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## Updating the Caroline Doctrine: A Relic In an Age of Hypersonic Weapons

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## ARTICLES

# UPDATING THE CAROLINE DOCTRINE: A RELIC IN AN AGE OF HYPERSONIC WEAPONS

BY DAVID S. JONAS\* AND TYLER BREEDEN\*\*

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“*Oh, this is a high time for hypersonic missiles*”—Sam Fender.<sup>1</sup>

The United States dropped “Little Boy” and “Fat Man” on the cities of Hiroshima and Nagasaki in 1945, bringing an end to World War II and killing between 110,000 and 210,000 people.<sup>2</sup> Japan surely needed much more than rock and roll to help them—especially since Japan had no nuclear weapons of their own to deter the United States from attacking with nuclear weapons.<sup>3</sup> Nuclear weapons technology has evolved considerably in the years since 1945, when only the United States possessed nuclear weapons.<sup>4</sup> Nine states now have or are suspected of having them, and at least one other state appears to be working towards a nuclear weapons capability.<sup>5</sup> Delivery systems have become faster, stealthier, and more accurate while the quantity, explosive yield, and lethality of nuclear explosive devices have also increased.<sup>6</sup> With the potential to cause immeasurable destruction, world leaders have for decades sought to decrease the threat of nuclear war, reduce nuclear arsenals, and—most importantly—prevent further proliferation of nuclear weapons.<sup>7</sup>

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1. Lyrics from SAM FENDER, *Hypersonic Missiles*, on *HYPERSONIC MISSILES* (Polydor Ltd. 2019).

2. See Alex Wellerstein, *Counting the Dead at Hiroshima and Nagasaki*, BULL. OF THE ATOMIC SCIENTISTS (Aug. 4, 2020), <https://thebulletin.org/2020/08/counting-the-dead-at-hiroshima-and-nagasaki> (further explaining the events surrounding the Hiroshima bombings).

3. See Jake Adelstein, *New Evidence of Japan’s Effort to Build Atom Bomb at the End of WWII*, L.A. TIMES (Aug. 5, 2015), <https://www.latimes.com/world/asia/la-fg-japan-bomb-20150805-story.html> (noting that Japan’s project was scheduled to finish four days after their surrender).

4. E.g., Kelsey Davenport, *Nuclear Weapons: Who Has What at a Glance*, ARMS CONTROL ASS’N (Jan. 2022), <https://www.armscontrol.org/factsheets/Nuclearweaponswhohaswhat> (providing estimates of nuclear warhead inventories based on active programs); Sanne Verschuren, *China’s Hypersonic Weapons Tests Don’t Have to Be a Sputnik Moment*, WAR ON THE ROCKS (Oct. 29, 2021), <https://warontherocks.com/2021/10/chinas-hypersonic-missile-tests-dont-have-to-be-a-sputnik-moment/> (discussing China’s development of hypersonic delivery systems and their threat to the United States).

5. Davenport, *supra* note 4 (referencing activities undertaken by Iran, Libya, and Syria).

6. See, e.g., *id.*; see Verschuren, *supra* note 4.

7. See *Treaties & Agreements*, ARMS CONTROL ASS’N, <https://www.armscontrol.org/treaties> (last visited Apr. 8, 2023) (providing a current list of nuclear weapons treaties).

States around the world have entered arms control treaties and arms reduction agreements to reduce the risk of military standoffs between nuclear-armed states.<sup>8</sup> Entire continents have created “Nuclear Weapon Free Zones” to prevent the stationing, storage, or transport of nuclear weapons through their geographic areas.<sup>9</sup> States that have developed peaceful nuclear energy programs have committed to international verification regimes to ensure that nuclear technology is only being used for peaceful purposes.<sup>10</sup> However, despite strong international pressure, some states have continued to covet nuclear weapons.<sup>11</sup>

In recent years, Iran has become a major concern and shown signs that it has an active nuclear weapons program.<sup>12</sup> It has violated its legally binding safeguards agreement with the International Atomic Energy Agency (IAEA), hidden nuclear sites from international inspectors, and continued to enrich uranium ever closer to weapons grade.<sup>13</sup> At the same time, Iran has continuously threatened Israel with annihilation and provided training and funding to terrorist organizations that frequently stage attacks.<sup>14</sup>

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8. See, e.g., Treaty with Russia on Measures for Further Reduction and Limitation of Strategic Offensive Arms, Russ.-U.S., Apr. 8, 2010, S. TREATY DOC. NO. 111-5 (establishing an agreement between the U.S. and Russia to enhance U.S. national security).

9. See, e.g., African Nuclear Weapons Free Zone Treaty, *opened for signature* Apr. 11, 1996, 35 I.L.M. 698 (entered into force July 15, 2009)

10. See, e.g., Agreement Between Belgium, Denmark, the Federal Republic of Germany, Ireland, Italy, Luxembourg, the Netherlands, the European Atomic Energy Community and the Agency in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, Sept. 14, 1973, INFCIRC/193.

11. Davenport, *supra* note 4.

12. INT’L ATOMIC ENERGY AGENCY [IAEA], *Implementation of the NPT Safeguards Agreement and Relevant Provisions of Security Council Resolutions in the Islamic Republic of Iran*, at 10, IAEA Doc. GOV/2011/63 (Nov. 8, 2011).

13. *Id.*; see, e.g., Francois Murphy, *Iran Accelerates Enrichment of Uranium to Near Weapons-Grade*, IAEA Says, REUTERS (Aug. 18, 2021), <https://www.reuters.com/world/middle-east/iran-accelerates-enrichment-uranium-near-weapons-grade-iaea-says-2021-08-17> (noting Iran’s use of advanced centrifuges to enrich up to 60% at its above-ground pilot enrichment plant).

14. See, e.g., Amir Vahdat & Jon Gambrell, *Iran Leader Says Israel a ‘Cancerous Tumor’ to be Destroyed*, AP NEWS (May 22, 2020), <https://apnews.com/article/middle-east-religion-iran-jerusalem-israel-a033042303545d9ef783a95222d51b83> (where Iran’s leader calls Israel a ‘cancerous tumor’); see also Jon Gambrell, *Iran Fires 2 Missiles Marked with ‘Israel Must Be*

When international diplomacy fails to discourage regimes from building a nuclear weapon, what recourse does a threatened state have to respond appropriately to the nuclear threat? Article 51 of the U.N. Charter permits acts of self-defense when resisting an armed attack, but a strict reading of Article 51 permits a state to resist only when an attack has begun or is ongoing.<sup>15</sup> Customary international law operates concurrently with the U.N. Charter; the Caroline Doctrine permits states facing imminent attack to take measures deemed to be necessary and proportional to the threat faced.<sup>16</sup> However, the unique nature of nuclear weapons renders the traditional necessity and proportionality test obsolete. As demonstrated by the attacks on Hiroshima or Nagasaki, one nuclear weapon alone can potentially kill hundreds of thousands of people and destroy the physical infrastructure of an entire city.<sup>17</sup> Waiting for a nuclear weapon to be detonated on their soil or even to reach operational capability is not a legitimate expectation for the threatened states.

It is for this reason that scholars have attempted to expand or modify the Caroline Doctrine for the nuclear age, adding balancing tests or weighting factors to permit what seems to be a logical act of self-defense.<sup>18</sup> However, the Caroline Doctrine was developed when the

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*Wiped Out*, AP NEWS (Mar. 9, 2016), <https://apnews.com/article/c9e2945ea3ef4dd9972f23cf663ac99e> (noting a test-launch by Iran with missiles emblazoned "Israel must be wiped out"); see also Matthew Levitt, *Hezbollah's Regional Activities in Support of Iran's Proxy Networks*, MIDDLE E. INST. (July 2021), [https://www.mei.edu/sites/default/files/2021-07/Hezbollah's%20Regional%20Activities%20in%20Support%20of%20Iran's%20Proxy%20Networks\\_0.pdf](https://www.mei.edu/sites/default/files/2021-07/Hezbollah's%20Regional%20Activities%20in%20Support%20of%20Iran's%20Proxy%20Networks_0.pdf).

15. U.N. Charter art. 51.

16. See Matthew Waxman, *The 'Caroline' Affair in the Evolving International Law of Self-Defense*, LAWFARE INST. (Aug. 28, 2018), <https://www.lawfareblog.com/caroline-affair> (referencing a statement made by U.S. Secretary of State, Daniel Webster).

17. See Wellerstein, *supra* note 2.

18. See Leah Schloss, *The Limits of the Caroline Doctrine in the Nuclear Context: Anticipatory Self-Defense and Nuclear Counter-Proliferation*, 43 GEO. J. INT'L L. 555, 581 (2012) (proposing a new doctrine of using force when necessary, which would occur when a threatening nuclear *program* (not *attack*) is imminent, there has been an exhaustion of all peaceful means, and the response is proportional); Beth M. Polebaum, Note, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U. L. REV. 187, 208–17 (1984) (proposing the reasonable nation standard, in which a nation that reasonably determines nuclear weapons will be used against it should defend itself under traditional notions of

proportionality to eliminate the nuclear threat. This standard comprises a two-part analysis: (1) ascertaining the dangers the threatened nation perceived, and (2) whether those perceptions are reasonable. Reasonableness factors include: a clear threat with nuclear weapons, whether it is technologically credible, the last available moment, any affirmative duty to seek all means of resolution, or limited to force necessary to eliminate nuclear threat); Rachel A. Weise, Note, *How Nuclear Weapons Change the Doctrine of Self-Defense*, 44 N.Y.U. J. INT'L L. & POLS. 1331, 1337–39 (2012) (suggesting that a preemptive strike is permissible if: (1) the nuclear activity is in violation of international law, (2) the state acting in self-defense is specifically threatened, (3) the attacking state must be in compliance with non-proliferation guidelines, including good faith efforts to reduce nuclear stockpile, and (4) the attacking state must have presented the issue to the UN, who failed to take action by not forming a vote or receives 9 of 15 votes regardless of permanent member votes); Anthony D'Amato, *Open Forum: Israel's Air Strike Against the Osiraq Reactor: A Retrospective*, 4 (2010) (Nw. Univ. Sch. of L., Working Paper No. 83) (proposing criteria for authorizing preventative self-defense under the U.N. Charter: (1) the target must be nuclear, (2) the target state must be an unstable rogue state likely to use nuclear weapons for international blackmail and aggrandizement, (3) the preemptive strike can only be on the nuclear target and must minimize the loss of life, and (4) the international community must be de facto disabled from carrying out the strike itself); Kristen E. Eichensehr, Note, *Targeting Tehran: Assessing the Lawfulness of Preemptive Strikes Against Nuclear Facilities*, 11 UCLA J. INT'L L. & FOREIGN AFFS. 59, 62 (2006) (suggesting that, in addition to Article 51 limits, we consider: (1) whether the attack protected the status quo and maintained the balance of power, (2) whether an armed attack could feasibly remove the threat and has considered the long term possibility of prolonged conflict and regional destabilization, (3) whether the attacking state considered why the attack was unilateral and consequences for the power of the regime of the targeted state, (4) whether environmental and civilian harm was minimized, and (5) consider whether the attack would create a good legal precedent in the world); Mark E. Newcomb, *Non-Proliferation, Self-Defense, and the Korean Crisis*, 27 VAND. J. TRANSNAT'L L. 603, 622 (1994) (proposing that, in response to nuclear threat, the standard should be: (1) the state reasonably determined that nuclear weapons will be used as an *aggressive force* against it, (2) affirmatively pursued alternative resolutions and remained in diplomatic process until ultimate moment of action, (3) only acted after actors conduct has coalesced into coherent nuclear threat, and (4) achieved minimal destruction); Thomas Graham Jr., *Is International Law Relevant to Arms Control?: National Self-Defense, International Law, and Weapons of Mass Destruction*, 4 CHI. J. INT'L L. 1, 8–9 (2003) (discussing and expanding upon questions proposed by Richard G. Maxon in applying international law to the Bush doctrine: (1) is the proposed response aimed at protecting the status quo? (2) has there been a violation of a legal obligation? (3) has there been an actual armed attack from an external source, (4) is the response or proposed response timely? (5) is the military response in self-defense necessary? (6) is the military response in self-defense proportionate? (7) has any military response been immediately reported to the Security Council? (8) has the U.N. Security Council taken meaningful, effective measures to stop the aggressive conduct? (9) are there objective indicators that an

primary weapons of warfare were bows and arrows, muskets, and cannonballs.<sup>19</sup> Its applicability to the unique threat posed by nuclear weapons is informative but should not be controlling. It is time to recognize a new international law doctrine that has been developing since the 1980s, one that permits the use of force to prevent the development of nuclear weapons by hostile states.

International law, as embodied in treaties such as the Treaty on the Non-Proliferation of Nuclear Weapons, Treaty on the Prohibition of Nuclear Weapons, South Pacific Nuclear Weapons Free Zone Treaty, and the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean, prohibits every signatory state which currently does not have nuclear weapons from developing one.<sup>20</sup> A state facing threats of annihilation, genocide, or destruction by another state developing nuclear weapons may take such actions as would be necessary to prevent the acquisition of a nuclear weapon.<sup>21</sup> This article will assess how acts of counter-proliferation have formed a niche doctrine for military action against threatening nuclear weapon programs from non-nuclear weapon states and will follow the emerging doctrine's application to future nuclear threats.

## I. BACKGROUND

Nuclear weapons are a uniquely destructive tool of warfare. In

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attack is imminent? (10) does the past conduct or hostile declarations of the aggressor reasonably lead to a conclusion that an attack is probable? (11) what is the nature of the weapons available to the aggressor nation? and (12) have peaceful means been exhausted?); see also Davis Brown, *Enforcing Arms Control Agreements by Military Force: Iraq and the 800-Pound Gorilla*, 26 HASTINGS INT'L & COMP. L. REV. 159, 160–61 (2003) (arguing that use of force should be used for grave injuries resulting from states breaching international agreements).

19. Letter from Daniel Webster to Lord Ashburton (Apr. 24, 1841), in TREATIES AND OTHER INT'L ACTS OF THE U.S. (Hunter Miller, ed. 1934) [hereinafter Webster].

20. Treaty on the Non-Proliferation of Nuclear Weapons art. 2, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT]; Treaty on the Prohibition of Nuclear Weapons art. 1, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161; South Pacific Nuclear Free Zone Treaty art. 3, Aug. 6, 1985, 24 I.L.M. 1442 [hereinafter Treaty of Rarotonga]; Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean art. 1, Feb 14, 1967, 22 U.S.T. 762, 43 U.N.T.S. 481 [hereinafter Treaty of Tlatelolco].

21. Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 711 (2005).

1945, two bombs with a combined explosive yield of thirty-five kilotons killed between 110,000 and 210,000 people.<sup>22</sup> After World War II, a nuclear arms race between the United States and the Soviet Union led to arsenals with explosive yields ranging from the 0.01 kiloton U.S.-built Davey Crockett bomb to the largest weapon ever tested, the fifty megaton Soviet-built Tsar Bomba.<sup>23</sup> Today, even the smallest nuclear arsenal possessed by North Korea is estimated to have twenty-five to fifty warheads, each one capable of causing immense destruction and loss of life.<sup>24</sup>

With the demonstrated effectiveness of nuclear weapons, there are a variety of reasons why states would want a nuclear weapon. Raj Ramanna, India's former head of weapons development said: "[F]or us it was a matter of prestige that would justify our ancient past. The question of deterrence came much later. As Indian scientists we were keen to show our Western counterparts, who thought little of us those days, that we too could do it."<sup>25</sup> India has technically possessed nuclear weapons since the 1970s, but these statements hold true today as states may find many benefits from nuclear weapons, including international or domestic legitimacy and the ability to address regional security concerns.<sup>26</sup> For example, North Korea, a country with a GDP smaller than the size of the state of Vermont in 2020, has captured the world's attention and secured personal meetings with the President of the United States to elicit economic and security cooperation.<sup>27</sup>

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22. Wellerstein, *supra* note 2.

23. Matthew Seelinger, *The M28/M29 Davy Crockett Nuclear Weapon System*, ARMY HIST. FOUND., <https://armyhistory.org/the-m28m29-davy-crockett-nuclear-weapon-system/> (last visited Apr. 12, 2023); *Tsar Bomba*, ATOMIC HERITAGE FOUND. (Aug. 8, 2014), <https://ahf.nuclearmuseum.org/ahf/history/tsar-bomba>.

24. *North Korea*, NUCLEAR THREAT INITIATIVE (Oct. 21, 2021), [www.nti.org/countries/north-korea](http://www.nti.org/countries/north-korea).

25. RAJ CHENGAPPA, WEAPONS OF PEACE 82 (2000).

26. Raja Ramanna & Homi J. Bhabha, *Indian Nuclear Program*, ATOMIC HERITAGE FOUND. (Aug. 23, 2018), [www.atomicheritage.org/history/indian-nuclear-program](http://www.atomicheritage.org/history/indian-nuclear-program).

27. BUREAU OF ECON. ANALYSIS, U.S. DEP'T OF COM., *Gross Domestic Product by State, Third Quarter 2020* (2020), <https://apps.bea.gov/regional/histdata/releases/1220gdpstate/index.cfm>; Jeong-Ho Lee, *North Korea's Economy Contracted Most in Two Decades in 2020*, BLOOMBERG L. (July 29, 2021), [https://www.bloomberglaw.com/product/blaw/document/QX17CUT0AFBC?criteria\\_id=169687c9db6a9fb0ae40cf31c908e505&searchGuid=c8d7f681-65ad-411c-b1bb-](https://www.bloomberglaw.com/product/blaw/document/QX17CUT0AFBC?criteria_id=169687c9db6a9fb0ae40cf31c908e505&searchGuid=c8d7f681-65ad-411c-b1bb-)



Syria and Iran, the states that are considered by the Arms Control Association to be of the highest concern for nuclear weapon development, likely can relate to such rationales.<sup>28</sup> For over a decade, Syria has been a hotbed for insurgency and both friendly and adversarial states have staged military interventions within their territory.<sup>29</sup> Building a nuclear weapon could give Syria greater bargaining power with other states and allow the current regime to demonstrate the strength of its grip on power. Iran—thanks to decades of bellicose rhetoric, support for terrorist organizations throughout the Middle East, and concerns over its nuclear program—has had its economy dragged down by Western-driven sanctions.<sup>30</sup> It, too, may see a nuclear weapon as a path towards a greater position of power. However, Iran has also repeatedly threatened Israel with annihilation.<sup>31</sup> Iran's leaders have referred to the state as a “cancerous tumor” to be “uprooted and destroyed” and tested ballistic missiles with the words “Israel must be wiped out” written on it.<sup>32</sup> In November 2021, Iranian Brigadier General Abolfazl Shekarchi told reporters, “[w]e will not back off from the annihilation of Israel, even one millimeter. We want to destroy Zionism in the world.”<sup>33</sup>

For decades, there was growing concern in the United States, European Union, and Israel that Iran was working towards building a nuclear weapon and had an unacceptably short “breakout period”—

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63ffe83d3c72; Josh Lederman & Hans Nichols, *Trump Meets Kim Jong Un, Becomes First Sitting U.S. President to Step Into North Korea*, NBC NEWS (June 30, 2019), <https://www.nbcnews.com/politics/donald-trump/trump-kim-jong-un-meet-dmz-n1025041>.

28. *Arms Control and Proliferation Profile: Syria*, ARMS CONTROL ASS'N (Mar. 2022), <https://www.armscontrol.org/factsheets/syriaprofile#Proliferation>; *Timeline of Nuclear Diplomacy With Iran*, ARMS CONTROL ASS'N (Jan. 2023), <https://www.armscontrol.org/factsheets/Timeline-of-Nuclear-Diplomacy-With-Iran>.

29. Zachary Laub, *Syria's Civil War: The Descent Into Horror*, COUNCIL ON FOREIGN RELS. (Mar. 17, 2021), <https://www.cfr.org/article/syrias-civil-war>.

30. *Six Charts That Show How Hard U.S. Sanctions Have Hit Iran*, BBC (Dec. 9, 2019), <https://www.bbc.com/news/world-middle-east-48119109>.

31. Benjamin Weinthal, *Iranian Brig.-Gen. Urges Destruction of Israel Prior to Nuke Talks*, JERUSALEM POST (Nov. 28, 2021), <https://www.jpost.com/middle-east/iran-news/iranian-brig-gen-urges-destruction-of-israel-prior-to-nuke-talks-687248>.

32. Vahdat & Gambrell, *supra* note 14.

33. Weinthal, *supra* note 31.

the point where Iran had the technical capabilities and equipment necessary to build a nuclear weapon.<sup>34</sup> Several states—the United States, France, China, Russia, United Kingdom, and Germany—together with the European Union negotiated The Joint Comprehensive Plan of Action (JCPOA), a diplomatic agreement concluded with Iran in 2015 designed to increase the time required for its breakout period.<sup>35</sup> The efficacy of the agreement was hotly debated, with a majority of criticism originating in the United States and Israel.<sup>36</sup>

Proponents of the agreement argued, *inter alia*, that the JCPOA extended Iran's breakout period to at least one year, thereby making it more likely that any nefarious activity by Iran would be discovered.<sup>37</sup> Opponents in the United States and Israel argued that the JCPOA lacked essential verification measures to discover violations by Iran and that the non-legally binding nature of a political agreement would not be taken seriously by Iran's leaders.<sup>38</sup>

On May 8, 2018, President Donald Trump withdrew from the JCPOA, citing a variety of reasons related to the deal's shortcomings, but without citing evidence of Iran's breach of the agreement.<sup>39</sup> In the months that followed, the United States re-instituted sanctions on

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34. Simon Henderson, *Iranian Nuclear Breakout: What it Is and How to Calculate It*, WASH. INST. OF NEAR E. POL'Y (Mar. 24, 2021), <https://www.washingtoninstitute.org/policy-analysis/iranian-nuclear-breakout-what-it-and-how-calculate-it>.

35. Kali Robinson, *What is the Iran Nuclear Deal?*, COUNCIL ON FOREIGN RELS. (Aug. 18, 2021), <https://www.cfr.org/background/what-iran-nuclear-deal>.

36. *Netanyahu: We Won't be Bound by 'Iran Deal That Threatens Us With Annihilation'*, TIMES OF ISRAEL (Apr. 7, 2021), <https://www.timesofisrael.com/netanyahu-we-wont-be-bound-by-iran-deal-that-threatens-us-with-annihilation>; David S. Jonas, *Five Reasons Why the Iran Deal is Still a Really Bad Idea*, WAR ON THE ROCKS (Oct. 2015), <https://warontherocks.com/2015/10/five-reasons-why-the-iran-nuclear-deal-is-still-a-really-bad-idea>.

37. Graham Allison, *9 Reasons to Support the Iran Deal*, ATLANTIC (Aug. 4, 2015), <https://www.theatlantic.com/international/archive/2015/08/iran-nuclear-deal-reasons-support/400466>.

38. Jonas, *supra* note 36.

39. Anne Gearan & Karen DeYoung, *Trump Pulls United States Out of Iran Nuclear Deal, Calling the Pact 'an Embarrassment,'* WASH. POST (May 8, 2018), [https://www.washingtonpost.com/politics/trump-will-announce-plans-to-pull-out-of-iran-nuclear-deal-despite-pleas-from-european-leaders/2018/05/08/4c148252-52ca-11e8-9c91-7dab596e8252\\_story.html](https://www.washingtonpost.com/politics/trump-will-announce-plans-to-pull-out-of-iran-nuclear-deal-despite-pleas-from-european-leaders/2018/05/08/4c148252-52ca-11e8-9c91-7dab596e8252_story.html).

broad sectors of Iran's economy.<sup>40</sup> Since then, there has been an ongoing multi-year diplomatic standoff in which Iran has taken several steps that can only mean it is working towards building a nuclear weapon.<sup>41</sup> Iran allowed bilateral agreements for access of international inspectors from the IAEA to expire, surrounded its facilities with air defense missiles, and passed legislation obligating their nuclear agency to enrich uranium to 60%—far above the JCPOA authorized limit of 3.67%.<sup>42</sup> It is possible to separate Iran's rhetoric against Israel and view the threat of nuclear weapon development as a bargaining chip for sanctions negotiations with the West. But should Israel, the state on the receiving end of Iran's threats of annihilation, be expected to risk the development of an Iranian nuclear weapon? And should international law force Israel to wait until it is attacked without acting?

The Israeli government has demonstrated its opposition to such risk. Israeli leaders have adopted a strong counter-proliferation policy on emerging nuclear threats.<sup>43</sup> The first action occurred in 1981 with Operation Opera.<sup>44</sup> Israel conducted airstrikes on Iraq's Osirak nuclear

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40. Lesley Wroughton & Parisa Hafezi, *U.S. Re-Imposes Iran Sanctions, Tehran Decries 'Bullying'*, REUTERS (Nov. 5, 2018), <https://www.reuters.com/article/us-usa-iran-sanctions/u-s-reimposes-iran-sanctions-tehran-decries-bullying-idUSKCN1NA0ZR>.

41. *The Joint Comprehensive Plan of Action (JCPOA) at a Glance*, ARMS CONTROL ASS'N (Mar. 2022), <https://www.armscontrol.org/factsheets/JCPOA-at-a-glance> [hereinafter *JCPOA at a Glance*].

42. Kelsey Davenport & Julia Masterson, *IAEA Report on Iran Raises Serious Concerns About Monitoring*, ARMS CONTROL ASS'N (Sept. 8, 2021), <https://www.armscontrol.org/blog/2021-09-08/iaea-report-iran-raises-serious-concerns>; Parisa Hafezi, *Iran Says Sound Near Bushehr Nuclear Plant was Related to Military Drill*, REUTERS (Dec. 20, 2021), <https://www.reuters.com/world/middle-east/blasts-near-irans-bushehr-nuclear-plant-were-due-air-defence-exercise-fars-2021-12-20>; *Iranian Parliament Bill on Nuclear Program: Full Text in English*, NAT'L IRANIAN AM. COUNCIL (Dec. 3, 2020) [hereinafter NIAC, *Iranian Parliament Bill on Nuclear Program*], <https://www.niacouncil.org/publications/iranian-parliament-bill-on-nuclear-program-full-text-in-english/?locale=en>.

43. Gawdat Bahgat & Abdolrasool Divsallar, *Israel's New Iran Strategy Complicates Regional Security*, MIDDLE E. INST. (July 27, 2022), <https://www.mei.edu/publications/israels-new-iran-strategy-complicates-regional-security>.

44. David K. Shipler, *Israeli Jets Destroy Iraqi Atomic Reactor; Attack Condemned By U.S. and Arab Nations*, N.Y. TIMES (June 9, 1981), <https://www.nytimes.com/1981/06/09/world/israeli-jets-destroy-iraqi-atomic-reactor-attack-condemned-us-arab-nations.html>.

facility, which was then under construction, with the help of French, Italian, and Brazilian experts.<sup>45</sup> Israel believed it was acting in anticipatory self-defense, citing Iraqi leader Saddam Hussein's comments that the nuclear plant was "being constructed against Israel."<sup>46</sup>

International reactions were sharply critical of the Israeli attack. The United Nations General Assembly passed U.N. Resolutions every year from 1981-1985, condemning the attack as a "grave threat to international peace and stability" and criticizing Israel for standing by its attacks.<sup>47</sup> The United States, usually a steadfast ally of Israel, withheld the sale of F-16 fighter jets from Israel and voted in favor of U.N. Resolutions condemning the attack.<sup>48</sup>

However, the attack on Osirak was only the first instance of Israeli counterproliferation and the only time international condemnation was clearly critical of the military option.<sup>49</sup> Israel did not conduct further actions against potential nuclear threats until its strike on a Syrian nuclear facility in 2007, less than one year after North Korea tested its first nuclear device.<sup>50</sup> As will be discussed in section III, Israel has undertaken several military operations to preemptively destroy or disrupt nuclear weapons programs.<sup>51</sup> Instead of widespread condemnation, international leaders have reacted with either approval,

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45. *Id.*

46. *Id.*

47. G.A. Res. 36/27 (Nov. 13, 1981); G.A. Res. 37/18 (Nov. 16, 1982); G.A. Res. 38/8 (Nov. 10, 1983); G.A. Res. 39/14 (Nov. 16, 1984); G.A. Res. 40/6 (Nov. 1, 1985).

48. Alexandra Evans, *A Lesson from the 1981 Raid on Osirak*, WILSON CTR. (July 10, 2017), <https://www.wilsoncenter.org/blog-post/lesson-the-1981-raid-osirak>.

49. *Timeline: Israeli Attacks on Iran*, U.S. INST. PEACE (Jan. 30, 2023), <https://iranprimer.usip.org/blog/2022/aug/11/timeline-israeli-attacks-iran>.

50. Leonard S. Spector & Avner Cohen, *Israel's Airstrike on Syria's Reactor: Implications for the Nonproliferation Regime*, ARMS CONTROL ASS'N, <https://www.armscontrol.org/act/2008-08/features/israel's-airstrike-syria's-reactor-implications-nonproliferation-regime> (last visited Apr. 5, 2023); David E. Sanger, *North Koreans Say They Tested Nuclear Device*, N.Y. TIMES (Oct. 9, 2006), <https://www.nytimes.com/2006/10/09/world/asia/09korea.html>.

51. Ehud Eilam, *How Israel Tried to Stop Iran's Nuclear Program*, KINGSTON CONSORTIUM ON INT. SEC., (Oct. 17, 2022), <https://www.thekcis.org/publications/insights/insight-210>.

silence, or restrained criticism, illuminating the development of new international norms for strikes seeking to deter suspected nuclear weapons development.<sup>52</sup>

## II. CURRENT STATE OF THE LAW

### A. TREATIES

Most of the world has recognized that the threat of nuclear weapons is not limited to states engaged in hostilities. Radioactive fallout from a modern nuclear war has been modeled to produce global effects: from “nuclear winter” to widespread crop failings and the collapse of marine ecosystems.<sup>53</sup> The fear of rapidly expanding nuclear capabilities and arsenals prompted world leaders to engage in widespread attempts to curb nuclear weapons testing and development, prevent the proliferation of nuclear weapons to more states, and pressure nuclear powers to reduce their weapon stockpiles and capabilities.<sup>54</sup> These attempts often take the form of bilateral and multilateral treaties—from arms control treaties to the creation of nuclear weapon free zones.<sup>55</sup>

For example, The Limited Test Ban Treaty (LTBT)—originally signed by the United States, United Kingdom, and the Soviet Union—sought to prohibit nuclear weapons or other nuclear explosive tests in the atmosphere, outer space, or underwater in both territorial waters and high seas.<sup>56</sup> Since the LTBT entered into force in 1963, 127 states have signed, ratified, or acceded to the treaty.<sup>57</sup> Shortly thereafter, the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean required states to prohibit “testing, use, manufacture, production or acquisition by any means whatsoever of any nuclear

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52. *Id.*

53. Alexandra Witze, *How a Small Nuclear War Would Transform the Entire Planet*, NATURE (Mar. 16, 2020), <https://www.nature.com/articles/d41586-020-00794-y#ref-CR1>.

54. *Treaties & Agreements*, *supra* note 7.

55. *Id.*

56. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water art.1, Aug. 5, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 43.

57. U.S. DEP'T OF STATE, *Limited Test Ban Treaty Signatories*, <https://2009-2017.state.gov/t/avc/trty/199116.htm#signatory> (last visited Apr. 12, 2023).

weapons.”<sup>58</sup> The treaty entered into force in 1967, and has been ratified by all thirty-three states in Latin America and the Caribbean.<sup>59</sup>

The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) is the “cornerstone of the global non-proliferation regime.”<sup>60</sup> The NPT differentiates between Nuclear Weapon States (NWS) and Non-Nuclear Weapons States (NNWS). NWS—the United States, France, United Kingdom, China, and Russia—are prohibited from taking actions which “assist, encourage, or induce any non-nuclear weapon State to manufacture or otherwise acquire nuclear weapons.”<sup>61</sup> Similarly, NNWS are required “not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.”<sup>62</sup> The NPT has been signed by all states except India, Pakistan, and Israel.<sup>63</sup> Both India and Pakistan acquired their nuclear weapons after the NPT was signed, in 1974 and 1998, respectively.<sup>64</sup> It is unknown exactly when Israel created its weapons program, though it is widely understood that it has nuclear weapons and began development as early as the 1960s.<sup>65</sup> North Korea, the only state to have withdrawn from the NPT, restarted a dormant nuclear program in secret in 2002 before conducting its first test in 2006.<sup>66</sup>

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58. Treaty of Tlatelolco, *supra* note 20, art. 1.

59. U.N. Off. for Disarmament Affs., *Status of the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean*, <https://treaties.unoda.org/t/tlatelolco> (last visited Apr. 12, 2023).

60. UNITED NATIONS, *Tenth Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT)*, <https://www.un.org/en/conferences/npt2020/background> (last visited Apr. 12, 2023).

61. NPT, *supra* note 20, art. 1.

62. *Id.* art. 2.

63. See Jenifer Mackby, *The Nuclear Non-Proliferation Treaty*, CSIS (May 10, 2010), <https://www.csis.org/analysis/nuclear-non-proliferation-treaty> (affirming the states that have not signed the treaties).

64. See *India and Pakistan*, CTR. FOR ARMS CONTROL & NON-PROLIFERATION, <https://armscontrolcenter.org/countries/india-and-pakistan> (last visited Apr. 9, 2023) (explaining that India gained nuclear weapons in 1974 and Pakistan gained nuclear weapons in 1998).

65. See *Fact Sheet: Israel's Nuclear Inventory*, CTR. FOR ARMS CONTROL & NON-PROLIFERATION, <https://armscontrolcenter.org/fact-sheet-israels-nuclear-arsenal> (discussing the ambiguity around Israel's nuclear armament).

66. See *Chronology of U.S.-North Korean Nuclear and Missile Diplomacy*,

Since the NPT entered into force, states have continued to sign, ratify, or accede to redundant treaties to reinforce their commitment to non-proliferation. For example, thirteen states in the South Pacific signed the South Pacific Nuclear Weapon Free Zone Treaty which entered into force in 1986.<sup>67</sup> The treaty requires state parties “not to manufacture or otherwise acquire” nuclear explosive devices, nor to “seek or receive any assistance in the manufacture or acquisition of any nuclear explosive device.”<sup>68</sup> The Comprehensive Nuclear Test Ban Treaty, signed in 1996 with 185 signatories, required states “not to carry out nuclear weapon test explosions.”<sup>69</sup> Finally, the Treaty on the Prohibition of Nuclear Weapons, which opened for signature in 2017, requires state parties “never under any circumstances to develop, test, produce, manufacture, otherwise acquire or stockpile nuclear weapons.”<sup>70</sup>

Thus, for over sixty years, the international community has determined that nuclear proliferation is something that should be avoided. Every state in the world that does not currently possess nuclear weapons has signed or ratified treaties that prohibit the development of nuclear weapons.<sup>71</sup> States that have developed nuclear weapons, but are not recognized in the NPT as NWS because they do not meet the NPT definition of an NWS, still engage in conduct to limit the spread of nuclear weapons.<sup>72</sup> For example, India and Pakistan

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ARMS CONTROL ASS'N (Apr. 2022), <https://www.armscontrol.org/factsheets/dprkchron#2005> (explaining that this event occurred after a collapse in diplomatic efforts).

67. See generally Treaty of Rarotonga, *supra* note 20 (providing the date of entry into force).

68. *Id.* art. 3.

69. Comprehensive Nuclear-Test-Ban Treaty art. 1, Sept. 10, 1996, S. TREATY DOC. NO. 105-28, 35 I.L.M. 1439 (not yet in force).

70. NPT, *supra* note 20, art. 1.

71. See Toni Johnson, *The Four Nuclear Outlier States*, COUNCIL ON FOREIGN RELS. (May 19, 2010, 4:12 PM), <https://www.cfr.org/background/four-nuclear-outlier-states> (detailing how states that have developed nuclear weapons while refusing to sign the NPT do not necessarily meet criteria to be considered Nuclear Weapon States).

72. See *Fact Sheet: Timeline of the Nuclear Nonproliferation Treaty*, ARMS CONTROL ASS'N (Aug. 2022), <https://www.armscontrol.org/factsheets/Timeline-of-the-Treaty-on-the-Non-Proliferation-of-Nuclear-Weapons-NPT> (explaining the details of how each state that has not signed the NPT tests and stocks nuclear weapons).

supported diplomatic attempts to prevent Iran from developing a nuclear weapon, and Israel has engaged in military actions against Iran, Syria, and Iraq when it believed those states were developing nuclear weapons.<sup>73</sup>

## B. THE U.N. CHARTER AND SELF-DEFENSE

Following the end of World War II, the international community sought to form an organization that could be used to settle disputes between nations.<sup>74</sup> The U.N. Charter was signed in 1945.<sup>75</sup> It sought, much like the Kellogg-Briand Pact of 1929, to make war illegal.<sup>76</sup> Unlike the short, three-article Pact of 1929, the U.N. created a robust system for international representatives to voice and vote on their state's positions on the international stage.<sup>77</sup>

The U.N. makes clear in Article 2 of its Charter that member nations are prohibited from using “the threat or use of force against the territorial integrity or political independence of any state.”<sup>78</sup> However, recognizing that some states may still act aggressively, Article 51 declares that “nothing in the present Charter shall impair the inherent right of individual or collective self defense [sic] if an armed attack occurs against a member.”<sup>79</sup> The Charter goes on to state that self-defense is appropriate only “until the Security Council has taken measures necessary to maintain international peace and security.”<sup>80</sup>

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73. See Nayanima Basu, *India Has ‘No Immediate Plans’ to Resume Oil Purchases from Iran After Trump’s White House Exit*, THE PRINT (Jan. 3, 2021, 5:20 PM), <https://theprint.in/diplomacy/india-has-no-immediate-plans-to-resume-oil-purchases-from-iran-after-trumps-white-house-exit/578687> (stating that certain states that are not parties to the NPT still support its nonproliferation goals); see also David K. Shieler, *Israeli Jets Destroy Iraqi Atomic Reactor; Attack Condemned by U.S. and Arab Nations*, N.Y. TIMES (June 9, 1981), <https://www.nytimes.com/1981/06/09/world/israeli-jets-destroy-iraqi-atomic-reactor-attack-condemned-us-arab-nations.html> (reporting on the destruction of an Iraqi atomic reactor by Israel).

74. U.N. Charter art. 1.

75. *Id.* art. 111.

76. Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy art. 1, Aug. 27, 1928, 46 Stat. 2343, 2345–46, 94 L.N.T.S. 59, 63 (1929).

77. U.N. Charter, *supra* note 15, art. 2, ¶ 4.

78. *Id.* art. 2, ¶ 4.

79. *Id.* art. 51.

80. *Id.* The fifteen-nation Security Council is made up of permanent and non-



But the language of Article 51 alone is far from clear. When is self-defense permitted? What constitutes an “armed attack”?<sup>81</sup> What are the Security Council’s necessary measures?<sup>82</sup> And what does it mean for there to be “international peace and security”?<sup>83</sup> Article 51 purports simultaneously to not impair the “inherent right” of self-defense while limiting the use of that right to instances where an armed attack “occurs.”<sup>84</sup> A textualist reading of Article 51 would suggest that a state is required to wait until a nuclear strike against it is underway before it is permissible to use self-defense.<sup>85</sup>

Many states and scholars have recognized a strict reading as being illogical in the age of modern warfare and nuclear weapons.<sup>86</sup> Yet, the U.N. Charter was drafted after Germany’s *blitzkrieg* tactics in World War II demonstrated the power of modern tactics and weapons and was signed following the deployment of two nuclear weapons.<sup>87</sup> Therefore, it seems the drafters would have been aware of the implausibility and inadvisability of waiting until an armed attack is occurring against a state before it could respond.<sup>88</sup> Some scholars have attempted to stretch the definition of “armed attack” by citing the more permissible French wording of the U.N. Charter (which uses the phrase *aggression armée*—“armed aggression”) or by declaring state actions—such as preparing forces for war—as acts of armed

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permanent members. The United States, Soviet Union, United Kingdom, France, and China represent the five permanent members. The other ten states are voted to their positions by the General Assembly of nations. *Id.* art. 23, ¶ 1.

81. U.N. Charter art. 51.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. See Jared Zimmerman, *Assessing How Article 51 of the United Nations Charter Prevents Conflict Escalation*, REALCLEAR DEF. (June 4, 2018), [https://www.realcleardefense.com/articles/2018/06/04/assessing\\_how\\_article\\_51\\_of\\_the\\_united\\_nations\\_charter\\_prevents\\_conflict\\_escalation\\_113507.html](https://www.realcleardefense.com/articles/2018/06/04/assessing_how_article_51_of_the_united_nations_charter_prevents_conflict_escalation_113507.html) (contrasting self-defense from the escalation of conflict).

87. See *United Nations Charter (1945)*, NAT’L ARCHIVES, <https://www.archives.gov/milestone-documents/united-nations-charter> (explaining how the U.N. Charter was established to maintain international peace and security in the wake of World War II).

88. See *The Formation of the United Nations*, OFFICE OF THE HISTORIAN (Oct. 24, 1945), <https://history.state.gov/milestones/1937-1945/un> (declaring that the principle of sovereign equality is intrinsic to the international community).

aggression.<sup>89</sup> The General Assembly drafted U.N. Resolution 3314 to define “aggression” in 1974, but it was adopted without a vote—indicative of disagreement between states—and was outright rejected by the United States as a function reserved only to the U.N. Security Council.<sup>90</sup>

The International Court of Justice (ICJ) discussed the discrepancy between the “inherent right” of a state to act in self-defense and the limiting language of Article 51. In *Nicaragua v. United States*, the ICJ stated that the U.N. Charter does not solely reflect or alter customary international law, but sometimes “customary international law continues to exist alongside treaty law.”<sup>91</sup> The ICJ noted that while Article 51 allows self-defense in an armed attack, it does not define or detail what actions are permissible.<sup>92</sup> However, customary international law on proportionality and necessity would still control a state’s defensive actions despite not being detailed in the Charter.<sup>93</sup>

The ICJ discussion does not provide answers to the questions posed above. However, it does indicate that the definitions of “self-defense” and “armed attack” may be discerned from customary international law and are not solely to be found within the text of the U.N. Charter.

### C. CUSTOMARY INTERNATIONAL LAW

“Self-defense” by states has been broadly defined into four temporal categories: preventative, preemptive, anticipatory, and concurrent self-defense.<sup>94</sup> On one end of the spectrum, the UN Charter

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89. See Jordan J. Paust, *Armed Attacks and Imputation: Would a Nuclear Weaponized Iran Trigger Permissible Israeli and U.S. Measures of Self Defense?*, 45 GEO. J. INT’L L. 411, 414 (2015) (arguing Israel’s right to defend itself under the French wording of article 51, “armed aggression”).

90. See Michael Reisman & D. Stephen Mathias, *The Definition of Aggression and the ICC*, AM. SOC’Y INT’L L., 96, 181–85 (1974) (showing the history of unresolved attempts to define “aggression” by the United Nations).

91. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 ¶ 176 (June 27) (clarifying that customary law subsists of general practice of law, independent of treaty law).

92. See *id.* (describing the right to self-defense under article 51 as “guaranteed”).

93. *Id.*

94. See Ashley S. Deeks, *Taming the Doctrine of Pre-Emption*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW, 661, 662–63, 665–68 (June 2, 2016) (elaborating more specifically on the four categories of self-defense).

holds that concurrent self-defense is actions taken in response to an active military attack.<sup>95</sup> On the opposite end of the spectrum, preventative self-defense occurs when a state is seeking to prevent the development of a future or imminent threat, “often without having precise information about where or when the attack might occur.”<sup>96</sup> Some states, including the United States, have invoked this understanding of self-defense to justify military action.<sup>97</sup> Most states, however, do not accept preventative self-defense as a legitimate form of self-defense.<sup>98</sup>

Preemptive self-defense occurs when a state “views an opponent’s particular, tangible actions as almost certainly developing into an armed attack against it.”<sup>99</sup> The United States has also viewed this theory of self-defense favorably, although there have been mixed responses from international partners.<sup>100</sup> For example, in 2012, U.S. planners reportedly sought to use British military installations in Cyprus in the event it would be necessary to launch strikes on Iran, but the request was rejected by the U.K. government.<sup>101</sup> The U.K. government reportedly stated that because Iran denied plans to develop a nuclear weapon, there was no “clear and present threat” that would permit the United Kingdom to take part in acts of military aggression by the United States.<sup>102</sup>

Before the invasion of Iraq, the United Kingdom similarly argued against military action; the U.K. Attorney General stated on July 30, 2002 that “the development of [weapons of mass destruction] is not in

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95. *Id.*

96. *Id.*

97. See Craig Martin, *Challenging and Refining the Unwilling or Unable Doctrine*, 52 VAND. J. TRANSNAT’L L. 387, 415–16 (2019) (discussing the debate surrounding the Bush Doctrine—the justification for the Iraq War).

98. *Id.*

99. See Deeks, *supra* note 94, at 662–63, 665–68 (giving further details on how states particularize self-defense).

100. See Martin, *supra* note 97, 415–16 (providing additional information on the United States’ approach to self-defense).

101. See Nick Hopkins, *Britain Rejects U.S. Request to Use U.K. Bases in Nuclear Standoff with Iran*, THE GUARDIAN (Oct. 25, 2012), <https://www.theguardian.com/world/2012/oct/25/uk-reject-us-request-bases-iran> (noting that Britain cited legal advice that a preemptive strike had the potential to breach international law).

102. *Id.*

itself sufficient to indicate such imminence.”<sup>103</sup> The Attorney General expanded on the British government’s position to Parliament in 2004 that “[I]t is therefore the Government’s view that international law . . . does not authorize the use of force to mount a pre-emptive strike against a threat that is more remote. However, those rules must be applied in the context of the particular facts of each case. That is important.”<sup>104</sup>

Anticipatory self-defense refers to actions taken in response to an imminent attack, just before the attack occurs.<sup>105</sup> Anticipatory self-defense has long been recognized under the Caroline Doctrine as being a legitimate form of defense.<sup>106</sup> The Caroline Doctrine was drafted in 1837 when British troops attacked an American ship, the *Caroline*, while it was navigating Canadian waters.<sup>107</sup> The *Caroline* was transporting American volunteers into Canada to support a Canadian rebellion.<sup>108</sup> One night, a contingent of British troops attacked the *Caroline*, setting it on fire and pushing it over Niagara Falls, leaving one American citizen dead and another 12 missing.<sup>109</sup> The subsequent correspondence between the American and British governments

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103. See Richard Norton-Taylor, *Chilcot Inquiry: Iraq Papers Show Lord Goldsmith’s Warning to Tony Blair*, THE GUARDIAN (June 30, 2010), <https://www.theguardian.com/uk/2010/jun/30/chilcot-inquiry-lord-goldsmith-blair> (addressing the key issue of imminence in Mr. Blair’s statement).

104. See HL Deb (21 Apr. 2004) (66) cols. 356–76 (providing Lord Peter Goldsmith’s statement, reenforcing preemptive attacks on remote threats as outside the scope of imminence that permits self-defense).

105. See Deeks, *supra* note 94, 662–63, 665–68 (detailing how this approach adheres to the Caroline Doctrine, which leaves a responding state with no choice of means).

106. See Megan C. Mallone & Christine E. Seibert, *Anticipatory Self Defense*, JAG REPORTER (Dec. 13, 2018), [https://www.jagreporter.af.mil/Post/Article-View-Post/Article/2549128/anticipatory-self-defense/#\\_ednref3](https://www.jagreporter.af.mil/Post/Article-View-Post/Article/2549128/anticipatory-self-defense/#_ednref3) (detailing that the Caroline Doctrine formed in 1837).

107. See Maria Benvenuta Occelli, “Sinking” *The Caroline: Why the Caroline Doctrine’s Restrictions on Self-Defense Should Not Be Regarded as Customary International Law*, 4 SAN DIEGO INT’L L.J. 467, 468 (2003) (providing further background on the case); see HUNTER MILLER, TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 444 (Vol. 4, 1934) (outlining the historical context regarding the foundational argument of self-defense in the *Caroline* case).

108. *Id.*

109. *Id.*

eventually led to the development of a coherent doctrinal statement.<sup>110</sup> The American Secretary of State Daniel Webster wrote “[I]t will be for that Government to show a necessity for self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”<sup>111</sup>

Nuclear weapons seem to be encompassed in the “instant” and “overwhelming” threat contemplated by the Caroline Doctrine.<sup>112</sup> However, the requirement of necessity is not straightforward. A state cannot act to defend itself against a weapon when the threatening state does not yet possess it. However, if a state were to possess a nuclear weapon, it would alter the balance of power so severely that conventional military or economic advantages of the threatened state are irrelevant. For example, even if it is assumed that Israel has overwhelming military power capable of deterring a conventional threat from Iran, the threat of a single nuclear detonation in an Israeli city would completely change Israel’s security position. Worse still, if a state does decide that the threat against it is so severe that attacking a nuclear armed state is justified, the resulting conflict would surely cause greater harm and suffering to civilian populations.

Logically, the most opportune time to conduct military actions to deter a potentially nuclear armed state is before the nuclear weapon is created. However, such a strike appears to fit most cleanly within the definition of preventative or preemptive self-defense.<sup>113</sup> Given the U.K. Attorney General’s statements that “the development of [weapons of mass destruction] is not in itself sufficient to indicate such imminence,” but that “those rules must be applied in the context of the particular facts of each case,” we must be able to distinguish the position of the United States and Iran in 2012 with Israel and Iran today.<sup>114</sup>

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110. *Id.* at 444–45.

111. *See* Webster, *supra* note 19 (demonstrating that it was Daniel Webster whose words make up the elements of the Caroline Doctrine).

112. *Id.*

113. *See* Deeks, *supra* note 94, 662–63, 665–68 (providing a definition of self-defense).

114. *See* Norton-Taylor, *supra* note 103 (providing statements from the Attorney General on self-defense); *see* Goldsmith, *supra* note 104 (discussing the meaning of imminence).

### III. A NEW DOCTRINE

Scholars have recognized that the unique threat posed by nuclear weapons renders traditional self-defense theories unworkable, and they have also recognized that military action to deter a state which threatens genocide or annihilation and takes steps towards building a nuclear weapon should be permissible.<sup>115</sup> This past scholarship largely demonstrates that scholars have attempted to stretch definitions and rules to provide legal justification for what feels like a rational and reasonable act of defense.<sup>116</sup> Some scholars have proposed that Israeli strikes (or even U.S. strikes) could be considered concurrent self-defense due to ongoing attacks from Iranian-backed militias and terrorist organizations.<sup>117</sup> Others, likely because theories of anticipatory self-defense have been most widely accepted in the international community, have attempted to modify the Caroline Doctrine to the unique circumstances posed by nuclear weapons.<sup>118</sup>

However, international law is formed by state practice, not by scholars or the ICJ.<sup>119</sup> Within the last twenty years, Israel has engaged in several military actions against Iran, each evoking different responses from the international community.<sup>120</sup> Collectively, state actions and responses affirm or reject the tests posed by past

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115. See Weise, *supra* note 18 (detailing how traditional theories around self-defense are altered by nuclear weapons).

116. See GEORGE P. FLETCHER & JENS DAVID OHLIN, *DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY* 86–106 (2008) (discussing the domestic law overtones of self-defense theories of just actions in international law).

117. See Gregory E. Maggs, *Symposium: A Nuclear Iran: The Legal Implications of a Preemptive National Security Strategy: How the United States Might Justify a Preemptive Strike on a Rogue Nation's Nuclear Weapon Development Facilities Under the U.N. Charter*, 57 SYRACUSE L. REV. 465, 466 (2007) (detailing how certain preemptive military action by the United States could be justified).

118. See Schloss, *supra* note 18, at 580–85 (discussing the limits of the Caroline Doctrine); see Weise, *supra* note 18, at 1368–90 (discussing the influence of nuclear weapons on the Caroline Doctrine); see Polebaum, *supra* note 18, at 208–18 (proposing a standard for preemptory strikes in anticipation of nuclear strikes).

119. See MALCOLM N. SHAW, *INTERNATIONAL LAW* 2–3, 5 (9th ed. 2021) (detailing how international law is formed).

120. E.g., Dalia Dassa Kay, *Israel's Dangerous Shadow War With Iran*, FOREIGN AFFS. (Feb. 27, 2023), [foreignaffairs.com/israel/israels-dangerous-shadow-war-iran](https://foreignaffairs.com/israel/israels-dangerous-shadow-war-iran) (discussing three attacks on Iranian groups by Israel in the span of two month including a strike on pro-Iranian militant groups in Syria, a drone attack on a military site in Iran, and a strike targeting Iranian officials in Damascus).

scholarship. From these most recent events, scholars can see the beginnings of new customary international law: one that is narrowly focused on the threat of nuclear weapons.

#### A. THE BASIC FRAMEWORK

To distinguish this emerging framework, we must first ensure that our analysis is grounded in international law principles. The first step is recognizing a state's obligations under Article 2(4) of the U.N. Charter to "refrain in their international relations from the threat or use of force" against another state.<sup>121</sup> If a state is publicly declaring threats of annihilation, genocide, or destruction of another state, it would be in violation of obligations under the U.N. Charter. Such threatening statements place the targeted state in a defensive posture.<sup>122</sup>

Threats without action, though concerning, are likely insufficient to trigger a state's right to self-defense without the capabilities to carry out the threats.<sup>123</sup> Therefore, step two is determining if the threatening language would be advanced by a nuclear weapon. A single nuclear weapon, as demonstrated twice in history, can destroy entire cities.<sup>124</sup> The possession of nuclear weapons would elevate any threat of annihilation, genocide, or destruction from mere bellicose rhetoric to a distinct possibility.

The third step is recognizing that states that do not currently possess nuclear weapons are a part of at least one international treaty which prohibits the possession of nuclear weapons.<sup>125</sup> None of these treaties detail negative consequences for a state which violates or withdraws from it. However, the international community has reacted to breaches of these treaties as threats to international peace and stability. For

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121. U.N. Charter art. 2, ¶ 4.

122. *Id.* art. 39 ("The Security Council shall determine the existence of any threat to the peace . . . and shall make recommendations, or decide what measures shall be taken. . . .").

123. *See id.* arts. 39–41 (noting that the Security Council will begin to take action after it has determined that a threat already exists).

124. Wellerstein, *supra* note 2 (discussing the damage done to Hiroshima and Nagasaki after the United States dropped nuclear bombs on both cities).

125. NPT, *supra* note 20, art. 2 ("Each non-nuclear-weapon State Party to the Treaty undertakes not to receive . . . nuclear weapons . . . not to manufacture or otherwise acquire nuclear weapons . . . and not to seek or receive any assistance in the manufacture of nuclear weapons. . . .").

example, the NPT requires states to conclude a legally binding safeguards agreement with the IAEA to verify the peaceful nature of their nuclear programs.<sup>126</sup> If the IAEA determines that there are serious violations, it may submit a report to the U.N. Security Council “as the organ bearing the main responsibility for the maintenance of international peace and security.”<sup>127</sup>

Therefore, if a state is facing threats of annihilation, genocide, or destruction by another state—actions which would be made more likely if the threatening state possessed nuclear weapons—and then that state takes actions in violation of treaties designed to maintain peace and security, then the threatened state may act in self-defense.

Iran has threatened Israel with annihilation and destruction.<sup>128</sup> Those threats would be made more plausible by the creation of nuclear weapons, of which only a few could destroy the entire State of Israel.<sup>129</sup> Iran has taken numerous actions in violation of its international obligations, alarming the international community and undermining regional peace and security.<sup>130</sup> Israel is therefore a threatened state which may take such actions as necessary to protect itself from the threat. International law permits military actions which are proportional to the threat confronted and target military objectives.<sup>131</sup> Because the threat is the creation of a nuclear weapon,

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126. *Id.* art. 3, ¶ 4.

127. Int’l Atomic Energy Agency [IAEA] Statute, art. III.B.4, Dec. 28, 1989, <https://www.iaea.org/sites/default/files/statute.pdf>.

128. *See, e.g.,* Vahdat & Gambrell, *supra* note 14 (discussing a speech from Iran’s Supreme Leader where he referred to Israel as a “cancerous tumor” that “will undoubtedly be uprooted and destroyed.”); Gambrell, *supra* note 15 (“Iran test-launched two ballistic missiles . . . emblazoned with the phrase ‘Israel must be wiped out’ in Hebrew. . .”).

129. *See* Gambrell, *supra* note 14 (quoting then-Vice President Joe Biden) (“A nuclear-armed Iran is an absolutely unacceptable threat to Israel. . .”).

130. *E.g.,* Davenport & Masterson, *supra* note 42 (noting the serious concern raised by Iran’s growing supply of uranium and risk that IAEA will not be able to create a record of Iran’s nuclear activities); Hafezi, *supra* note 42 (finding that talks between the United States and Iran to reinstate their nuclear pact has made little to no progress); NIAC, Iranian Parliament Bill on Nuclear Program, *supra* note 42, arts. 1–2 (laying out Iran’s goals to produce and store at least 120 kilograms of uranium each year and employ 190,000 separative work units).

131. *See* Murphy, *supra* note 21, at 711 (explaining the “imminent threat” school of thought which believes Article 51 of the U.N. Charter allows for preemptive self-defense).



any military response should be proportional to the stage of development and likelihood of successful nuclear weapon creation.<sup>132</sup> Israel's counter-proliferation activities and the international response provides evidence of how a state should assess the proportionality of their military options.

## B. PROPORTIONAL RESPONSE BY THE THREATENED STATE

A threatened state that resorts to military action should still act in proportion to the threat against it. Although the threat of annihilation, genocide, or destruction via nuclear weapons is great, states are likely not able to act in proportion to that distant threat.<sup>133</sup> In her article in the Georgetown Journal of International Law, Leah Schloss proposed a modification to the Caroline Doctrine, determining that use of force was necessary to prevent an imminent nuclear program, not a nuclear attack.<sup>134</sup> As stated above, while the use of nuclear weapons is the ultimate potential harm, it is the concrete actions towards building a weapon that a state should be permitted to disrupt. Critically, Israel has conducted several military operations which have been accepted by the international community to varying degrees. This section will use these examples to illustrate the potential boundaries of proportional military responses.

For some states, revealing information on its nuclear weapons program to the international community may be an effective deterrent. Upon revelation of a secret nuclear weapons program, other states apply effective diplomatic pressure or economic sanctions to curb the

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132. Schloss, *supra* note 18, at 580–82 (proposing a new doctrine which allows use of force when it is necessary, imminent, and proportional, and all other peaceful means of resolution have been resolved).

133. The Russian government has cited numerous reasons for its invasion of Ukraine on February 24, 2022. One such post hoc justification is their allegation that Ukraine may seek to build nuclear weapons. The international response has been strongly against the Russian government's actions. Jimmy Nsubuga, *Russia Accuses United States of Helping Ukraine Build Nuclear Weapons*, YAHOO! NEWS (Mar. 15, 2022), <https://news.yahoo.com/russia-ukraine-united-states-nuclear-weapons-180245345.html>.

134. Schloss, *supra* note 19, at 580–82 (outlining a proposed new doctrine for international self-defense regarding nuclear counter-proliferation which includes allowing the use of force to respond to an imminent nuclear threat, including a growing nuclear program).

development of the threatening state's program and enhance the scrutiny of verification regimes.<sup>135</sup> Such intelligence gathering operations may require violations of another state's sovereignty.<sup>136</sup>

Israeli spies conducted a raid on an Iranian warehouse in 2018, stealing and subsequently publishing documents that Israel claimed constituted evidence of Iran's intent to continue a nuclear weapons program.<sup>137</sup> Iran denied that a raid occurred, although Israel openly claimed responsibility.<sup>138</sup> The IAEA responded by demanding access to Iranian nuclear sites and, while some EU leaders debated over what the stolen documents meant for the JCPOA, none criticized Israeli actions.<sup>139</sup>

States which have a more advanced weapons program may be subject to more severe military actions, such as attacks on key nuclear weapons development infrastructure. Several examples have been undertaken which have not been met with international condemnation. In 2010, a malicious computer worm called Stuxnet was discovered after it caused several Iranian nuclear centrifuges to spin out of control and self-destruct.<sup>140</sup> The development of Stuxnet has been attributed to the United States and Israel.<sup>141</sup> In 2007, Israel conducted airstrikes

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135. See *id.* at 570–75 (discussing non-military means to settle international nuclear disputes).

136. E.g., David E. Sanger & Ronen Bergman, *How Israel, in Dark of Night, Torched its Way to Iran's Nuclear Secrets*, N.Y. TIMES (July 15, 2018), <https://www.nytimes.com/2018/07/15/us/politics/iran-israel-mossad-nuclear.html> (discussing a Mossad operation in Tehran).

137. *Id.*

138. See Gerald F. Seib, *Inside Israel's Raid to Seize Nuclear Documents in Iran*, WALL ST. J. (July 15, 2018), <https://www.wsj.com/articles/inside-israels-raid-to-seize-nuclear-documents-in-iran-1531670401> (discussing a security briefing where senior Israeli intelligence officials disclosed specific details of the operation).

139. See Mark Landler et al., *Israel's Claims on Iran Divide Europe and U.S. on Merits of Nuclear Deal*, N.Y. TIMES (May 1, 2018), <https://www.nytimes.com/2018/05/01/us/politics/israel-iran-deal-united-states.html> (quoting former U.S. ambassador to Israel Daniel B. Shapiro as he calls the Trump-era an “opportunity” for Prime Minister Netanyahu to achieve things he would not have been able to do in the Obama era).

140. See Kim Zetter, *An Unprecedented Look at Stuxnet, the World's First Digital Weapon*, WIRED (Nov. 3, 2014), <https://www.wired.com/2014/11/countdown-to-zero-day-stuxnet> (noting that IAEA inspectors first discovered the digital virus when they noticed that centrifuges were failing at an alarming rate).

141. Ellen Nakashima and Joby Warrick, *Stuxnet was Work of US and Israeli*

against a secret Syrian plutonium production facility.<sup>142</sup> The international community, including Syria, was silent, which was “particularly notable” given the similarities to the attack on Iraq’s Osirak plant twenty-five years earlier.<sup>143</sup>

Interpreting silence in the development of international law can be difficult. However, there are “three factors [that] are usually required to conclude that a passive state has acquiesced.”<sup>144</sup> These include (1) failure to react over a period of time, (2) knowledge of the facts which would imply the ability to react, and (3) “silence can be interpreted as acquiescence only so far as a reaction could be expected.”<sup>145</sup> Israel claimed responsibility immediately following the raid on Iran, but did not openly admit to strikes on Syria’s reactor until 2018.<sup>146</sup> However, “it was never in any real doubt that Israel was behind the strike,” and even once it admitted to the strikes, the international community failed to condemn Israeli actions.<sup>147</sup>

Even without the admission of Israeli officials when strikes do occur, the international community has been vocal on perceived violations of international law. In 2020 and 2021, Iranian nuclear

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*Experts, Officials Say*, WASH. POST (June 2, 2012), [https://www.washingtonpost.com/world/national-security/stuxnet-was-work-of-us-and-israeli-experts-officials-say/2012/06/01/gJQAlnEy6U\\_story.html](https://www.washingtonpost.com/world/national-security/stuxnet-was-work-of-us-and-israeli-experts-officials-say/2012/06/01/gJQAlnEy6U_story.html) (citing an anonymous source who claim that the United States and Israel collaborated on this classified project).

142. Spector & Cohen, *supra* note 50 (explaining that seven Israeli warplanes destroyed an industrial facility near al-Kibar, Syria, which was later identified as a nearly completed nuclear reactor); Sanger, *supra* note 50 (calling Israel an “undeclared” nuclear power).

143. Spector & Cohen, *supra* note 50 (“The lack of reaction contrasted starkly to the international outcry that followed Israel’s preventative strike in 1981 that destroyed Iraq’s Osirak reactor”); Sanger, *supra* note 50.

144. Etienne Henry, *Alleged Acquiescence of the International Community to Revisionist Claims of International Customary Law (With Special Reference to the Jus Contra Bellum Regime)*, 18 MELBOURNE J. INT’L L. 260, 264-265 (2017).

145. *Id.* (discussing that a state may only acquiesce to what it knows and that the ICJ has found that a waiver of action must be express or “unequivocally implied” from the State’s conduct).

146. Tom Bateman, *Why Is Israel Making this Public Now?*, BBC (Mar. 21, 2018), <https://www.bbc.com/news/world-middle-east-43481803> (finding that the timing of Israel’s admission is important given the way the military chose to publicize it).

147. *See id.* (finding no evidence that Israel was condemned by any other country for the attack).

facilities experienced explosions that were attributed to Israel.<sup>148</sup> Condemnation from the international community came after the attack in 2021, when the E.U. representatives re-negotiating the JCPOA criticized “any attempts to undermine or weaken diplomatic efforts on the nuclear agreement” without specifically condemning the perpetrator or the nature of the attacks.<sup>149</sup> Similarly, Iran’s chief nuclear scientist was killed in a roadside ambush by what was later reported to be a remotely controlled machine gun.<sup>150</sup> Dozens of states condemned the killing as an “assassination or extrajudicial killing” or even an “act of terrorism.”<sup>151</sup> Extrajudicial or targeted killings have been widely criticized by the international community as a violation of international humanitarian law.<sup>152</sup>

To differentiate these Israeli actions and the world response, we may conclude that military action is appropriate when it is the minimum amount of force necessary to deter an ongoing nuclear program, conforms with law of war principles to avoid civilian casualties, and occurs without ongoing and good faith attempts to negotiate a diplomatic solution.

Luckily, the world has yet to experience the logical progression of military options when confronting a more advanced nuclear threat. At its most extreme, a state may engage in widespread attacks to eliminate an emerging nuclear weapons program.<sup>153</sup> In the face of

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148. See A.F.P., *E.U. Says it “Rejects Any Attempts” to Undermine Iran Nuclear Talks*, TIMES OF ISR. (Apr. 12, 2021, 2:18 PM), [https://www.timesofisrael.com/liveblog\\_entry/eu-says-it-rejects-any-attempts-to-undermine-iran-nuclear-talks/](https://www.timesofisrael.com/liveblog_entry/eu-says-it-rejects-any-attempts-to-undermine-iran-nuclear-talks/) (finding that Iran accused Israel of the attack on Iran’s Natanz site).

149. *Id.* (quoting E.U. spokesman Peter Stano).

150. *Mohsen Fakhrizadeh Assassination: How the World Reacted*, AL-JAZEERA (Nov. 29, 2020, 8:54 PM) [hereinafter *Mohsen Fakhrizadeh Assassination*], <https://www.aljazeera.com/news/2020/11/28/iranian-nuclear-physicist-kiiling-world-reaction> (reporting that Iranian nuclear physicist Mohsen Fakhrizadeh was shot in eastern Tehran).

151. *Id.* (quoting spokespersons from the United Nations and Turkey).

152. See JESSICA DORSEY & CHRISTOPHE PAULUSSEN, *TOWARDS A EUROPEAN POSITION ON ARMED DRONES AND TARGETED KILLING: SURVEYING E.U. COUNTERTERRORISM PERSPECTIVES* 16 (Int’l Ctr. for Counterterrorism, 2015) (emphasizing the importance that the international community closely monitors how states use force and ensure that it is in accordance with the U.N. Charter and not an extrajudicial killing).

153. See Dan Reiter, *Preventive Attacks Against Nuclear Programs and the*

repeated attempts to cripple the nuclear program, Iran has spread its nuclear program over a wider geographic area and protected it from military attacks by hiding the facilities underground.<sup>154</sup> A state which seeks to disable such a widespread, hardened, and protected program on the verge of creating a nuclear weapon should be permitted to engage in more serious and coordinated attacks to prevent a weapon from being developed.

At all times, diplomatic efforts should be undertaken in the hopes of avoiding military actions. However, as shown by North Korea, and possibly Iran, emerging nuclear powers may use negotiations to distract or stall decisive international action while the state continues its weapons development.<sup>155</sup> Iran should not be permitted to increase the number or complexity of its reactors or increase enrichment of uranium to 60% under the guise of good faith negotiations. To prevent a state from exercising its most serious of military options, states should take actions swiftly and early to prevent a reduced breakout time.

### C. CURRENT AND FUTURE APPLICATION

On February 24, 2022, Russia attacked Ukraine, deeming it a “special military operation.”<sup>156</sup> Russia has attempted to cite several rationales for its invasion, including the protection of the self-declared republics of the Donetsk and Luhansk regions, defense of the Russian-speaking population from genocide, self-defense from Ukrainian Army border attacks, and the allegation that Ukraine is building

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“Success” at Osiraq, 12 NONPROLIFERATION REV. 355, 355–56 (2005) (praising the controversial attack by Israel against the Iraqi nuclear reactor at Osiraq).

154. See Kaelan Deese, *Iran Moving Key Nuclear Facility Underground: Report*, THE HILL (Dec. 9, 2020, 4:06 PM), <https://thehill.com/policy/international/middle-east-north-africa/529524-iran-moving-key-nuclear-facility-underground> (noting that Iran decided to move their nuclear facility underground following an explosion that destroyed a centrifuge assembly hall).

155. See JCPOA at a Glance, *supra* note 41 (laying out the timeline of Iran’s weapon’s development and implementation).

156. Natalia Zinets & Aleksander Vasovic, *Missiles Rain Down Around Ukraine*, REUTERS (Feb. 24, 2022, 7:45 PM), <https://www.reuters.com/world/europe/putin-orders-military-operations-ukraine-demands-kyiv-forces-surrender-2022-02-24> (discussing how Russia declared war in a televised address and claimed that the goal of the “operation” was to protect Russians from being subjected to “genocide” in Ukraine).

chemical, biological, or nuclear weapons with the help of the United States.<sup>157</sup> Most of the international community has recognized these allegations as baseless, in part due to the United States, United Kingdom, and Ukrainian-led intelligence announcing several “false flag” operations before they occur.<sup>158</sup>

Although Russian war aims and justifications have continued to evolve, we can use this event as yet another example of the international response to counter-proliferation operations and in response to anticipated criticism that the emerging framework described above is too permissive. Russia has attempted to address the core tenets of the above-mentioned framework: it has alleged Russian-speaking populations are facing genocide at the hands of Ukrainian authorities—a genocide which would be made more effective using nuclear weapons—and that Ukraine has been working towards building nuclear weapons in violation of its treaty obligations.<sup>159</sup>

However, Russia’s attempts to justify its invasion have been met with resounding criticism, including strong skepticism and outright denials that genocide against Russian-speakers is ongoing.<sup>160</sup> Unlike Iran, Ukrainian officials have not threatened genocide, extermination, or annihilation of Russian speakers in Ukrainian or Russian-backed separatist-controlled territory. No other state or international agency

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157. Mark Rice-Oxley, *Is There Any Justification for Putin’s War?*, THE GUARDIAN (Mar. 13, 2022, 8:46 PM), <https://www.theguardian.com/world/2022/mar/13/is-there-any-justification-for-putins-war> (examining the validity of Putin’s many justifications for war).

158. *Id.* (analyzing each individual claim and why its basis may not be valid); Carol E. Lee & Teaganne Finn, *U.S. Warns Russia Could Use Chemical Weapons in False-Flag Operation in Ukraine*, NBC NEWS (Mar. 9, 2022, 5:45 PM), <https://www.nbcnews.com/politics/national-security/us-warns-russia-use-chemical-weapons-false-flag-operation-ukraine-rcna19391> (quoting then-White House Press Secretary Jen Psaki) (“[W]e should all be on the lookout for Russia to possibly use chemical or biological weapons in Ukraine, or to create a false-flag operation using them.”).

159. *E.g.*, Rice-Oxley, *supra* note 157 (referencing specifically the Donbas region); *see also* Nsubuga, *supra* note 133 (discussing Russia’s allegation that the United States is working with Ukraine to develop biological weapons).

160. *See, e.g.*, Jon Greenberg, *Ethnic Russians Face “Genocide Perpetrated by the Kyiv Regime”*, POLITIFACT (Feb. 25, 2022), <https://www.politifact.com/factchecks/2022/feb/25/vladimir-putin/putin-repeats-long-running-claim-genocide-ukraine> (explaining that the numbers and statistics coming from the region do not support evidence of genocide).

has provided evidence or alleged that Ukraine is in violation of any treaty or safeguards agreement.<sup>161</sup> Finally, even assuming Russia's allegations had merit, an invasion of Ukraine by 110–130 battalion tactical groups—190,000 soldiers, tanks, armored personal carriers, aircraft, helicopters, mobile artillery—is a grossly disproportionate response to unsupported allegations.<sup>162</sup> The strong international response has demonstrated that a state may not simply pay lip-service to the prerequisite factors to justify a full-scale invasion.

On July 13, 2022, President Biden stated that the United States would use military force “as a last resort” to prevent Iran from building a nuclear weapon.<sup>163</sup> This is an unequivocal statement of U.S. willingness to engage in military action to prevent Iran from obtaining a nuclear weapon. While words without action—even from an American President—may not be enough to trigger a response from foreign leaders cautious not to impact the ongoing negotiations regarding reviving the JCPOA, we may apply our analysis of the budding framework to predict the international response to unilateral military action by the United States.

The first step is determining whether Iran has threatened the United States with annihilation, genocide, or destruction. The United States and Iran have on many occasions threatened and used force against each other: the United States killed Iranian Quds Force commander, General Qassem Suleimani, in an airstrike on January 3, 2020, and Iran retaliated with a missile strike on a U.S. military base.<sup>164</sup>

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161. *Id.* (“If genocide were taking place, civilian deaths in Eastern Ukraine would be going up. According to the UN Commission on Human Rights, they have plummeted”).

162. *Ukraine Crisis: Russia Has in Place 70% of Military Needed for Full Invasion – U.S. Officials*, THE GUARDIAN (Feb. 6, 2022), <https://www.theguardian.com/world/2022/feb/06/ukraine-crisis-russia-has-in-place-70-of-military-needed-for-full-invasion-us-officials> (finding a drastic increase in Russian military strength in the region over the course of two weeks).

163. Ted Snider, *Why is Biden Joining the Warpath Against Iran?*, RESPONSIBLE STATECRAFT (July 20, 2022), <https://responsiblestatecraft.org/2022/07/20/why-is-biden-joining-israel-on-the-warpath-against-iran> (emphasizing that this level of military intervention would only be used as a last resort).

164. Julian Borger & Martin Chuluv, *U.S. Kills Iran General Qassem Suleimani in Strike Ordered by Trump*, THE GUARDIAN (Jan. 3, 2020), <https://www.theguardian.com/world/2020/jan/03/baghdad-airport-iraq-attack-deaths-iran-us-tensions> (describing the order that former-President Trump gave to kill Iran's “most

The Iranian ambassador to the U.N., when asked directly whether Iran would seek retaliation against American civilians responded “No, we are- we do not have any- anything against the American citizens, the people.”<sup>165</sup> However, Iran has also shown a willingness to attack or support attacks on American civilians.<sup>166</sup> An Iran Revolutionary Guard Corps-backed plot to kill former presidential advisor John Bolton was revealed to have been foiled in August 2022.<sup>167</sup> Iran backed terrorist organizations, such as Hamas, have frequently targeted and killed American citizens abroad as well.<sup>168</sup>

Still, these acts of violence against American citizens likely do not rise to the same level as those faced by Israel. Israel is confronted with threats of annihilation and genocide with the intention of destroying the state of Israel whereas the threats against U.S. citizens are intended to destroy American resolve and influence in the Middle East.<sup>169</sup> While the American media has reported on threats which would rise to the level of annihilation, such as a threat to turn New York City into “hellish ruins” with nuclear weapons, these threats often come from sources without clear links to Iran’s leadership (in this example, from two Telegram accounts “with ties” to Iran’s Islamic Revolutionary

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powerful general”); Vanessa Romo, *Iran Launches Missile Attacks on Military Bases Housing U.S. Troops in Iraq*, NPR (Jan. 7, 2020), <https://www.npr.org/2020/01/07/794388410/military-base-housing-u-s-troops-in-iraq-has-been-attacked> (explaining the response by Iran to launch ballistic missiles against two U.S. military bases in Iraq, which Iran defended as self-defense).

165. *Ambassador: Iran Vows Revenge, but has Nothing Against Americans*, PBS (Jan. 6, 2020, 6:50 PM), <https://www.pbs.org/newshour/show/ambassador-iran-vows-revenge-but-has-nothing-against-americans> (interviewing with PBS News Hour spokesperson Judy Woodruff).

166. See, e.g., Daniel L. Byman, *Proxy Power: Understanding Iran’s Use of Terrorism*, BROOKINGS (July 26, 2006), <https://www.brookings.edu/opinions/proxy-power-understanding-irans-use-of-terrorism> (discussing a bombing in Saudi Arabia by Iranian-backed terrorists which killed 20 and wounded almost 400).

167. Press Release 22-860, Dept. of Just., Member of Iran’s Islamic Revolutionary Guard Corps (IRGC) Charged with Plot to Murder the Former National Security Advisor (Aug. 10, 2022) (hypothesizing that the attempted murder was in retaliation for the death of Qasem Soleimani in January 2020).

168. See Byman, *supra* note 166 (noting that Iran often “sings the praises” of terrorist groups such as Hamas).

169. *Id.* (discussing three purposes for attacking Israel including opposition to the existence of a Jewish state, giving Iran prestige in the Muslim world, and undermining the peace processes with the goal of reducing the changes that Iran will be isolated in the Middle East).



Guards Corps (IRGC).<sup>170</sup> Though Iranian nuclear weapons would certainly threaten American lives and interests, their hypothetical use would not be to annihilate or destroy the U.S. homeland or commit genocide against Americans.

Thus, we can predict that should the United States attack Iran unilaterally, it would likely face criticism by foreign states. However, the United States is unlikely to take action unilaterally in the name of its own national security. The day after President Biden's threat of force against Iran, the United States and Israel penned The Jerusalem U.S.-Israel Strategic Partnership Joint Declaration.<sup>171</sup> In relevant part, the declaration states:

Consistent with the longstanding security relationship between the United States and Israel and the unshakeable U.S. commitment to Israel's security, and especially to the maintenance of its qualitative military edge, the United States reiterates its steadfast commitment to preserve and strengthen Israel's capability to deter its enemies and to defend itself by itself against any threat or combination of threats. The United States further reiterates that these commitments are bipartisan and sacrosanct, and that they are not only moral commitments, but also strategic commitments that are vitally important to the national security of the United States itself.

The United States stresses that integral to this pledge is the commitment never to allow Iran to acquire a nuclear weapon, and that it is prepared to use all elements of its national power to ensure that outcome. The United States further affirms the commitment to work together with other partners to confront Iran's aggression and destabilizing activities, whether advanced directly or through proxies and terrorist organizations such as Hezbollah, Hamas, and Palestinian Islamic Jihad.<sup>172</sup>

The United States chose to invoke its national security interests as a secondary effect to maintaining Israel's security.<sup>173</sup> Rather than cite

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170. Joshua Rhett Miller, *Iran Vows to Build Nukes if Provoked, Turn NY into Hellish Ruins*, N.Y. POST (Aug. 1, 2022), <https://nypost.com/2022/08/01/iran-vows-to-build-nukes-turn-new-york-into-hellish-ruins> (occurring during stalled efforts to reinstate a nuclear deal between Iran and the United States).

171. The Jerusalem U.S.-Israel Strategic Partnership Joint Declaration, Isr.-U.S., July 14, 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/14/the-jerusalem-u-s-israel-strategic-partnership-joint-declaration>.

172. *Id.*

173. *See id.* (emphasizing the United States' commitment to maintaining security and strength in Israel).

threats to American forces, diplomatic missions, or civilians, the United States couched its threat to Iran within the realm of collective self-defense of a state facing a more existential threat to its very existence. The wording of the declaration indicates that the United States recognizes the genocidal threats directed at Israel is a more appropriate legal justification—one that is more likely to be accepted by foreign leaders.

#### IV. CONCLUSION

This article has outlined an emerging framework that supports military action to prevent hostile states from creating or acquiring nuclear weapons. As states, particularly Israel, have engaged in such activity, legal scholars have attempted to stretch existing theories of self-defense. However, these attempts are misguided. The threat faced by nuclear weapons is unique and deserving of independent analysis. The international response to acts of counterproliferation by Israel has included both approval or silence as well as targeted criticism. Such criticism has been specific to tactics, such as targeted killings of nuclear scientists,<sup>174</sup> or timing, such as during sensitive periods of diplomatic negotiation,<sup>175</sup> but not at the underlying justification to prevent the creation of a nuclear weapon. Counterproliferation activities of the past several decades indicate an understanding that states facing serious threats of annihilation, destruction, or genocide by nuclear weapons should be permitted to take necessary action before the hostile state creates or acquires a nuclear weapon.

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174. *Mohsen Fakhrizadeh Assassination*, *supra* note 150 (documenting the assassination of nuclear physicist Mohsen Fakhrizadeh).

175. *JCPOA at a Glance*, *supra* note 41 (discussing the implementation schedule of the 2015 Iran nuclear deal).

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