims was "never there."¹¹⁵

In September 2002, the American intelligence community issued a comprehensive summary of intelligence on Hussein's alleged WMD programs.¹¹⁶ The National Intelligence Estimate ("NIE") reported that "Iraq possessed chemical and biological weapons, was making advances in developing ways to weaponize and deliver biological weapons, and was 'reconstituting its nuclear program.'"¹¹⁷ When no WMDs or plans to manufacture WMDs were ever found in Iraq, it became clear that the NIE had "presented [the Bush Administration's] opinion as fact," by misrepresenting the views of the intelligence community and by "maximizing alarming findings while minimizing internal doubts about them."¹¹⁸ When the Senate Intelligence Committee reviewed the NIE report after conventional fighting had ended, the Committee came to the conclusion that not only was the NIE wrong, but that "the major key judgments . . . either [were] overstated[] or were not supported by[] the underlying intelligence reporting" and these errors were not random, but all used to reinforce the argument for war.¹¹⁹

Ultimately, the Iraq War is different from standard preventive wars: whereas normal preventive wars aim to prevent an unfavorable change in the balance of power, the Iraq War was used to change a regime that was already contained and had little hope of acquiring WMDs. Rumsfeld admitted that the Bush Administration "did not act in Iraq because of dramatic new evidence of Iraq's pursuit of weapons of mass murder. . . .

¹¹² RON SUSKIND, *THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA'S PURSUIT OF ITS ENEMIES SINCE 9/11* 62 (Simon & Schuster 2006).

¹¹³ *Id.*

¹¹⁴ *FIASCO*, *supra* note 80, at 50.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 52.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 52–53.

[It] acted because we saw the existing evidence in a new light, through the prism of our experience on September 11.”¹²⁰

While this new outlook is certainly understandable, it is questionable, especially considering that the administration was looking at the same evidence as the war doubters, and that the administration truly believed that America and its allies were in danger from a greatly weakened and contained Hussein. Regardless of what the administration actually believed, it seems clear that the nation that instigates a war, regardless of its defensive nature, bears the burden of producing convincing evidence to justify it. Judging the Iraq War under Walzer’s test, the Iraq War is unjust because, while one can argue that Hussein had a manifest intent to injure America and its allies, there was no active preparation making this intent a positive danger, and as such, waiting to attack would not have compounded the danger. Thus, because the Iraq War fails the test’s second prong, it is a preventive war and is per se unjust.

Some opponents to the Iraq War argue that force must be used as a last resort. While this may seem to be the logical position in light of the lack of evidence of Hussein’s WMDs, a question arises as to the requirement of finality. Sometimes, as in the case of the French anti-war position to the Iraq War, finality is “merely an excuse for postponing the use of force indefinitely.”¹²¹ Conceptually, there is always some intermediate step, short of force, which could be undertaken. Prior to the Iraq War, it appeared that many were ready to resign themselves to abandoning the justified goal of disarming Hussein in order to stop the rush to war. However, this resignation seemed to ignore the fact that containment was the “only real alternative” to the Iraq War, and that force was central to the containment regime operating from 1991 to 2003.¹²² As Walzer points out, the use of force is not an all or nothing proposition.¹²³ Rather, the use of force “must be timely and proportional. . . . [T]he threat that Iraq posed could have been met with something less than [a war to enact regime change].”¹²⁴ Therefore, “a war fought before its time is not a just war.”¹²⁵

3. Preventive Strikes on Nuclear Targets: Osirak

If the force short of war necessary to maintain the containment measures on Hussein is a justified use of force, then what of similar use of force short of war intended to forestall the similar production of nuclear

¹²⁰ DOMINIC D. P. JOHNSON, *OVERCONFIDENCE AND WAR* 193 (Harvard Univ. Press 2004).

¹²¹ ARGUING ABOUT WAR, *supra* note 78, at 160.

¹²² *Id.* Despite the fact that the United Nations authorized the use of force to evict Iraqi forces from Kuwait, the American and British armed forces were shouldering the burden of the containment regime. Michael Walzer mused that it might be possible, under a Utilitarian worldview, to justify the Iraq War on the grounds that the containment regime was costly, bore its own risks, and could not go on indefinitely. See WALZER, *supra* note 48, at xv (Preface to the 4th Ed.). Walzer concludes that such an argument, though persuasive, would only be justified under an optimistic calculation and that moral actors cannot be that optimistic when arguing about war and people’s lives. This optimistic calculation would seem to be the worldview under which the Bush Administration has acted. See WALZER, *supra* note 48, at xv (Preface to the 4th Ed.).

¹²³ ARGUING ABOUT WAR, *supra* note 78, at 160.

¹²⁴ *Id.* at 160–61.

¹²⁵ *Id.* at 161.

weapons, but undertaken in a situation dissimilar to that of the United States and Iraq after Iraq's retreat from Kuwait (that is, a situation not of victor and vanquished, but of two states of relatively equal status)? A modern use of force short of war—the Israeli bombing of the French-built, Iraqi nuclear reactor at Osirak in 1981—gives an opportunity to evaluate whether this type of force, which has some but not all of the uncertainties and unpredictable consequences of preventive war, can be justified, or whether it remains an unjustified preventive war.

On June 7, 1981, fourteen Israeli planes attacked Iraq's Osirak nuclear reactor, dropping multiple 2,000-pound bombs with impressive precision—an act which resulted in the complete destruction of the facility.¹²⁶ While the Israeli government justified this act as a legitimate exercise of self-defense,¹²⁷ the Iraqi government labeled it aggressive and reiterated that the “nuclear programme was ‘exclusively designed for peaceful purposes’ and that . . . [Iraq] had not committed any act contrary to its international obligations.”¹²⁸ The United Nations condemned Israel for the strike, but did not require Israel to pay reparations or otherwise punish the state.¹²⁹

For the purposes of non-regime change preemptive action, it may be more efficient to begin with the second prong of Walzer's test—whether there is active preparation to follow through with a manifest intent to injure—before analyzing the first prong—whether the intent to injure exists. This is so because if one were to evaluate the intent to injure prior to determining whether nuclear weapons were being made, the fearful state, upon determining that the intent to injure exists, may deem the uncertainty too great and proceed to act even without evidence indicating a positive danger. Despite the fact that this is essentially what happened with the Iraq War, the possibility is minimal that a fearful state will repeat the errors made in connection with forceful regime change after the United States' current predicament in Iraq and the negative reaction of the world community to it.

It is unanimously agreed that Iraq was capable of producing nuclear weapons at the time of the Israeli raid,¹³⁰ but it is a mystery, not a puzzle, as to Hussein's ultimate intentions and whether Iraq was actually preparing to manufacture nuclear weapons. It is significant that the capability to produce nuclear weapons does not mean that one has the intention to do so, although it should draw concern, since having the capability produces no added benefits to a civilian nuclear energy program. One Iraqi nuclear scientist who witnessed the bombings, Dr. Imad Khadduri, claims that “a full weapons programme began only after the Osirak attack. Before that . . . there was some ‘dabbling but nothing sophisticated and focused.’”¹³¹

¹²⁶ TIMOTHY L. H. MCCORMACK, *SELF-DEFENSE IN INTERNATIONAL LAW: THE ISRAELI RAID ON THE IRAQI NUCLEAR REACTOR* 15 (St. Martin's Press 1996).

¹²⁷ Beth M. Polebaum, Note, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U. L. REV. 187, 217 (1984).

¹²⁸ MCCORMACK, *supra* note 126, at 16.

¹²⁹ Polebaum, *supra* note 127, at 217.

¹³⁰ MCCORMACK, *supra* note 126, at 38.

¹³¹ Patrick Jackson, *Osirak: Threats Real and Imagined*, BBC NEWS, June 5, 2006, available at http://news.bbc.co.uk/1/hi/world/middle_east/5009212.stm.

Despite the fact that Dr. Khadduri admitted Iraq's violation of international treaties by "dabbling" in nuclear weapons research, one can assume that mere "dabbling" will not produce a nuclear weapon. Thus, in order to come to some sort of conclusion regarding this mystery, one can only look at Iraqi officials' statements and circumstantial evidence.

Statements made by Hussein and other Iraqi officials, although not conclusive, indicate that Iraq may have been willing to take advantage of its capability to produce a nuclear weapon. At the time of the Israeli raid, Iraq and Iran were in the midst of fighting one of the deadliest wars since World War II. During this war, Iranian bombers struck Osirak, but failed to destroy it.¹³² Israeli Prime Minister Menachem Begin claimed that, after this unsuccessful attack, Iraq issued a statement that "[t]he Iranian people should not fear the Iraqi nuclear reactor, which is not intended to be used against Iran, but against the Zionist enemy [Israel]."¹³³ Although this quote has often been called into question, it is well established that Hussein and other Iraqi officials frequently called for the destruction of Israel and claimed that as soon as the Arabs developed the capability, they should do so.¹³⁴ While this grandstanding does not necessarily indicate a manifest intent to injure—for it was probably meant more for domestic consumption than as an international threat—it does indicate a possible intent to produce nuclear weapons.

Israel also asserted that Iraq's actions indicated that the purpose of its nuclear program was for weaponization instead of for civilian energy purposes. In 1974, Iraq had attempted to purchase a gas-graphite reactor.¹³⁵ This type of reactor was used by the nuclear powers to "extract plutonium for use in nuclear bombs."¹³⁶ Furthermore, Iraq had purchased the necessary facilities to reprocess nuclear fuel, thereby simplifying plutonium recovery, and had also stockpiled uranium.¹³⁷ Although these actions only indicate that Iraq wanted the capability to make nuclear weapons, not that it intended to do so, it is questionable why a state would go to such great lengths to develop a capability that it did not intend to use. This question was compounded by the fact that Iraq insisted on weapons-grade fuel, even though France offered to supply Iraq with "caramel" fuel—a fuel that was suitable for operating the reactor but was not sufficiently enriched to make a nuclear weapon.¹³⁸

As Iraq's nuclear program appeared to have no purpose other than to produce nuclear weapons, one must evaluate whether Hussein had a manifest intent to use a nuclear weapon against Israel under the second prong of Walzer's test. Since the partition of Palestine in 1947 and the creation of Israel shortly thereafter, Iraq has not only refused to recognize Israel's right to exist, but has also actively participated in activities aimed

¹³² Polebaum, *supra* note 127, at 218.

¹³³ *Id.*

¹³⁴ *Id.* at 218–19, n. 159–61.

¹³⁵ Davis Brown, *Enforcing Arms Control Agreements by Military Force: Iraq and the 800-Pound Gorilla*, 26 HASTINGS INT'L & COMP. L. REV. 159, 168 (2003).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ MCCORMACK, *supra* note 126, at 50–51.

at Israel's destruction at every possible opportunity.¹³⁹ It is not the refusal to recognize Israel's right to exist that establishes a manifest intent to injure, for Pakistan, after all, has nuclear weapons and has refused to recognize Israel. Rather, it is the continuing state of belligerence that indicates the intent is present. Iraq refused to participate in any armistice agreement with Israel even after every other Arab state at war with Israel did so.¹⁴⁰ Although a state of belligerency does not necessarily justify Israel's actions, it would be impossible to deny that it did not play some part in the decision making process.¹⁴¹ Some would point to the chemical weapon attacks against Iraqi Kurds and Iranian soldiers during the Iran-Iraq War as well as the Scud missile attacks on Israel during the Gulf War as examples of why Hussein could not be trusted with nuclear weapons. While the conclusion may be accurate, it is irrelevant for the purpose of evaluating the Osirak attack, because the Israeli raid occurred in 1981, prior to the chemical weapons attacks of the Iran-Iraq War and the Gulf War.

Hussein's manifest intent to injure Israel cannot be expressed in terms of belligerency or past relations. Instead, one must ask whether Hussein would ever use a nuclear weapon against Israel other than in self-defense. The most likely conclusion to this mystery is an indefinite "maybe." Unlike with most leaders who view survival as their paramount consideration and who would not be willing to sacrifice their own people, some have predicted that Hussein would order a surprise nuclear attack against Israel in order to overwhelm Israeli defenses and for him to assume leadership of the Arab world.¹⁴² Although this is a purely subjective character evaluation, there is not much more one can do when evaluating this type of mystery. In fact, the Israeli intelligence assessment of Hussein's personality viewed him as a man willing to sacrifice normal considerations in order to achieve his own "personal and national ambitions,"¹⁴³ which an ex-Defense Intelligence Agency psychologist stated is characterized by "extreme grandiosity, paranoia, sadistic cruelty, and a total lack of remorse."¹⁴⁴ Hussein had a "messianic" dream of uniting the Arab world, and, although he was not psychotic, he was "politically out of touch with reality."¹⁴⁵ Thus, while Hussein would not sacrifice himself as a "martyr," his own calculations as to whether he could get away with bombing Israel might not have conformed to reality.¹⁴⁶

Yet, despite this negative view of Hussein's character, there was no overwhelming evidence indicating that he would ignore MAD anymore than any other leader. Furthermore, Hussein had only used chemical

¹³⁹ *Id.* at 101.

¹⁴⁰ *Id.* at 102.

¹⁴¹ *Id.* at 102-03.

¹⁴² While it would be risky to attack a nuclear state, and it is especially risky to existentially threaten a nuclear state, the joint Syrian and Egyptian armies did exactly this in the Yom Kippur War in 1973. Thus, one cannot discount the possibility of Hussein acting similarly.

¹⁴³ MCCORMACK, *supra* note 126, at 103-04 (citing Weissman & Krosney, *Report of Israeli Secret Intelligence Agency on the Personality of Saddam Hussein*, 19-20, 86-89 (1981)).

¹⁴⁴ Thomas Omestad, *Psychology and the CIA: Leaders on the Couch*, 95 FOREIGN POL'Y 104, 112-13 (1994).

¹⁴⁵ *Id.* at 113.

¹⁴⁶ *See id.*

weapons against states or groups that would not have been able to retaliate in like kind. For this reason, Hussein freely used chemical weapons against Iranian soldiers and Iraqi Kurds because they could not retaliate with their own nuclear or chemical weapons. However, he did not equip the Scud missiles he fired into Israel with chemical weapons. Likewise, despite his capability, Hussein did not use chemical weapons against American soldiers in the Gulf War or in the Iraq War.

Although there is no conclusive answer as to whether Iraq had a manifest intent to strike Israel with nuclear weapons, and it is uncertain whether Iraq planned to produce nuclear weapons at all, there seems to be two reasons that would, if not justify the attack, bring it very close to justifiability. First, it is important to understand Israel's history of war with its Arab neighbors. In 1947, after rejecting the UN partition of Palestine into an Arab state and a Jewish state, Egypt, Syria, Lebanon, and Jordan, together with military or logistical support from almost every other Arab country, including Iraq, attempted to snuff out the Jewish state's short life. Then, in 1967, the Six Day War placed Israel under an existential threat. Merely six years after the Six Day War, Syria and Egypt launched a surprise attack on the Jewish holy day of Yom Kippur that again placed Israel's mere existence in jeopardy. In between each of these military engagements, Israel's Arab neighbors either intermittently shelled Israeli civilians or financed and supported Palestinian terrorists. In context, the Israeli attack on Osirak was just eight years after the Yom Kippur War and during a time of constant terrorist threats. In light of this history, it would seem callous to declare that a tiny state such as Israel must only focus on the threat at hand, rather than on previous attacks and instances of aggression. For example, while it may not be justified or legal for a battered woman to kill her husband, it may be understandable for the woman to do so given the circumstances. Although there are clearly different considerations for a battered state to take into account, and while Israel's raid on Osirak may not satisfy Walzer's test, it would not be difficult to understand why Israel acted the way it did.¹⁴⁷ For these reasons, while the Israeli raid on Osirak may not have been a justified use of force, it would be a mistake to declare it an unjustified preventive use of force whose sole purpose was to prevent a shift in the balance of power.

The second reason that Israel's attack on Osirak may be understandable is that Israel unsuccessfully tried to negotiate a peaceful resolution.¹⁴⁸ This lack of success can be attributed to Iraq's signature on the Non-Proliferation Treaty and its cooperation, albeit limited, with the International Atomic Energy Agency ("IAEA"), which seemed to give Iraq the benefit of the doubt in the eyes of the international community.¹⁴⁹ The fact that there was very little Israel could do diplomatically,¹⁵⁰ and the fact that Israel did not have a truly fool-proof second strike capability until

¹⁴⁷ Michael Skopets, Comment, *Battered Nation Syndrome: Relaxing the Imminence Requirement of Self-Defense in International Law*, 55 AM. U. L. REV. 753, 769 (2006).

¹⁴⁸ MCCORMACK, *supra* note 126, at 107-09.

¹⁴⁹ *Id.* at 109.

¹⁵⁰ Iraq refused to participate in any forum or any agreement with Israel. *Id.* at 107.

2003,¹⁵¹ made the military solution seem like the only option to remove the alleged nuclear threat. The last prong of Walzer's test—whether waiting will magnify the risk—is clearly satisfied here. Once the reactor was operational, an attack on it would have exposed Iraqi civilians to significant danger. Thus, it was a question of “now or never.”¹⁵² Israel chose the former option and it would be foolhardy to imagine that any other country in similar circumstances would have chosen the latter option. The last prong of Walzer's test is further proven by comparing Israel's situation in 1981 to its situation in 1967. The Six Day War was a justified war because, while Nasser's intent to injure Israel may have been distant, the military buildup placed Israel in substantial danger of being attacked at any time. Likewise, Hussein possessing a nuclear weapon would have put Israel in imminent danger of being bombed at any time. Thus, while MAD may hypothetically deter Hussein initially, this deterrence would last only until he believed he could get away with bombing Israel.

4. *Force Short of War: The Cuban Missile Crisis*

In October 1962, the Soviet Union installed medium-range, nuclear-armed ballistic missiles in Cuba, just ninety miles from the United States.¹⁵³ After a heated debate, the Kennedy Administration instituted a naval blockade of Cuba, which they called a quarantine, and demanded the missiles' removal.¹⁵⁴ Although a blockade is normally considered an act of war under the Charter, the Kennedy Administration sought to justify its actions under a collective security framework, arguing that the blockade was authorized by the Organization of American States under Articles 52 and 53 of the Charter.¹⁵⁵

The Security Council debates seemingly ignored the United States' justification and instead focused on whether the quarantine was a lawful exercise of self-defense.¹⁵⁶ Likewise, for Just War theorists, the deployment of nuclear weapons to Cuba and the subsequent American response must be viewed through the lens of preemptive self-defense. Undoubtedly, the nuclear weapons in Cuba were a threat to the United States, since their placement in Cuba reflected a strategic shift in favor of the Soviet Union. However, the more pertinent question is whether this deployment translated only into a shift in the balance of power or whether it would have put the United States under the continuous threat of war, just as it did the Israelis in 1967. In light of the fact that MAD rendered neither the Soviet Union nor the United States willing to attack the other directly prior to the Cuban Missile Crisis, there seems to be no reason now to believe this doctrine obsolete. Furthermore, the placement of nuclear weapons in Cuba would

¹⁵¹ Peter Beaumont & Conal Urquhart, *Israel Deploys Nuclear Arms in Submarines*, THE OBSERVER, Oct. 12, 2003, available at <http://www.guardian.co.uk/world/2003/oct/12/israel1>.

¹⁵² ARGUING ABOUT WAR, *supra* note 78, at 147.

¹⁵³ William C. Bradford, Symposium, The Changing Laws of War: Do We Need a New Legal Regime After September 11?, “The Duty to Defend Them”: A Natural Law Justification for the Bush Doctrine of Preventive War, 79 NOTRE DAME L. REV. 1365, 1403 (2004).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1404–05.

¹⁵⁶ *Id.* at 1405 (indicating that, although the Charter renders preemptive self-defense illegal, member states continue to see it as a viable and justified option).

not have placed the United States under the continuous threat of war, since the Soviets were interested in a strategic advantage, not nuclear war. Thus, under the preemption test, any attempt to destroy the nuclear weapons in Cuba would be preventive and therefore unjustified, since the goal would be to prevent a change in the balance of power, and not to preempt a probable attack. Additionally, any strike on or war with Cuba would have been unjustified because, after the institution of the quarantine and subsequent negotiations, the Soviet Union agreed to remove the missiles in Cuba if the United States removed nuclear missiles from Turkey. While there may be some debate as to whether the force short of war that was utilized during the crisis was justified or legal, that is beyond the scope of this article. It is enough to say that the quarantine may have been justified in order to prevent a future war, and as such, furthers the purpose of Just War Doctrine and cannot be condemned outright.

IV. CASE STUDY: A PROPOSED ATTACK ON IRAN

In late 2002, an exiled Iranian opposition group reported that Iran was hiding a secret nuclear energy program and intended to develop nuclear weapons.¹⁵⁷ Although American neo-conservatives and certain Israeli politicians had been pushing for regime change in Tehran for many years, the discovery of this clandestine program and the subsequent election of hard-line Iranian president, Mahmoud Ahmadinejad, gave these individuals the needed boost to convince President Bush of the need to invade Iran once the invasion of Iraq was completed. This suspicion of Iran is not limited solely to these individuals; rather, Ahmadinejad's provocative questioning of the Holocaust and his virulent statements that Israel should be eliminated have caused serious concern in the West over Iran's intentions.

In order to determine whether a strike on Iran's nuclear facilities would be preemptive and thus justified, or preventive and unjustified, it is first important to evaluate the history of relations between Iran and those threatening an attack, America and Israel. The relationship of these three nations can be thought of as triangular. When one relationship prong is on the rise, it is likely that the other relationship prong may be on the wane, and vice versa. Indeed, when America's relationship with Iran was souring in the 1980s, Israel's relationship with Iran was getting better, and Israel was urging America to reconcile with Iran. Conversely, at the end of the Cold War, it was Israel that wanted to scuttle American-Iranian rapprochement out of concern over the decline of American-Israeli relations. By evaluating this history, it will be possible to derive a few fundamental conclusions about this triangular relationship that will clarify the debate over the justness or unjustness of eliminating Iran's nuclear capacity.

¹⁵⁷ *Chronology of Iran's Nuclear Program*, HAARETZ.COM, Dec. 2, 2007, available at <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=930004&contrassID=1&subContrassID=1> [hereinafter *Chronology*].

A. THE TRIANGULAR RELATIONSHIP

Although the Islamic Republic of Iran proclaims its foreign policy to be motivated by religion, a survey of this policy reveals that the radical rhetoric does not often match its actions. Whenever ideological convictions and strategic considerations conflict, the Islamic Republic seems to always choose the latter. Those who push for regime change in Tehran seem to take Iran's rhetoric at face value and thus conclude that Iran is irrational and undeterrable. However, the Islamic Republic of Iran is attempting to achieve the same regional and economic dominance that the American-backed Shah, the ex-emperor of Iran, tried to achieve during his reign. Indeed, the current enmity between Iran and Israel is not due to the ideological change in Iran's government, but to geopolitical occurrences, namely the end of the Cold War and the destruction of Iraq's army in the Persian Gulf War. Ultimately, the parties are the same, but the world changed.

Iranian national identity has been shaped over the past century by real and perceived foreign powers' subjugation of their country. Although not the first instance of outside aggression against Iran, the lessons of World War II impressed upon Iranians the need to become a regional superpower. During World War II, because the Shah Mohammad Reza refused to allow the Allies access to Iran's territory, the British and the Soviet Union invaded the country, deposed the Shah, and installed as the country's ruler, his son, Shah Mohammad Reza Pahlavi.¹⁵⁸ The new Shah believed that Iran was not only destined to be a regional superpower, but that it deserved to be as a result of Iran's enormous population and economic potential. Thus, the Shah's American orientation during the Cold War was designed to allow Iran to achieve its rightful place in the world and to prevent its old enemy Russia (the Soviet Union) from pulling Iran towards its orbit.¹⁵⁹

Iran, like Israel, has rarely had friendly relations with the Arab "interior" of the Middle East, and, as a result, the two countries had a secret relationship during the Cold War based upon the Periphery Doctrine.¹⁶⁰ This doctrine holds that Iran and Israel would be stronger by building relationships with the non-Arab "periphery" of the Middle East, since the Arab interior is hostile to non-Arabs.¹⁶¹ However, as Iran would need to cooperate with the Arabs if it ever desired to be the regional superpower, Iran never granted *de jure* legitimacy upon Israel.¹⁶²

Despite their common enemies, Israel always needed Iran more than Iran needed Israel. Because Iran, under the Shah, wanted to be the *only* regional superpower, Iran never wanted Israel to get too strong and was

¹⁵⁸ KENNETH M. POLLACK, *THE PERSIAN PUZZLE: THE CONFLICT BETWEEN IRAN AND AMERICA* 38 (Random House 2004).

¹⁵⁹ TRITA PARSİ, *TREACHEROUS ALLIANCE: THE SECRET DEALINGS OF ISRAEL, IRAN, AND THE UNITED STATES* 20–22 (Caravan 2007).

¹⁶⁰ *Id.* at 21–22.

¹⁶¹ *Id.*

¹⁶² *Id.* at 21. However, in the early 1950s Iran's nationalist Prime Minister Mosaddeq did grant it *de facto* recognition. *Id.*

covetous of Israel's strong relationship with the United States.¹⁶³ Thus, after the Six Day War, when Israel appeared stronger than before, Iran revived relations with the Arab countries and criticized Israel's occupation of Arab territories.¹⁶⁴ In order to achieve the top spot in the Middle East, Iran often played Israel and the Arabs against each other.¹⁶⁵ In the Yom Kippur War of 1973, despite Iran's official neutrality, the Shah neglected his secret friendship with Israel and supported the Arabs in their surprise attack because he viewed the Arab's cause of reacquiring lost territory as justified.¹⁶⁶ However, after the war, indicating the one-sidedness of the relationship, Israel still purchased oil and weapons from Iran.¹⁶⁷ Even though Iran needed Israel to offset the Arabs, the Shah frequently considered Israel a liability, as his relationship with it impeded peace with the Arabs, a prerequisite to becoming the region's dominant power.

As a result of his increasing megalomania, the Shah made many strategic decisions that were harmful to Iran's interests and paralyzed Iran's government.¹⁶⁸ Ultimately, the Shah was exiled in 1979, and the Islamic Republic was founded. Things would never be the same between Iran and Israel. Yet, Israel believed that very little had changed and that the region's common threats would unite the two nations regardless of the Islamic Republic's official delegitimization of Israel.¹⁶⁹

The American-Iranian relationship has followed a clearer path than that of Israel's complicated relationship with Iran. The Iranian Prime Minister Mossadeq was deposed in an American-backed coup in 1953, and the previously-weak Shah was installed as emperor. In order to prevent the Soviet Union from invading Iran and bringing it into the Communist camp, America consistently backed the Shah.¹⁷⁰ Although many in the West saw him as an "enlightened dictator" on account of his modernization programs, the Shah was a brutal dictator nonetheless, and, by the late 1970s, protests mounted to force him from power.¹⁷¹ Ultimately, the Shah left Iran in 1979¹⁷² and the Ayatollah Ruhollah Khomeini, an exiled cleric and a fiery critic of the Shah and everything the Shah stood for, including his ties to America and Israel, returned to Iran to great jubilation and fanfare.¹⁷³ Although the revolution was a broad-based movement, with some estimating that nearly ten percent of the nation participated in

¹⁶³ *Id.* at 23, 39.

¹⁶⁴ *Id.* at 30-31.

¹⁶⁵ PARSİ, *supra* note 159, at 45.

¹⁶⁶ *Id.* at 46.

¹⁶⁷ *Id.* at 47.

¹⁶⁸ *Id.* at 54-55, 64, 66-67. Iraq, the primary threat to both Iran and Israel, entered into an accord with Iran whereby Iran acquired coastal territory in return for the cessation of the joint Iranian and Israeli operation in Northern Iraq to train Kurdish guerrilla insurgents. However, it was widely recognized that the agreement was not worth the paper it was written on—a sentiment that would later prove true when Iraq attacked Iran. *Id.* at 54-55. Iran also supported the Arab-led UN initiative to label Zionism, the founding doctrine of Israel, equivalent to racism. Israel was not happy about the Shah's support of this resolution. *Id.* at 64.

¹⁶⁹ *Id.* at 91.

¹⁷⁰ POLLACK, *supra* note 158, at 66-67.

¹⁷¹ *Id.* at 122.

¹⁷² *Id.* at 135.

¹⁷³ *Id.* at 141.

demonstrations and strikes,¹⁷⁴ the Ayatollah prompted the institution of the Islamic Republic via an ambiguous referendum and subsequently pushed aside groups with differing ideologies, including secularists, leftists, and military supporters of the Shah.¹⁷⁵

Khomeini cut all ties to Israel, but despite couching his language in religious terms, he wanted exactly what the Shah wanted: regional dominance. Khomeini sought to achieve these goals in two ways: through a more distant friendship with America and by appealing to the Arab masses.¹⁷⁶ In fact, Iran had diplomatic relations with the United States for the first year after the revolution (which Khomeini saw as the key to regional dominance), but a hostage crisis planned by more radical elements changed his plan.¹⁷⁷

Although many American politicians couch their disdain for the Islamic Republic in terms of the regime's oppressive nature and the anti-Americanism it espouses, American revulsion of Iran can be traced to the hostage crisis of 1979–1980 as well as to the Iranian-sponsored bombings and kidnappings of Americans in Lebanon during the 1980s. In 1979, with the 1953 American-backed coup in the front of their minds, several hundred Iranian students attacked the American embassy in Tehran and held 52 American diplomats hostage for 444 days.¹⁷⁸ The stated goal, other than to humiliate America, was to prevent the Americans from having a base from which to overturn the revolution.¹⁷⁹ After a failed American rescue attempt, the hostage crisis finally ended in 1981, at the exact moment that President Carter left office, and served as a final humiliation for his presidency.¹⁸⁰ Although most American citizens probably do not realize the roots of their disdain for Iran, other than their politicians' simplistic and overblown slogans, the humiliation of being unable to free the American hostages "left a terrible scar on the American psyche" and has continued to affect American perceptions of Iran.¹⁸¹

Iran's attempts to appeal to the Arab masses and incite Islamic revolution in the Arab states was not successful on account of Iran's Shiite background, while Iran's standing in the international community was significantly diminished by the hostage crisis.¹⁸² Seeking friendship with the United States as a lost cause, yet, out of fear of the Soviet Union's territorial ambitions, Iran and Israel sought to rekindle their past friendship. With that intent, Israel shipped to Iran tanks that were previously sent to Israel by the Shah to be refurbished.¹⁸³ Israel used Iran's isolation and fear to its advantage, and, on the eve of Iraq's invasion of Iran in 1980, the Periphery Doctrine was making a return.¹⁸⁴

¹⁷⁴ *Id.* Other revolutions, such as the French Revolution, had only one to two percent participation.

¹⁷⁵ *Id.* at 152.

¹⁷⁶ PARSİ, *supra* note 159, at 88–89.

¹⁷⁷ *Id.* at 89–90.

¹⁷⁸ POLLACK, *supra* note 158, at 153.

¹⁷⁹ *Id.* at 154.

¹⁸⁰ *Id.* at 172.

¹⁸¹ *Id.*

¹⁸² PARSİ, *supra* note 159, at 94.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

Yet, despite Israel's attraction to Iran and its pleas to America to ignore Iran's rhetoric,¹⁸⁵ the Americans were eager to inflict punishment on the Iranians, and so supplied Hussein with funds and, indirectly, weapons, both conventional and chemical, in the Iran-Iraq War.¹⁸⁶ Iran's only ideological victory in the Arab world was in Lebanon, where the nation's majority Shiite population, angered by the American troop presence, engaged in a bombing and hostage-taking campaign, killing and injuring hundreds of American soldiers and civilians in the process. However, Iran's support for Hezbollah, the Lebanese Shiite group responsible for this campaign, was meant to control the Arabs and get the Americans to realize Iran's importance,¹⁸⁷ not to destroy Israel, who overstayed its initial warm welcome in Southern Lebanon, where the majority of Shias lived.¹⁸⁸ During this period, Israel continued to provide Iran with weapons,¹⁸⁹ cooperated with Iran on the bombing of Osirak,¹⁹⁰ and pressured the United States to engage Iran, instead of supporting Iraq in the Iran-Iraq War.¹⁹¹ Israel was also instrumental in pressuring Iran to release American hostages in return for American weapons during the Iran-Contra Scandal.¹⁹²

Nothing proves the Islamic Republic's failure to translate radical rhetoric into actions more than Iran's stance on Israel. Khomeini and others in the Islamic Republic rarely missed an opportunity to demonstrate their Islamic credentials by denying Israel's right to exist. However, in private, Khomeini stated that if the Palestinians were to come to an agreement with the Israelis, the Iranians would recognize Israel as well.¹⁹³ Thus, while the Iranians were publicly escalating their criticism of Israel, privately, cooperation between Iran and Israel in the 1980s increased.¹⁹⁴ Furthermore, proof that strategic considerations were more important to Iran than ideology can be seen in Iran's lack of support for Hezbollah during the Iran-Iraq War, which increased Hezbollah's frustration with Iran for not supporting the fight against Israel.¹⁹⁵ During the Cold War, Iran and Israel needed each other more than ever: Iran needed Israel to bring Washington to terms with Iran, and Israel needed Iran as a bulwark against Arab and Soviet threats.¹⁹⁶

A common theme in American-Iranian relations is the reoccurring American propensity to reject Iranian goodwill gestures or to renege on a promise to repay these gestures in kind. Iran was more isolated after the Iran-Iraq War and attempted to curry favor in Washington by pressuring Hezbollah to release American hostages.¹⁹⁷ President George H.W. Bush promised Iran that their relations would change if the hostages were

¹⁸⁵ *Id.* at xi (Preface), 110.

¹⁸⁶ POLLACK, *supra* note 158, at 207.

¹⁸⁷ PARSİ, *supra* note 159, at 111–12.

¹⁸⁸ *Id.* at 103.

¹⁸⁹ *Id.* at 106.

¹⁹⁰ *Id.* at 107.

¹⁹¹ *Id.* at 110.

¹⁹² POLLACK, *supra* note 158, at 208.

¹⁹³ PARSİ, *supra* note 159, at 102.

¹⁹⁴ *Id.* at 100–01.

¹⁹⁵ *Id.* at 103.

¹⁹⁶ *Id.* at 115.

¹⁹⁷ *Id.* at 133.

released, but Bush went back on his word and did not follow through with any concrete steps once the release occurred.¹⁹⁸

With the end of the Cold War and the American victory against Iraq in the Persian Gulf War, the circumstances changed for Iran, to the point that it no longer had to fear the Soviet Union. It now felt, however, even more threatened by America's more prominent power in the region.¹⁹⁹ Israel was concerned that, with Iraq subdued, the United States would ally itself with Iran, since it would be a better ally in the region than Israel, since it had the population and size to be a regional power.²⁰⁰ Consequently, Israel urged the United States not to talk with Iran, and Iran subsequently was excluded from Israeli-Palestinian negotiations.²⁰¹ Additionally, with the Cold War over and the formerly pro-Soviet Arab countries warming up to Washington, Israel recognized that it needed something to bind Israel and America together. Thus, in only what can truly be called a "manufactured" threat, Israel started sounding the alarm²⁰² about Iran, despite the fact that Iran didn't consider Israel a serious threat worthy of its attention and was more concerned about Iraq's army, which had been purposefully left in place by the Americans as a bulwark against Iran.²⁰³

Throughout the 1990s, Iran only took active political and military steps against Israel and America whenever it appeared that Israeli-Palestinian or Israeli-Arab peace might take hold and transform the Middle East.²⁰⁴ The strategic implications were clear: an Israel at peace with its Arab neighbors and in charge of a "New Middle East," as the Israelis were advocating, would necessarily be at the expense of Iran. Thus, the combination of Iran's exclusion from determining the future of the Middle East and Israel's warning about the Iranian threat when there was none created a self-fulfilling prophecy where Iran saw that it had little choice but to act as a spoiler in order to achieve its goal, which was the same as the Shah's goal: strategic dominance. Thus, Iran's military support of Hezbollah's attacks on Israeli and worldwide Jewish targets dates only to the beginning of the Oslo Peace Accords. Attacks increased as peace became more likely, and attacks diminished or ended completely when prospects for peace dimmed.²⁰⁵ Reformist Iranian President Khatami's tenure from 1997–2005 presented an opening for relations to develop amongst the three countries, but ultimately this hope was dashed by radical elements within the Iranian government.²⁰⁶

Among the few positive developments to come out of the Al-Qaeda terrorist attacks of 2001 was a brief warming of relations between America and Iran. Iran realized that the terrorist attacks had fundamentally shifted America's focus into an offensive gear and that there was a prime

¹⁹⁸ *Id.* at 134.

¹⁹⁹ PARSİ, *supra* note 159, at 142, 147.

²⁰⁰ *Id.* at 149.

²⁰¹ *Id.* at 151, 159.

²⁰² *Id.* at 167.

²⁰³ *Id.* at 170.

²⁰⁴ *Id.* at 174.

²⁰⁵ PARSİ, *supra* note 159, at 215, 220.

²⁰⁶ *Id.* at 202.

opportunity to not only make peace with America and Israel, but possibly even ally with the world's only superpower. Hillary Mann, a Middle East policy expert at the National Security Council under President George W. Bush, had been meeting with an Iranian diplomat to the UN prior to the terrorist attacks. After the attacks, the Iranian diplomat told Mann that Iran was ready to cooperate unconditionally, which had been the United States government's continuing demand of Iran before public talks could take place.²⁰⁷ The Iranian government officially committed itself to helping the United States in the war in Afghanistan and simultaneously had "very public and warm discussions" on setting up Afghanistan's new government.²⁰⁸ Inspired by Iran's changed attitude, Mann and Colin Powell, the Bush Administration's Secretary of State, developed a "road map" geared towards eventually normalizing relations with Iran and other "rogue nations" that were sympathetic to, or possibly afraid of, America's retaliation after the attacks.²⁰⁹ When Powell took the idea to the White House, the administration's neo-conservatives and hard-liners rejected it and instead stated that "[i]f a state like . . . Iran offers specific assistance, we will take it without offering anything in return. We will accept it without strings or promises. We won't try and build on it."²¹⁰ The Iranians did not help the United States in Afghanistan solely because it was good for Iran, although it is undeniable that predominantly Shiite Iran opposed and even threatened war against the Taliban, the fervently anti-Shia, de facto, radical Sunni Islamic government of Afghanistan. However, the Iranians specifically stated that they understood how fundamentally the terrorist attacks had an impact on the United States and that, if Iran offered unconditional aid, then this would be the best way to "change the dynamic" between the two nations.²¹¹

The brief warming of relations between Iran and America suddenly chilled when a ship carrying weapons bound for the Palestinian Liberation Organization was intercepted by Israeli forces claiming the weapons were from Iran.²¹² Although no evidence was ever presented²¹³ and "[t]he Iranian government probably didn't even know about the arms shipments,"²¹⁴ President Bush, in his 2002 State of the Union speech, linked Iran with Iraq and North Korea in the now notorious, "Axis of Evil." This label surprised the Iranians, since they had just helped the Americans in Afghanistan and had offered to engage in unconditional talks.²¹⁵ The dialogue between Iranian and American diplomats continued, however, in what can only be understood as a showing of good faith.²¹⁶

²⁰⁷ John H. Richardson, *The Secret History of the Impending War with Iran that the White House Doesn't Want You to Know*, ESQUIRE MAGAZINE, Oct. 18, 2007.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ PARSI, *supra* note 159, at 233–34.

²¹⁴ Richardson, *supra* note 207.

²¹⁵ *Id.*

²¹⁶ *Id.*

As a further example of Iran's serious attempt to improve relations with America, in 2003, Iran secretly gave Mann an outline of a peace proposal, which offered dramatic concessions, such as giving up its nuclear program, ending support for Palestinian and Lebanese terrorist groups, and recognizing Israel.²¹⁷ Iran also gave a similar proposal to Israel that would effectively de-link Iran and Israel from the triangular relationship with America and that would ensure that each could dominate their respective corners of the Middle East.²¹⁸ The Bush Administration decided, along with Israel, to ignore it.²¹⁹ Instead, rumors started to emerge that the Bush Administration was planning "efforts to destabilize the Iranian government and even to promote a popular uprising."²²⁰ Thus, at the height of its power, the Bush Administration seemed to think that it could accomplish regime change instead of having to accommodate the Islamic Republic. The result of this, Mann stated, would leave an "Iran that has nuclear weapons and no dialogue with the United States."²²¹ Ultimately, as a result of America's predicament in Iraq and Israel's continual struggle with Hamas and Hezbollah, the tables are now turned, and Iran is ascendant, while Israel and America are bogged down and unable to exert their power over Iran.

B. HISTORY OF THE IRANIAN NUCLEAR PROGRAM

Since the discovery of the existence of Iran's nuclear program by the rest of the world in late 2002, there has been a debate over whether a military effort should be launched to destroy Iran's nuclear facilities, even though the Shah signed the Nuclear Non-Proliferation Treaty ("NPT"), which, although prohibiting military use, allows for civilian nuclear research.²²² The fact, however, that Iran kept its program secret, combined with Ahmadinejad's radical rhetoric, is the root of other nations' concern.

It is difficult to determine whether Iran is cheating on their NPT commitments because the line separating a nuclear weapons program from a nuclear energy program is extremely thin.²²³ One component separating a civilian from a military program is the level of uranium enrichment.²²⁴ Uranium that is enriched to a low level is suitable for electrical power, but highly enriched uranium can be used to fuel a nuclear weapon.²²⁵ Another boundary between civilian and military programs is the weapon's design, which only has military applications.²²⁶ The weapons design is considered the easier aspect of building a nuclear bomb.²²⁷ The American designers of the first atomic bomb, for example, were so sure of their design, that they

²¹⁷ *Id.*

²¹⁸ PARSİ, *supra* note 159, at 250–51.

²¹⁹ Richardson, *supra* note 207.

²²⁰ *Id.*

²²¹ *Id.*

²²² Christopher de Bellaigue, *Big Deal in Iran*, 51 N.Y. REV. OF BOOKS, Feb. 26, 2004 [hereinafter *Big Deal in Iran*].

²²³ William J. Broad, *The Thin Line Between Civilian and Military Nuclear Programs*, N.Y. TIMES, Dec. 5, 2007.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

didn't even test it before using it on Japan.²²⁸ To date, there has been no discovery of a continuing secret weapons program in Iran. The present controversy relates to the extent of uranium enrichment and whether, one day, Iran intends to turn this enrichment capability into a nuclear weapon.

In late 2003, the IAEA demanded that Iran give up uranium enrichment.²²⁹ Iran agreed to disclose all of its nuclear activities and signed an "additional protocol" allowing IAEA inspectors to make snap inspections of suspected sites.²³⁰ According to the IAEA, Iran was not violating its NPT duties by building a uranium enrichment plant or a heavy water facility.²³¹ However, Iran was acting suspiciously—its answers to outstanding questions were combinations of "outright 'lies' and admissions that were calibrated to get the international community off its back."²³² Iran's acceptance of the additional protocol was a retreat nonetheless, because Iran had accepted a dictate from an outside power. For more than two years Iran suspended enrichment,²³³ but in early 2006 Iran began enrichment activities again.²³⁴ In March 2006, the IAEA reported Iran's violations to the Security Council. Since then, there have been three rounds of sanctions imposed on Iran intended to curb its enrichment.²³⁵ Mohammed ElBaradei, the head of the IAEA, said, "I can't say that the Iranian program is peaceful."²³⁶ However, the IAEA had been unable to find "any diversion of nuclear material to nuclear weapons or other nuclear explosive devices."²³⁷ Yet, questions persist: Iran has not provided adequate information about its enrichment program, the role of the Iranian military is "ambiguous," and the Iranians were found to have possessed a document, which they claim was unsolicited, that investigators claim is helpful in "the fabrication of nuclear weapons components."²³⁸

In a shocking reversal of a previous report, the American intelligence community issued a combined report of the sixteen intelligence agencies, the National Intelligence Estimate,²³⁹ stating with "high confidence" that Iran halted its nuclear weapons program in 2003 "primarily in response to increasing international scrutiny and pressure," namely the invasion of Iraq.²⁴⁰ The report also stated with "moderate confidence" that Iran would not be "technically capable" of enriching enough uranium for a nuclear weapon, a benchmark entirely separate from building the bomb itself, until 2010–2015.²⁴¹ Furthermore, the report concluded that Iran's "decisions are

²²⁸ *Id.*

²²⁹ *Big Deal in Iran*, *supra* note 222.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ Christopher de Bellaigue, *Iran and the Bomb*, 53 N.Y. REV. OF BOOKS, Apr. 27, 2006 [hereafter *Iran and the Bomb*].

²³⁴ *Id.*

²³⁵ *Chronology*, *supra* note 157.

²³⁶ *Iran and the Bomb*, *supra* note 233.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ National Intelligence Council, *National Intelligence Estimate—Iran: Nuclear Intentions and Capabilities*, Nov. 2007.

²⁴⁰ Fred Kaplan, *Nuclear Meltdown: We're Not Going to Bomb Iran*, SLATE.COM, Dec. 3, 2007, <http://www.slate.com/id/2179084/>.

²⁴¹ *Id.*

guided by a cost-benefit approach rather than a rush to a weapon irrespective of the political, economic, and military costs.”²⁴² To use the language of puzzles and mysteries, the conclusion about the weapons program is a puzzle, which was seemingly solved but which could be reopened if new information presented itself, and the conclusion about Iranian decision-making is a mystery, since it involves judging an opponent’s intentions. Many criticized the report for drawing conclusions to a mystery, but it would seem that this is the entire purpose of having intelligence agencies, and having these agencies present unanalyzed information to decision-makers seems like a poor idea. It is more likely that those who condemned the report simply disagreed with the inference that the Islamic Republic is not an inherently “evil” regime or that it might be effective to negotiate with the Iranians. A more valid criticism is that the report only concerned itself with Iran’s capability of building nuclear warheads, not with Iran’s declared civilian work.²⁴³ Such a narrow definition is problematic and does not rule out Iran mastering the difficult enrichment phase of building a bomb, which also has civilian applications, before embarking upon the relatively easier aspect of designing the warhead.

The controversy over Iran’s nuclear weapons program was quickly reignited when the IAEA publicly disclosed information that put the NIE’s conclusions in doubt.²⁴⁴ ElBaradei reported that Iran was previously engaged in nuclear work that is “not consistent with any application other than the development of a nuclear weapon.”²⁴⁵ While it is known that this nuclear work continued for a few months after the time that the NIE claimed it stopped,²⁴⁶ it is believed that the work, whether it amounted to a nuclear weapon design or not, was eventually suspended and remains suspended to this day. However, Iran’s insistence on further uranium enrichment and its rapidly progressing mastery of this process requires that Iran’s civilian nuclear program be scrutinized closely and continuously.²⁴⁷

Thomas Fingar, chairman of the National Intelligence Council, the entity that wrote the NIE, later defended the NIE and stated that if he had known that the document would be made public, he would have written it differently.²⁴⁸ Instead, he would have written:

You can’t have a bomb unless you have fissile material, [and] the Iranians continue to develop fissile material. A weapon is not much good if you can’t deliver it—they have a missile-development program. But you don’t

²⁴² Mark Mazzetti, *U.S. Report Says Iran Halted Nuclear Weapons Program in 2003*, INT’L HERALD TRIB., Dec. 3, 2007, available at <http://www.iht.com/articles/2007/12/03/america/cia.php>.

²⁴³ William J. Broad & David E. Sanger, *Meeting on Arms Data Reignites Iran Debate*, N.Y. TIMES, Mar. 3, 2008 [hereinafter *Meeting on Arms Data Reignites Iran Debate*].

²⁴⁴ David E. Sanger, *Agency Confronts Iran with Evidence on Weapons*, N.Y. TIMES, Feb. 22, 2008.

²⁴⁵ *Meeting on Arms Data Reignites Iran Debate*, *supra* note 243.

²⁴⁶ *Iran Papers Imply Atomic Subterfuge*, L.A. TIMES, Mar. 2, 2008, at A4.

²⁴⁷ *Iran Stepping Up Its Uranium Work*, N.Y. TIMES, Feb. 25, 2008.

²⁴⁸ Interview by Greg Bruno with Thomas Fingar, Chairman of the National Intelligence Council, *Fingar: Iran Nuclear Assessment Strong, Framing of Argument Wasn’t*, Mar. 19, 2008, available at <http://www.cfr.org/publication/15759/fingar.html>.

have a bomb unless you can produce a device and weaponize it. That's what's stopped.²⁴⁹

Although there may have been illegal nuclear weapons development in the past, and although uranium enrichment continues today, the aspects of Iran's nuclear program that violate the NPT have ceased.

C. CASE STUDY ANALYSIS

Iran's nuclear program is threatening to both Israel and the United States. An Iran with a nuclear weapon or the capability to produce one would utterly destroy Israeli military supremacy and would prevent it from deterring Palestinian and Lebanese militants.²⁵⁰ Accordingly, the United States would feel compelled to cut a deal with Iran that would enable Iran to be recognized as the regional power, which would allow Iran to gain a strategic advantage at Israel's expense.²⁵¹ Neoconservatives and far-right Israeli politicians contend that Iran plans to use a nuclear weapon against Israel, and that MAD will not work with the Islamic Republic. An Iranian nuclear weapon or the capability to produce one would force the United States to shift its policies away from Israel and its Arab allies and towards Iran. Since American politicians view Iran with such disgust, this is a threat in itself and would undoubtedly be seen as nuclear blackmail.

For the purposes of the preemption test, it must first be determined whether America or Israel will undertake to change the regime in Iran or strike Iran's nuclear facilities. It would seem logical that the least intrusive means of removing a nuclear threat would be the most justified, and, therefore, strikes would be preferred to regime change. On the other hand, a strike on the nuclear facilities would not only damage surrounding civilian areas, but would also disperse nuclear contamination across Iran. However, in light of the fact that America's military is bogged down in Iraq and Israel's air force would be unable to reach Iran,²⁵² if any attack would be launched, it would most likely be an air strike by the United States Air Force, although a joint Israeli-American attack cannot be ruled out. Additionally, there is no reason to believe that regime change would prevent Iran from acquiring a nuclear weapon.²⁵³ A secular regime would be just as likely to strive to be the regional superpower. It is not the nature of the Islamic Regime that drives its conflict with Israel or America; rather, it was the geopolitical changes that occurred at the end of the Cold War.²⁵⁴ For these reasons, I will only evaluate the justness or unjustness of either an American or Israeli strike on Iran's nuclear facilities and will, accordingly, begin with the preemption test's second prong.

²⁴⁹ *Id.*

²⁵⁰ PARSİ, *supra* note 159, at 272.

²⁵¹ *Id.*

²⁵² *Id.* at 278.

²⁵³ *Id.* at 274.

²⁵⁴ *Id.*

1. *Second Prong: Active Preparation*

As of March 2008, it is unclear what Iran's intentions are. It is undisputed that Iran continues to enrich uranium as fast as is technologically feasible. Thus far, Iran has hewn toward the civilian side of uranium enrichment and has not enriched uranium to the levels necessary for military use. Additionally, from all available evidence, Iran may have had a weapons program in the past but suspended it in 2003 or shortly thereafter, coinciding with the Iraq War. While it is possible that Iran completed the easier step of weapons design before even beginning to enrich uranium, there is no evidence to indicate that this occurred.

Iran's elusiveness and suspicious behavior could indicate a third possibility, taken straight out of the Israeli playbook: Iran could be attempting nuclear ambiguity—that is, Iran's nuclear program is neither completely civilian nor completely military.²⁵⁵ It could be that Iran would like the option of one day producing a nuclear weapon but has not yet made the affirmative decision to do so.²⁵⁶ By learning how to enrich uranium for use in a nuclear weapon, but not yet mastering the weaponization aspect, Iran could remain within the NPT while retaining the option to go nuclear upon short notice. While there may be very little difference in terms of the threat, the fact that Iran may be technically complying with the NPT indicates a deficiency with the NPT, not with Iran's behavior. However, for the purposes of Just War Doctrine, the ability to quickly make a nuclear weapon is almost as significant a threat as having one completed. Having the capability most likely satisfies the second prong, although it will have implications for the third prong, as there would still be time to forestall a nuclear attack if Iran had not yet completed the weaponization aspect.

2. *First Prong: Manifest Intent to Injure*

As it is entirely within the realm of possibility that Iran could acquire a nuclear weapon in the near future, one must determine whether Iran possesses the manifest intent to use this hypothetical nuclear weapon against either Israel or the United States, or whether it is intended to be used to shift the balance of power in Iran's direction. This inquiry will supply an answer to a mystery, and will encompass three related questions: (1) Is the reason for acquiring a nuclear weapon offensive or defensive?; (2) Is the Islamic Republic of Iran inherently anti-Israel and/or anti-American?; and (3) Is Iran a rational actor that can be deterred from using a nuclear weapon if it acquires one?

The best answer to the first two related inquiries is that the Islamic Republic is not inherently anti-American or anti-Israel, since ideology gave way to strategy multiple times in the past and that the desire for a nuclear capability in the current atmosphere reflects a purely defensive mindset, since achieving a nuclear weapon would force America and Israel to view Iran as an equal, deserving of respect and regional superpower status.

²⁵⁵ Christopher de Bellaigue, *Bush, Iran & the Bomb*, 52 N.Y. REV. OF BOOKS, Feb. 24, 2005 [hereinafter *Bush, Iran & the Bomb*].

²⁵⁶ *Id.*

Many commentators have posed the question, why does an oil-rich state like Iran need nuclear energy at all? Although it is possible that Iran is preparing for a time where all the oil wells have run dry, this does not explain the urgency of Iran's uranium enrichment activities. Yet, the better answer is that nuclear technology will both improve the economy by bringing in foreign investment and also be a testament to Iran's ingenuity and capability of being a regional power. It is curious that at a time when Iran produced more oil and domestic consumption was less than it is today, there was no question of why Iran needed nuclear technology when American President Gerald Ford offered the Shah the opportunity to purchase a nuclear reprocessing facility that would enable Iran to reprocess the materials for a nuclear weapon.²⁵⁷ Clearly, the problem that the West has with the Iranian nuclear program is not one of nuclear proliferation; the West has a problem with the Islamic Republic's regime, and questioning its need for nuclear energy is merely a distraction from the real issue.

As the history of Iranian-Israeli-American foreign relations indicates, Iran's ideology and radical rhetoric never truly explained its actions. Even when Iran actually followed through and encouraged its Lebanese or Palestinian proxies to attack Israel, this was seen not as an attempt to destroy the Jewish state, but rather to prevent the creation of an Israel-centric Middle East that would thereby exclude Iran. Furthermore, when Iran recently started following through with its rhetoric regarding America, the purpose seemed not to inflict tremendous injury, but rather to "ensure that the Americans are too harassed to be able to threaten" Iran.²⁵⁸ When evaluating Iran's stated foreign policy goals, it is impossible to ignore Iran's recent help in Afghanistan and Iraq, as well as its involvement in the Iran-Contra Scandal and its secret relations with Israel. Iran seeks to be a regional player, regardless of its leadership, and its actions can be explained with this in mind.

If Iran intended to destroy Israel and hurt the Americans, it seems odd, that, in 2003, Iran would offer both Israel and the United States everything each of them could possibly want from Iran, with the exception of regime change. Yet, instead of responding positively, as the Iranians expected, both the Israelis and the Americans believed that they could get a better deal—the end of the Islamic Republic. It is this American and Israeli goal that the Islamic Republic fears most. In fact, one could pose the question in the reverse and ask whether Israel and America are inherently anti-Islamic Republic. In light of the parties' responses, this seems to be the most logical answer. With this inference in mind, it only makes sense for the Iranians to develop a nuclear weapon in order to forestall an attack or invasion.²⁵⁹

²⁵⁷ PARSİ, *supra* note 159, at 267.

²⁵⁸ *Iran and the Bomb*, *supra* note 233.

²⁵⁹ If one only looks at the "axis of evil," one notes that Iran is in the middle of two extremes. America attacked Iraq, which did not have nuclear weapons and which was not building them, but negotiated with North Korea, which had a nuclear weapon and made no attempt to hide it. It only seems logical that if America views one's government as "evil," one would be more inclined to develop a nuclear weapon.

Since it would appear from this analysis that Iran is not inherently anti-Israeli or anti-American and its intentions are seemingly defensive in nature, the last question, whether Iran's leaders are rational, is still relevant, since past actions are not always an indication of a current leader's intentions, which truly can be a mystery. Iran's current President, Ahmadinejad, is on record making statements questioning whether the Holocaust took place and declaring that Israel should be wiped off the map. Although Iran's past leaders employed similar rhetoric to win over the Arab street population while simultaneously cooperating with Israel, there is no indication that similar cooperation is occurring behind the scenes at this time. It may be that Ahmadinejad is irrational and would use a nuclear weapon in a surprise strike on Israel, just as many feared Hussein would do. Noted scholar of the Middle East, Bernard Lewis, argues that:

Ahmadinejad's millenarian beliefs should undermine any assumption that if Iran gets nuclear weapons, the Middle East will be protected from nuclear catastrophe by the doctrine of mutually assured destruction (MAD) . . . [since he and his followers] "clearly believe" that the time for a "cosmic struggle" and "the final victory of the forces of good over evil" is nigh.²⁶⁰

Three arguments undermine this statement. First, there is no reason to believe that Ahmadinejad's rhetoric will be translated into policy since past rhetoric was always ignored in favor of strategic considerations. Second, Ahmadinejad has no control over Iran's foreign policy and would be nowhere near having his "finger" on the button of a nuclear weapon.²⁶¹ Despite his rhetoric, Ahmadinejad, and every other Iranian official who speaks on the topic has reiterated that Iran would only strike Israel if Israel struck Iran first.²⁶² Lastly, there is no evidence to assume that MAD would not work with Iran's leaders, for Lewis ascribed his belief "to a fractured and secretive state[,] a transparency of intent and an ideological rigidity that . . . [Iran] does not have."²⁶³ If Iran were to bomb Israel with nuclear weapons, which it said it would not do, Israel's second-strike response, not to mention the American response, would clearly devastate Iran. While a one-to-one ratio of nuclear bombs favor Iran due to Israel's small size, Israel's nuclear capacity would ensure that little of Iran would remain in the event of an Iranian nuclear strike. Even if Iran were to develop the capability to produce a nuclear weapon, it is not likely that it would use this capability as a form of nuclear blackmail, since a main component of Iran's quest for regional primacy is its economy, which undoubtedly would be devastated by European trade sanctions.²⁶⁴

Ultimately, it cannot be said that Iran has a manifest intent to use nuclear weapons on or against Israel or America. Iran is not inherently anti-Israeli or anti-American, since its main goal is to become a dominant regional player, and would do whatever is necessary to accomplish this

²⁶⁰ Christopher de Bellaigue, *Defiant Iran*, 53 N.Y. REV. OF BOOKS, Nov. 2, 2006.

²⁶¹ *Id.* See also Borzou Daragahi, *Iran's Inner and Outer Circles of Influence and Power*, L.A. TIMES, Dec. 31, 2007.

²⁶² *Iran and the Bomb*, *supra* note 233.

²⁶³ *Id.*

²⁶⁴ *Bush, Iran & the Bomb*, *supra* note 255.

goal. A nuclear attack on the other regional player, Israel, would not be conducive to this goal, since the response would be catastrophic. It also cannot be said that, if Iran were to develop a nuclear weapon, that it would be an offensive weapon, since Iran's entire foreign policy seems to be reactive to Israeli and American pressures to isolate it. Finally, to claim that the current Iranian leadership is suicidal and irrational, and is willing to use nuclear weapons first, despite the overwhelming nuclear response, is to make a claim that cannot be proven; and it assumes that these leaders are more radical and fundamental than the founder of the Islamic Republic, Ayatollah Khomeini, who acknowledged Israel's *de facto* right to exist and acted pragmatically with the Jewish state during his lifetime. Even Israel's current leaders do not claim that the Iranian leadership is suicidal or irrational: the acting Prime Minister of Israel, Tzipi Livni, has stated privately that an Iranian nuclear weapon would not be an existential threat to Israel.²⁶⁵

3. *Third Prong: Waiting Magnifies the Danger*

Since the first prong evaluating a manifest intent to injure was not satisfied, there is therefore no danger that could be magnified by waiting. However, if circumstances were to change and the first prong was met, there would then be the question of when it would be justifiable to strike at Iran's nuclear facilities. As mentioned previously, Iran may only be seeking to acquire *the capability* to produce nuclear weapons, not the weapons themselves. Such a capability would be almost as significant a deterrent as a nuclear weapon itself. Assuming that the intelligence indicated that Iran was seeking to weaponize, but had not yet embarked on the weapons design, and still assuming that the first prong had been satisfied, the proper time to strike at the facilities would be not at the first possible moment, but rather only after serious negotiations have taken place and failed. Since Iran sought America's and Israel's cooperation in the past, such a "grand bargain," if seriously negotiated, would have a reasonable chance of success. However, this is not the current situation, and the intricacies of what would comprise a "serious negotiation" need not be considered here.

4. *Battered Nation Syndrome*

Israel is a battered nation. This identity shapes Israeli leaders' responses to both real and perceived threats. Israel is also a tiny nation with very little strategic depth. These two factors combined mean that Israelis are less likely to refrain from acting when a genuine threat arises, such as the Iranian nuclear program, despite the injustice of any attack. However, unlike Israel's attack on Iraq's nuclear reactor, which was condemned but in time gained tacit approval by the international community, any Israeli attack on Iran's nuclear facilities at this time would not be understandable. When one considers Israel's rejection of Iran's 2003 "peace" proposal and

²⁶⁵ Gidi Weitz & Na'ama Lanski, *Livni Behind Closed Doors: Iran Nukes Pose Little Threat to Israel*, HAARETZ.COM, Oct. 25, 2007, available at <http://www.haaretz.com/hasen/spages/916758.html>.

that Israel shut Iran out of proposals to form a new Middle East and fabricated the Iranian threat in order to spur Israeli-Arab peace negotiations (when the threat did not exist and when a pragmatic relationship already existed), one comes to the conclusion that Israel is at least partly to blame for the deterioration in relations between the two nations. To attack a nation's nuclear facility when the attacked nation offered the attacking nation everything it wanted is not only unjust, it is incomprehensible under a theory of battered nation syndrome.

D. CONCLUSION

There is legitimate cause for concern when a declared civilian program is being used to develop nuclear weapons, or the capacity to produce them, on short notice. Yet, despite Israeli and American rhetoric, Iran's leaders do not appear irrational, undeterrable, or suicidal. Iran's leaders want what they believe they deserve: a security guaranty for the Islamic Republic and an opportunity to lead the Middle East. Few can deny that Iran could be worthy of regional leadership, especially considering its size, population, rich culture, ancient history, and economic potential. Yet, any attack on Iran's nuclear facilities would be a preventive attack and would, therefore, be unjustified. There is no concrete proof that Iran is developing nuclear weapons, and Iran's past behavior does not indicate a manifest intent to use a nuclear weapon, if developed, on either Israel or the United States. Furthermore, there is no reason to believe that Iran would engage in nuclear blackmail, since this notion is incompatible with building Iran's economy and relationship with European markets. For the above reasons, if Iran were ever to acquire a nuclear weapon, Israel would not be placed under the continuous threat of war, as it was in 1967 when multiple Arab countries could have attacked at a moment's notice. At the very least, the acquisition of a nuclear weapon by Iran would drastically change the balance of power in the Middle East. It would force Israel and the United States to come to terms with Iran, as the region's third superpower. Lastly, the nature of past Iranian-Israeli relations negates the argument that, as a battered nation, Israel could act against Iran. Iran and Israel had a long-running pragmatic relationship until the end of the Cold War, and Iran's 2003 Peace Proposal indicates that Israel would not have to withstand an unreasonable threat. Perhaps with more pragmatic leaders in these three nations, the 2003 proposals can be resurrected and Iran's nuclear program can become part of a multilateral project, potentially stimulating economic growth and eliminating the need for other nations to enrich their own uranium.²⁶⁶

²⁶⁶ William Luers, Thomas R. Pickering & Jim Walsh, *A Solution for the US-Iran Nuclear Standoff*, 55 N.Y. REV. OF BOOKS, Mar. 20, 2008.

