

INSS Insight No. 345, June 15, 2012

The Legality of an Attack against Iranian Nuclear Facilities

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The starting point for any analysis of the legality of an armed attack by Israel or the US against Iranian nuclear facilities must be the UN Charter prohibition against "the threat or use of force."¹ The UN Charter provides explicitly for only two exceptions to the prohibition against use of force. The first exception is if the use of force is authorized by the UN Security Council acting within its powers under Chapter VII of the Charter. It can be assumed with high certainty that China and Russia would veto any proposal that the Security Council authorizes use of force against Iranian nuclear facilities and that therefore no such authorization will be forthcoming.

The second explicit exception to the prohibition against the use of force refers to a State's "inherent right of individual or collective self-defense where an armed attack occurs against a Member of the United Nations."² There has not been an armed attack by Iran against either Israel or the US. Iran has supported Hamas and Hezbollah terrorist attacks against Israel but according to a ruling of the International Court of Justice, supplying arms and training to an enemy of a State does not, by itself, constitute an armed attack against that State.³

Some commentators consider that since Article 51 of the UN Charter refers to an "inherent" right of self defense therefore this inherent right preserves the pre-Charter right of preemptive self defense. Preemptive self defense implies a right to use force to prevent a potential attack even if no preliminary steps for an attack have been taken by the potential attacker. Pre-conditions for the right to preemptive self defense include establishing that the need to use force was overwhelming, the threat was imminent and there was no alternative.⁴ An Iranian use of nuclear weapons against Israel would certainly seem to satisfy the condition of the "overwhelming need". According to a recent *Foreign Policy* study, a "nuclear attack on Tel Aviv... would potentially kill 42 percent of the Israeli population".⁵ How far it would be dire for the US could however be debatable. In order to satisfy the second condition, namely of having no alternative, the US and Israel would need to present a convincing case that sanctions and diplomatic pressure were not yielding results. The third pre-condition, that of an "imminent" threat appears to be problematical. This pre-condition could perhaps be met by relying on the statement by the International Court of Justice that "a 'peril' appearing in the long term might be held to be 'imminent' as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable. A measure of uncertainty about the future does not necessarily disqualify a State from invoking necessity, if the peril is clearly established on the basis of the evidence reasonably available at the time."⁶

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Whether a right of preemptive self defense continues to exist under the UN Charter is a matter of contention. Israel raised such an argument to justify its 1981 attack against the Iraqi *Osirak* nuclear reactor. The Security Council nevertheless condemned the attack and ordered Israel to pay compensation to Iraq.⁷ At the time the US refrained from supporting the right of preemptive self defense presumably because of the apprehension that it could serve as a legal precedent. Would Pakistan have had a right of preemptive self defense against the Indian nuclear program and *vice versa*? Does such a right exist for South Korea regarding North Korea? The US government, or at least the G.W. Bush administration, has, nevertheless, subsequently adopted the position that preemptive self defense is legal. The 2002 National Security Strategy Directive states that "The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. There are few greater threats than a terrorist attack with WMD. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively in exercising our inherent right of self-defense."⁸ The British Attorney General however gave his opinion that international law "does not authorize the use of force to mount a pre-emptive strike" against a remote threat.⁹

In addition to a right of self defense, the general principles of international law, allow the plea of "necessity" where a State violates a rule of international law in order to prevent a greater harm even where there has been no armed attack. The rule has been formulated as applying where such action "is the only way for the State to safeguard an essential interest against a grave and imminent peril" and the action does not cause a greater harm.¹⁰

This plea of necessity has been implicitly accepted by the world legal community in a number of instances. In the 1967 *Torrey Canyon* incident, the British RAF bombed a Liberian oil supertanker that had gone aground of the Cornish coast and was in danger of causing a serious oil spill. The potential ecological danger to the coast was considered a justification for bombing the ship. In 1965 Israel shelled Syrian equipment being used to build a canal to divert some of the headwaters of the Jordan River into the Dead Sea. The Syrian plan was widely seen as a spite diversion since Syria would not be utilizing the diverted water. There was widespread international acquiescence with the measured Israeli use of force, although clearly there had been no Syrian armed attack against Israel.

In order to provide legal justification for an Israel or US attack against Iranian nuclear facilities it would therefore be necessary to prove that Iran was developing nuclear weapons, that such weapons would be a dire threat, that there was no other way to prevent such development and that the circumstances allowed for no delay.

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¹ Article 2(4) of the UN Charter.

² Article 51 of the UN Charter.

³ Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua V. United States Of America) Merits, Judgment Of 27 June 1986 <http://www.icj-cij.org/docket/files/70/6503.pdf>

⁴ Exchange of letters US and UK relating to the Caroline incident.
http://avalon.law.yale.edu/19th_century/br-1842d.asp

⁵ http://www.foreignpolicy.com/articles/2012/05/24/are_we_focusing_on_the_wrong_nuclear_threat

⁶ *Gabčíkovo-Nagymaros Project* case Para. 54

<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=&case=92&code=hs&p3=4>

⁷ UN Security Council Resolution 487 (1981) 19 June 1981. The US abstained in the vote.
[http://daccess-dds-](http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/418/74/IMG/NR041874.pdf?OpenElement)

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⁸ <http://georgewbush-whitehouse.archives.gov/nsc/nss/2006/print/sectionV.html>

⁹ Hansard, House of Lords Debate, 21 April 2004. 75 BYIL 822, 823 (2004).

¹⁰ International Law Commission Draft on Responsibility of States for Internationally Wrongful Acts 2001, Article 25

http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf