Striking First: Israel's Post-Gulf War Options under International Law

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It's farewell to the drawing-room's civilised cry,
The professor's sensible whereto and why,
The frock-coated diplomat's social aplomb,
Now matters are settled with gas and with bomb.

W.H. Auden, Danse Macabre

I. INTRODUCTION

The poet Auden saw things very clearly. Today, in the Middle East more than anywhere else, war is the acknowledged final arbiter of a myriad of disputes. Conflicts are resolved "with gas and with bomb." For Israel, faced with seemingly endless belligerency after the recent Gulf War¹ and perhaps even the portent of total destruction, the situation may call for preemption.²


². Preemption is a military strategy of striking an enemy state first, with the expectation that the only alternative is to be struck first oneself. A preemptive attack differs from a preventive attack, which is launched out of concern for long-term deterioration in the pertinent military balance, rather than fear of imminent hostilities. Thus, in a preemptive attack, the enemy's action is anticipated in a very short time, while in a preventive attack, the interval is considerably longer. Because a preventive attack is never justified under international law, the distinction between preemptive and preventive attacks is exceedingly important.
This Article considers whether preemption would be permissible under international law in a particular geopolitical context. First, it examines whether a preemptive strike by Israel against its Arab adversaries would constitute an instance of anticipatory self-defense, or simply a legitimate use of force in an ongoing state of war.\(^3\) This Article then discusses the expected tactical costs and benefits that Israel may derive from preemption. Additionally, it examines the extent to which tactical military considerations are interwoven with normative judgments of legality. Finally, this Article considers the options available to Israel in the event that it adopts preemption as a military strategy.

II. ARAB-ISRAELI HOSTILITIES

A. Current State of War

It is generally acknowledged that all of the Arab states, except Egypt, consider themselves at war with Israel.\(^4\) The arrangements that concluded the first Arab-Israeli War, waged between 1947 and 1949, included bilateral general armistice agreements between Israel and Egypt;\(^5\) Israel and Lebanon;\(^6\) Israel and Jordan;\(^7\) and Israel and

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3. In the aftermath of the Gulf War, Israel decided not to respond to Iraq's 39 missile attacks against the Jewish state. However, if Israel should ever decide to respond in the future, Israel might characterize its response as one of the following measures of self-help short of war: (1) reprisal; (2) self-defense; or (3) anticipatory self-defense. Alternatively, Israel could argue persuasively that a condition of war has existed between itself and Iraq since 1948, the year of Israel's independence, and that any military strikes by Israel are therefore not measures of self-help short of war. In that case, Israel would argue that its strikes were a legitimate use of force in an ongoing conflict.

In the final analysis, the lawfulness of a military strike by Israel and the reasonableness of its characterization would depend upon such factors as the general moves toward peace underway in the region, the time lapse between Iraq's aggression and Israel's response, and the level of continuing danger to Israel posed by the Iraqi regime.

According to a summary of Iraq's Scud attacks on Israel by the Israel Defense Forces ("IDF"), the missiles directly killed one person and indirectly produced twelve deaths and two hundred injuries. Additionally, 1644 families were evacuated in Tel Aviv and Ramat Gan and 4095 buildings were damaged (3991 apartments and residential buildings, 331 public institutions, 17 educational institutions, and 54 businesses). See Scud Toll: Summing Up the 39 Missile Attacks, THE JERUSALEM POST, Mar. 9, 1991, at 3 (Int'l ed.) [hereinafter Scud Toll].

4. See The Israeli Government Peace Initiative (May 15, 1989), reprinted in JOSEPH ALPHIER, MIDDLE EAST MILITARY BALANCE, 1989-1990, at 122-26 (1990). Under international law, a state of war exists not only if there is an armed conflict between two or more states, but also if there is a conflict in which one of the states involved considers itself at war. For a comprehensive and authoritative discussion of when a state of war becomes effective, see INGRID DETTER DE LUPIS, THE LAW OF WAR 5-15 (1989).


Syria.\textsuperscript{8} Israel and Iraq have never signed an armistice agreement.\textsuperscript{9}

Following the Israeli agreements with Egypt, Lebanon, Jordan, and Syria, the United Nations Security Council issued a resolution that “noted with satisfaction the several Armistice Agreements,” and found “that the Armistice Agreements constituted an important step toward the establishment of permanent peace in Palestine.”\textsuperscript{10} Moreover, the Security Council found that the agreements superseded the truce previously provided for in Security Council resolutions.\textsuperscript{11} With the exception of Egypt, none of the armistice agreements have been superseded by an authentic peace treaty.\textsuperscript{12}

One can question how these armistice agreements would impact the lawfulness of prospective Israeli preemptive attacks against certain Arab targets. Significantly, a general armistice is a war convention, agreement, or contract concluded between belligerents.\textsuperscript{13} Such an agreement does not terminate a state of war. The 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land stipulates, in the Annex to the Convention, that “an armistice suspends military operations by mutual agreement between the belligerent parties.”\textsuperscript{14}

The courts of individual countries have affirmed the principle that an armistice does not end a war.\textsuperscript{15} Indeed, throughout history, armistices generally have presumed an eventual resumption of hostili-

\begin{itemize}
\item \textsuperscript{7} General Armistice Agreement, Apr. 3, 1949, Jordan-Isr., 42 U.N.T.S. 303.
\item \textsuperscript{8} General Armistice Agreement, July 20, 1949, Isr.-Syria, 42 U.N.T.S. 327.
\item \textsuperscript{9} Iraq has long been an active enemy of Israel. Baghdad sent significant numbers of expeditionary forces in the 1948 War of Independence, the 1967 Six Day War, and the 1973 Yom Kippur War. During the 1948 war, Iraqi forces entered Trans-Jordan and engaged Israeli forces in Western Samaria. In the aftermath of the 1967 war, Iraq again deployed forces in Jordan. The forces remained there for more than two years. During the 1973 war, Baghdad committed about one-third of its 95,000 troops to assist Syria in its campaign against the Israel Defense Forces on the Golan Heights. For a comprehensive and authoritative pre-Gulf War assessment of Iraq’s threat to Israel, see Yonathan L., \textit{Iraq: Regional Ambitions and Traditional Fears}, 20 IDF J. 56-62 (1990).
\item \textsuperscript{11} See id.
\item \textsuperscript{12} See Treaty of Peace Between the Arab Republic of Egypt and the State of Israel, Mar. 26, 1979, Egypt-Isr., 18 I.L.M. 362.
\item \textsuperscript{13} BLACK’S LAW DICTIONARY 108 (6th ed. 1990).
\item \textsuperscript{14} Convention No. IV Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, ch. V, art. 36, 36 Stat. 2277, T.S. No. 539 [hereinafter Convention No. IV] (emphasis added).
\item \textsuperscript{15} See, e.g., Kahn v. Anderson, 255 U.S. 1 (1921); Carrimore Six Wheelers, Ltd. v. Arnold, [1949] 2 All E.R. 416 (Eng.).
\end{itemize}
ties. As no peace treaties exist between Israel and the Arab states with which it negotiated armistice agreements in 1949, except Egypt, or between Israel and Iraq, a condition of belligerency remains between these states and Israel.16

From a jurisprudential perspective, this suggests that a first use of force by Israel against any one of these states would constitute neither a tactical preemptive strike nor an instance of anticipatory self-defense. Because preemption is customarily defined as a preventive first-strike when war is imminent, and anticipatory self-defense is defined in law as a measure of self-help short of war, such designations make no sense when war is already underway.

An application of the term “first use” to an Israeli act of force against a belligerent would be an oxymoron. It is nonsense to identify such an operation as an act of aggression when another state already has declared itself at war with Israel. Therefore, a “first use” of force by Israel should be considered merely one more military operation in a protracted war, with its legality appraised exclusively in terms of conformance with the laws of war in international law.17

B. Anticipatory Self-Defense

If no condition of war existed between Israel and a feared Arab state, one might question whether a defensive first-strike by Israel against such a state would always constitute an instance of aggression. Although the authoritative definition set forth by a 1974 United Nations General Assembly resolution indicates that a state’s first use of armed force constitutes prima facie evidence of aggression, this determination is qualified by reference to such use that is “in contravention

16. For pertinent documents and commentary on Israel-Arab agreements, see ROSALYN HIGGINS, UNITED NATIONS PEACEKEEPING, 1946-1967, ch. I (1969) (a study issued under the auspices of the Royal Institute of International Affairs).

of the Charter."  Moreover, the resolution grants the Security Council authority, "in conformity with the Charter," to "conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity."  

Therefore, under some conditions, a first use of force is permissible under international law. Israel has the same right to self-defense enjoyed by other states. In an age of uniquely destructive weaponry, international law does not require Israel to accept its own annihilati-


20. The right of self-defense should not be confused with reprisal. Although both are commonly known as measures of self-help short of war, the essential difference lies in their respective purposes. Taking place after a country is harmed, a reprisal is punitive in character, and is not a means of protection. Self-defense, on the other hand, is intended to mitigate harm. The United Nations has identified the problem of using reprisal as a rationale for permissible use of force: "States have a duty to refrain from acts of reprisal involving the use of force." See Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1971). The prohibition against reprisal can be inferred from the broad regulation of force found in article 2(4), the obligation to settle disputes peacefully found in article 2(3), and the general limiting of permissible force by states to self-defense. See id.
tion. Thus, an Israeli defensive strike, a “first use” of force, could be sanctioned where force is not used to achieve a prohibited objective, but only to forestall destruction of its land and its people by hostile neighbors.

This form of self-help is known jurisprudentially as “anticipatory self-defense.” Importantly, this resort to force is not limited by the qualification of the United Nations Charter of “an armed attack.”21 This customary right traces its modern origins to the Caroline case, which involved an unsuccessful rebellion against British rule by colonists in Canada.22 Since this incident, a serious threat of armed attack has generally provided justification for defensive military action. In an exchange of diplomatic notes between the governments of the United States and Great Britain, then-United States Secretary of State Daniel Webster outlined a framework for self-defense that did not require a prior attack.23 Webster adjudged military preemption permissible if the danger threatened was “instant, overwhelming, leaving no choice of means and no moment for deliberation.”24

21. See U.N. Charter art. 51. Article 51 of the United Nations Charter provides as follows:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Id.


23. Id.

24. Id. The right of anticipatory self-defense was also affirmed in Hugo Grotius, The Law of War and Peace, bk. II (1625). Recognizing the need for “present danger” and threatening behavior that is “imminent in a point of time,” Grotius indicated that self-defense was permissible not only after an attack had been suffered but also in advance where “the deed may be anticipated.” See id: ch. I. Emmerich De Vattel, The Law of Nations, bk. II (1758) took a similar position:

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

Id. ch. IV. Grotius and Vattel parallel Jewish scripture and law, although the latter speak more generally of interpersonal relations than of international relations. The Torah contains a provision exonerating from guilt a potential victim of robbery with possible violence if, in self-defense, he struck down and, if necessary, killed the attacker before he committed any crime. See Exodus 22:1 (emphasis added). Additionally, one noted rabbi has stated, “If a man comes to slay you, forestall by slaying him!” Rashi: Sanhedrin 72a. Perhaps even more analogous to anticipatory self-defense under international law is a decision in the Talmud that categorizes a
Some scholars argue that the customary and generalized right of anticipatory self-defense that arose after the Caroline incident has been superseded by the specific language of article 51 of the United Nations Charter. These scholars aver that article 51 constructs a new and far more limited statement of self-defense. This position is problematic because, in some circumstances, it is inherently unreasonable and actually undermines the basic right of states to exist. The Security Council apparently recognized this problem when, in 1967, it refused to censure Israel for its 1967 preemptive attack against Egypt, Jordan, and Syria.

Preemption, of course, has figured importantly in Israel's strategic calculations on a number of occasions. Israel used preemptive strikes in its 1956 war with Egypt over the Suez Canal and in its destruction of the Iraqi nuclear reactor in 1981. Israel's failure to preempt in October 1973 contributed to heavy Israeli losses on the Egyptian and Syrian fronts during the Yom Kippur War. Recently, Israel's decision not to preempt after Iraq's August 1990 invasion of Kuwait and Saddam Hussein's subsequent threats against Israel led to war “to diminish the heathens so that they shall not march against them” as milhemet reshut or discretionary. See Sotah 44b.

25. See, e.g., Louis Henkin, Force, Intervention and Neutrality in Contemporary International Law, AM. SOC'Y INT'L L. PROC. 147, 150 (1963); see also supra note 21.

26. Id.

27. See Louis Henkin et al., INTERNATIONAL LAW: CASES AND MATERIALS 967-70 (1980). This does not suggest that acceptance of the right to anticipatory self-defense is problem-free. The danger is that states will manipulate international law to protect themselves against charges of aggression. The remedy lies not in removing the right of states to claim anticipatory self-defense, but in ensuring that the criteria for the permissible use of force are clear and explicit.

28. Preemption, by strict legal definition, cannot be undertaken by one state against another with which it is at war. The current situation in the Middle East, a more or less "cold" peace occasionally interrupted with brief, intermittent periods of active hostilities, suggests that the term preemption is still useful. Hence, the term is used in this Article without distinction as to whether a condition of war exists between Israel and selected Arab states.


thirty-nine Iraqi Scud attacks on the Jewish state in an attempt to bring Israel into the war.\textsuperscript{31}

III. ISRAEL'S CURRENT POSITION

Israel is still in a dangerous position. Ongoing military preparations in the post-Gulf War Middle East pose serious threats to Israel's security, including threats carrying the dreadful portent of extinction. The current fragmentation of Israel's enemies, occasioned by Iraq's defeat by the United Nations coalition, appears to strengthen Israel. However, this is a temporary and uncertain advantage at best.

Before Iraq's August 1990 invasion and attempted takeover of Kuwait, Iraq had publicly sought the capability to "burn half of Israel."\textsuperscript{32} To accomplish its objective, Iraq had acquired substantial combat aircraft capacities, including the Soviet-supplied TU-22, TU-16 and MiG-23, and the French-supplied Mirage F-1.\textsuperscript{33} Iraq had also acquired from the Soviet Union the Scud B, a 300 kilometer ballistic missile with inertial guidance, and the FROG-7, an unguided free rocket over ground with a 60 to 70 kilometer range.\textsuperscript{34} The Soviets may have also exported an unknown number of SS-21s to Iraq, as a replacement for the FROG, with improved guidance capability.\textsuperscript{35}

In June 1990, the Jaffee Center for Strategic Studies at Tel Aviv University ("JCSS") published a memorandum identifying the emergence of Iraq as a crucial country for Israel and the entire region in the 1990s.\textsuperscript{36} According to JCSS Deputy Head Joseph Alpher:

Iraq came out of its war with Iran with the region's largest and best equipped armed forces, under a firmly ensconced leader who has proven capable of using them ruthlessly. Of all the Arab states, Iraq appears most likely to move the Middle East firmly into the nonconventional era. It is virtually an indispensable component of a renewed Eastern Front.\textsuperscript{37}

Another JCSS publication dealt specifically with Iraq's growing

\begin{thebibliography}{10}
\bibitem{31} See Scud Toll, supra note 3, at 3.
\bibitem{32} See Alpher, supra note 4, at 6.
\bibitem{34} Id. at 16.
\bibitem{35} Id.
\bibitem{36} See Joseph Alpher, The Decade of the '90s: Strategic Challenges for Israel (1990).
\bibitem{37} Id.
\end{thebibliography}
threat to Israel. In that publication, Alpher concluded that “for the first time since the Arab-Israel peace process began in earnest with the Sadat visit to Jerusalem in November 1977, an atmosphere is developing that raises the risk of an Arab-Israeli military escalation.”

Iraq’s ground forces grew from twelve divisions in 1980 to fifty-five divisions in 1988. Brigadier General (Res.) Dov Tamari emphasized in the publication that the Iraqi Air Force was well-equipped for both ground force support and deep strike capability.

Iraq’s remaining chemical warfare capability, as well as its continuing search for nuclear weapons, could continue to threaten Israel. Can Israel afford to wait until Iraq’s nuclear ambitions are fully implemented? If Iraq views its nonconventional capabilities

38. See Alpher, supra note 4.
39. Id. at 9.
40. Id. at 56.
41. Id. at 57.
42. Iraq began producing chemical weapons in the early 1960s and may still be capable of making at least 1000 tons annually. Saddam Hussein’s use of chemical weapons in the first Gulf War possibly killed or injured as many as 45,000 Kurds and Iranians. See Brig. Gen. (Res.) Aharon Levran, Threats Facing Israel from Surface-to-Surface Missiles, 19 IDF J. 37, 41-42 (1990). On June 30, 1990, Hussein told Diane Sawyer in an ABC interview, “Incidentally, the gas masks Israel is distributing are useless. You know that masks are useless against certain types of chemical weapons.” See 1 U.S. Senate Comm. on Govtl. Aff., Proliferation Watch, No. 3 (Sept. 1990).
43. Consider the following pre-war developments:
   - 8/9/90: Bern radio broadcast notes that Swiss authorities are investigating alleged illegal shipments of nuclear material from Switzerland to Iraq.
   - 8/13/90: London Sunday Times publishes a detailed article on Iraqi nuclear activities.
   - 8/31/90: Boston Globe article discusses American concerns that, pending a peaceful settlement in the Persian Gulf, Iraq’s program for developing nuclear weapons may still be intact.
   - 9/3/90: AP reports that three people accused of trying to illegally export nuclear detonation triggers were ordered by a London magistrate to stand trial.
   - 9/3/90: BBC Television airs one-hour special on Iraq’s acquisition of Western technology for the building of its nuclear, chemical and missile weapons programs. Documentary focuses on how Iraq has used an intricate web of front companies and middlemen to purchase sophisticated Western dual-use technology. Program underscores weaknesses of U.S. and British export control regimes and how Iraq exploited those weaknesses to its advantage.
   - 9/4/90: AFP wire service reports eyewitness sightings of three Iraqi missiles deployed near Kuwait City.
   - 9/4/90: Article in Christian Science Monitor discusses Iraq’s support of Argentina’s nuclear-capable Condor missile program and Brazil’s conventional arms program.
entirely as a counter-deterrent to Israel's long-range nuclear and conventional strike capability, preemption might appear decidedly irrational. On the other hand, if Iraq has a clear plan to launch new first-strikes against Israel, preemption may seem the only rational option.

Israel must ensure that its option to preempt remains tactically viable at all times. Israel's prospective resort to anticipatory self-defense depends upon more than jurisprudential considerations. It is also contingent upon Israel's capacity to reduce enemy offensive capabilities to tolerable and acceptable levels via superior hard target power and associated forms of active and passive defenses.

It is even conceivable that an Israeli preemption could involve nuclear weapons in order to meet the essential criteria of cost-effectiveness. Faced with circumstances in which neither non-nuclear preemption nor rejection of all first-strike options is perceived as adequate to sustain Israel, leaders of the Jewish state may be forced to decide between unleashing the horrors of atomic war, with all of the associated political and human consequences, or accepting Israel's annihilation. According to international law principles, the decision to undertake nuclear preemption would always be prima facie illegal.
IV. ISRAEL'S FUTURE SECURITY

A. Options

Optimally, the major world powers will recognize Israel's precarious position and take decisive steps to reduce Iraqi and other Arab preparations for aggression. If not, Israel may conclude that prompt non-nuclear preemption is the best way to protect itself. Preemption may indeed be the best means of reducing the risk of regional nuclear war. In fact, if preemption conforms to the codified and customary constraints of the laws of war, it could be decidedly law enforcing.

Given the logic of nuclear deterrence, Israel's adversaries must appreciate that their aggression could result in overwhelmingly damaging nuclear reprisals. Why, then, does not Israel simply sit back and rely upon its bomb "in the basement?"47 First, Israel's nuclear deterrent relies upon enemy perceptions of its capability and willingness. Should Iraq or other adversaries believe, correctly or incorrectly, that Israel's nuclear forces are vulnerable to a first-strike attack, they may decide to initiate hostilities. Similarly, should the Arab states believe that Israel will fail to make good on its implicit threat to retaliate with nuclear weapons, they may decide that a first-strike is their most rational option.48 Such a belief appears substan-
tially more likely in the aftermath of Israel’s nonreaction to Iraqi attacks.

B. Enemy Capabilities

Further support for Israel not remaining passive adduces from the prospective irrationality of Israel’s enemies. An enemy of Israel, motivated by preferences valued more highly than self-preservation, may decide to strike Israel, fully expecting to incur devastating military costs. Today, such preferences emanate largely from Islamic fundamentalism. Moreover, related strikes against Israel may be conceptualized by Israel’s enemies as jihad or holy war.49

As for other military preparations against Israel, Syria is strengthened by its control over Lebanon, its association with the United States-led coalition, and its substantial missile capabilities.50 These capabilities include the SS-21 and MiG-29 aircraft equipped with over-the-horizon AA-9 and AA-10 missiles.51 Egypt, the only Arab state formally at peace with Israel, was the first country to use Scud missiles in war, and is currently collaborating with Argentina in developing the Condor-2 or Bader-2000 missile.52 Aided by a German firm, Messerschmidt-Boelkow-Blohm, this project seeks to produce a high-accuracy surface-to-surface missile (“SSM”) with a range of approximately 800 kilometers.53 Libya, with an arsenal of approximately 100 Soviet SSM launchers, about twice as many as Syria, was the fourth state in the Middle East, following Egypt, Iraq, and Iran, to use Scud missiles.54

Even Saudi Arabia, which has never posed a serious threat to Israel, is now receiving arms of a quality and at a rate that warrants

49. Even if one were to assume that Arab leadership would always behave rationally, this would say nothing about the accuracy of information used in rational calculations. Rationality refers only to the intention of maximizing specified values or preferences. It does not address whether the underlying information is correct. Thus, even rational state actors may make errors in calculations, which then lead to war.


52. See Levran, supra note 42, at 38.

53. Id.

54. As Israel is beyond the range of Libya’s Scuds, the most serious current implication of these SSMs is that other Arab states will obtain them. Moreover, a Libyan SSM with a range of at least 1100 kilometers could directly threaten Israel in the future. For a compelling and authoritative account of missile threats facing Israel, see Levran, supra note 42, at 37-44.
genuine concern. On the ground, the net growth of Saudi armed forces in the 1990s could reach two to three divisions. In the air, with the completion of planned United States and British deliveries in the mid-1990s, the Saudi Air Force could reach a total strength of 300 combat aircraft, including latest-generation F-15 air-superiority fighters. The Israeli Air Force, while totaling about 640 aircraft, includes only 200 latest-generation equipment. Even Saddam Hussein’s pre-war air force of 700 planes had at most 75 latest-generation, top-quality aircraft.

Historically, Saudi Arabia has not posed a serious threat to Israel. Only a small number of Saudi units fought against Israel in its 1948 War of Independence, and they were under Egyptian command. During the 1967 Six Day War, Saudi Arabia deployed only a single brigade in eastern Jordan, and during the 1973 Yom Kippur War, it dispatched one brigade to Syria. However, Saudi Arabia’s position may change at any time, and Saudi weapons could be transferred to Israel’s more hardline enemies. Taken together with the fact that no formal peace exists between Israel and Saudi Arabia, large United States arms sales to Saudi Arabia could substantially affect the regional balance of military power. For the moment, Israel should take little comfort from the fact that Saudi Arabia shared Israel’s position as a recent target of Iraqi Scud attacks.

C. Palestinian Threat

Israel is threatened not only by enemy states, but also by its intercommunal conflict with the Palestinians. Although the question of “striking first” is definitionally unrelated to this conflict, an ongoing or even escalating intifada could weaken Israel’s overall military posture vis-à-vis enemy Arab states, thereby affecting Israel’s general

56. Id.
57. Id.
58. Id.
59. Id.
60. Id.
61. Id.
decision on preemption. Moreover, when Palestinian populations in the territories and within the "green lines" throw their support behind a particular Arab state, Israel could find itself calculating the prospective costs and benefits of a specific kind of first-strike.

Following Iraq's August 1990 invasion of Kuwait, the Palestine Liberation Organization ("PLO") expressed open support for Baghdad. At the August 10, 1990, Cairo summit, Yassar Arafat deflected attention from the invasion by shifting attention toward Afghanistan and Kashmir. Additionally, Abul Abbas sent his military forces to help police Kuwait, as did the Popular Front for the Liberation of Palestine's George Habash and the Democratic Front for the Liberation of Palestine's Nayef Hawatmeh. Mohammed Milhem, a senior aide to Arafat, publicly threatened Fatah-led terrorism "everywhere" in support of Iraq.64

The Palestinian question will have a direct bearing on the prospect of nuclear preemption for Israel if it is answered with the creation of a new Arab state.65 Such a resolution would surely reduce Israel's capacity to rely on deterrence.66 Thus, Israel would be confronted with significant new incentives to strike first. Such a strike might be directed at Palestine or at any other regional adversary or combination of adversaries.

D. Israeli Disclosure of Nuclear Capabilities

The threat posed to Israel by an independent Palestinian state

63. The "green lines" define Israel's pre-1967 borders and distinguish Israel proper from "the territories." These territories comprise 2270 square miles of Judean and Samarian highlands, and the 140 square miles of the Gaza Strip. If Israel were to allow transfer of these territories to Arab control, its width in the central sector of the country would be reduced from the present 40-55 miles to 9-16 miles.

64. For more information on Iraqi-PLO collaboration in the dismantling of Kuwait, see Laurie Mylroie, Blood Brothers, THE JERUSALEM POST, Nov. 3, 1990, at 9 (Int'l ed.).

65. The PLO has already declared itself a state. However, this declaration, in addition to having had no practical effect, does not satisfy the generally accepted criteria for statehood under international law: control over a fixed and clearly-defined territory, a population, a government, and the capacity to engage in diplomatic and foreign relations. See, e.g., Convention on Rights and Duties of States, Dec. 26, 1988, art. I, 49 Stat. 3097, 165 L.N.T.S. 19.

66. A new state of Palestine would preoccupy Israeli military forces to a far greater extent than does the intifada. Even if it were able to resist takeover by one or more of the other Islamic states in the region, Palestine would inevitably become a favored launching-point for renewed terrorism against Israel. Yassar Arafat's promises notwithstanding, PLO rejectionists would continue to celebrate violence against Israel as the essence of "national liberation." Recognizing an "improved" configuration of forces vis-à-vis an Israel with diminished strategic depth, a larger number of Arab states could calculate that they face a smaller, more beleaguered adversary.
would also have an impact upon Israel's nuclear strategy. For the moment, Israel, still buffered from a hot eastern border by the West Bank, can afford to keep its bomb "in the basement." However, if this territory were to become the heart of Palestine, Israel would almost certainly have to move from "deliberate ambiguity" to disclosure. This shift could improve Israel's nuclear deterrence posture, but might also enlarge the chances of a nuclear war should that posture fail.67

To what extent might Israel's removal of its bomb "from the basement" in response to transformation of the territories affect its inclination to preempt? If Israel became convinced that its Arab enemies were taking its shift to disclosure seriously, Israel's incentive to strike first could be reduced. If, however, leaders of the Jewish state came to believe that Israel's enemies were unimpressed by this shift, Israel's willingness to preempt could remain high.

Israel's calculations would also depend on the perceived vulnerability of its nuclear forces. If Israel's enemies were to believe that Israeli nuclear forces were susceptible to preemptive destruction, those enemies might strike first. Recognizing this, the Israeli inclination to preempt would itself be contingent, in part, upon Israel's expectations regarding Arab first-strikes. It follows that an Israeli shift from deliberate ambiguity to disclosure would benefit significantly from associated efforts at force hardening, multiplication, and dispersal.68

E. Assured Destruction or Counterforce Strategy?

Whether or not there is such a shift in its strategy, Israel will have to make certain decisions about the relative benefits of an "as-

67. Whether a shift from ambiguity to disclosure would actually enhance Israeli deterrence would depend upon several complex factors, including the types of weapons involved, the reciprocal calculations of Arab leaders, the effects upon rational decision-making processes by these Arab leaders, and the effects upon both Israeli and Arab operations. If, for example, bringing Israel's bomb in the basement into the light were to result in Arab predelegations of launch authority and/or new launch-on-warning procedures, the likelihood of unauthorized or accidental wars, including nuclear wars, would increase.

68. Such a shift would also benefit from a continually improving active defense option. At present, Israel is developing the Arrow ATBM with the United States' cooperation. See Levran, supra note 42, at 44. Regarding "dispersal" as a means of securing its nuclear deterrent, Israel has already contracted for two submarines that could greatly reduce the cost-effectiveness of an Arab first-strike against Israel. This means that submarine deployment of Israeli nuclear forces could greatly reduce Israel's incentive to preempt. For more information on developments in the Israeli navy, see Zvi Volk, Building a Superior Navy: An Interview With Rear Admiral Micha Ram, 19 IDF J. 10-13 (1990).
sured destruction” strategy versus a “counterforce” or warfighting strategy. If Israel were to remain content with developing the relatively inaccurate apparatus of an assured destruction posture, it could reduce the probability of Arab first-strikes. This probability might be reduced even further if the assured destruction posture were accompanied by fairly precise public disclosure of Israel’s nonthreatening nuclear stance. Simultaneously, this posture’s intrinsic damage-limiting inferiority to a developed counterforce capability would likely produce larger casualty and fatality figures should it fail to deter Arab first-strikes. If, on the other hand, Israel were to initially adopt a declared nuclear warfighting posture, Arab perceptions of inevitable war with Israel might be enlarged. With such perceptions, Arab leaders would have to decide whether to wait for an Israeli preemption or to strike first themselves. In the final analysis, this decision could be contingent, to a considerable extent, on the prevailing degree of inter-Arab cooperation.

If Israel chooses nuclear deterrence based on assured destruction, it runs the risk of “losing” a nuclear war. If, on the other hand, Israel chooses counterforce, the Arab states will feel especially threatened, a condition that might heighten the actual prospect of nuclear weapons use.

One variable affecting these predictions is the type and number of nuclear weapons required for each posture. Relatively few nuclear weapons are needed for assured destruction. However, these weapons, with only “countervalue” objectives, might be inaccurate. On the other hand, a counterforce objective would require a larger number of more accurate weapons that could destroy even the most hardened targets. To a certain extent, choosing counterforce makes Israel’s nuclear deterrent more credible and compelling, because its

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69. “Assured destruction” refers to the ability to inflict unacceptable damage upon an attacker after absorbing a first strike. “Mutual assured destruction” describes a condition in which an assured destruction capability is possessed by opposing sides. “Counterforce strategies” are those which target an adversary’s strategic military facilities and supporting infrastructure. Such strategies may be dangerous not only because of the collateral damage they might produce, but also because they may heighten the likelihood of first-strike attacks. In this connection, “collateral damage” refers to the damage to human and nonhuman resources resulting from strategic strikes directed at enemy forces or military facilities. This unintended damage could involve large numbers of casualties and fatalities.

70. “Countervalue strategies” refer to the targeting of an enemy’s cities or industries; in effect, the targeting of civilian populations. From the standpoint of international law, such targeting is prima facie unlawful. Yet, as a practical matter, it could reduce the incentives to preempt in unstable circumstances, thereby greatly reducing the prospect of catastrophic war.
weapons would be more precise and controlled, and therefore more amenable to actual use.

Yet, counterforce postures are more apt to encourage preemption. In addition, if counterforce-targeted nuclear weapons are fired, especially in a proliferated regional setting, the resulting escalation may produce extensive countervalue exchanges. Even if such escalation were averted, the collateral effects of counterforce detonations could still be devastating.

As a result, Israel will confront a paradox in making its nuclear policy choices. Credible nuclear deterrence, which is essential to security and survival in a perpetually hostile region, requires "usable" nuclear weapons. If such weapons are obviously incapable of providing a reasonable security objective, they will not be a deterrent. However, the more the weapons enhance nuclear deterrence, the more likely they will actually be fired. Although this paradox seems to suggest the rationality of deploying the least-harmful forms of usable nuclear weapons, the fact that there would be no coordinated agreements with enemy states on deployable nuclear weapons indicates a different conclusion. Unless Israel calculates that the more harmful weapons would produce greater hazards for its own population as well as the target countries, there would be no tactical benefit to selecting the least injurious nuclear weapons.

F. Summary

Tactical and normative assessments of preemption may be closely related. To a certain extent, the legality of regional first strikes by Israel depends upon the precise formulations of Israel's nuclear strategy. These formulations are based, in part, upon reciprocal perceptions of the vulnerability of Israel's nuclear forces. Ironically, Israel's inclination to strike first may also be affected by its enemies' steps to guard against preemption. Should Israel refrain from striking first until enemy states acquire nuclear weapons, the new nuclear powers are apt to implement protective measures that would pose additional hazards to Israel. These measures could involve attaching "hair trigger" launch mechanisms to nuclear weapon systems and

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71. Secure nuclear forces are a sine qua non of a credible nuclear deterrence posture. Yet, even if a nuclear weapon state, such as Israel, could maintain secure nuclear forces, prospective aggressors might, through informational errors, perceive insecurity. As a result, nuclear deterrence could fail, despite the fact that Israel had succeeded in protecting its pertinent weapons.
adopting "launch-on-warning" policies, possibly coupled with predelegations of launch authority.

Optimally, Israel must try to prevent the installation of such weapons, especially because of the expanded risks of accidental or unauthorized attacks against its armaments and population. Yet, if such installation becomes a fait accompli, Israel may still determine that a preemptive strike is cost-effective because the expected Arab retaliation, however damaging, might be more tolerable than the expected consequences of Arab first-strikes.

Israel's inclination to strike first also depends, in part, upon the new relationship between the United States and the Soviet Union. Should this result in diminished United States support, Israel, no longer a "strategic asset" of a superpower, may be driven to still greater measures of self-reliance. As the United States draws closer to its anti-Iraq coalition of moderate Arab states, Israel is experiencing a type of "constructive disengagement" from the United States. Unless this loss of patronage is quickly supplanted by new and substantially improved relations with Europe and the Soviet Union, Israel will become more isolated, a condition that could encourage preemption.

V. DANGERS RESULTING FROM NOT STRIKING FIRST

A. Iraq's Nuclear Capability

In November 1990, Israeli Foreign Minister David Levy told the European Parliament that his country had taken an enormous risk in not preempting against Iraq after the invasion of Kuwait. Levy stated that "Israel is taking upon itself a danger which no responsible

72. "Launch-on-warning" is a strategic doctrine calling for the launch of bombers and/or land-based missiles upon receipt of a warning that a missile attack is underway. The doctrine, which requires launch before the attacking warheads reach their intended targets, is sometimes called "launch on positive or confirmed notification of attack," to distinguish between possible and actual attack. In a crisis situation, this could be seriously destabilizing.

73. Based on the Soviet Union's perceived need for effective allies in the struggle against Islamic fundamentalism, Soviet support for Israel could evolve into precise military guarantees. Of course, it is conceivable that the United States and the Soviet Union could find themselves on the same side in the Middle East. In addition, Israel could discover itself the beneficiary of military guarantees from the United States and the Soviet Union. Significantly, the Soviet Union has already embarked upon far-reaching commercial agreements with Israel that could spill over into important forms of political and military cooperation. See Lea Levavi, Israeli Participation in Soviet Space Research a Possibility, THE JERUSALEM POST, Jan. 27, 1990, at 2 (Int'l ed.).

74. See David Levy: We took great risk in not hitting Iraq, THE JERUSALEM POST, Dec. 1, 1990, at 1, 4 (Int'l ed.).
government in the world would have taken.”

The danger to which Levy referred was the danger of permitting Iraq to progress toward full-fledged nuclear capability.

Iraq has previously attempted to buy detonation capacitors suitable for use in nuclear explosives from United States suppliers. In addition, it has sought components of uranium gas centrifuges from various suppliers. The “feed material” for such centrifuges would probably have come from the uranium yellowcake Iraq had already imported from Brazil, Portugal, Niger, and other sources, as well as from domestic uranium recovered from phosphate mining operations.

Before the recent war, most experts believed that Iraq needed at least five more years to construct a nuclear bomb. Such an estimate, however, was “dangerously ill-informed,” according to Paul Leventhal, president of the Nuclear Control Institute in Washington, D.C. This is because it only takes one to three weeks to convert the uranium-aluminum fuel that Iraq had possessed into the pure uranium fuel required for a bomb. Moreover,

[i]tsestimates also do not take into consideration evidence that Iraq has been designing and developing the non-nuclear components for nuclear weapons in advance of having the essential nuclear ingredients—highly enriched uranium or plutonium—ready to place in them. Finally, these estimates do not consider the plausibility of Iraq now acquiring or having already acquired substantial quantities of these weapons materials by clandestine means from poorly protected civil nuclear facilities in other countries—especially in western Europe and Japan—or even possibly from willing suppliers in the Third World.

Ominously, Leventhal concluded that “[i]f Iraq has the components of an implosion device—save the nuclear core—completed and

75. Id.
77. Id.
78. Id.
80. See Present Assessments Understate Iraq’s Nuclear Weapons Potential, Nov. 30, 1990 (statement released by the Nuclear Control Institute, Wash., D.C.).
81. Id.
ready to be assembled, Iraq could have a bomb within the one-to-three week conversion time.”

During the next year, of course, such assessments will be downgraded as a result of the Gulf War.

**B. Anticipatory Self-Defense**

In terms of preemption and international law, the on-going Iraqi threat might confer considerable latitude upon Israel. Returning to the judgment of the *Caroline* incident, the danger still threatening Israel could appear to be “instant, overwhelming, leaving no choice of means and no moment for deliberation.”

Of course, each of these criteria might be disputed by informed and reasonable observers. But in the absence of authoritative and capable central institutions that can reassure Israel with independent judgments and effective protection, Israel might still have to decide whether to preempt against enemy states.

The advent of the nuclear age may make it critical for a state not to wait for an actual act of aggression to occur. Recognizing this, Wolfgang Friedmann argues:

> The judgment as to when to resort to such (preemptive) measures now places an almost unimaginable burden of responsibility upon the major Powers. But while this immensely increases the necessity for a reliable international detection organisation and mechanism, in the absence of effective international machinery the right of self-defence must probably now be extended to the defence against a clearly imminent aggression, despite the apparently contrary language of Article 51 of the Charter.

Similarly, international law professor Myres McDougal of Yale University argues:

> The more important limitations imposed by the general community upon the customary right of self-defense have been, in conformity with the overriding policy it serves of minimizing coercion and violence across state lines, those of necessity and proportionality. The conditions of necessity required to be shown by the target state have never, however, been restricted to “actual armed attack”; imminence of attack of such high degree as to preclude ef-

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82. *Id.* at 2.

83. See *supra* notes 21-24 and accompanying text.

fective resort by the intended victim to non-violent modalities of response has always been regarded as sufficient justification. Furthermore, it is now generally recognized that a determination of imminence requires an appraisal of the total impact of an initiating state's coercive activities upon the target state's expectations about the costs of preserving its territorial integrity and political independence. Even the highly restrictive language of then-Secretary of State Webster in the Caroline case, specifying a "necessity of self defense, instant, overwhelming, leaving no choice of means and no moment for deliberation," did not require "actual armed attack," and the understanding is now widespread that a test formulated in the previous century for a controversy between two friendly states is hardly relevant to contemporary controversies, involving high expectations of violence, between nuclear-armed protagonists.85

C. Nuclear Proliferation

In view of what is now known about Iraq's pre-war nuclear weapons capacity, the "imminence" of the general danger posed to Israel may be much greater now than it was when Israel bombed Iraq's Osiraq reactor near Baghdad on June 7, 1981. At that time, the United Nations Security Council condemned the action as "a clear violation of the Charter of the United Nations and the norms of international conduct," and stated that it

[f]ully recognizes the inalienable sovereign right of Iraq and all other States, especially the developing countries, to establish programmes of technological and nuclear development to develop their economy and industry for peaceful purposes in accordance with their present and future needs and consistent with the internationally accepted objectives of preventing nuclear weapons proliferation . . . .86

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86. See United Nations, S.C. Res. 487 of June 19, 1981, cited in SWEENEY ET AL., supra note 85, at 1464. This resolution further expressed the Security Council's satisfaction regarding Iraqi compliance with the Treaty on the Non-Proliferation of Nuclear Weapons ("NPT") and considered that "Iraq is entitled to appropriate redress for the destruction it has suffered . . . ." Id. Significantly, when the Security Council met to consider the initial complaint by Iraq, which requested an immediate meeting "to deal with a grave act of aggression committed by Israel against Iraq with far-reaching consequences for international peace and security," it ignored the intrinsically deficient jurisprudential basis of the complaint. See 18 U.N. CHRON. 5 (1981). Iraq had always declared itself to be in a state of war with Israel, and had doggedly rejected any international measure or instrument which might have implied even the most indirect recognition of Israel and its elementary right to exist. See SWEENEY ET AL., supra
It is no small irony that today, in the aftermath of Iraq’s aggression against Kuwait and the resulting Gulf War, much of the world has made an about-face in its assessment of Israel’s 1981 air attack and associated “objectives of preventing nuclear weapons proliferation.”

From Israel’s perspective, regional nuclear proliferation represents the worst case scenario. As dangerous as it would be to have a single nuclear-armed adversary in Iraq, it would be even more intolerable to have several such adversaries in the Middle East. Should such circumstances be allowed to occur, the legal questions of Israeli pre-emption would likely become moot because the tactical difficulties involved in such strikes would become overriding and overwhelming.

D. A World with Many Nuclear Powers

The presence of a nuclear crowd in the Middle East would be intolerably hazardous for Israel. Consider the following:

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85. note 85, at 1466-67 (citing statement by Israeli Ambassador Yehuda Z. Blum to the United Nations Security Council on June 19, 1981). It follows from this analysis that no Israeli use of force against Iraq could possibly be considered as an act of aggression. Moreover, because of the extraordinary precision of the Israeli strike, there can be no question about its conformance to the jus in bello rules of discrimination and proportionality.

87. In his arguments before the Security Council, Israeli Ambassador Yehuda Z. Blum pointed out that the so-called National Charter of Iraq, proclaimed by Saddam Hussein in 1980, enjoined all Arab states to war against Israel “using all means and techniques,” and that Iraq, blessed with abundant supplies of oil, was normally one of the largest oil suppliers in the Organization of Petroleum Exporting Countries. See SWEENEY ET AL., supra note 85, at 1467. This second point, together with the fact that Iraq was expecting delivery of about 24 kilograms of weapons-grade uranium, suggests that Iraq’s motives had little to do with an energy crisis.

An expanded number of nuclear powers would undermine the possibility of a stable balance of terror. There would be too many "players," and too much resultant ambiguity, for reliable nuclear deterrence to obtain.

An expanded number of nuclear powers could make it very difficult to maintain symmetrical strategic doctrines among the pertinent states. Some of the new nuclear powers could shape their strategies along the lines of "assured destruction" capabilities. Others might seek more ambitious objectives, including a "nuclear warfighting" or "counterforce" capability.

An expanded number of nuclear powers could ultimately create conditions whereby first-strike attacks could be unleashed with impunity, regardless of the intended target state's willingness to retaliate or the security of its retaliatory forces. In a region of several nuclear powers, it could become possible for a nuclear-armed aggressor to launch its weapons against another state without being identified. Unable to know for certain where an attack originated, Israel, or any country in similar circumstances, might find itself facing a decision between lashing out blindly or not retaliating at all.

An expanded number of nuclear powers could create the conditions for "microproliferation"—the spread of nuclear weapons capabilities to Arab terrorist organizations. A possible outcome of such microproliferation might not only be nuclear terrorism, but also an


90. Under international law, any use of nuclear weapons by an insurgent group would represent a serious violation of the laws of war. These laws have been brought to bear upon
anonymous terrorist detonation that could mistakenly be blamed upon a state adversary of Israel. Here, microproliferation could even spark regional nuclear war between Israel and its state enemies.

VI. CONCLUSION

It is essential that Israel prevent regional nuclear proliferation. Whether or not this will require preemption depends, in part, upon Israel’s antecedent judgments concerning “mutual assured destruction” versus “counterforce” warfighting strategies. These judgments, in turn, will be influenced by the particular type and number of nuclear weapons needed.

Should Israel become content with a comparatively nonthreatening assured destruction posture, it could reduce the prospect of Arab first-strikes and its own forms of preemption. But should this posture fail in its deterrence objective, it could produce a “Third Temple” scenario. This means that, although choosing assured destruction is the better way for Israel to avoid preemption, it is also far more dangerous than counterforce if the Arabs decide to strike first.

In summary, opting for assured destruction is too risky for Israel. Thus, the Israeli government must settle upon appropriately “usable” nuclear weapons and tactics, and accept the greater preemption incentives associated with such a choice. Should these incentives actually produce Israeli defensive strikes sometime in the future, Israeli leaders, as long as the preemption falls within the constraints of the previously discussed rules of armed conflict, would be operating well within the authoritative norms of international law.

non-state participants in world politics by article 3, common to the four Geneva Conventions of August 12, 1949, and by the two protocols to those conventions. Protocol I makes the law concerning international conflicts applicable to conflicts fought for self-determination against alien occupation and against colonist and racist regimes. A product of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, which ended on June 10, 1977, the protocol, which was justified by the decolonization provisions of the United Nations Charter and by resolutions of the General Assembly, brings irregular forces within the full scope of the law of armed conflict. Protocol II, also additional to the Geneva Conventions, concerns the protection of victims of non-international armed conflicts. Hence, this protocol applies to all armed conflicts that are not covered by Protocol I and that take place within the territory of a state between its armed forces and dissident armed forces.

91. Founded upon Jewish-historical imagery, this “Third Temple” scenario is a shorthand expression for the total destruction of the state of Israel.