Legality, Legitimacy and Anticipatory Self-Defense: Considering an Israeli Preemptive Strike on Iran's Nuclear Program

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Cover Page Footnote
International Law; Commercial Law; Law
Legality, Legitimacy and Anticipatory Self-Defense: Considering an Israeli Preemptive Strike on Iran’s Nuclear Program

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"And self-defence is Nature's eldest law."¹

"... the right of every sovereign state to protect itself by preventing a condition of affairs in which it will be too late to protect itself."²

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¹ JOHN DRYDEN, Absalom and Achitopel, in THE POETICAL WORKS OF JOHN DRYDEN 119 (Richard Hooper, ed. 1891).

I. Introduction

World War III is an event the world universally wishes to avoid.\(^3\) Threats of preemptive strikes, retaliations, and nuclear weapons development bring speculation to the foreground about whether tensions today between Israel and Iran might result in an escalation of hostilities leading to a third World War.\(^4\) Iran has long professed hatred for the Jewish state,\(^5\) and, according to the International Atomic Energy Agency (IAEA), may be developing nuclear weapons.\(^6\) Israeli leaders say that if necessary, they will preemptively strike Iran to prevent it from developing nuclear attack capability.\(^7\)

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\(^3\) As Albert Einstein famously opined, “I know not with what weapons World War III will be fought, but World War IV will be fought with sticks and stones.”


While a strike might forestall a nuclear Iran, at least for the time being, the international community may not view this preemptive measure as legal or legitimate. Using force in self-defense must be subject to clear boundaries in order to prevent rampant violence. While war is never desired, "a legal war is more human than an illegal war." But the rules of using force must be generally known and accepted in order to be effective. This comment attempts to clarify the field of international law regarding use of force in anticipatory self-defense, and recommends that clear standards be widely established to better guide both nations considering such use of force and the international community, which must respond to this use of force.

This comment assesses the legality of a potential Israeli preemptive strike against Iran's nuclear program. There is no recognized and accepted analytical framework to assess this legality. Therefore, this comment employs two methods of analysis and considers them both: first, it will employ the time-tested analytical methodology of analogy by comparing the state of the current Israeli-Iran conflict to incidents of anticipatory self-defense. Second, it will apply an analytical framework, proposed by David A. Sadoff, that offers a clear, practicable standard to govern evaluation of anticipatory use of force. Part I discusses...
the backdrop of international law regarding the use of force in self-defense. Part II defines the terms used and discusses both the traditional and proposed analytical frameworks used to assess the legality of anticipatory acts of self-defense. Part III describes and analyzes generally recognized incidents of anticipatory self-defense. Part IV assesses the current situation between Israel and Iran using analogies to past incidents and Sadoff's proposed analytical framework. Part V concludes that while the traditional framework under customary international law would condemn an Israeli strike, a clearer standard encompassing legitimacy as well as legality would better guide the international community in evaluating anticipatory uses of force in the modern era.

II. International Law and the Use of Force in Self-Defense

Self-defense has been described as "[n]ature’s eldest law."\(^\text{12}\) Today, this right to self-defense has been codified in Article 51 of the U.N. Charter.\(^\text{13}\) In order to analyze the legality of an Israeli preemptive strike on Iran’s nuclear program, it is first necessary to understand the state of international law concerning the use of force in preemptive or anticipatory self-defense.

A. The Road to Modern International Law and the Use of Force

Before aspiring to describe the modern intricacies of international law, it is helpful to first understand the origins of international law and regulation of the use of force between nations. Person to person, community to community, and state to state, the use of force is a salient aspect of humankind’s history.\(^\text{14}\) As one scholar puts it, “force has been a consistent feature of the global system since the beginning of time.”\(^\text{15}\) War has been so prevalent in human history that it has been considered a “perennial

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\(^\text{13}\) See infra Part I.B.2.


\(^\text{15}\) Id. at 2-3.
fact of life... tantamount to... plague or flood or fire."\textsuperscript{16} It would "appear every once in a while, leave death and devastation in its wake, and temporarily pass away to return at a later date."\textsuperscript{17}

Over time, the need to restrict and regulate wars between nations developed, and war assumed a "legal status."\textsuperscript{18} The attempt to restrict is first characterized by the "just war–unjust war" dichotomy of Ancient Greece and Ancient Rome,\textsuperscript{19} which classical jurists and scholars of the sixteenth and seventeenth centuries advanced with their writings.\textsuperscript{20} By the nineteenth century, however, this dichotomy was abandoned.\textsuperscript{21} The accepted view of this period was that international law had nothing to do with attempting to distinguish just and unjust wars.\textsuperscript{22} War was viewed as "a right inherent in sovereignty itself."\textsuperscript{23} Through the nineteenth century, there was a widespread acceptance of a sovereign nation’s right to go to war.\textsuperscript{24}

Perhaps in reaction to this widespread acceptance, bilateral treaties between nations began to arise at the end of the nineteenth century.\textsuperscript{25} These treaties were formed to create contractual obligations between states to not go to war with each other.\textsuperscript{26} Bilateral treaties eventually led to the creation of multilateral

\begin{footnotes}
\item[17] Id. at 69.
\item[18] Id.
\item[19] Id. at 59-60.
\item[20] Id. at 61.
\item[21] Id. at 63.
\item[22] Dinstein, supra note 16, at 63. "Distinctions between just and unjust causes of war 'belong to morality and theology, and are as much out of place in a treatise on International Law as would be a discussion on the ethics of marriage in a book on the law of personal status.'" Id. (quoting T.J. Lawrence, The Principles of International Law 311 (P.H. Winfield ed., 7th ed. 1923)).
\item[23] Id. at 71 (citing A.S. Hershey, The Essentials of International Public Law 349 (1912)) (internal quotation marks omitted).
\item[24] Id.
\item[25] Id.
\item[26] Id. at 73. One example includes the 1878 treaty between Honduras and Nicaragua, in which the two nations agreed that "there shall in no case be war" between them. Id. (citing Tegucigalpa Treaty of Friendship, Commerce and Extradition, Hond.-Nicar., art. II, 1878, 152 C.T.S. 415, 416).
\end{footnotes}
treaties in an effort to "curtail somewhat the freedom of war in general international law." After a few multilateral attempts to restrict inter-state use of force, war finally became "illegal in principle" in 1928 with the General Treaty for Renunciation of War as an Instrument of National Policy (otherwise known as the Kellogg-Briand Pact). Though flawed, the Kellogg-Briand Pact was a "watershed date in the history of the legal regulation of the use of inter-state force."

These early developments in establishing the illegality of war led to the Charter of the United Nations, signed in 1945 in San Francisco. In response to the Second World War, the United Nations was created "to establish a universal international organization charged with the management of international conflict." Delegates of forty-nine states were determined "to save succeeding generations from the scourge of war." To this end, Article 2(4) of the U.N. Charter proscribes both the use and threat of force. Two major exceptions exist, however, to this general prohibition against use of force. Nations may use force

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27 Id. at 74.
28 The Hague Conventions of 1899 and 1907 and the Covenant of the League of Nations of 1919 took steps to contractually limit signatories' freedom to jump into war without taking alternative steps. See DINSTEIN, supra note 16, at 74-77.
29 Id. at 77-78.
30 Id. at 78, 80. The flaws of the Kellogg-Briand Pact were described to include "(i) the issue of self-defence was not clearly addressed in the text; (ii) no agreed upon limits were set on the legality of war as an instrument of international policy; (iii) the prohibition of war did not embrace the entire international community; and (iv) forcible measures short of war were eliminated from consideration." Id. at 80. While the Kellogg-Briand Pact "contained no express reservation of the right of national self-defense... the right of national defense [was regarded] as so firmly established in international law that no express reservation was required." Michael Franklin Lohr, Legal Analysis of U.S. Military Responses to State-Sponsored International Terrorism, 34 NAVAL L. REV. 1, 17 (1985).
31 See DINSTEIN, supra note 16, at 80.
32 AREND & BECK, supra note 14, at 29.
33 Id. (quoting U.N. Charter, pmbl.) (internal quotation marks omitted).
34 U.N. Charter art. 2, ¶ 4. ("All Members of the United Nations shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").
35 AREND & BECK, supra note 14, at 31-32. In addition to the two major exceptions, Article 106 allows the five permanent nation states of the Security Council to
if they are acting either in individual or collective self-defense or if force has been authorized by the U.N. Security Council.\textsuperscript{36}

\textbf{B. Self-Defense}

Even before the creation of the U.N. Charter, self-defense has been historically recognized as an inherent right of both individuals and sovereign nations.\textsuperscript{37} As one scholar notes, self-defense "has long been founded on the simple notion that every rational being... must conclude that it is permissible to defend himself when his life is threatened with immediate danger."\textsuperscript{38} In addition to an individual's right to self-defense, the right of nations to use force in self-defense has also traditionally been recognized.\textsuperscript{39} The right of a nation to defend its sovereignty is "embedded" in the "fundamental right of [s]tates to survival."\textsuperscript{40} This being the case, there is no dispute over the legality of a state defending itself against attacks on its sovereignty.\textsuperscript{41} What remains unsettled in modern legal scholarship, however, is when a nation

\textsuperscript{36} See U.N. Charter art. 51; infra Part I.B.2.

\textsuperscript{37} See Niaz A. Shah, Self-Defence. Anticipatory Self-Defence and Pre-emption: International Law's Response to Terrorism, 12 J. CONFLICT & SECURITY L. 95 (2007). "It is admitted that a just right of self-defence attaches always to nations as well as to individuals, and is equally necessary for the preservation of both." \textit{Id.} (quoting Daniel Webster, \textit{Letters from U.S. Secretary of State Daniel Webster to British Minister Mr. Fox, in 29 BRIT. \\& FOREIGN AFF. PAPERS 1129, 1137-398 (1840-1841)}).


\textsuperscript{39} Raymond & Kegley, supra note 12, at 100. "Envisioned by the ancients as a natural right of individuals, [self-defense] has also been recognized by international legal authorities as a right of sovereign territorial states since the Peace of Westphalia (1648) gave rise to modern world system [sic]." \textit{Id.}

\textsuperscript{40} DINSTEIN, supra note 16, at 159. Another scholar articulated the purpose of self-defense as "[protecting] certain essential legal rights; its aim is preventative and non-retributive, and... it is this characteristic which distinguishes self-defence from reprisals." D. W. BOWETT, \textit{SELF-DEFENSE IN INTERNATIONAL LAW} 20 (1958).

\textsuperscript{41} See DINSTEIN, supra note 16, at 159.
may invoke this right.\textsuperscript{42} Traditionally, self-defense may only be used when necessary to repel an “overt armed attack,” and is impermissible as a form of retaliation.\textsuperscript{43} The notion behind self-defense in \textit{anticipation} of an armed attack, however, is that “[s]tates faced with a perceived immediate attack cannot be expected to await the attack like ‘sitting ducks’ but should be allowed to take the appropriate measures for their defense.”\textsuperscript{44}

\subsection*{1. Customary International Law}

Under customary international law, nations may use force in anticipatory self-defense in order to “thwart discernible impending attacks.”\textsuperscript{45} The established doctrine arises from an incident known as the “Caroline incident.”\textsuperscript{46} In 1837, the United States and Great Britain were at peace and Canada was under British colonial rule.\textsuperscript{47} However, factions of Canadians were engaged in an “armed insurrection” against the British.\textsuperscript{48} The \textit{Caroline}, a privately-owned American steamship owned and operated by Americans, was used to transport men and supplies across the Niagara River to support the Canadian rebels.\textsuperscript{49} On the night of December 29, 1837, British soldiers seized the \textit{Caroline} while it was docked on the American side of the river, dragged the boat into the current, set it afire, and let it loose to drift over the Niagara Falls.\textsuperscript{50} Two Americans were killed in the incident.\textsuperscript{51}

In response, a series of letters were exchanged between Henry

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\textsuperscript{42} Raymond \& Kegley, \textit{supra} note 12, at 100.
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\textsuperscript{43} \textit{Id}.
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\textsuperscript{44} STANIMOR A. ALEXANDROV, \textit{SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW} 149 (1996) (citations omitted).
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\textsuperscript{45} Raymond \& Kegley, \textit{supra} note 12, at 100.
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\textsuperscript{46} This incident, widely cited as the origin of the necessary and proportionate requirements for use of force under customary international law, is said to have “attained a mythical authority.” \textit{See} CHRISTINE GRAY, \textit{INTERNATIONAL LAW AND THE USE OF FORCE} 149 (2008).
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\textsuperscript{48} \textit{Id}; \textit{see also} AREND \& BECK, \textit{supra} note 14, at 18.
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\textsuperscript{50} \textit{See id}; \textit{see also} AREND \& BECK, \textit{supra} note 14, at 18.
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\textsuperscript{51} Rogoff \& Collins, \textit{supra} note 49, at 495.
\end{flushright}
Fox, the British Minister in Washington, and the U.S. Secretary of State. The British claimed that the destruction of the Caroline was justified as "necessity of self-defense and self-preservation." The response of Secretary of State Daniel Webster has become immortalized as the factors necessary to justify an act of self-defense. Webster stated that the act would not be justifiable unless the British could show:

necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation. It will be for it to [show], also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.

This response has become known as the Caroline doctrine, and asserts that for a use of force in anticipatory self-defense to be justified, it must be necessary, proportionate, and in response to an imminent threat of armed attack where no other means of redress are available. These factors have become generally accepted and incorporated into customary international law.

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52 While initially the United States Secretary of State engaged in the matter was John Forsyth, he was replaced by Daniel Webster in early 1841. Id. at 495-96.
53 Id. at 496.
54 Id. at 496-97.
55 Id. at 497-98 (citing BRITISH DOCUMENTS ON FOREIGN AFFAIRS: REPORTS AND PAPERS FROM THE FOREIGN OFFICE CONFIDENTIAL PRINT, PART I, SERIES C, NORTH AMERICA, 1837-1941, VOL. I, (K. Bourne, ed., McLeod and Maine 1986)).
56 See id. at 498.
57 AREND & BECK, supra note 14, at 18. The Caroline doctrine was invoked on a number of occasions following the Caroline incident. See Sadoff, A Question, supra note 47, at 538-39. It was "preserved with reservations" in the 1928 Kellogg-Briand Pact, asserted as Japan's defense in 1931 for their invasion of Manchuria, and applied verbatim in the 1946 Nuremberg trials in the matter of Germany's 1940 invasion of Norway. Id. (internal citations omitted). But see James A. Green, Docking the Caroline: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense, 14 CARDOZO J. INT'L & COMP. L. 429 (2006) (contending that the Caroline formula for justifying anticipatory self-defense is not representative of contemporary customary international law).
2. The U.N. Charter and Article 51

The Charter of the United Nations was adopted in 1945. As discussed above, Article 2(4) of the Charter prohibits the use of force between nations, except in the case of two major exceptions. First, Article 51 articulates a nation’s right to use force in self-defense. Second, Chapter VII of the Charter allows the use of force “as may be necessary to maintain or restore international peace and security” under authorization of the U.N. Security Council. This analysis focuses on Article 51, as it is “the focal point” in discussing the permissibility of self-defense.

Under Article 51 of the Charter, a nation has the right to use force in individual or collective self-defense. The Article provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence 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

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59 U.N. Charter art. 51.
60 U.N. Charter art. 42.
61 Sadoff, A Question, supra note 47, at 540-41. Chapter VII (Article 42) uses of force are also tangentially relevant to a discussion of anticipatory self-defense. Article 39 of the Charter, which operates as the gateway to permit Article 42 actions, provides that “[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression.” U.N. Charter art. 39 (emphasis added). In fact, scholars observe that the reference to “‘the threat to the peace’ . . . demonstrates that pre-emptive action was always intended to be a major feature [of the Charter].” Christopher Greenwood, International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq, 4 SAN DIEGO INT’L L.J. 7, 19 (2003).
62 See Dinstein, supra note 16, at 161. Individual self-defense refers to the right of an individual state to use force in self-defense when it is the victim of an armed attack. See Eustace Chikere Azubuike, Probing the Scope of Self Defense in International Law, 17 ANN. SURV. INT’L & COMP. L. 129, 135 (2011). Collective self-defense refers to the right of a state to respond with force when another state is the victim of an armed attack. Collective self-defense preserves the right of nations bound by treaty to respond if a fellow treaty-state is attacked. See id. at 173-74; infra note 110.
order to maintain or restore international peace and security.\textsuperscript{63} While “the right of self-defence pursuant to the U.N. Charter has its origins in customary international law,” Article 51 appears to limit uses of force in self-defense only to situations where an “armed attack” has occurred.\textsuperscript{64} As Professor Dinsein succinctly observes, this limitation presents a “material difference in the range of operation of the right [of self-defense] between these two sources [of international law].”\textsuperscript{65} Many scholars have very divergent views on the implications of this difference.

3. The Debate

The debate surrounding the legality of anticipatory defense in modern international law is extensive and seemingly unlimited. Scholars can generally be divided into two camps: restrictionist and expansionist.\textsuperscript{66} First, however, it is necessary to clarify the terminology used in the debate on self-defense.\textsuperscript{67}

While a plethora of scholars seem to offer as many definitions and distinctions as there are authors,\textsuperscript{68} this article will use the terminology as categorized by David Sadoff.\textsuperscript{69} First, there are two general types of self-defense: reactive and non-reactive.\textsuperscript{70} Reactive strikes occur “when a State responds to an attack after it

\textsuperscript{63} U.N. Charter art. 51.
\textsuperscript{64} DINSTEIN, supra note 16, at 165.
\textsuperscript{65} Id.
\textsuperscript{66} These camps have also been categorized as “broad” and “narrow” interpretations of the right of self-defense. See, e.g., Natalino Ronzitti, The Expanding Law of Self-Defence, 11 J. CONFLICT & SEC. L. 343, 344-45 (2006).
\textsuperscript{67} For a further discussion of the importance of clarifying the semantics of these terms, see Dominika Švarc, Redefining Imminence: The Use of Force Against Threats and Armed Attacks in the Twenty-First Century, 13 ILSA J. INT’L & COMP. L. 171, 173 (2006).
\textsuperscript{69} See Sadoff, A Question, supra note 47, at 529-32.
\textsuperscript{70} Id.
has occurred.”

Non-reactive strikes, otherwise referred to as “defensive first strikes,” occur “when a State takes military action before being hit.”

Defensive first strikes can be further subdivided into three categories: interceptive, anticipatory, and preemptive. These three categories can be viewed as the rough points on a spectrum of “real or perceived timing of the threat posed by an aggressor State.” Interceptive self-defense encompasses the most immediate threats, while preemptive encompasses the least immediate.

Interceptive self-defense, as first articulated by Professor Dinstein, “takes place after the other side has committed itself to an armed attack in an ostensibly irrevocable way.” This refers to scenarios with the shortest amount of time between the self-defensive act and the perceived threat. As Sir Humphrey Waldock describes, “[w]here there is convincing evidence not merely of threats and potential danger but of an attack being actually mounted, then an armed attack may be said to have begun to occur, though it has not passed the frontier.” Dinstein asserts that not only is interceptive self-defense legitimate under customary international law, it is also legitimate under Article 51.

Anticipatory self-defense, by contrast, is “the use of force in

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71 Id. at 529.
72 Id.
73 Id. at 530.
74 Id.
75 Sadoff, A Question, supra note 47, at 530.
76 DINSTEIN, supra note 16, at 172. It has been suggested that the term “interceptive self-defense” may be more “consonant with reactive self-defense,” given the nature of the attack facing the nation. See Sadoff, Striking, supra note 10, at 445 n.8 (citing Guy B. Roberts, Self-Help in Combating State-Sponsored Terrorism: Self Defense and Peacetime Reprisals, 19 CASE W. RES. J. INT’L L. 243, 275 (1987)).
79 See DINSTEIN, supra note 16, at 172. One scholar notes, however, that interceptive defense “has only the slimmest instance margin of practical applicability.” Sadoff, Striking, supra note 10, at 445 n.8. More notable is the scholar’s observation that “there is virtually no historical instance in which such defensive force has ever been exercised.” Id.
'anticipation' of an attack when a State has manifested its capability and intent to attack *imminently.*" The Caroline doctrine is generally considered to reflect assertions of anticipatory self-defense. This refers to scenarios where an attack may be imminent but not yet underway. The temporal definition of what constitutes "imminence" is not well-established or even well-articulated. Many scholars assert that Article 51 of the U.N. Charter recognizes anticipatory self-defense through its preservation of states' "inherent right of... self-defense." Preemptive self-defense, which is used in this comment to encompass the concept of "preventive" self-defense, refers to the use of force "to quell any possibility of future attack by another state, even where there is no reason to believe that an attack is planned and where no prior attack has occurred." This scenario refers to defensive first strikes that are temporally the most removed from the perceived threat. While the majority of

80 Sadoff, *A Question,* supra note 47, at 530.
82 *See Shah,* supra note 37, at 112 ("Anticipatory self-defence... would authorise armed responses to attacks that are on the brink of being launched.") (emphasis added); *see also* Raymond & Kegley, *supra* note 12, at 101 ("[M]ilitary force is used to quell or mitigate an impending strike by an adversary.") (emphasis added).
83 *See* Michael N. Schmitt, *U.S. Security Strategies: A Legal Assessment,* 27 *Harv. J.L. & Pub. Pol'y* 737, 755 (2004) (contrasting the traditional interpretation of immediacy as when "the pending, armed attack is about to be attacked" with interpreting immediacy "in light of its underlying purposes, permitting States to defend themselves effectively against attack while allowing the greatest opportunity possible for means short of the use of force to resolve the situation").
84 U.N. Charter art. 51. *See Shah,* supra note 37, at 99-101; *see also* Waldock, *supra* note 78, at 498 ("If an armed attack is imminent within the strict doctrine of the Caroline, then it would seem to bring the case within Article 51.").
85 The term "preventive strike" is used to reflect strikes that occur when the threat is very removed in time, synonymous to our use of the term "preemptive" here. Specifically, preventive self-defense has been defined as "attacks... in which military force is used to eliminate any possible future strike, even when there is no reason to believe that aggression is planned or the capability to launch such a strike is operational." Raymond & Kegley, *supra* note 12, at 101-02. *See also* Dinstein, *supra* note 16, at 168 (referring to "preventive war").
87 *See id.* (distinguishing preemptive self-defense from anticipatory self-defense
scholars reject the legality of preemptive self-defense under international law, it has been argued that use of preemptive force may still be legitimate.

The restrictionist and expansivist schools of interpreting the legality of self-defense focus their debate on the "middle-ground" of defensive first-strikes, that of anticipatory self-defense. Professor Ronzitti aligns the two camps in terms of a geographical divergence. The restrictionist camp is referred to as the "continental doctrine," while the expansivist doctrine is attributed to common law countries and Israel. The question that divides the two camps is "whether the words 'if an armed attack occurs' introduce[s] . . . a rigid test of legitimate self-defense."

The restrictionist camp asserts that "self-defense [can] lawfully be exercised only if the State is the object of an actual attack." Under this view, "use of force under the Charter is expressly limited to situations where an armed attack has already commenced or occurred." The restrictionist camp recognizes the right to use force in anticipatory self-defense under customary international law, but asserts that the adoption of the Charter in 1945 limited "the scope of that right." As Professor Dinstein emphasizes, "[t]he use of the phrase 'armed attack' in Article 51 is which authorizes "armed response to attacks that are on the brink of launch") (emphasis added).

88 See Shah, supra note 37, at 115.
89 See Abraham D. Sofaer, The Best Defense? Preventive Force and International Security, 89 FOREIGN AFF. 109, 116 (2010) [hereinafter Soafer, Preventive Force] (recognizing that "the legitimacy of an action can differ from its legality"); see also supra notes 122-127 and accompanying text. But see Švarc, supra note 67, at 187 ("[Preventive war] is an offensive strategic response to a long-term threat, not a defensive tactical response to an impending attack, which is the underlying rational of the anticipatory action.").
90 Ronzitti, supra note 66, at 344-45.
91 Id. See also Greenwood, supra note 61, at 12 (mentioning that both the United States and the United Kingdom maintain that "the right of self-defense also applies when an armed attack has not yet taken place but is imminent").
92 Waldock, supra note 78, at 497 (emphasis added) (quoting U.N. Charter art. 51).
93 Ronzitti, supra note 66, at 345.
94 Shah, supra note 37, at 97.
95 Id.
not inadvertent... [it] is deliberately restrictive."96 Dinstein concludes that "self-defence consistent with Article 51 implies resort to counter-force... in reaction to the use of force by the other party."97

By contrast, the expansivist camp asserts that "the right of self-defence can be exercised not only when the State has been the object of an armed attack but also when the attack is imminent."98 Three reasons have been cited to support this theory. First, expansivists cite that the actual reading of "if an armed attack occurs" does not necessarily mean "after an armed attack has occurred."99 Professor Waldock elaborates that this "goes beyond the necessary meaning of the words," and cites the French text: "dans un cas où un Membre des Nations Unies est l'objet d'une agression armée."100 Second, expansivists note that the Article 51's preservation of the "inherent right" of self-defense was "a comparatively late addition to the Charter, for most States initially assumed that the right of self-defense was inherent in the proposals and did not need explicit mention in the Charter."101 Lastly, and most persuasively, the expansivist camp notes that Article 51 preserves the "inherent right" of self-defense.102

D. W. Bowett remarks that "[t]he reference to an 'inherent' right suggests something of the philosophy of natural law."103 Professor Dinstein himself points out that "the right of self-defence pursuant to the U.N. Charter has its origins in customary international law."104 As customary international law permits an act of

96 Dinstein, supra note 16, at 166.
97 Id. at 167.
98 Ronzitti, supra note 66, at 344.
100 Id. In the English version of the U.N. Charter, this text reads "if an armed attack occurs against a Member of the United Nations." U.N. Charter, art. 51. See also supra note 63 and accompanying text. Literally translated, however, the French version may read "in a case where a member of the United Nations is the object of an armed aggression" (translated by the author).
102 Id. (emphasis added).
103 Bowett, supra note 40, at 187.
104 Dinstein, supra note 16, at 165. Though this observation can support the expansivist argument, Dinstein himself appears to subscribe to the restrictionist camp.
anticipatory self-defence "when the threat of an armed attack is 'imminent,'" it is therefore "not implausible to interpret article 51 as leaving unimpaired the right of self-defense as it existed prior to the Charter." As Professor Shah articulates, "[t]he intention of article 51 seems to be to make anticipatory self-defence a statutory right, not to limit it," strongly evidenced by "[t]he inclusion of the word 'inherent' and the absence of any objection to it by states." With such a dispute over the ambiguity of Article 51, many scholars would turn to the International Court of Justice (ICJ) for a judicial ruling on whether anticipatory self-defense is legal under Article 51. Yet the ICJ has not ruled on the matter. In Nicaragua v. United States, while the ICJ "based its decision on the norms of customary international law concerning self-defence as a sequel to an armed attack," the Court explicitly refrained from pronouncing a judgment on the legality of anticipatory self-defense. Without a judicial pronouncement on the matter,

See id. at 167-68 (calling for a reading that "the right of self-defence under Article 51 exists 'if, and only if, an armed attack occurs'" (citing Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 181 (June 27) (Schwebel, J., dissenting)).

105 Shah, supra note 37, at 99. See also supra notes 45-57 and accompanying text.


107 Shah, supra note 37, at 100.

108 Id.

109 See, e.g., Ronzitti, supra note 66, at 345.

110 Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) [hereinafter The Nicaragua Case]. In this matter, the ICJ ruled on whether the use of force by the United States against Nicaragua was justified under the doctrine of collective self-defense. See Gray, supra note 46, at 130. Under this doctrine, a third-party state may use force in defense of another state that has been attacked, "bas[ing] its participation in collective action on its own right of self-defence." Bowett, supra note 40, at 216. Nicaragua brought a case against the United States before the ICJ to challenge both the United States' use of force against the government of Nicaragua and for its support of the military and paramilitary activities opposing the Nicaraguan government. See Gray, supra note 46, at 75. The court ruled against the United States, with dissenting opinions from U.S. and British judges. See id. at 130. While the basis of the ICJ's ruling concerned collective self-defense, the court's discussion of using force in self-defense established that the legality of such acts is based in customary international law as well as in the U.N. Charter. See Alexandrov, supra note 44, at 135; see also Gray, supra note 46, at 118-30.

111 DINSTEIN, supra note 16, at 166; see also Shah, supra note 37, at 100; Ronzitti,
scholars will continue to battle over the legality of anticipatory self-defense.

4. The State of the Law and Implications

Today, there is no accepted state of international law regarding the use of force as anticipatory self-defense against an imminent armed attack. However, as numerous scholars have noted, the world has changed in many significant ways since the drafting of the U.N. Charter in 1945. At that time, drafters were primarily concerned with “overt acts of conventional aggression.” Since 1945, however, most conflicts have been in the form of civil conflicts, covert actions, or acts of terrorism. The “ever-present threat of the use of nuclear and other weapons of mass destruction” is changing our traditional notions of warfare. While nuclear weapons physically existed at the time the U.N. Charter was drafted, “the delegates at San Francisco knew nothing of the nature and effects of nuclear weapons” and thus “could not have addressed the threat, proliferation, and potential use of these weapons of mass destruction.” One delegate specifically referred to the Charter as a “pre-atomic age charter.”

Many scholars of the expansivist view point out this seemingly obvious observation: “[n]o state can be expected to await an initial attack which, in the present state of armaments, may well destroy the state’s capacity for further resistance and so jeopardize its very existence.” The ICJ itself, in its advisory opinion in the Nuclear

supra note 66, at 345.

112 AREND & BECK, supra note 14, at 73.

113 See id. at 37.

114 Id.

115 Id.; see also Sofaer, Preventive Force, supra note 89, at 110 (listing the proliferation of weapons of mass destruction, piracy, drug and human trafficking, and genocide as reasons that support the use of preemptive force).

116 AREND & BECK, supra note 14, at 73.

117 Id. at 38-39.

118 Id. at 39 (citing John F. Dulles, Secretary of State, Address Before the American Bar Association (Aug. 26, 1953)).

119 BOWETT, supra note 40, at 191-92. See also Greenwood, supra note 61, at 15 (“In a nuclear age, common sense cannot require one to interpret an ambiguous provision in a text in a way that requires a state passively to accept its fate before it can defend itself.”) (quoting ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 242 (1994)).
Weapons Case,\textsuperscript{120} recognizes the "right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake."\textsuperscript{121} It seems that there is room for a preemptive use of force under the U.N. Charter if and only if a state's very survival is at stake.

Lastly, one could argue against even considering the legality of using preemptive force.\textsuperscript{122} Abraham Sofaer notes that despite the "illegality" of using force for "preventive purposes," states have engaged in such force in over 100 instances since the signing of the U.N. Charter in 1945.\textsuperscript{123} He argues that rather than being concerned over the legality of a preemptive use of force, states should be concerned over the legitimacy of such an act.\textsuperscript{124} Sofaer advocates adopting a proposal from the 2004 report of the Secretary General's High-Level Panel on Threats, Challenges and Change:\textsuperscript{125} the U.N. Security Council should "adopt and systematically address a set of agreed guidelines, going directly not to whether force can legally be used but whether, as a matter of good conscience and good sense, it should be."\textsuperscript{126} According to Sofaer, the benefits of "using legitimacy as a guide . . . would allow states to take into account a broader range of considerations than current international law typically dictates."\textsuperscript{127}

\textsuperscript{120} 1996 I.C.J. 226 (July 8) [hereinafter Nuclear Weapons Advisory Opinion].
\textsuperscript{121} Id. at ¶ 96. But see ALEKSANDROV, supra note 44, at 23 (quoting JAMES BRIERLY, THE LAW OF NATIONS 405 (Humphrey Waldock ed., 6th ed. 1963)) (distinguishing "self-defense" from "self-preservation" from the observation that "self-preservation in the case of a state . . . is not a legal right but an instinct; and even if it may often happen that the instinct prevails over the legal duty not to do violence to others, international law ought not to admit that it is lawful that it should do so.").
\textsuperscript{122} Sofaer, Preventive Force, supra note 89, at 112-17.
\textsuperscript{123} Id. at 112.
\textsuperscript{124} See id. at 116. The context of Sofaer's argument is legality according to the U.N. Charter and the U.N. Security Council. See id. at 112. Sofaer goes on to explain that while many acts of force are both legitimate and legal, or both illegitimate and illegal, there are inconsistencies. See id. at 116-17. He describes the decision of the U.N. Security Council in the 1990s to deny weapons to victims of ethnic and religious abuse as "legal but arguably illegitimate," and NATO's intervention and use of force in Kosovo as "illegal but arguably legitimate." Id.
\textsuperscript{125} High-level Panel Report, supra note 9; see also infra Part II.B.2.
\textsuperscript{126} High-level Panel Report, supra note 9, at ¶ 205; Sofaer, Preventive Force, supra note 89, at 116.
\textsuperscript{127} Sofaer, Preventive Force, supra note 89, at 117.
The state of the law concerning the legality of using force in preemptive or anticipatory self-defense is convoluted, to say the least. However, this does not mean that it is impossible to evaluate the legality of an Israel preemptive attack on the Iranian nuclear program.

III. The Legality of Anticipatory Self-Defense and Preemptive Force

Though the state of modern international law is unclear, there are many arguments to support the legality of using force in anticipatory self-defense. Under the Caroline doctrine of customary international law, the traditional framework to evaluate use of force in anticipatory self-defense addresses three elements: necessity, proportionality, and imminence of a threat such that no other recourse is available. Alternative frameworks have also been proposed to expand the customary Caroline framework. Using both the traditional and alternative analytical frameworks to analyze several modern incidents where the use of anticipatory self-defense was evidenced or claimed, it is possible to evaluate the legality of a potential Israeli strike on Iran's nuclear reactor.

A. Framework under Customary International Law

Regardless of legality under strict interpretation of Article 51 of the U.N. Charter, the Caroline-based elements of necessity, proportionality, and imminence must be fulfilled for an anticipatory use of force to be legal under customary international law. While some commentators include imminence in their analysis of necessity, most commentators include imminence as

128 See supra Part I.B.1.
129 See supra note 56 and accompanying text.
130 See supra Part I.B.2.
1. Necessity and Proportionality

The principles of necessity and proportionality are “part of the basic core of self-defence [upon which] all states agree.”\(^{135}\) The requirements of necessity and proportionality in self-defense are not expressly included in the U.N. Charter, but rather, are tenets of customary international law that have been reaffirmed by the ICJ in the Nicaragua case and in the ICJ’s Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons.\(^{136}\) As Gray succinctly describes, the “basic, uncontroversial principles” of necessity and proportionality are that self-defense “must not be retaliatory or punitive; the aim should be to halt and repel an attack.”\(^{137}\) Necessity and proportionality “constitute a minimum test” that is determinative of the legality of using force in self-defense.\(^{138}\) Thus, if a nation’s use of force is lacking in either necessity or proportionality, the use of force is not justified under the doctrine of self-defense, and may in fact be unlawfully retaliatory or punitive.\(^{139}\)

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\(^{135}\) GRAY, supra note 46, at 148.

\(^{136}\) See id. at 149-50. In the Nicaragua case, the court observed that “[Article 51] does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well-established in customary international law.” The Nicaragua Case, supra note 110, ¶ 176 (emphasis added) (quoted in DINSTEIN, supra note 16, at 183). The ICJ’s 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons stated that “[t]he submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law.” Nuclear Weapons Advisory Opinion, supra note 121, ¶ 41 (quoted in DINSTEIN, supra note 16, at 183).

\(^{137}\) GRAY, supra note 46, at 150.

\(^{138}\) Id. at 154.

\(^{139}\) See id. at 154-55. Though the actions of the United States in the Nicaragua case were deemed to be illegal on other grounds, the absence of necessity and proportionality were additional indicators of the illegality of the acts under customary international law. See id. at 151.
Necessity, by itself, is not a controversial proposition.\textsuperscript{140} States need to demonstrate that “such forceful action was \textit{necessary} to defend itself against an impending attack.”\textsuperscript{141} However, applying necessity to a particular scenario “calls for assessments of intentions and conditions bearing upon the likelihood of attack.”\textsuperscript{142} The nature of necessity is that it is often interposed with the “imminence” factor.\textsuperscript{143} One scholar explains the logical relation between necessity and legal use of force in self-defense by describing necessity to mean that “there must have been no other feasible means of dealing with a particular threat.”\textsuperscript{144} Notably, this means that “force should not be considered necessary until peaceful measures have been found wanting.”\textsuperscript{145} As this comment assesses a preemptive strike in defense of a potential nuclear attack, the element of necessity—as separate from an analysis of imminence—will primarily address whether “peaceful measures” are still available to Israel.

Proportionality assesses the appropriateness of a nation’s action in response to a perceived threat.\textsuperscript{146} Thus, an \textit{ex ante} analysis of proportionality is not immediately relevant when attempting to \textit{predict} the legality of a future act of self-defense. However, as proportionality is an integral component to the legality of inter-state uses of force, understanding the role proportionality plays in lawful acts of anticipatory self-defense is still pertinent to this comment’s analysis. The requirement of proportionality means that “[a]cts done in self-defense must not exceed in manner or aim the necessity provoking them.”\textsuperscript{147} Another scholar notes that “a forcible response must be limited to removing that threat, and cannot extend beyond this defensive

\textsuperscript{140} See Schachter, supra note 106, at 1635.
\textsuperscript{141} Arend & Beck, supra note 14, at 72.
\textsuperscript{142} See id.
\textsuperscript{143} See Rockefeller, supra note 134, at 142 (“The requirement of imminence is meant to assure the necessity of an act.”) (quoted in Sadoff, Striking, supra note 10, at 475 n.158).
\textsuperscript{145} See Schachter, supra note 106, at 1635.
\textsuperscript{146} See id. at 1638.
\textsuperscript{147} Id. at 1637.
objective to encompass the pursuit of broader offensive or strategic goals." An act in self-defense that exceeds the bare minimum necessary to respond to the threat risks becoming a retaliatory act, and thus unlawful under customary international law. Simply put, a nation's "counter-attack" must not amount to a reprisal for the purpose of revenge or as a penalty.

Proportionality is also relevant to the theoretical implications of anticipatory self-defense. In its pure form, proportionality dictates that "harm returned should not exceed harm received." Inherent in this concept is that an attack as deterrence is actually at odds with this precept of proportionality, as the purpose of an attack meant to deter is "the greater the disproportionality, the greater the chance of avoiding harm to either party by avoiding conflict altogether." Thus, the element of proportionality serves as the essential limit on the acts that nations may engage in when using force in anticipatory self-defense.

For the purposes of this comment's analysis, "necessity" is limited to assessing whether Israel has exhausted all available peaceful means and "proportionality" is limited to exploring the limits of any acts Israel would be permitted to take in defending itself against a nuclear strike.

2. Imminence

Imminence is "the most problematic variable of anticipatory self-defense... that has no precise definition in international law." However, the importance that imminence plays in the legitimacy of using force in anticipatory self-defense is clear. As one scholar recognizes:

It is important that the right of self-defense should not freely

148 Garwood-Gowers, supra note 144, at 281.
149 See Schachter, supra note 106, at 1637.
150 See id. at 1638.
152 Id. (internal quotation marks omitted).
153 See supra notes 140-145 and accompanying text.
154 Švarec, supra note 67, at 182.
allow the use of force in anticipation of an attack or in response to a threat. At the same time, we must recognize that there may well be situations in which the imminence of an attack is so clear... that defensive action is essential for self-preservation.155

Illustrating its role in customary international law, the absence of imminence was indeed determinative when the International Military Tribunals at Nuremberg applied the Caroline test following World War II, rejecting Germany's proffered justification that their "invasion of Norway had been an act of anticipatory self-defense."156 Today, however, the doctrinal debate surrounding the legality of states using force in anticipatory self-defense stems primarily from the varying definitions and meanings of "imminence."157 Thus, imminence becomes the most essential factor to define when determining whether a use of force in self-defense is permissible,158 and is therefore the primary question in analyzing whether Israel would be presently justified to strike Iran's nuclear program.

The notion of imminence in customary international law reaches back to the Caroline incident.159 Under the Caroline doctrine, "[a]n attack must be apparent in certain terms, and the impending harm must be of such an immediate nature that instant armed force is the only way to ward off the blow."160 This standard for imminence focuses on the temporal aspect and is strictly measured.161 An imminent attack, strictly measured, is one that is "just about to occur or, in other words, when "[a]n attack is in evidence."

Scholars have suggested that the imminence of an attack can rise to such urgency that use of force in anticipatory self-defense would fall within the stricture of Article 51.163

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155 Schachter, supra note 106, at 1634 (emphasis added).
156 See Greenwood, supra note 61, at 13, 15.
157 See Anderson, supra note 68, at 267. The clearest modern example of the role imminence plays and the vagueness of its definition is seen in the Osirak incident of 1981, discussed infra Part III.C.
158 See Anderson, supra note 68, at 267.
159 See Greenwood, supra note 61, at 15; see also Anderson, supra note 68, at 271.
160 Anderson, supra note 68, at 272.
161 See Švarc, supra note 67, at 182.
162 See id. at 182-83 (citing O'Connell, supra note 86).
163 See Waldock, supra note 78, at 498 ("Where there is convincing evidence not
Many scholars are now arguing that a relevant measurement of imminence, however, should no longer be strictly temporal. The strict requirement is out of touch with "the realities of modern military conditions." The nature of imminence has been affected in two significant ways since the development of the Caroline doctrine. First, the "gravity of the threat" has changed significantly. Today we face nuclear weapons and other weapons of mass destruction that have the capacity to destroy a nation before it ever has a chance to defend itself. This is vastly different from the "cross-border raids conducted by men armed only with rifles" that were the predominant form of international uses of force at the time of the Caroline incident. Second, the method of delivering an attack has changed. With increased rapidity of an attack reaching its target once launched, it is now "far more difficult to determine the time scale within which a threat of attack . . . would materialize." Within this framework, Professor Greenwood asserts that in order to justify the existence of an "imminent threat," there must be sufficient evidence that "the threat of attack exists . . . [requiring] evidence not only of the possession of weapons but also of an intention to use them."

Customary international law is, by its very nature, an important groundwork for establishing the bounds on inter-state actions. Nevertheless, it has many shortcomings as a framework

merely of threats and potential danger but of an attack being actually mounted, then an armed attack may be said to have begun to occur, though it has not passed the frontier . . . If an armed attack is imminent within the strict doctrine of the Caroline, then it would seem to bring the case within Article 51."

164 See, e.g., Švarc, supra note 67, at 182-83.
165 See Greenwood, supra note 61, at 15.
166 Id. at 16.
167 Id.
168 See id.
169 Id.
170 Id. at 15.
171 Greenwood, supra note 61, at 16.
172 Id. (emphasis added).
173 The nature of customary international law is described as principles resulting "from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) of Foreign Relations Law: Sources of International Law § 102 (1987) ("[C]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.").
to assess the legality of using force in self-defense. While strict interpretation of the U.N. Charter's restriction on using force in self-defense is often too restrictive,\textsuperscript{174} customary international law suffers from being too vague to serve as a guide for state actors.\textsuperscript{175} Additionally, it may be "out of sync" with the realities of a state's reasoning and behavior when facing threats to their very survival.\textsuperscript{176} Thus, scholars began to look for, or propose, alternatives.

\textbf{B. Alternative Framework}

The scholarly landscape concerned with anticipatory self-defense is consumed with widespread disagreement, from expansivist-restrictionist doctrinal dichotomies\textsuperscript{177} to inconsistent definitions of prevention, preemption, anticipatory self-defense,\textsuperscript{178} and the very factors of necessity, proportionality and imminence\textsuperscript{179} that are essential to this vast doctrinal theory of international law. However, there is one observation on which all scholars can perhaps agree: at present, the international arena does not have a practicable framework to consistently evaluate the legality or legitimacy of a nation's use of force in anticipatory self-defense. As a result, several scholars have proffered a variety of proposals to compensate for the vagueness of customary international law and the unrealistic restrictiveness of the U.N. Charter in assessing anticipatory self-defense. Though several proposals have been offered by numerous scholars,\textsuperscript{180} this comment limits its

\begin{itemize}
\item \textsuperscript{174} See supra Part I.B.3.
\item \textsuperscript{175} See Sadoff, Striking, supra note 10, at 446.
\item \textsuperscript{176} See id. at 463. To illustrate this point, when Israel was criticized for striking Iraq's Osirak nuclear reactor, discussed infra Part III.C, the Israeli Ambassador responded that "[t]o assert the applicability of the Caroline principles to a State confronted with the threat of nuclear destruction would be an emasculation of that State's inherent and natural right of self-defence." See id. at 463 n.103 (emphasis added) (citing Michael Skopets, Comment, Battered Nation Syndrome: Relaxing the Imminence Requirement of Self-Defense in International Law, 55 AM. U. L. REV. 753, 771 (2005)).
\item \textsuperscript{177} See supra Part I.B.3.
\item \textsuperscript{178} See supra note 68 and accompanying text.
\item \textsuperscript{179} See supra Part II.A.
\item \textsuperscript{180} See e.g., Doyle, supra note 2 (proposing standards as criteria for the international community to consider in evaluating the legality of preventive uses of
\end{itemize}
consideration to the framework proposed by David Sadoff, which focuses its proposal specifically to assessing use of force in anticipatory, rather than preventive, self-defense.

1. David Sadoff, “Striking a Sensible Balance”

Sadoff proposes an alternative legal framework to assess the legality of “proactive defense,” which encompasses interceptive, anticipatory and preemptive self-defense.181 His analysis, while derived from customary international law, seeks to expand on this doctrine to produce a “clear, practicable legal standard to govern the use of first strikes.”182 The substantive components of the proposed framework include (1) properly gauging the threat, (2) exhausting peaceful alternatives, and (3) taking responsive action.183 As the second and third components tend to follow the same considerations as under a traditional customary international law analysis, this comment describes only the first component in depth.

In order to gauge the threat of attack, Sadoff proposes analyzing the (i) nature and scale, (ii) likelihood, and (iii) timing of the threat.184 With a state gauging the threat of attack, Sadoff calls for establishing an evidentiary standard to “address[] the nature, quality, and reliability of a state’s information about the underlying facts and circumstances that have led it to decide to act against a given threat.”185 He proposes that the evidentiary standard requires a state to show “with clear and compelling evidence the existence of a serious and urgent need with respect to

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181 See Sadoff, Striking, supra note 10, at 444.
182 See id. at 444.
183 See id. at 442.
184 Id. at 470.
185 See id. at 478.
a given threat.\textsuperscript{186}

The first two prongs of a state's assessment using Sadoff's framework appear to go to the necessity element of the Caroline doctrine. When assessing the nature and scale of a potential attack, a state will need to consider (1) "the character and magnitude" of the threatened attack (including (a) the type of weapons the enemy may use, (b) the size of an army, or (c) whether it would be an invasion or an isolated attack); (2) whether or not there would be warning; (3) what the likely targets of an attack would be; and (4) what the impact of an attack would be on the state's capacity to defend itself.\textsuperscript{187}

In assessing the likelihood of an attack, Sadoff explains that a state would assess the probability of whether the attack would in fact occur if there were no "proactive defense" measures taken.\textsuperscript{188}

The analysis by the target state would be subjective, in that it considers the state-actor's perceptions of the "intent and capabilities of the presumed aggressor state."\textsuperscript{189} The author recommends using an "operational assessment" of likelihood (e.g., when the attacking state's "decision to attack has become 'effectively irrevocable'"), rather than a probability-based assessment (e.g., "'reasonable certainty' or 'highly probable'").\textsuperscript{189}

An operational-based standard would be a higher threshold than a probability-based standard, so that defensive actions are

\textsuperscript{186} Id. at 480 (internal quotation marks omitted).

\textsuperscript{187} Sadoff, Striking, supra note 10, at 471.

\textsuperscript{188} See id. at 473.

\textsuperscript{189} Id. Sadoff suggests several questions that would be useful for a country making this assessment:

(1) Has the presumed aggressor publicly expressed its will to attack or has intelligence confirmed as much? (2) Has it arrayed or deployed forces such that they are poised to attack? What lessons can be gleaned based on historical experience and what insights can be gained from the leadership profile of the enemy? (3) Does the presumed aggressor have vital national interests or powerful domestic political concerns that might make it more likely to attack? (4) What is the status of any ongoing negotiations between the states at issue, and has the United Nations, any military pact, or a global or regional power expressed a willingness to intervene? (5) What is the presumed aggressor's overall technical competence, and does it believe it has the military strength sufficient to achieve its objectives?

\textsuperscript{190} Id. at 474.
appropriate when the question of attack is not if an attack will occur, but when—"the uncertainty lies in whether the attack will occur sooner rather than later." Such a high threshold would surely satisfy the "necessity" prong of the *Caroline* doctrine.

An assessment of "timing" is an important consideration because it addresses the urgency of a potential defensive action. This factor appears to go to the imminence prong of the *Caroline* doctrine. Sadoff advocates mandating a "last window of opportunity" approach in the timing analysis, meaning that a defensive action would be appropriate when "a present danger... is known and... [when] any additional delay in acting would 'seriously compromise security.'" He advocates this approach over requiring "temporal imminence" because "the underlying rationale of the imminence requirement is to ensure military action is truly necessary."

Sadoff brings a "realist" approach to the matter of assessing when using force in anticipatory self-defense would be appropriate. He appropriately notes that the standards currently employed under customary international law and the *Caroline* doctrine are "too limited in scope to be of general use" and lack the details needed for utility purposes. Furthermore, his suggested framework provides numerous questions and factors that would provide practical guidance to nations considering using

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191 *Id.*
192 *Id.*
195 *Id.* (citing Rockefeller, supra note 134, at 142). Sadoff lists the following factors to consider when assessing timing:

(1) the nature and extent of military developments or location of military deployments by the presumed aggressor; (2) the political rhetoric or public expressions of intent by the presumed aggressor; (3) the capability of the presumed aggressor to mount the type of attack anticipated; (4) the status of diplomatic negotiations (if any) between the presumed aggressor and the target state; and (5) the geographical distance the attack would cover, based on the location of the assets to be employed and the likely targets.

*Id.* at 477-78.

196 *Id.*
197 *Id.* at 446.
force in "proactive defense." This guidance would also enable the international community to consistently evaluate the legitimacy of a nation’s use of force. As Sadoff remarks, this would enable third parties to "cast their military and diplomatic support accordingly behind the state whose conduct more closely conformed to international law."

2. Considering Legitimacy

Legitimacy is vital to the success of any legal order. In the present context, legitimacy refers to the "the anticipated reaction of the relevant international community to a State’s decision to use force." In 2004, the U.N. Secretary-General’s High-Level Panel on Threats, Challenges and Change observed that "[t]he effectiveness of the global collective security system . . . depends ultimately not only on the legality of decisions but also on the common perception of their legitimacy." The panel notes that if either "common global understanding" or "acceptance" of when use of force is both legal and legitimate is lacking, the result will be a weaker international legal order.

In realist terms, however, legitimacy and legality are often separate considerations. An act that is considered legitimate

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198 See id. at 443-44.
199 Sadoff, Striking, supra note 10, at 446.
200 Id.
203 The Panel was convened in 2004 by U.N. Secretary-General Kofi Annan “to assess current threats to international peace and security; to evaluate . . . existing policies and institutions[;] . . . and to make recommendations.” High-level Panel Report, supra note 9, ¶ 3.
204 Id. ¶ 204. The panel also observed that “[t]he maintenance of world peace and security depends importantly on there being a common global understanding, and acceptance, of when the application of force is both legal and legitimate.” Id. ¶ 184.
205 See id. ¶ 184.
206 See SOFAER, THE BEST DEFENSE, supra note 202, at 103-05. In the international context, the ineffectiveness of legal standards and the subsequent “frequent disregard” of
may not always be deemed legal, and an act that is legal may not always be considered legitimate.\textsuperscript{207} Legitimacy differs from legality on several points. First, legitimacy is established by the "actual views and values of [s]tates and other relevant parties" rather than by the academic or professional opinions of international legal scholars on the meaning of the U.N. Charter.\textsuperscript{208} Second, legitimacy differs from legality in that it is usually a "relative judgment, rather than a definitively positive or negative one."\textsuperscript{209} The very nature of legitimacy is that it turns on numerous factors, rather than requiring that "certain standards be met" as with legality.\textsuperscript{210} Third, an assessment of legitimacy should consider not only the views of other nation states, but the views of non-state entities such as international agencies, non-governmental groups, the press and the public.\textsuperscript{211}

The U.N. High-Level Panel, however, has demonstrated a recognition of the vital importance of legitimacy by citing five criteria that the Security Council should always address when deciding whether to authorize or endorse the use of force: (1) "seriousness of threat," (2) "proper purpose," (3) "last resort," (4) "proportional means," and (5) "balance of consequences."\textsuperscript{212} For the first criterion, "seriousness of threat," the question to pose is, "Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify \textit{prima facie} the use of military force?"\textsuperscript{213} Inquiry regarding "proper purpose" begs the question "Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question?"\textsuperscript{214} "Last resort" is relatively straight-forward, and asks whether "every non-

\textsuperscript{207} See \textit{id.} at 105. One example of when a legal action was not necessarily considered legitimate is when the Security Council decided to block Muslim Kosovars from obtaining weapons, because this allowed "well-armed Serbs to massacre Muslims without meaningful resistance." \textit{Id.}

\textsuperscript{208} \textit{Id.} at 104.

\textsuperscript{209} \textit{Id.} at 105.

\textsuperscript{210} See \textit{id.}

\textsuperscript{211} See \textit{SOFAER, THE BEST DEFENSE, supra} note 202, at 105.

\textsuperscript{212} High-level Panel Report, \textit{supra} note 9, ¶ 207.

\textsuperscript{213} \textit{Id.}

\textsuperscript{214} \textit{Id.}
military option for meeting the threat in question [has] been explored, with reasonable grounds for believing that other measures will not succeed.”\(^{215}\) This criterion can be viewed as synonymous with an analysis of “necessity.”\(^{216}\) “Proportional means” predictably refers to proportionality: “Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?”\(^{217}\) The final criterion recommended by the Panel, “balance of consequences,” goes to the heart of the legitimacy inquiry.\(^{218}\) The Panel illustrates this inquiry by posing whether “there [is] a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction.”\(^{219}\) This is essentially the age-old question, “Will the proposed action do more harm than good?”\(^{220}\) Sofaer recommends that when answering this question, one “should go beyond the immediate, physical effects of a particular action and take into account the long-term, ethical consequences.”\(^{221}\)

The *Caroline* doctrine has been a pillar in the development of customary international law’s analysis of anticipatory self-defense. However, widespread debate on the relationship between this doctrine and Article 51 of the U.N. Charter has created a vague understanding of what constitutes the strict bounds of legality when using force in self-defense. While alternative frameworks effectively address the doctrinal weaknesses of the *Caroline* doctrine and customary international law, understanding

215 Id.


221 Id. at 125-26. In addition to the five criteria put forward by the Panel, Sofaer also discusses two additional criteria: “international support” and “confidence in findings and conclusions.” *Id.* at 115-17, 120-24. For the first, Sofaer emphasizes the legitimacy of any action that is endorsed by the Security Council. *See id.* at 115. The U.N. High-Level Panel, to be sure, would likely argue that this is a prerequisite for international legitimacy. Sofaer however, suggests it as merely a supplementary consideration. *See id.* at 116. For the second, Sofaer discusses the importance of reliable intelligence, referring to the impact of mistaken intelligence on the perceived legitimacy of U.S. involvement in Iraq in 2003. *Id.* at 120-23.
international reactions to past incidents of anticipatory self-defense is essential. Analysis of these incidents will illustrate the bounds of legality and legitimacy within the international community and provide insight on how an alternative framework would be applied to future incidents.

IV. Anticipatory Self-Defense: Examples and Incidents

Without a clear legal framework to guide an evaluation of using force in anticipatory self-defense, modern day incidents of “non-reactive force” used in anticipatory self-defense are crucial to answering two essential questions: First, are there instances in which the use of anticipatory self-defense would be recognized as legitimate, and secondly, where would the line be drawn to distinguish acceptable and unacceptable uses of force? Four examples of nations using force in anticipatory self-defense have been generally recognized and analyzed as such since the adoption of the U.N. Charter. These examples shed light on the current acceptance or rejection of the doctrine of anticipatory self-defense and provide a baseline to examine whether the current situation between Israel and Iran might give rise to a legitimate use of anticipatory self-defense.

A. 1962 Cuban Missile Crisis

In 1962, the U.S.S.R. sent “over 100 shiploads of armaments”

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222 In addition to the incidents discussed here, the military efforts of the United States in Afghanistan (and to some extent, in Iraq) since the events of September 11, 2001, have also been analyzed and discussed in the context of the legitimacy and legality of anticipatory self-defense. See, e.g., Mikael Nabati, International Law at a Crossroads: Self-Defense, Global Terrorism, and Preemption (A Call to Rethink the Self-Defense Normative Framework), 13 TRANSNAT’L L. & CONTEMP. PROBS. 771 (2003); O’Connell, supra note 86; Shah, supra note 37. Discussions of these military efforts and justifications, while bearing legitimate relevance to the discussion at hand, are based on preventive use of force in combatting terrorism. We are confining our current analysis to the use of force between nation states, however, and are thereby consciously excluding U.S. military efforts against Al Qaeda in Afghanistan and elsewhere from our examples. For a sample of the scholarly commentary regarding the legitimacy of preventive uses of force and “the Bush doctrine,” established in 2002 to address the threat of global terrorism, compare Robert J. Delahunty & John Yoo, The “Bush Doctrine”: Can Preventive War Be Justified?, 32 HARV. J.L. & PUB. POL’Y 843 (2009) with W. Michael Reisman & Andrea Armstrong, The Past and Future of the Claim of Preemptive Self-Defense, 100 AM. J. INT’L L. 525 (2006).
to Cuba, which included numerous launch missile sites.\textsuperscript{223} The United States responded by creating a naval quarantine around Cuba, so that all ships going to Cuba would be inspected and no ships with weapons would be allowed to pass through.\textsuperscript{224} In the course of the quarantine, no ships tried to get around the quarantine, no ships were seized, and only one ship was boarded without incident.\textsuperscript{225} One day after announcing the quarantine, the United States asked for and received regional support from the Organization of American States (OAS).\textsuperscript{226}

The United States did not seek to justify the act on the basis of Article 51.\textsuperscript{227} Nor did the United States claim that the U.S.S.R.'s posturing with Cuba's cooperation was unlawful.\textsuperscript{228} Instead, the United States relied on Article 52 to justify its actions, citing its use of "regional arrangements... relating to the maintenance of international peace and security."\textsuperscript{229} International reactions to the legality of the quarantine reflected "ideological lines," with Chile, China, France, Ireland, the United Kingdom, and Venezuela supporting the quarantine, and Ghana, Romania, the Soviet Union, and Egypt opposing it.\textsuperscript{230}

As this incident involved a non-reactive use of force, a brief Caroline analysis is relevant.\textsuperscript{231} The element of necessity may have been present, as the gravity of the threat (proximity of nuclear missiles) was immense.\textsuperscript{232} Nevertheless, all peaceful measures may not have been exhausted. The proportionality element seems to be met, in that almost no force was actually used.\textsuperscript{233} Satisfying the imminence requirement is more difficult because it is not clear that using force was the only way "to ward

\begin{itemize}
\item[223] Sadoff, \textit{A Question}, supra note 47, at 563-64.
\item[224] \textit{Id.} at 564.
\item[225] \textit{Id.} (citing \textit{FRANCK}, supra note 81, at 99 n.9).
\item[226] \textit{Id.}; \textit{FRANCK}, supra note 81, at 99.
\item[227] \textit{Id.} at 565.
\item[228] \textit{Id.}
\item[229] Sadoff, \textit{supra} note 47, at 565 (quoting U.N. Charter art. 52).
\item[230] \textit{Id.} at 566 (citing \textit{ALEXANDROV}, \textit{supra} note 44, at 156 n.174).
\item[231] \textit{Id.} at 565.
\item[232] \textit{See id.} at 564 (discussing the increased number of missiles that would need only minutes to reach U.S. targets from Cuba versus hours from Soviet territory).
\item[233] \textit{See id.}
\end{itemize}
off the blow."\textsuperscript{234} The possession of weapons and a clear intention to use them, at least as a threat against the United States, however, were clearly present.\textsuperscript{235} Regarding the reaction of the international community, "very few [states] . . . relied on a strict interpretation of Articles 2(4), 51, and 53."\textsuperscript{236} Thus, even though this incident does not suggest either "clear acceptance or rejection" of anticipatory self-defense, it demonstrates that in 1962, states were not interpreting the U.N. Charter in a clearly "restrictive" way.\textsuperscript{237}

\textbf{B. 1967 Six Day War}\textsuperscript{238}

Scholars have described the Six Day War between Israel and Egypt as a "classic case of military preemption."\textsuperscript{239} In 1967, tensions were rising between Israel and its Arab neighbors.\textsuperscript{240} Leading up to the incident of June 5, 1967, five overt acts indicated that Egypt would launch an attack on Israel.\textsuperscript{241} First, Egypt mobilized troops along Israel's Sinai border "to an unprecedented extent."\textsuperscript{242} Second, Egypt began cementing ties with Jordan, Syria and Iraq.\textsuperscript{243} Third, the Egyptian president ordered U.N. Emergency Force troops to leave Sinai, where they had been deployed as a buffer between Egypt and Israel.\textsuperscript{244} Fourth, Egypt imposed a blockade of the Straits of Tiran, a waterway vital to Israeli shipping.\textsuperscript{245} Lastly, the Egyptian

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\textsuperscript{234} Anderson, supra note 68, at 272; see also supra note 161 and accompanying text.

\textsuperscript{235} See Sadoff, \textit{A Question}, supra note 47, at 564 (discussing how intelligence photography revealed launching sites and movable delivery vehicles capable of deploying nuclear weapons).

\textsuperscript{236} FRANCK, supra note 81, at 101.

\textsuperscript{237} Sadoff, \textit{A Question}, supra note 47, at 566.

\textsuperscript{238} This incident has also been referred to as "Israeli-Arab War (1967)." FRANCK, \textit{supra} note 81, at 101.

\textsuperscript{239} Raymond & Kegley, \textit{supra} note 12, at 102. Note, however, that the authors' use of the phrase "preemption" actually refers to what this comment refers to as "anticipatory self-defense."

\textsuperscript{240} Id.

\textsuperscript{241} Id.

\textsuperscript{242} Sadoff, \textit{A Question}, supra note 47, at 566; Raymond & Kegley, \textit{supra} note 12, at 102.

\textsuperscript{243} Raymond & Kegley, \textit{supra} note 12, at 102.

\textsuperscript{244} Id.; Sadoff, \textit{A Question}, supra note 47, at 566; FRANCK, \textit{supra} note 81, at 101.

\textsuperscript{245} See Sadoff, \textit{A Question}, supra note 47, at 567; Raymond & Kegley, \textit{supra} note
president proclaimed that in any war with Israel, Egypt’s goal would be “the destruction of the Jewish state.”

The final result of this buildup was that on June 5, Israel launched a “surprise” air attack on Egypt’s forces that resulted in a “decisive victory” in a matter of days.

In the ensuing period, Israel first claimed that Egypt had made the first move. Shortly thereafter, however, this argument lost weight and Israel made the alternative claim that the blockade represented an “act of war” and the deployments of troops appeared to be an imminent attack. Thus, though Israel’s attack on Egypt was an act of anticipatory self-defense in substance, Israel did not rely on this doctrine to justify its actions. International reaction was generally supportive of Israel, though some states viewed the incident as an act of aggression by Israel. Despite the fact that the “primary facts” demonstrated a clear example of anticipatory self-defense, no state cited the principle

12, at 102.

246 Raymond & Kegley, supra note 12, at 102.
247 Id.; Sadoff, A Question, supra note 47, at 567.
248 Sadoff, A Question, supra note 47, at 567; Gray, supra note 46, at 161.
249 Sadoff, A Question, supra note 47, at 567.
250 Franck, supra note 81, at 104. Israel instead based its justification on actual self-defense. Id. Some scholars find this fact significant in the debate over the legality of such acts. See Gray, supra note 46, at 161 (“This reluctance expressly to invoke anticipatory self-defense is in itself a clear indication of the doubtful status of this justification for the use of force.”).
251 Sadoff, A Question, supra note 47, at 567-68. Morocco, Syria and the Soviet Union all viewed Israel’s acts as acts of aggression. Id. In a particularly condemnatory remark at the U.N. Security Council meeting of June 19, 1981, Uganda rejected “Israel’s dangerous notion of the doctrine of self-defense, under which it claims the right to attack a Member State on the basis of the speculative conjecture that a nation engaged in peaceful scientific research might possibly, at an unforeseen time, use its technology for offensive purposes.” U.N. SCOR, 14th Sess., 2288th mtg. ¶ 145, S/PV.228 (June 18, 1981). The support for Israel’s actions was reflected in the U.N. debates, in which Israel’s self-defensive acts were not condemned. See Sadoff, A Question, supra note 47, at 567-68 (internal citations omitted). Furthermore, the U.N. Security Council itself “notably did not call for the withdrawal of Israeli troops from newly occupied territory.” See Franck, supra note 81, at 102 (citing S.C. Res. 234, U.N. Doc. S/RES/234 (June 7, 1967)).
252 These “primary facts” include the facts that “Israel had not yet been attacked militarily when it launched its first strikes... [and] had not begun to exhaust its diplomatic remedies [regarding Egypt’s blockade of the Straits of Tiran]. Its attack on Egypt was in anticipation of an armed attack, not a reaction to it.” Franck, supra note
of anticipatory self-defense in its support.\(^{253}\)

In a *Caroline* analysis of this incident, necessity, proportionality and imminence all appear to be present. For the necessity requirement, Israel was facing the possibility of invasion, as evidenced by the amassing of the troops along its Sinai border.\(^{254}\) The proportionality of the response also seems appropriate, as the duration of the armed engagement was only six days and the attack was limited to Egypt’s military forces.\(^{255}\) Furthermore, the mobilization of troops, the blockade, the removal of U.N. troops, and the accompanying threatening remarks by the Egyptian president all strongly indicate the imminence of an invasion.

Though there was a lack of consensus in the international community regarding the legitimacy of anticipatory self-defense, Israel’s actions were widely viewed as legitimate when the customary international law elements of necessity, proportionality and imminence were all present.\(^{256}\)

**C. 1981 Israeli Attack on Osirak**\(^{257}\) Nuclear Reactor

The Osirak incident has been described as an example of “preemptive” force.\(^{258}\) In early 1981, Iraq was constructing a nuclear reactor near Baghdad, “code-named Osirak.”\(^{259}\) Israel viewed the Osirak reactor as “a threat to Israel’s survival.”\(^{260}\) The type of reactor used and the type of fuel purchased could both be

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81, at 104-05 (emphasis added).

\(^{253}\) Sadoff, *A Question*, supra note 47, at 567-68.

\(^{254}\) Id. at 567.

\(^{255}\) See id. at 567.

\(^{256}\) The customary international law analysis of this incident is discussed below. *See infra* Part IV.C.1.


\(^{258}\) Raymond & Kegley, *supra* note 12, at 101-03. The authors use the term “preventive use of military force.” *Id.*

\(^{259}\) Sadoff, *A Question*, supra note 47, at 568.

\(^{260}\) Raymond & Kegley, *supra* note 12, at 103.
used in weapons manufacture. Additionally, Israel noticed that Iraq was buying more uranium than it would need for scientific research. Iraqi leaders were expressing "vehement hostility" to Israel. This last factor was augmented by the history of three wars between Israel and Iraq and the fact that Iraq continued to deny Israel's legal existence. Lastly, the nature of the threat and Israel's vulnerability to an initial strike were factors in Israel's decision to act.

On June 7, 1981, Israel attacked and destroyed the Iraqi nuclear reactor. Israel said it acted to "remove a nuclear threat to its existence." To justify its actions, Israel claimed anticipatory self-defense. Though citing scholars' expansive interpretation of Article 51, Israel was unable to cite any examples of state practice of anticipatory self-defense. The U.N. Security Council, while not reaching a consensus on the matter of anticipatory self-defense, did unanimously condemn the act as a "clear violation" of the U.N. Charter and "the norms of international conduct." Individual states had varied reactions to Israel's actions. Some states agreed with the doctrine of anticipatory defense, but condemned the incident for lack of imminence: there was no "instant and overwhelming need for self-defense." Other states simply rejected the principle of anticipatory self-defense. The United States condemned the incident, citing the fact that peaceful means were not pursued, given that the International Atomic Energy Agency (IAEA) did not have evidence that the reactor would be used to develop

261 See id.
262 Sadoff, A Question, supra note 47, at 568.
263 Raymond & Kegley, supra note 12, at 103.
264 Sadoff, A Question, supra note 47, at 568.
265 See Raymond & Kegley, supra note 12, at 103.
266 Sadoff, A Question, supra note 47, at 569.
267 GRAY, supra note 46, at 163.
268 Id.
269 Sadoff, A Question, supra note 47, at 569.
270 Id. at 570 (internal citations omitted).
271 Id. These states include Sierra Leone, Malaysia, Uganda, Niger and the United Kingdom. Id. at 569-70.
272 Id. at 569. These states include Iraq, Mexico, Egypt, Syria, Guyana, Pakistan, Spain, and Yugoslavia. Id.
nuclear weapons.\(^{273}\)

Under a *Caroline* analysis, it can be argued that both necessity and proportionality were present. The possibility of nuclear armament and the state of hostilities between Israel and Iraq suggest there could have been a grave threat to Israel, satisfying the necessity prong of the *Caroline* doctrine. The action taken, a targeted destruction of the “threat” (the nuclear reactor), seems to meet the proportionality requirement.\(^{274}\) Imminence, however, was clearly not present.\(^{275}\) The threat to Israel had not been “of such an immediate nature that instant armed force [was] the only way to ward off the blow.”\(^{276}\)

From this incident, we have a possible recognition of the principle of anticipatory self-defense, though it was not in fact viewed to be present here.\(^{277}\)

**D. 2007 Israeli Attack on a Syrian Nuclear Facility**

In the early hours of September 6, 2007, Israeli jets launched an attack on an undisclosed target near Al-Kibar in north-eastern Syria.\(^{278}\) While the Syrian government has never admitted it, the general consensus of the international community is that the target of the attack was a secret Syrian nuclear reactor, and that it was destroyed in the attack.\(^{279}\) The first official intelligence report regarding the target was released by the United States in April 2008.\(^{280}\) This report stated that there was evidence as early as spring 2007 that the Syrian target “was a nearly completed nuclear reactor intended to produce plutonium for a weapons programme.”\(^{281}\) The report also indicated that the complex was

\(^{273}\) Id. at 570.

\(^{274}\) *See infra* Part IV.C.1.

\(^{275}\) *See* SOFAER, THE BEST DEFENSE, supra note 202, at 57.

\(^{276}\) Anderson, *supra* note 68, at 272.

\(^{277}\) Though this incident is generally recognized to not meet the requirements of anticipatory self-defense under customary international law, several scholars have stated that it may be justifiable under the doctrine of preemptive self-defense or under other legitimacy reasons. *See, e.g.*, DOYLE, *supra* note 2, at 78-84; SOFAER, THE BEST DEFENSE, supra note 202, at 57.

\(^{278}\) Garwood-Gowers, *supra* note 144, at 266.

\(^{279}\) *See id.* at 266-67.

\(^{280}\) Id. at 267.

\(^{281}\) Id. at 268.
"weeks and possibly months from operational capacity." To support the intelligence conclusions of the United States, IAEA investigators did discover plutonium particles at the Al-Kibar site. The IAEA all but officially concluded that the Al-Kibar site was a nuclear reactor when the IAEA Director General Yukiya Amano "explicitly confirm[ed]" that the destroyed facility was "a nuclear reactor under construction." Interestingly, Syria's immediate reaction to the attack was rather muted. On September 9, 2007, Syria registered an official complaint with the U.N. Security Council and General Assembly, asserting only that "Israel had committed a breach of the airspace of the Syrian Arab Republic." The complaint also asserted that during the attack, Israel "dropped some munitions but without managing to cause any human casualties or material damage."

282 Id. (citing Office of the Director of National Intelligence, Background Briefing with Senior U.S. Officials on Syria's Covert Nuclear Reactor and North Korea's Involvement (Apr. 24, 2008), available at http://www.cfr.org/syria/background-briefing-senior-is-officials-syria-covert-nuclear-reactor-north-koreas-involvement/p16105 (follow "Breifing" hyperlink for full document) (internal citations omitted)).

283 Id. at 268-69. Syria's reaction to the discovery of these plutonium particles was to assert that they came "from Israeli missiles used in the airstrike." Id. at 269. The IAEA rejected this claim, however, saying that "the particles discovered at the site were of a different composition to those found in uranium-based munitions." Id. (citing INT'L ATOMIC ENERGY AGENCY, Implementation of the NPT Safeguards Agreement in the Syrian Arab Republic, GOV/2008/60 ¶¶ 7, 8, available at http://www.globalsecurity.org/wmd/library/report/2008/syria_iaea_gov-2008-60_081119.htm).


286 Id. (citing Syria Letter to U.N., supra note 285) (internal quotation marks omitted).
More interestingly, the international reaction to the incident was also muted. Israel itself, while eventually admitting that they were responsible for the attack,\textsuperscript{287} did not provide any legal justifications for the attack.\textsuperscript{288} While the United States issued "tentative support" for the attack, no states other than Syria condemned the incident.\textsuperscript{289}

Professor Garwood-Gowers asserts that even under the customary international law doctrine of anticipatory self-defense, this attack on Syria is clearly unlawful under current international law by failing to meet the requirements of necessity and imminence.\textsuperscript{290} Specifically, he cites Israel’s failure to “exhaust peaceful means of resolving its concerns over Syria’s nuclear intentions” through either the IAEA or the U.N. Security Council.\textsuperscript{291}

In analyzing this incident, Garwood-Gowers seeks to evaluate whether the state of modern international law regarding the use of preventive force has changed.\textsuperscript{292} “If the international community’s response . . . indicates general acceptance of a new practice or interpretation, then it can be said that a change to customary international law has taken place.”\textsuperscript{293} Garwood-Gowers explains that any “significant opposition” would be enough to disrupt any

\textsuperscript{287} Id. at 267 (stating Israel “confirm[ed] that it had struck a target inside Syria but refus[ed] to elaborate on the nature of the target . . . ”) (citing Israel Admits Air Strike on Syria, BBC NEWS (Oct. 2, 2007), http://news.bbc.co.uk/2/hi/middle_east/7024287.stm) (internal quotation marks omitted).

\textsuperscript{288} Id. at 279.

\textsuperscript{289} Garwood-Gowers, supra note 144, at 266-68. Even after the initial reports on the incident, the only states to comment on the incident were Iran, Russia, and North Korea. Id. at 266 (internal citations omitted).

\textsuperscript{290} See id. at 279-80.

\textsuperscript{291} Id. at 280.

\textsuperscript{292} Id. at 272.

\textsuperscript{293} Id. at 272. Garwood-Gowers also explains that if the prohibition on use of force was attributed a \textit{jus cogens} status, then it would take more than mere “general acceptance” to change international law. Id. \textit{Jus cogens} are norms that are strong enough to automatically void treaties that conflict with them. \textit{Dinstein}, supra note 16, at 93 (“[A] peremptory norm of general international law.”). \textit{Jus cogens} can be modified only by “the emergence of a conflicting general custom [or treaty].” Id. at 96. Specifically, Garwood-Gowers discusses whether the “Bush doctrine,” the preventive war approach adopted by the United States in 2002, has increased the international legitimacy of preventive war actions. Id. at 275-79.
display of "general acceptance," indicating that international law remains unchanged.\textsuperscript{294} He concludes that while there is still no "general acceptance" sufficient to mark a shift in international law, the incident does reflect a shift in state practice that "indicate[s] a broader lack of concern over the legality of relatively minor uses of force."\textsuperscript{295} The muted reaction by the international community may demonstrate that even though such an attack may be \textit{illegal} under current international law, it may be that the international community does not view the incident as \textit{illegitimate}. These incidents do not clearly demonstrate that using of force in anticipatory self-defense is definitively legal, or even legitimate, under modern international law. Yet they provide guidance as to what situations do and do not warrant use of non-reactive force in the eyes of this same international community.\textsuperscript{296} The Six Day War strongly suggests that there are situations in which "non-reactive" uses of force would be widely seen as legitimate.\textsuperscript{297} Overt preparations for attack, as in the Cuban Missile Crisis and the Six Day War, appear to warrant acts bordering on "unlawful" under the restrictive interpretation of Article 2(4)'s prohibition on the use of force.\textsuperscript{298} These situations are thus more likely to warrant acceptance of using force in anticipatory self-defense. Nevertheless, overt hostility with the mere possibility of nuclear weapon development, such as in the Osirak incident,\textsuperscript{299} does not appear to automatically warrant the use of force.

These various incidents thus provide real world examples of what the international community would consider necessary, proportionate, and imminent. The most controversial element seems to be imminence. These incidents provide the baseline to which the three prongs of the \textit{Caroline} doctrine can be applied in evaluating whether the present conflict between Israel and Iran constitutes such imminence as would justify a preemptive strike.

\textsuperscript{294} Id. at 272.
\textsuperscript{295} Garwood-Gowers, \textit{supra} note 144, at 290.
\textsuperscript{296} See id.
\textsuperscript{297} Id. Garwood-Gowers proposes that "the international community may now be more willing to tolerate unilateral uses of force, at least as far as minor incidents are concerned." Id.
\textsuperscript{298} See id.
\textsuperscript{299} Id.
V. Today: Israel and Iran

A. History

While it may be hard to believe in today’s era of hostility and threat, history reveals that Israel and Iran have not always been enemies. In World War II, Iranian diplomats helped save “thousands of Jews” from the Holocaust.\(^\text{300}\) Iran was one of the first Muslim nations to establish economic and trade ties with Israel.\(^\text{301}\) Indeed, Iran has a long history of “Jews [being] welcome members of Iranian society.”\(^\text{302}\) The two states were allies for a period spanning almost three decades, united by the common “enemy” of Sunni Arabs.\(^\text{303}\) The friendly economic ties between the two nations changed in 1979 with Iran’s Islamic Revolution.\(^\text{304}\) The Ayatollah that ousted the Shah in the revolution preached strong anti-Israeli rhetoric, setting the stage for the severe decline of Iran-Israel relations in modern Iran.\(^\text{305}\)

This history of cooperation is a far cry from today’s state of affairs, where Iran proclaims a strong anti-Israeli stance. Iran’s support of Hamas and Hezbollah, two militant groups that seek the destruction of Israel, exemplifies the current view of Iran towards Israel and has often been cited by Israel in their reasons to need to take defensive measures against Iran.\(^\text{306}\)

B. Current Events

For Iran to be a threat to Israel, it has to have both the capability to attack Israel with nuclear weapons and the intention to do so.\(^\text{307}\)


\(^{301}\) Id.


\(^{303}\) Weiss, *supra* note 300.

\(^{304}\) Id.

\(^{305}\) See Sobhani, *supra* note 302.

\(^{306}\) For a summary of the history of conflict between Israel, Lebanon, and the Hezbollah, including a discussion of the 2006 Israeli invasion of Lebanon, see Wrachford, *supra* note 151.

\(^{307}\) See *supra* text accompanying note 172.
1. Capability: Iran's Nuclear Development

Towards the end of 2011 and into the early part of 2012, world tensions concerning Iran’s nuclear program mounted quite dramatically.308 Iran’s nuclear program has been a controversial issue since the program’s “re-birth” in the 1990s.309 Though Iran is a signatory to the Nuclear Non-Proliferation Treaty,310 members of the international community have long been suspicious of the purposes underlying Iran’s clandestine nuclear research.311 Many worry that Iran is seeking to develop nuclear weapons.312 Yet Iran has consistently asserted that its nuclear program is purely for peaceful purposes.313

The most recent round of mounting tensions was marked by a November 2011 IAEA report314 indicating Iran may be “carry[ing] out activities relevant to the development of a nuclear device.”315 The report was “the harshest judgment that United Nations weapons inspectors had ever issued” against Iran’s program.316 It reports that Iran is employing a variety of “research, development and testing activities . . . that would be useful in designing a nuclear weapon.”317 It does not, however, provide an estimate on

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308 Times Topic: Iran's Nuclear Program, N.Y. TIMES (last updated Oct. 15, 2012), http://topics.nytimes.com/top/news/international/countriesandterritories/iran/nuclear_program/index.html?scp=1-spot&sq=iran%20nuclear%20program&st=cse [hereinafter Times Topic]. (“Iran’s nuclear program is one of the most polarizing issues in one of the world’s most volatile regions.”).

309 Id. The nuclear program actually first began in the 1960s, but was abandoned after the Islamic Revolution in 1979. It was reinstated in the 1990s. Id.


311 See Times Topic, supra note 308.

312 See id.


314 February IAEA Report, supra note 6.


316 Times Topic, supra note 308.

317 See Sanger & Broad, supra note 315.
how long it will be before Iran develops nuclear weapons. Yet should Iran enrich its uranium to 90%, it would have enough enriched uranium for four nuclear weapons. A separate report estimates that Iran could develop nuclear weapons in sixty-two days or less.

Following the release of the November IAEA report, the United States and Europe began a series of economic sanctions intending to derail Iran's nuclear development. The sanctions target both Iran's access to foreign banks and financial institutions, as well as companies involved in Iran's nuclear, oil, and petrochemical industries. These sanctions appear to have an effect on Iran's economy. Iranian leaders, in response to the strains on the economy resulting from the sanctions, have been making public statements encouraging "Iranian self-reliance and resentment toward the West." Iran also threatened to close the Strait of Hormuz, "a vital artery for transporting about one-fifth of the world's oil supply." Some commentators believe that these "aggressive gestures" may demonstrate that Iranian leaders are responding "frantically, and with increasing unpredictability" to the sanctions.

In February 2012, the IAEA released another report. This

318 See id.
322 See Landler, supra note 321.
323 See Rick Gladstone, Tough Words from Iran as Sanctions Cut Deep, N.Y. TIMES, Feb. 9, 2012, at A9; see also Lowrey & Sanger, supra note 321 (reporting oil exports are down 20-30% and that the value of Iran’s currency has sharply decreased).
324 See Gladstone, supra note 323.
327 See February IAEA Report, supra note 6.
report indicates Iran may not be cooperating sufficiently with IAEA, as Iran refused to grant the IAEA inspectors access to one of their nuclear sites and dismissed IAEA’s November concerns because “Iran considered them to be based on unfounded allegations.”

Most significantly, however, the report shows a dramatic increase in Iran’s production of enriched uranium: a nearly 50% increase in Iran’s stockpile since the IAEA’s November report. Iran already has enough enriched uranium to build four nuclear weapons, should it attempt to build them.

The report concludes by stating that the IAEA “is unable . . . to conclude that all nuclear material in Iran is in peaceful activities” and “continues to have serious concerns regarding possible military dimensions to Iran’s nuclear programme.”

The summer of 2012 saw an increase in concerns over the volatility of the Israel-Iran situation. An August 2012 IAEA report revealed that Iran has indeed completed installation of three-quarters of the centrifuges it would need to develop “nuclear fuel” in a deep underground site. Further, Iran has “cleansed” a site that IAEA inspectors suspect was used to conduct “explosive experiments that could be relevant to the production of a nuclear weapon”—such a cleanup impedes the ability of IAEA inspectors to determine what work exactly had been conducted at the site. These IAEA concerns have culminated in an official IAEA resolution, passed on September 13, 2012, that rebukes Iran for the continued development of its nuclear program.

The jump in enriched uranium production, coupled with Iran’s

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328 Id. at 3.


330 See id. The number of weapons that Iran could produce with its present quantity of enriched uranium was separately estimated to be as many as five. See Lowrey & Sanger, supra note 321.

331 See February IAEA Report, supra note 6, at 11.


333 Id.

lack of transparency, quite rightly exacerbates international concern about “Iran’s march toward nuclear-weapons capability.”

2. Intention: Iran-Israel Tensions

For almost twenty years, Israel has asserted that Iran poses an “existential threat” to Israel. In 2005, President Mahmoud Ahmadinejad, at a conference entitled “The World without Zionism,” made the following statement:

Our dear Imam [Ayatollah Ruhollah Khomeini] said that the occupying regime must be wiped off the map and this was a very wise statement. We cannot compromise over the issue of Palestine. Is it possible to create a new front in the heart of an old front. This would be a defeat and whoever accepts the legitimacy of [Israel] has in fact, signed the defeat of the Islamic world.

It should be noted, however, that shortly after this speech was posted, it was removed from its original website and Iran’s foreign ministry “insisted [Iran] had no intention of attacking Israel.” Yet the President himself insisted that his remarks were “just.” Ayatollah Khomeini, Iran’s supreme religious leader, referred to Israel as a “cancerous tumor.” One scholar noted in 1996 that “Israel faces serious and unprecedented danger from Iran” stemming from “that revolutionary Islamic regime’s . . . unalterable commitment to destruction of the Jewish State.”

In Israel, top officials are openly considering conducting a

335 See Warrick, supra note 329.
339 Id.
341 Beres, supra note 5, at 66.
preemptive strike on Iran's nuclear program. In early November, Israel simulated a “mass-casualty attack,” which prompted speculations that Israel was simulating an attack on Iran. In the past, Israeli Prime Minister Benjamin Netanyahu has asserted that if the United States does not prevent Iran from acquiring nuclear weapons, “Israel may be forced to attack Iran’s nuclear facilities itself.” More recently, Prime Minister Netanyahu and Ehud Barak, Israel’s defense minister, have publicly supported an Israeli preemptive strike against Iran’s nuclear program. Barak has outlined three questions that Israel would have to answer in the affirmative to order to preemptively strike Iran:

1. Does Israel have the ability to cause severe damage to Iran’s nuclear sites and bring about a major delay in the Iranian nuclear project? And can the military and the Israeli people withstand the inevitable counterattack?
2. Does Israel have overt or tacit support, particularly from America, for carrying out an attack?
3. Have all other possibilities for the containment of Iran’s nuclear threat been exhausted, bringing Israel to the point of last resort? If so, is this the last opportunity for an attack?

342 Isabel Kershner & David E. Snager, Israel Faces Questions About News Reports of Eying Iran Strike, N.Y. TIMES, Nov. 4, 2011, at A10. Specifically, the speculated preemptive strike would target the uranium enrichment facility at Natanz, supposedly the “centerpiece of Iran’s known nuclear-fuel production.” Id.


346 Bergman, supra note 7. Interestingly, two days after the publication of the news article that reported these questions, a “high-ranking Israeli official” called the article’s author to clarify that “on the question of international legitimacy, Israel is ‘not looking for the international community’s support or consent’ or even tacit approval, ‘but rather a sympathetic view of Israel’s difficult situation.’” The Staff, The Aftermath of “Israel v. Iran,” N.Y. TIMES, Feb. 1, 2012, http://6thfloor.blogs.nytimes.com/2012/02/01/the-aftermath-of-israel-v-iran/?scp=4&sq=israel%20iran&st=cse.
While Israeli leaders assert that there is no deadline to make the final decision of whether to strike and assure the public that such a decision is not imminent, Barak warned in January 2012 that "no more than one year remains to stop Iran from obtaining nuclear weaponry."\(^{347}\) If Israel is to conduct a preemptive strike to take out Iran's nuclear program, they must do so before "Iran's accumulated know-how, raw materials, experience and equipment . . . will be such that an attack could not derail the nuclear project."\(^{348}\) This point in the Iranian nuclear program, when the program enters its "immunity zone," may be reached as early as the fall of 2012.\(^{349}\)

In response to these threats of preemptive strike, Iran has in turn made threats of its own.\(^{350}\) The day after the IAEA released its February report, which indicated extensive developments in Iran's nuclear program,\(^{351}\) Iran stated that any Israeli attacks on Iranian nuclear installations "will undoubtedly lead to the collapse of the [Zionist] regime."\(^{352}\) Iran has threatened retaliation through its long-range missile program.\(^{353}\) In November, Iran also asserted it would attack NATO bases in Turkey if either Israel or the United States launched an attack against Iran.\(^{354}\)

Overall, it appears that Iran does not presently have the capability to employ nuclear weapons, but the prospect of attaining this capability is growing increasingly—and worryingly—likely. Iran's intention to use these weapons against Israel is not definite or transparent, but it is still a possibility.\(^{355}\) Strikingly, the clearest Iranian threats against Israel are seen primarily in the context of warning Israel of the possibility of

\(^{347}\) Bergman, supra note 7.

\(^{348}\) Id.


\(^{351}\) See supra notes 327-335 and accompanying text.


\(^{353}\) See id.

\(^{354}\) See id.

\(^{355}\) See id.
retaliation against an Israeli preemptive strike.\textsuperscript{356} It is in this convoluted history of threat-and-reaction that it is necessary to anticipate whether an Israeli preemptive strike on Iran’s nuclear program would be legal or legitimate under modern international law.

C. Analysis

Under a restrictive interpretation of the U.N. Charter, Israel would not be justified in attacking Iran’s nuclear program because Iran has not yet conducted an “armed attack.”\textsuperscript{357} Yet most authorities agree that Israel would be justified in a preemptive strike against Iran if the imminence of an Iranian attack were “clear.”\textsuperscript{358} An analysis under customary international law’s \textit{Caroline} doctrine provides the foundation to determine whether the possibility of an Iranian nuclear attack on Israel is sufficiently imminent to justify an Israeli preemptive strike. However, as discussed in Part II.A, the present analytical framework under customary international law is vague and difficult to apply.\textsuperscript{359} To supplement the traditional \textit{Caroline} analysis, this comment will also apply the analytical framework proposed by David Sadoff, which offers clear factors to guide an analysis of whether an Israeli preemptive strike would be acceptable under modern international law.\textsuperscript{360}

\textbf{1. Customary International Law}

The \textit{Caroline} doctrine, which underlies the customary international law analysis of anticipatory self-defense, has three prongs: necessity, proportionality, and imminence.\textsuperscript{361} Assessing the necessity and proportionality prongs of the \textit{Caroline} doctrine is straightforward for the purposes of this comment. Necessity requires that an action be “necessary to defend... against an impending attack” and occur only after peaceful measures have

\begin{itemize}
\item \textsuperscript{356} See \textit{id}.
\item \textsuperscript{357} U.N. Charter art. 51; see also \textit{supra} notes 93-97 and accompanying text.
\item \textsuperscript{358} See \textit{supra} text accompanying note 155.
\item \textsuperscript{359} See \textit{supra} notes 173-174 and accompanying text.
\item \textsuperscript{360} See Sadoff, \textit{Striking}, \textit{supra} note 10.
\item \textsuperscript{361} See \textit{supra} Part II.A.
\end{itemize}
been exhausted.\textsuperscript{362} Successfully defending against a nuclear attack requires, by its very nature, a preemptive strike because an attack would decimate a nation instantly.\textsuperscript{363} In addition, it might be argued that peaceful measures have been exhausted if Iran continues its present course of action: non-cooperation with U.N. inspectors and apparent development of nuclear weapons, in contravention of the Non-Proliferation Treaty\textsuperscript{364} and in spite of the international pressure of multilateral economic sanctions. Thus, for the purposes of this comment, a preemptive strike to deter the threat of nuclear attack would meet the “necessity” requirement of the \textit{Caroline} doctrine.

Proportionality requires that action should not exceed what is minimally necessary to respond to a threat.\textsuperscript{365} It would be in Israel’s diplomatic interests to respond with only the minimum required to avert the threat of nuclear attack. A preemptive strike that neutralizes Iran’s nuclear program and does not exceed the immediate threat to Israel to pursue “broader offensive or strategic goals” would satisfy the requirement of proportionality.\textsuperscript{366}

With the assumption that an Israeli preemptive strike would meet both the necessity and proportionality prongs of a customary international law analysis, this comment focuses on whether the threat posed by Iran is sufficiently imminent to allow an Israeli preemptive strike. As imminence is implicitly fact-based, this comment will compare the present situation to the two incidents that provide the most guidance on whether an act of anticipatory self-defense is justified: the 1967 Six Day War, in which Israel was considered justified in its defensive actions,\textsuperscript{367} and the 1981 Israeli attack on Osirak, which was uniformly condemned.\textsuperscript{368}

As discussed in Part III.B, several threats were present in the

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\item \textsuperscript{362} \textit{See supra} notes 140-145 and accompanying text.
\item \textsuperscript{363} \textit{See} Schachter, \textit{supra} note 106, at 1634 (“[N]uclear missiles [may], on the first strike, destroy the capability for defense and allow virtually no time for defense . . . .”).
\item \textsuperscript{364} \textit{See} Treaty on the Non-Proliferation of Nuclear Weapons art. 2, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (“Each non-nuclear-weapon State Party to the Treaty undertakes not to . . . manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices . . . .”).
\item \textsuperscript{365} \textit{See supra} notes 149-154 and accompanying text.
\item \textsuperscript{366} \textit{See} Garwood-Gowers, \textit{supra} note 144, at 281.
\item \textsuperscript{367} \textit{Id.} at 273.
\item \textsuperscript{368} \textit{Id.} at 274.
\end{itemize}
period leading up to the Six Day War that support the conclusion that the threat of an Egyptian armed attack on Israel was “imminent”: (1) Egypt’s troops were mobilized at Israel’s border, (2) Egypt was forming military ties with Israel’s enemies, (3) Egypt ordered the removal of the U.N. troops who were present for conflict-diffusing purposes, (4) Egypt invoked a blockade on Israel’s trade, and (5) the leader of Egypt proclaimed a goal of “destroying” Israel. As Israel’s strike on Egypt’s troops was generally considered to be legitimate by the international community, it is these factors, taken together, that seem to meet the “imminence” requirement of customary international law.

Israel, taken in the light most favorable to an argument for legitimacy, may face two of these Six Day War factors in the present situation with Iran. First, it is widely reported that Iranian leaders believe that Israel should be “wiped off the map.” This is somewhat similar to the threats by Egypt’s leader that preceded the Six Day War. However, other than a few well-publicized statements from public leaders, there does not appear to be any further corroborations of an intention to attack Israel.

Developing nuclear weapons, because of their first-strike capabilities, may be tantamount to a mobilization of troops. With nuclear capability, Iran would be able to attack Israel as swiftly as if it had a legion of troops on Israel’s border. However, the mobilization of troops in the Six Day War was a threat that was unique to Israel, due to the geographical nature of the region. Comparatively, there is no strong tie between Iran’s nuclear program and Israel that would indicate that such a “mobilization,” if it were to be considered such, would be specifically targeting Israel. The only tie that could conceivably serve as such a link is Iran’s professed hatred of the Jewish state. However, the remaining three factors from the Six Day War – developing

370 See generally Raymond & Kegley, supra note 12, at 102 (explaining Egypt’s goal in a war with Israel would be destruction of the “Jewish state”).
371 See supra notes 336-341 and accompanying text.
372 Egypt was growing military ties with Jordan, Syria, and Iraq. Egypt borders Israel to the southwest, Jordan borders Israel to the east, and Syria borders Israel to the northeast. The geography of these forces is significant in that a military coalition was being formed to surround the Israeli state.
373 See supra note 341 and accompanying text.
regional military ties, a blockade, and the removal of U.N. troops – are not present. The absence of these factors indicates that the threat currently posed by Iran only moderately resembles the threat posed by Egypt preceding the Six Day War.

The present situation between Israel and Iran more closely resembles Israel’s attack on the Osirak reactor in 1981, which was widely regarded as an unacceptable use of force under customary international law. Several factors that were considered to be insufficient to justify an act of anticipatory self-defense are present here: the development of nuclear weapons and the attendant risk of a nuclear first strike; IAEA reports indicating that Iran’s nuclear program are quite possibly directed towards the development of nuclear weapons; and a high production of enriched uranium that could be intended for use in nuclear weapons. However, the IAEA reports and the vast quantities of enriched uranium indicate that there may an even stronger argument for an “imminent attack” by Iran today.

The presence of these factors, without more, does not rise to the “imminence” seen in the Six Day War. First, two factors articulated by Professor Greenwood are not definitively present: possession of weapons and an intention to use these weapons. The IAEA has not reported that Iran actually has, or will soon have, nuclear weapons; it merely suggests that there may be military dimensions to the nuclear program. Second, though it seems clear that Iranian leaders would prefer that Israel not exist, this does not necessarily equate to an “intention” to use nuclear weapons—should they come into Iran’s possession—against the Israeli state.

While Israel may have a stronger argument for imminence today than it did in 1981, the present situation bears much stronger resemblance to the 1981 Osirak incident, where imminence was clearly not found, than to the 1967 Six Day War. As the Iranian threat against Israel does not rise to the imminence required by the Caroline doctrine, an Israeli preemptive strike against Iran would not be legal under customary international law.

374 See Garwood-Gowers, supra note 144, at 264.
375 See id.
376 See supra text accompanying note 173.
377 See February IAEA Report, supra note 6, at 8.
2. Sadoff’s Framework

The analytical framework proposed by David Sadoff offers an analysis of anticipatory self-defense that is significantly less vague than analysis available under customary international law. The first component of Sadoff’s framework, properly gauging the threat, is precisely the task undertaken by this comment. Sadoff’s framework breaks down this component in a way that reflects and clarifies the “imminence” analysis of the Caroline doctrine. This framework analyzes the factors of (a) the nature and scale, (b) the likelihood, and (c) the timing of the threat to determine whether a threat would be sufficiently imminent to justify an act of anticipatory self-defense.  

First, assessing the nature and scale of an Iranian nuclear attack is fairly straightforward. Israel fears facing the threat of “first strike” nuclear attack, which would leave little or no time for Israel to respond defensively once launched. Israel would likely receive little to no warning of a nuclear launch. Such an attack could decimate the entirety of the Israeli state. The nature and scale of the threat is likely the gravest threat imaginable.

The “likelihood” of the attack, however, is much more ambiguous. First, the statements by Iranian leaders that demonstrate a desire to see Israel “wiped off the map,” though troubling, do not seem to effectively constitute a “public expression” of a “will to attack.” The intent of the attacker here is couched in public rhetoric. Though there are strong ideological tensions embodied in Israeli-Arab conflict that engulf the entirety of the Middle East. There is little doubt that Iranian leaders would be happy to have a world without the Israeli state, this does not indicate a clear intention to launch an attack. Second, Iran does not presently have the capacity to mount the attack. Though Iran is possibly on the path to achieving this capacity,

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378 See Sadoff, Striking, supra note 10, at 470.
379 See Schachter, supra note 106.
381 See supra note 189 and accompanying text.
383 See February IAEA Report, supra note 6, ¶ 50.
384 See id.
is not synonymous with being on the path to actually using nuclear weapons against Israel. There does not seem to be any certainty that a nuclear attack on Israel will occur. Thus, the present situation is not a matter of when, but of if. Third, Sadoff’s framework considers the international community’s reaction to a nuclear attack on Israel. Such a reaction would be extremely condemnatory, and would likely deter such an attack. Though Iran expresses strong anti-Israel sentiments, it has not outwardly expressed any intention to attack and does not presently have the capacity to attack.

The third factor in gauging the threat, timing, is interspersed with the likelihood factor. Sadoff suggests similar questions for the assessment of these two components. This seems appropriate. If an attack is not very likely to occur, then it is moot to consider whether the timing of an attack is sufficiently immediate to justify a pre-emptive strike.

3. Considerations

Under the analyses of both the customary international law and Sadoff’s frameworks, an Israeli preemptive strike on Iran would be neither legitimate nor legal. The legality afforded by the Caroline doctrine is restricted to situations where the threat of attack is imminent and the use of force employed to defend is necessary and proportionate to the threat posed. Though a threat of nuclear attack would be very serious, such a threat from Iran is not presently imminent. Yet if a nuclear threat were to become “imminent” under the Caroline doctrine or “likely” under the Sadoff framework, using preemptive force to deter an attack would be justified.

Also significant to the Caroline doctrine’s approach is that there are more options available to Israel than just using force. First, Israel has the option of appealing to the U.N. Security

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385 See supra notes 191-192 and accompanying text (explaining defensive actions are appropriate when the question of attack is not “if” an attack will occur, but “when”).

386 See Sadoff, Striking, supra note 10, at 478.

387 Both sets of questions suggested by Sadoff inquire to the presumed attacker’s “publicly express” will or intent, military deployments by the presumed attacker, status of negotiations between the states at issue, and the military capabilities of the presumed attacker. See supra notes 191 and 197.

Council, which may authorize the preemptive use of force through its Chapter VII authority. Second, the use of diplomatic pressure and international sanctions by Israel's allies has not been exhausted, and may yet prove successful in subduing Iran as a nuclear threat. The evidence that the economic sanctions are having an effect on Iran, though sparking worry in some due to concerns the leaders may be acting more erratically, is actually a strong indicator that alternatives to using force are working.

VI. Conclusion

There are several problems in the traditional customary international law framework of analyzing necessity, proportionality, and imminence to evaluate uses of force in anticipatory self-defense. First, the rules that govern use of force must be generally known. The expansivist-restrictionist doctrinal debate concerning the strict legality of anticipatory self-defense under Article 51 creates ambiguity in understandings of the law. This ambiguity undermines the ability of the international community to reach consensus in condemning or endorsing uses of force in anticipation of an armed attack. Yet the solution cannot be found in choosing one side over the other. On one hand, adopting the restrictivist approach to Article 51 of the U.N. Charter and precluding the legality of using force in any instance not first preceded by an "armed attack" would leave nations vulnerable to first strikes that threaten state survival. On the other hand, adopting the expansivist approach can leave too much room for using force in self-defense where there is no actual imminence of a threatened attack.

389 See supra note 61 and accompanying text.


391 See supra notes 321-326 and accompanying text.

392 See High-level Panel Report, supra note 9, at 2.

393 See supra notes 64-65 and accompanying text.

394 See supra notes 98-108 and accompanying text.
Second, the rules that govern use of force must be generally accepted. The current legal framework is unsuited to the realities of modern warfare, where weapons of mass destruction carry first-strike capabilities that leave no opportunity for self-defense. Modern international law must have the flexibility to recognize the right of a state to use preemptive force when it is the only defense available against an attack threatening the state's very existence. Without this flexibility, the legal order loses legitimacy. Without general acceptance of the laws that should bind, these laws lose their normative and prescriptive value.

Expansive overhaul of the modern international legal order is not the solution. Customary international law is established by the general practices of states, which in turn generates a collective sense of legal obligation. If changes to modern international law occur too quickly and in too high a degree, it will be even more difficult for laws to be generally known. Another risk is that any large overhaul may favor the large, powerful states at the expense of states with less influence. The solution should be incremental changes to the existing legal framework. This would allow the law to retain its normative value that would favor all states as equal entities under the law. Incremental changes would also allow the law to develop at a pace with which international consensus can keep up.

Incorporating legitimacy into modern international law is a priority. Legitimacy ensures the general acceptance necessary to sustain a legal order. The criteria suggested by the U.N. High-Level Panel on Threats, Challenges and Change is a good starting point. The Panel encourages the U.N. Security Council to address these criteria when deciding whether to authorize or endorse the use of military force in anticipatory self-defense. However, the U.N. should affirmatively endorse consideration of these criteria to member-states and to intergovernmental
organizations charged with moderating international use of force. In addition, modern law should formally incorporate consideration of the normative views of both state actors and non-state actors, including the nongovernmental organizations and the press.

Furthermore, the international community needs predictability and transparency in modern international law to assure legitimacy. A clear, practicable framework for the evaluation of uses of force must be adopted. The framework proposed by David Sadoff would be a good candidate. His proposal incorporates the traditional Caroline model of analysis while also including a mode of assessment of modern day considerations, such as nuclear threats. The framework lists numerous factors to consider when gauging the severity of a threat. Factors such as these will help create a clear method to evaluate use of force, which will result in predictability and transparency in future evaluations.

Under both traditional and alternative analyses, Israel would not be presently justified to preemptively strike Iran’s nuclear program. Under the customary international law analysis, Israel would not be justified because the threat is not yet imminent: Iran has not demonstrated a clear intent to attack Israel and does not yet have the capability to carry out a nuclear attack. Under Sadoff’s proposed framework, Israel would not be justified for many of the same reasons: there is not a sufficient likelihood that an attack would occur.

There is room, however, for Israel to justify a preemptive strike under the “preventive” self-defense approach, in which a preemptive strike may occur though the threat is more temporally removed. This demonstrates the danger inherent in adopting such an approach, which discounts the importance of anticipatory force being used only as a “last resort.” An approach that strays too far from existing modern law norms runs the risk of endorsing actions that would be widely viewed as illegitimate.

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401 See Sadoff, Striking, supra note 10, at 457.

402 See supra notes 85-89 and accompanying text.

403 One example of an action endorsed under the preventive war doctrine, but
An additional consideration is that under a legitimacy argument, the danger that a nuclear Iran poses to global peace and security may be enough to justify a preemptive strike in order to ensure global security. Many nations have indeed spoken out against Iran’s development of nuclear weapons. By several accounts, a nuclear-capable Iran would be a serious threat to the entire Middle East region and the world. For example, Algerian ministers claim that once Iran achieves nuclear capability, they will share the technology with “its fellow Muslim nations.” However, this danger should not be addressed by the unilateral assessment of a paternalistic nation, such as the United States. If the threat Iran poses to global security warrants a preemptive strike, then multilateral action by the U.N. Security Council should be taken.

In conclusion, though it is tempting to simply “rewrite the rules” to adapt the traditional international laws to address modern day threats, doing so would disrupt the international legal order. Deficiencies in the modern legal framework should be addressed incrementally, with a priority given to incorporating legitimacy and creating clear, practicable standards to evaluate use of force in anticipatory self-defense. Such a framework would clarify the widely criticized is the 2003 U.S. involvement in Iraq.

For a detailed analysis of the “major civilian effects” of a nuclear conflict between Iran and Israel, see ANTHONY CORDESMAN & ABDULLAH TOUKAN, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES, IRAN, ISRAEL AND THE EFFECTS OF A NUCLEAR CONFLICT IN THE MIDDLE EAST (June 1, 2009), available at http://csis.org/publication/iran-israel-and-effects-nuclear-conflict-middle-east.


There are a number of criticisms concerning the effectiveness of the Security Council. See Sadoff, Striking, supra note 10, at 460. However, the necessity of multilateral action, rather than unilateral, is paramount to preserving the integrity of international legal order.
present illegitimacy and illegality of an Israeli strike on Iran’s nuclear program. Wide recognition of the illegitimacy of a strike would lead to international condemnation, thus foiling the trigger that would lead the world into World War III.