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Killing Outside the Law: The Case of Israel's policy of assassinating Iranian Nuclear Scientists

Robert Brosius

I. Introduction

On the morning of January 12, 2010, Massoud Ali-Mohammadi, a leading nuclear physics professor, was killed instantly after a motorcycle rigged with a remote controlled bomb exploded as he left his Tehran home.¹ Eighth months later on November 29, nuclear physicist Majid Shahriyari was killed when an unidentified assailant on a motorcycle planted a magnetic bomb on his car.² Another nuclear scientist Fereydoun Abbasi-Davani, under UN sanctions for his role in Iran's nuclear program³, was injured in a similar attack carried out the same day.⁴ Then on July 23 a member of Iran's Atomic Energy Organization and an expert in high-voltage switches necessary for nuclear warheads, was shot dead by two assailants on motorcycles.⁵ Finally on January 11, 2012 Mostafa Ahmadi Roshan died in a similar attack after an assailant on a motorcycle placed a magnetic bomb on his car.⁶ Roshan was a nuclear physicist and supervisor

¹ Alan Cowell, *Blast Kills Physics Professor in Tehran*, N.Y. TIMES, Jan. 12, 2010, at A12.

² Dieter Bednarz and Ronen Bergman, *Mossad Zeroes in on Tehran's Nuclear Program*, DER SPIEGEL (Jan. 17, 2011), <http://www.spiegel.de/international/world/0,1518,739883,00.html>.

³ S.C. Committee established pursuant to S.C. Res. 1737 (2006).

⁴ Richard Spencer, *Tehran attack kills leading Iranian nuclear scientist*, THE TELEGRAPH (Nov. 29, 2010), <http://www.telegraph.co.uk/news/worldnews/middleeast/iran/8167805/Tehran-attack-kills-leading-Iranian-nuclear-scientist.html>.

⁵ Scott Shane, *Iranian Scientist Gunned Down at Home*, N.Y. TIMES, July 24, 2011, <http://www.nytimes.com/2011/07/24/world/middleeast/24iran.html>.

⁶ Daniel Tovrov, *Are Israel, US Secretly Paying Terrorists to Destabilize Iran?*, INTERNATIONAL BUSINESS TIMES, (March 20, 2012), www.ibtimes.com/articles/316923/20120320/mek-war-iran-israel-united-states.htm.

at the control Natanz uranium enrichment center.⁷ No one has claimed responsibility for the attacks.

While there was no official claim of responsibility, Iran placed the blame at the feet of Israel and the United States. The United States vehemently denied any role in the killings.⁸ Israel, while officially denying any link, stopped short of condemning the attacks.⁹ Despite official government positions, Israeli and American intelligence sources say the attacks have been carried out by Mossad,¹⁰ Israel's intelligence agency, in conjunction with the People's Mujahedin of Iran,¹¹ an opposition group the United States has labeled a terrorist organization.¹²

These attacks come amid escalating tensions between Iran and Israel concerning Iran's nuclear program. Many in the West believe Iran is pursuing - and is close to completing - a nuclear

⁷ *US denies killing Iran nuclear scientist with magnetic bomb*, MSNBC.COM NEWS SERVICES (Jan. 11, 2012), http://www.msnbc.msn.com/id/45953703/ns/world_news-mideast_n_africa/t/us-denies-killing-iran-nuclear-scientist-magnetic-bomb/#.T3O6zI7N73M.

⁸ Richard Engel and Robert Windrem, *Israel teams with terror group to kill Iran's nuclear scientists, U.S. officials tell NBC News*, NBC NEWS (Feb. 9, 2012), http://rockcenter.msnbc.msn.com/_news/2012/02/08/10354553-israel-teams-with-terror-group-to-kill-irans-nuclear-scientists-us-officials-tell-nbc-news.

⁹ Frank Gardner, *Is Iran already under covert attack?*, BBC NEWS (Nov. 15, 2011), <http://www.bbc.co.uk/news/world-middle-east-15741989>.

¹⁰ Bednarz and Bergman, *Mossad Zeroes in*.

¹¹ Engel and Windrem, *Israel teams with terror group*.

¹² US DEPT. OF STATE, FOREIGN TERRORIST ORGANIZATIONS (Jan. 27, 2012). The People's Mujahedin of Iran, also known as Mujahedin-e Khalq Organization, and by the acronyms MEK, MKO, PMOI was originally founded in 1955 and advocated the overthrow of the Shah of Iran. In 1981 the MEK lost in a power struggle to Khomeini and then received shelter and support from Saddam Hussein during the Iran-Iraq war. **[Find more about why labeled terrorist orgs]**. In 2009, the European Union removed the MEK from their designated terrorist list.

bomb, despite Iran's assurances the program is for peaceful purposes.¹³ In the meantime both sides have ratcheted up the bellicose rhetoric leading many to believe it is only a matter of time before Israel will strike attack against Iran's nuclear program.¹⁴

It is within this context that the conflict between Israel and Iran continues. However, the question remains: is Israel's policy of assassinating Iranian civilian nuclear scientists legal under international law? Undoubtedly it is not. Under international human rights law, Israel is not only violating the scientists' right to life conferred on them by multiple treaties and conventions, but is also violating treaties concerning police action, human rights, and obviously Iran's territorial sovereignty. Proponents of Israel's policy argue Israel is merely acting out of self-defense, but the facts do not justify such a right as defined by the UN Charter, nor a right to pre-emptive warfare under customary international law. Israel's policy can only lead to an escalation of tensions in the region and most likely harden Iran's resolve in its pursuit of a nuclear program. The international community, specifically the UN Security Council, needs to take a hard stance with these kinds of attacks targeting civilians in order to discourage and prevent any expansion on the use of such tactics.

This paper begins by establishing what body of international law applies to the analysis of assassination and also of self-defense. Next I demonstrate how Israel's policy violates both international law, as embodied in treaties and custom, as well as Israel's own domestic law. Then I will discuss why Israel's claims of self-defense are not applicable here and why they have no

¹³ Alexei Anishchuk, *Russia says Iran, West "interested" in nuclear offer*, REUTERS NEWS SERVICE (April 25, 2012) <http://www.chicagotribune.com/news/sns-rt-us-iran-nuclear-russiabre83o1ch-20120425,0,438096.story>.

¹⁴ Bednarz and Bergman, *Mossad Zeroes in*.

legal right to pre-emptive self-defense in this context. Finally, in the conclusion I explain why any right of self-defense, specifically one involving the assassination of civilians must be narrowly construed and in this case be universally condemned.

II. The Law Governing State-Sponsored Assassinations

It is important to note at the outset that there is no express prohibition on assassination international law. Nonetheless the illegality of assassination, especially of civilians, is found in the rights and obligations of states under various treaty provisions as well as international customary law. Section II of the paper first outlines the meaning of assassination and why it is used here followed by analysis of applicable rules under human rights law and international humanitarian law. Because human rights law applies, there is a closer analysis of various treaties and conventions outlining the rights and duties of states and individuals. Finally, the last part of this section concludes Israel's assassination policy here violates human rights law.

II. A. The Meaning of Assassination in International Law

There is no universally accepted definition of assassination, but all variations contain a common theme. To qualify as assassination there must be a specific individual targeted, whether private or public, for a political purpose.¹⁵ The political purpose requirement implies a specific state of

¹⁵ Michael N. Schmitt, *State Sponsored Assassination in Domestic and International Law*, 17 *Yale J. Int'l L.* 625, 627-28 (1992); Matthew C. Wiebe, *Assassination in Domestic and International Law: The Central Intelligence Agency, State-Sponsored Terrorism, and the Right of Self-Defense*, 11 *Tulsa J. Comp. & Int'l L.* 363, 365 (2003);

mind and thus differentiates assassination from murder.¹⁶ There is no exact definition of political purpose and for this reason “legal analysis of the lawfulness of [assassination] is best resolved with a contextual reading of each case which relies on both political context and reference to the traditional doctrines governing the use of force: proportionality, necessity, and discrimination concerning the target.”¹⁷ As previously alluded, the assassinations of the Iranian scientists have taken place in a highly politicized setting. Israel has an obvious policy of preventing Iran from advancing its nuclear program to the stage where they can build a nuclear weapon. Killing the nuclear scientists has a twofold objective of eliminating the scientists that can help construct a nuclear weapon and showing force to persuade Tehran to end its pursuit of nuclear technology.

While these terms are often used interchangeably,¹⁸ using the term “assassination” is preferable to using “extra-judicial killings” or “targeted killings” as the former applies more to intra-state police action,¹⁹ while the latter is more commonly associated with targeted killings of terrorists and lacks a political element.²⁰ Therefore while I make a distinction between the terms, all are, by their definition, illegal under international law.²¹

¹⁶ Schmitt., 625.

¹⁷ Ibid., (quoting W. Michael Resiman & James E. Baker, *Regulating Covert Action: Practices, Contexts and Policies of Covert Coercion Abroad in International and American Law* 23 (1992) at 71.

¹⁸ UN G.A. A/HRC/14/24/Add.6 , at page 5. “The common element in all these contexts is that lethal force is intentionally and deliberately used, with a degree of pre-meditation, against an individual or individuals specifically identified in advance by the perpetrator... the specific goal of the operation is to use lethal force.”

¹⁹ W. Jason Fisher, *Targeted Killing, Norms, and International Law*, 45 Colum. J. Transnat'l L. 711 (2006-2007), 713.

²⁰ Orna Ben-Naftali & Keren R. Michaeli, ‘We Must Not Make a Scarecrow of the Law’: A Legal Analysis of the Israeli Policy of Targeted Killings, 36 Cornell Int'l L.J. 233, note 4. Add U.S. and Israeli definitions?

²¹ *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston), para. 10.

II. B. Assassinations International Humanitarian Law and Human Rights Law

There are two bodies of law that could apply when analyzing conduct in an international context. First there is international humanitarian law, which applies to conduct in times of armed conflict. International humanitarian law is generally embodied in the Geneva Conventions and determines the laws of war and how to treat combatants and non-combatants. However, when there is no armed conflict international human rights law applies to state actors. International human rights law is outlined in various treaties, conventions, and international customary law discussed in more detail below.

In the case of Israel and Iran, despite public bravado and clandestine tit-for-tats, there is no armed conflict invoking the rules under international human rights law. “Armed Conflict” is another nebulous term that is ultimately a factual determination. In the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), the court considered the definition of armed conflict in its *Tadic* Jurisdiction Decision. The court wrote, “[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups with a state.”²² If a conflict is essentially in a single state domestic law generally applies, unless there is a factual showing that the intensity of the conflict and the organization of the forces cross the threshold for an internal armed conflict.²³ Geneva Conventions define armed conflict in Common Article II as,

²² *Prosecutor v. Tadic*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70.

²³ *Id.* at para. 175.

“ Any difference arising between two States and leading to intervention of member of the armed forces is an armed conflict for the purposes of Article 2”.²⁴ The classification of a conflict is important because during an armed conflict, whether internal or international, the parties must respect the rights and duties under international humanitarian law. If the conflict is not considered an armed conflict, or is merely a domestic matter, then domestic law applies.

Even with the expansive definition of “armed conflict” in Common Article II, based on the low intensity of activity between Israel and Iran, the limited scope of the assassinations, and the public posture of the respective governments (neither is claiming there is a state of war, there is no evidence of a state of armed conflict required to invoke international humanitarian law. If the conflict were to expand and include more regular military forces or an increased intensity of the low-level attacks, this analysis could change.

II. B. 1. The Right to Life under Human Rights Law

Under international human rights law, there are a few important norms relevant to our situation. The first is an inherent right to life embodied in various treaties and customary law. Next is the important prohibition on the use of force with limited exceptions. This law is also found in multiple treaties and even though state practice may appear to not follow the prohibition very strictly, there is customary international practice condemning the use of force.

²⁴ Common Article 2 to the Geneva Convention paragraph 1.

In international human rights law, the right to life is the paramount right from which all other rights derived and is considered a jus cogens norm.²⁵ The International Covenant on Civil and Political Rights (“ICCPR”) states, “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his right.”²⁶ This is a strong statement that recognizes everyone’s right to enjoy their life, a right that cannot be taken from them arbitrarily. Furthermore the right to life is non-derogable and applies equally during hostilities.²⁷ Both Iran and Israel have signed and ratified the ICCPR.²⁸

The other two documents in the so-called International Bill of Rights establish the general principle of the right to life as well. The United Nations’ Universal Declaration of Human Rights holds that “Everyone has the right to life, liberty, and security of person.”²⁹ Similarly the rights to work and be a productive member of society is tied to the right to life in the International Covenant on Economic, Social and Cultural Rights.³⁰ Other regional charters and covenants likewise state there is a right to life and that states cannot derogate from this right.³¹

²⁵ Ramcharan p. 6

²⁶ International Covenant on Civil and Political Rights, Article 6, Paragraph 1.

²⁷ *Id.* at Article 4; and Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, para. 25.

²⁸ UN Treaty Depository, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

²⁹ U.N. Declaration of Universal Human Rights

³⁰ International Covenant on Economic, Social and Cultural Rights, preamble.

³¹ See, e.g., American Convention on Human Rights, Article 4(1) and (2); African Charter on Human and Peoples’ Rights, Article 4; General Comment No. 6 (1982) UN Human Rights Committee; European Convention for the Protection of Human Rights and Fundamental Freedoms. International Covenant on Civil and Political Rights. See, also, ICJ Advisory Opinion on the Use of Nuclear Weapons.

These treaty rights apply extra-territorially to a states' activity regardless of the location, including actions in another states' sovereign territory. Due to the fundamental, non-derogable nature of the right to life and the purpose and objects behind the treaties in which it is founded, it would lead to absurd results if it did not apply to acts in another's territory.³² Melzer writes, "The notion of 'jurisdiction' for the purposes of human rights law has been said to focus on *conduct* rather than *territory*, and to emphasize the duty of States to conduct their operations according to human rights standards with regard to all individuals who may be under their effective control or who may be directly affected by their actions."³³ Human Rights law confers rights and protections on citizens against the abuse of states and their agents.³⁴ While keeping this maxim in mind, it naturally follows that if a state can deprive a human of his or her life, that person will be considered under the jurisdiction of the offending state under the treaties.³⁵

There is obviously an international prohibition against the taking of human life that applies to states whether within their territory or without. Both Iran and Israel are signatories to the aforementioned treaties and covenants, but even if they were not, this prohibition can safely be assumed to constitute part of the body of customary international law. When Israel and its agents assassinated the Iranian scientists, Israel was in breach of its duties and obligations under international human rights law. Israel denied the scientists their right to life as recognized in the international community.

³² Theodor Meron, *Extraterritoriality of Human Rights Treaties*, AJIL 8, No. 1 (Jan. 1995) pp. 78 – 82, 80. Ben-Naftali, *The Extraterritorial Application of Human Rights to Occupied Territories*, 100 A.S.I.L. Proc. 90, 92 – 94 (2006). See, also, ICJ Advisory opinion on the

³³ Nils Melzer, *Targeted Killing in International Law*, 137-138.

³⁴ Meron, *Extraterritoriality* at 80.

³⁵ Melzer., at 136.

II. B. 2. The Lawful Deprivation of Life

The only way Israel could avoid its obligations rests on the word “arbitrary” in the ICCPR. The ICCPR specifically forbids the “arbitrary taking of life”. There are four elements of arbitrariness as: (1) Requirement of a sufficient legal basis; (2) Requirement of Necessity; (3) Requirement of Proportionality; and (4) Requirement of Precaution.³⁶ A State could justify taking someone’s life as a police action if the circumstances fell under those elements. The treaty on the Basic Principles of the Use of Force and Firearms by Law Enforcement Officials and the Code of Conduct for Law Enforcement Treaties embody these elements and outlines when a state can deprive someone their life.³⁷ It states, “Law enforcement officials shall not use firearms against persons except in self-defense or defense of others against death or serious injury... and only when less extreme means are insufficient to achieve these means.”³⁸ This statement is in line with the overall theme of the treaty to develop non-lethal means of law enforcement and to limit to the use of lethal force to prevent imminent serious threats and to protect life.³⁹ The terms imminent and serious, in conjunction with the objects and purpose of the treaty, must be construed narrowly.⁴⁰

II. C. Israel’s Assassination Policy Violates Human Rights law

³⁶ U.N. Secretary General, *Extrajudicial, summary or arbitrary executions*, ¶¶ 31, 34, 37-38, U.N. Doc. A/61/311 (Sept. 5, 2006).

³⁷ General Assembly Resolution 34/169 (Dec. 17, 1979).

³⁸ Paragraph 9.

³⁹ *Id.*, *see e.g.*, paras. 9, 10, 5, 7.

⁴⁰ *Id.* preamble.

Israel is in violation of human rights law because they are arbitrarily depriving the scientists of their right to live. Since there is no armed conflict, Israel could attempt to justify its policy on a basis of police action, but such a claim could not be upheld. There is no legal basis on which to base the deprivation of life.⁴¹ Even still, Israel would fail in the necessity of taking life and the proportionality as delineated in the treaty conventions on police activity. The use of firearms and bombs is being used as an attack on unarmed civilians and not in defense of the law enforcers or civilians. There is no valid claim for police action.

III. Self-Defense as a Sufficient Legal Basis for Taking Life in International Law

A sufficient legal basis requires a positive legal right. Assassination in peacetime raises a presumption of illegality.⁴² To avoid liability under international law for both the breach of Iran's territorial sovereignty,⁴³ the murder of its citizens, the use of "proxy combatants", and possibly even a breach of the peace or a crime of aggression,⁴⁴ Israel would have to justify the assassination of the scientists as a valid act of pre-emptive self-defense. The UN Charter in Article 51 recognizes a state's right to defend itself. Article 51 states:

⁴¹ A claim of self-defense is analyzed in greater detail below.

⁴² Louis Beres, *On Assassination as Anticipatory Self-Defense: Is it Permissible?*, 70 U. Det. Mercy L. Rev. 13 (1992-1993), 13.

⁴³ "Turning to the principle of respect of state sovereignty, the Court recalls concept of sovereignty, both in treaty-law and customary international law, extends to internal waters and territorial sea of every state and to the airspace above its territory." Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America I.C.J. (Judgment) (Summary) p. 166.

⁴⁴ Article 39 of the U.N. Charter prohibits crimes entailing breach of the peace and crime of aggression and allows for the Security Council to rectify any breach under its Chapter VII powers.

“Nothing in this present Charter shall impair the right of individual or collective self-defence if an armed attack occur against a member of the United Nations, until the Security Council has taken measures to maintain international peace and security. Actions 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 order to maintain or restore international peace and security.”⁴⁵

Article 51 has three distinct requirements a State must prove to be justified in acting in self-defense. First, to act in self-defense requires an armed attack. Second, any self-defense is temporary in nature as the phrase “until the Security Council has taken measures...” implies. Third, there is a procedural requirement that a nation report the use of self-defense to the Security Council “immediately”.⁴⁶ While this reporting requirement is not considered part of customary international law, a failure to report reflects negatively on a state’s claim that it is exercising self-defense under Article 51.⁴⁷ In Security Council hearings, the United States has taken the position that failure to report use of force contradicts a States’ claim to be operating under Article 51.⁴⁸

The reading of Article 51 of the UN Charter shows a limited right for a nation to defend itself in limited circumstances. This reading is consistent with the overall prohibition of unilateral force in the UN Charter. Article 2(4), discussing the purpose and objects of the Charter, reads, “All Members shall refrain in their international relations from the threat or use of force against the

⁴⁵ U.N. Charter art. 51.

⁴⁶ *Id.*

⁴⁷ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. V. U.S.)*, 1986 I.C.J. 14, 181 (June 27) (Judgment), para. 234. “[The Court] does not therefore treat the absence of a report on the part of the United States as a breach... [b]ut the court is justified in observing that this conduct... hardly conforms with the [US’s] avowed conviction that it was acting in the context of ... Article 51 of the Charter.”

⁴⁸ *Id.*, citing U.N. doc. S/PV.2187.

territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” The prohibition against the use of force is clear and must be read in conjunction with the other principles found in the Charter.⁴⁹

Articles 2(4) and Article 51 are inextricably linked to Chapter VII, which lays out the role of the Security Council – the UN organ responsible for peace and security. Article 39 gives the Security Council the authority to determine when there has been a breach of the peace, an act of aggression, or a threat to the peace.⁵⁰ The remedial powers of the Security Council are established in Articles 41 (“measures not involving the use of force”) and 42 (measures involving the use of force when Article 41 measures are insufficient).⁵¹ Additionally any measure taken under the auspices of self-defense do not “in any way, affect the authority and the responsibility of the Security Council under the Charter to take at any time such action as it deems necessary to maintain or restore international peace and security.”⁵²

In 1993, the International Court of Justice (ICJ) decided whether the United States’ assertion of self-defense was proper when it attacked two Iranian oil platforms in the Persian Gulf in

⁴⁹ Legality of the Threat of Nuclear Weapons paras. 36-39.

⁵⁰ G.A. Res. 3314 defines aggression as “Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.”; Breach of the Peace, labeled a crime determined by the security council in Art. 39, was defined by the Nuremberg tribunal as, “(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances; (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).” See, also, Roger S. Clark, *Nuremberg and the Crime Against Peace*, 6 Wash. U. Global Stud. L. Rev. 527 (2007).

Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 1950. Accessed at <http://www.icrc.org/ihl.nsf/full/390>.

⁵¹ U.N. Charter

⁵² Legality of the Threat of Nuclear Weapons at para. 44.

response to an alleged attack by Iran on a US flagged merchant vessel as well as allegations that Iran laid a mine that struck a US Navy warship. Invoking UN Charter Article 51, the US justified the attack in its report to the Security Council and later in front of the ICJ, arguing Iran's actions in the Gulf threatened US national security interests, threatened the lives of US nationals, caused financial damage to its nationals and due to the failure of diplomacy to deter Iran, "armed action was the only option left to the United States."⁵³ Nonetheless the court rejected the US's claims of self-defense first holding that the US did not satisfactorily satisfy its burden of proving Iran was the culprit behind the attacks, nor that the attacks asserted were of the "most grave form" required under the Court's holding in Nicaragua v. U.S.⁵⁴ Next, the court turned to an evaluation of the necessity and proportionality of the United States' response reiterating the principle that "measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any measure of discretion."⁵⁵ Using this high standard, the court held the targets of the attack were not a necessary response to the attacks complained. The court noted the US never protested to Iran of military activity on their oil platforms and that one of the platforms was admittedly only "a target of opportunity".⁵⁶ Similarly the proportionality argument was struck down due to the scale of the US attacks, reiterating there was no clear evidence of who was behind the original armed attacks and the damage to the US warship did not result in the loss of life nor the loss of the ship.⁵⁷

⁵³ *Id.* at paras. 47-49; 67-8.

⁵⁴ *Id.*

⁵⁵ *Id.*, at para. 74.

⁵⁶ *Id.* at para.76.

⁵⁷ *Id.*, at para.77.

In sum, a reading of the UN Charter shows there is “an inherent right” of self-defense, albeit, when read in accordance with the principles espoused in the rest of the Charter, a limited right. Any resort to self-defense must be temporary - giving way to a multi-lateral response led by the Security Council - and must be in response to an armed attack. Importantly, behind all these rights is the general prohibition in the use or threat of force. In light of this narrow right, when can a nation find recourse in pre-emptive self-defense?

B. Origin of the Right to Pre-Emptive Self-Defense

Proponents of a broad right of self-defense argue that requiring a State to wait to be attacked to respond is unrealistic and illogical.⁵⁸ Many proponents of anticipatory self-defense argue for a continuation of a pre-Charter custom rule of self-defense.⁵⁹ The so-called ‘expansionists’ of self-defense point to the ‘*Caroline* Incident’ in which British troops destroyed a rebel Canadian ship in American territorial waters.⁶⁰ The United States’ response sent by Secretary of State Webster lead to what is now called the Webster formula for the use of force. The nation using force must show a ‘necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation.’⁶¹ Expansionists also point to the Nuremberg and Tokyo tribunals, which alluded to a right of preventative self-defense and a determination that a validity of preventative self-defense is a factual dispute citing the *Caroline* case.⁶² It is important to note that

⁵⁸ See, eg. Schwebel, ‘Aggression, intervention and self-defence’, 479-81; Leo van den Hole, ‘Anticipatory Self-Defence Under International Law’, (2003) 19 *American Un ILRev* 69-106.

⁵⁹ Tom Ruys, ‘*Armed Attack*’ and Article 51 of the UN Charter, (New York: Cambridge University Press: 2010), 257; Bowett, *Self-defence in international law*.

⁶⁰ *Ibid.*, citing Jennings, ‘The *Caroline* and *McLeod* Case’.

⁶¹ *Ibid.*

⁶² Ruys, note 27, p. 257.

the Caroline Case, though decided almost 150 years ago is still cited as good precedent including in the ICJ's Nicaragua case.⁶³

Opponents of an expansive view on the right to anticipatory self-defense argue both that the customary practice – especially reliance on the *Caroline* incident - is outdated or, alternatively, the UN Charter has modified and pre-empted that customary practice.⁶⁴ The Charter of the United Nations, central to world affairs and involving almost every nation on earth, can be said to embody to the general law and not just an ordinary convention.⁶⁵ Therefore, while the convention enumerates a right to self-defense in Article 51, it is simultaneously limited when read with the object and purpose of the treaty as well as the other articles.

There exists a great divide in scholarly opinion whether there is a right to pre-emptive self-defense. Despite the divergence in opinion, the UN Charter provisions would seem to preclude any use of pre-emptive self-defense. The Security Council is the primary mechanism for resolving disputes and should be consulted if one nation threatens another. Nonetheless, under certain circumstances, if the threat is sufficiently imminent, a state could resort to limited interceptive self-defense, generally designed to thwart the impending attack. Allowing this type of self-defense is logical even if a difficult standard to apply. Preventative self-defense, for non-imminent threats, however, cannot be justified under international law.

C. Requirements of self-defense

⁶³ Para 237.

⁶⁴ Brownlie, 'The principle of non-use of force'.

⁶⁵ See, P. Jessup, *A Modern Law of Nations*, (1948), 168.

The use of self-defense, whether anticipatory or reactive, has two elements to ensure it is a proper use of the right. First is a necessity requirement that involves both the necessity of the use of force in terms of timing, but also in terms of the targets selected.⁶⁶ The second element is the proportionality of the act of self-defense that analyzes the scale and effects of the act of defense.⁶⁷ These conditions ensure that any use of self-defense will be restricted to the means required to halt the opposition's attack. This standard is inline with the purpose the UN Charter prohibiting the use of force except for the minimum allowed under Article 51. Because Article 51 is an exception to the general rule, it should be interpreted strictly.⁶⁸ "There is a specific rule whereby self-defence would warrant only measures that are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law."⁶⁹

1. Necessity

Necessity requires the nation invoking the right to self-defense prove all diplomatic efforts and other measures not involving the use of force have failed. While it is not an absolute requirement that use of force be the "last resort",⁷⁰ States have often criticized the use of force where diplomatic channels were not exhausted. When states go to the security council after undertaking an attack in self-defense, whether ultimately found justified or not, the states almost always

⁶⁶ Ruys, p. 95.

⁶⁷ *Id.*, at 111.

⁶⁸ Gamal Moursi Badr, *The Exculpatory Effect of Self-Defense in State Responsibility*, 10 Ga. J. Int'l & Comp. L. 1 (1980), 10.

⁶⁹ Legality on the Threat or Use of Nuclear Weapons at para. 41).

⁷⁰ David Kaye, *Adjudicating Self-Defense: Discretion, Perception, and the Resort to Force in International Law*, 44 Colum. J. Transnat'l L. 134 (2005-2006).

claim the futility of further diplomatic efforts.⁷¹ Due to the implications of the use of anticipatory self-defense, the need to use diplomacy is especially acute. When states fail to adequately make use of diplomatic channels, the international community will be less likely to condone such use of force.⁷²

One can also read an immediacy element to necessity that requires some sort of flexible, temporal link to the act that provoked the use of self-defense.⁷³ Determining this link is especially difficult in the context of anticipatory self-defense and is one of the critical elements when determining whether pre-emptive self-defense can be justified. Because there is always some level of uncertainty when determining immediacy, there must be some leeway. However, in the context of reactive self-defense, while allowing for some flexibility in response time, a nation must exercise self-defense while the opposition's attack is still in progress otherwise the purpose of self-defense – repulsing the attack – can no longer be met. Instead, such an act would be punitive.⁷⁴ Nonetheless, some useful criteria for a pre-emptive strike could include the likelihood of attack in terms of capability and desirability of the enemy nation to attack; the results of diplomatic overtures so far; the nature of the threat; and the level of proof of the threats. The temporal aspect of necessity is determined by the relevancy of the threat. In the Nicaragua Case, Nicaragua brought suit in the International Court of Justice against the U.S. claiming the U.S. was responsible for military activities as well as the activities of paramilitary

⁷¹ See e.g., Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America). 2003 I.C.J. 161 (Nov. 6 2003) (Judgment).

⁷² See, e.g.,

⁷³ Ruys, p. 99.

⁷⁴ Badr, *Exculpatory Effect*, at 25-26.

groups in Nicaragua's territory.⁷⁵ The United States responded it was justified, and therefore exculpated from liability, because it acted in collective self-defense on behalf of El Salvador, Costa Rica, and Honduras.⁷⁶ However, the ICJ rejected the US's claim of necessity because the US had other avenues of addressing their concerns short of armed force and by the time the US did attack, there could no longer conceivably have been any threat from El Salvador.⁷⁷ Once the threat has passed a state can no longer meet the necessity requirement.⁷⁸

The final aspect of necessity is the necessity of the target of attack. Importantly, any use of force by a nation using pre-emptive self-defense immediately invokes international humanitarian law, which has developed rules regarding proper targets.⁷⁹ The targeting must be in response to the force that is to be prevented.⁸⁰ For example, in the Oil Platforms Case, the US sought to justify its attack on the platforms by providing evidence there was military personnel on the platforms used to monitor and track ships in the Gulf. Therefore, the US suggested, attacking the platforms was justified because the same intelligence and surveillance the Iranians gathered from the platforms was used to attack the US flagged ship.⁸¹ As previously discussed, the Court rejected this claim because the US' failure to complain about the military previously suggested attacking the platforms was not necessary. Similarly the scale of the attacks and the opportunism of the targets previously mentioned went against necessity.⁸² Necessity, as analyzed by the court, appears to require the target of self-defense to be the source of the threat with a relatively high

⁷⁵ *Nicaragua v. U.S.* at para. 1.

⁷⁶ *Id.* at para. 165.

⁷⁷ *Id.* at paras. 237, 238.

⁷⁸ *Id.*

⁷⁹ See the Geneva Conventions. Discussed more *infra*.

⁸⁰ Badr, *Exculpatory Effect*, at 27.

⁸¹ *Paramilitary Activities Case* at para. 74.

⁸² *Id.*

standard of proof. Targeting necessity is strictly construed and does not allow for similar, yet non-threatening targets, to be attacked.

2. Proportionality

Proportionality requires that any use of self-defense must be in proportion to the size and nature of the threat to be prevented. In a case of anticipatory self-defense, any attack must be designed to eliminate the threat, but not go beyond the level required to eliminate the threat or expand hostilities. International humanitarian law, which would be the governing law in the case of a state undertaking a preemptive attack, also requires all attacks be proportional and that there is no unnecessary effect on the civilian population or the civilian infrastructure and that weaponry is not used in an indiscriminant manner.⁸³ **Nicaragua and Proportionality.**

D. Summary of Necessity and Proportionality in Self-Defense

In sum, for a claim of self-defense to be justified in international law, the defensive response must be both necessary and proportional. These are strict requirements that must be read narrowly in light of the general prohibition on the use of force found in the U.N. Charter. Necessity implies that there are no other avenues for response except a reply of force, but this reply must be necessary in terms of the targets chosen and the timeframe in which the state asserting self-defense acts. Proportionality likewise requires a carefully chosen and limited

⁸³ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. #, dat. Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Conflicts (Protocol I), 8 June 1977, art

response. If these two conditions are not met, a state's claim of self-defense will be rejected and the state will be liable for its actions.

1. The Example of Israel's Attack on the Osiraq Facility

Israel has used force in a preemptive or preventative manner on a few occasions.⁸⁴ The prime example is the bombing of the Osiraq nuclear reactor in Iraq in 1981. On June 7 of that year, Israel aircraft destroyed the reactor located at a research facility near Baghdad.⁸⁵ The following day Israel reported the attack to the Security Council and justified its attack as a valid exercise of self-defense on various grounds including, the reactor would soon be fully operational, waiting any longer would risk nuclear fallout over Baghdad, and that the attack would have been futile in a matter of months.⁸⁶ Israel did not want the "nightmare" of the existence of an Iraqi nuclear reactor.⁸⁷ Despite Israel's justifications, it was met with near universal condemnation by the rest of the world as an unjustified resort to force. The Security Council, after hearing the protestations and arguments various member states leveled against Israel, unanimously adopted a resolution "strongly condemning" Israel's attack, which was "in clear violation of the Charter."⁸⁸ This resolution was followed by General Assembly Resolution 36/27 of November 1981 that adopted the Security Council's findings and condemned Israeli aggression as well.⁸⁹

⁸⁴ [Footnote on 7 days war and self-defense, what kind of self-defense?]

⁸⁵ Louis Rene Beres and Yoash Tsiddon-Chatto, *Reconsidering Israel's Destruction of Iraq's Nuclear Reactor*, 9 Temp. Int'l & Comp. L.J. 437 (1995), 437.

⁸⁶ Israeli document to the SC justifying use of force June 8, 1981.

⁸⁷ Kristen E. Eichensehr, *Targeting Tehran: Assessing the Lawfulness of Preemptive Strikes Against Nuclear Facilities*, 11 UCLA J. Int'l L. & Foreign Aff. 59 (2006), 61.

⁸⁸ SC resolution 487(1981); list some of the other findings as well.

⁸⁹ *Id.*

The near universal condemnation shows that even if there are disputes over pre-emptive self-defense, there is clearly no acceptance of preventative pre-emptive defense to a non-imminent threat. However, it is also important to show Israel's thinking and practice. Israel identified the threat of the reactor and decided to destroy it, even without direct provocation, before they lost the strategic initiative. Even in the face of worldwide criticism, Israel stood by its belief of self-defense.

Even still, the Osiraq attack can be distinguished from the case at hand on a number of points. First, the Osiraq attack focused on the sole nuclear reactor in Iraq, thus eliminating Israel's perceived threat in one quick swoop. There were some civilian casualties,⁹⁰ but it is undisputed the target was the reactor. Here, the scientists as individuals are being targeted and killed. While the Osiraq attack can at least be classified as preventative, the targeting of the scientists probably does not even fit in that category of attack. Their deaths will not prevent Iran's nuclear program from moving forward, but will at most slow it down. It appears that Osiraq would not be of precedential value to Israel in terms of justifying preventative self-defense.

IV. The Assassination of the Iranian Scientists Cannot be Justified as an Act of Self-Defense

As previously discussed, state sponsored assassinations in peacetime are presumptively illegal under international law.⁹¹ There is also a jus cogens norm prohibiting the denial of the right to live for arbitrary purposes. A state can argue self-defense to defend the taking of a life, but the

⁹⁰ Beres and Tsiddon-Chatto, *Israel's Destruction of Iraq's Nuclear Reactor*.

⁹¹ See note, *infra*.

right to self-defense is strictly limited under the UN Charter and the right to pre-emptive self-defense – if such a right exists – is even more limited. Therefore in the case at hand, Israel would be hard pressed to overcome the presumptions in defense of their policy of assassinating Iran’s nuclear scientists.

Israel could claim the assassinations were required or supported as an act of self-defense, however, this claim would fail on the facts. First Israel could not meet the necessity requirements neither in terms of immediacy nor for targeting. Immediacy in this case would have to be analyzed in terms of the Iran’s nuclear program and the development of a nuclear bomb. Israel and the West have long maintained that Iran’s nuclear program is a danger to the region and the world. Despite this belief, intelligence sources of both Israel and the United States believe that Iran has not yet decided to construct an atomic weapon.⁹² This is also in line with at least twenty years of warnings from Israel and the United States about the immediacy of Iran’s acquisition of a nuclear weapon.⁹³

Recognizing Israel’s right to attack in this situation would open the door for preemptive strikes in international relations. Allowing a state to act on unclear intelligence to attack another state would establish a terrible precedent. The implications of war, especially in a hot-bed such as the Middle East, could lead to disastrous effects on civilians throughout the region. Let alone, any

⁹² *Special Report: Intel Shows Iran’s nuclear threat not imminent*, REUTERS NEWS SERVICE (Mar. 23, 2012), http://articles.timesofindia.indiatimes.com/2012-03-23/us/31229572_1_enrichment-nuclear-program-mohsen-fakhrizadeh.

⁹³ Scott Peterson, *Imminent Iran nuclear threat? A timeline of warnings since 1979*, Christian Science Monitor (Nov. 8, 2011), <http://www.csmonitor.com/World/Middle-East/2011/1108/Imminent-Iran-nuclear-threat-A-timeline-of-warnings-since-1979/Earliest-warnings-1979-84>.

conflict between Iran and Israel could very likely escalate and involve multiple nations. Using a preemptive strike here, especially one targeting civilians, will only escalate the situation and lead to the real possibility of war. A pre-emptive attack is an acknowledged use of armed force that is only justified because it's self-defense. A nation that is pre-emptively attacked can turn around and strike back with perhaps an even clearer justification of self-defense. This downward spiral must be prevented and therefore any use of self-defense, especially pre-emptive self-defense must be strictly analyzed with a very high burden on the acting party.⁹⁴

The facts here question the immediacy of the threat of Iran constructing a nuclear weapon. Most current analyses are unclear on how long it would take Tehran to construct a nuclear weapon.⁹⁵ There is also the issue of whether the acquisition of a nuclear weapon would even constitute an pre-text for pre-emptive self-defense. Iran's acquisition of a nuclear weapon would definitely shift geopolitical power in the region, which would not be favorable to Israel's interests. As of now, Israel is the only nation in the Middle East thought to possess nuclear weapons, providing a trump card for any regional dispute. If Iran, a sworn enemy of Israel, were to acquire nuclear weapons technology, the deterrence effect would apply in Tehran as well creating two regional nuclear powers. Though many claim that, by nature, nuclear weapons are a deterrent and therefore defensive weapon,⁹⁶ nuclear weapons could still be used to attack if a regime was sufficiently destabilized or belligerent. The ruling powers in Iran, even though at times

⁹⁴ For an example of the debacle of preemptive war, see the lead up to the United States' invasion of Iraq and ensuing blunders.

⁹⁵ *Special Report*, REUTERS.

⁹⁶ Condoleezza Rice, *Promoting the National Interest*, 79 Foreign Aff. 45 (2000), 61-62.

belligerent, would not be likely to use a nuclear weapon offensively as retaliatory strikes would surely spell doom for Tehran's regime.⁹⁷

Even if Israel could make out an immediacy claim under necessity, its argument would surely fail under targeting necessity. Assuming, *arguendo*, Iran's nuclear program is the perceived threat, targeting the scientists for assassination would not be the appropriate response. This type of tactic would not halt Iran's program and its effects are only to slightly increase the difficulty in production of the program.⁹⁸ The selection of the scientists is also suspect in terms of necessity as only two of those targeted were directly connected with Iran's nuclear program and most were university professors or academics.⁹⁹ These types of targets are hardly likely to be necessary, especially for assassination. Assassinating the scientists would also run afoul of international humanitarian law regarding the conduct of war and the protection of civilians. States have the duty of preventing collateral damage to civilians and are prohibited from directly targeting civilians at all.¹⁰⁰ The only exception is if the civilian has taken up arms in a conflict against the offending State.¹⁰¹ Only under the most liberal reading of taking arms would consider the scientists remotely engaged in direct hostilities against Israel.

The Israeli Supreme Court took up the issue of civilian combatants in The Public Committee Against Torture, et al. v. Israel, where the court was considering the issue of the targeted killings

⁹⁷ *Id.*

⁹⁸ *Special Report*, REUTERS.

⁹⁹ *Id.*

¹⁰⁰ Additional Protocol I to the Geneva Conventions, art. 51(3).

¹⁰¹ *Id.*

of alleged terrorists in Palestine.¹⁰² First, the court recognized that Israel was not a signatory to the First Additional protocol of the Geneva Convention, yet nonetheless found the provision protecting civilian non-combatants – as well as the limitation to this protection discussed previously - was customary international law and therefore binding.¹⁰³ According to the Israeli Supreme Court, taking part in hostilities means “... using weapons in an armed conflict, [...] gathering intelligence, or while preparing himself for the hostilities.”¹⁰⁴ While determining the definition of “direct hostilities”, the court held that such a finding was a factual determination and then listed a series of acts they found to constitute direct participation, noting, “the function [of the civilian] determines the directness of the participation in hostilities.”¹⁰⁵

The facts of our case applied to the Israeli High Court’s holding in Public Committees shows that Israel’s policy is illegal in Israeli law. Israel’s High Court required, in line with the Geneva Convention, the targets killed were taking part in direct hostilities against Israel. These scientists were not fighting nor taking up arms. The closest argument that could possibly be made, yet ultimately fail, is that the scientists were preparing for hostilities. However, such a reading would lead to absurd results if a state could attack and kill civilians in a time of peace who were only conducting research or at the most dangerous, working on technology that *might* be used as a weapon. Given the enormous military industry located throughout the world, many civilians, who ought to be protected from the brutality of war, would be fair game. While this argument may seem stretched, so is the claim that these scientists were engaged in direct hostilities.

¹⁰² HCJ 769/02 The Public Committee v. The Government of Israel, PD [2006].

¹⁰³ *Id.* at paragraph 32 quoting Geneva Convention.

¹⁰⁴ *Id.* at paragraph 33.

¹⁰⁵ *Id.* at paragraph 35. Some of the acts listed include, gathering intelligence, transportation of combatants, and operating or servicing weapons. It does not include people selling food or medicine or those providing strategic, logistic, propaganda or monetary aid.

Specifically targeting the scientists may limit the overall damage and the sophistication of the weaponry used ensured that only the scientists themselves were killed with no collateral damage,¹⁰⁶ however, at the end of the day it is not soldiers or even politicians being killed, but civilian scientists.¹⁰⁷ That is illegal under treaty based and customary international law.

V. Conclusion: Israel's Policy of Assassination is Illegal and must be Condemned by the International Community

While the threat of a nuclear Iran to Israel should not be underestimated, such a threat does not justify assassinating civilians. Following the two world wars, which killed millions of innocents, the international community sought to prevent and limit the effect of war on civilians and assuredly forbid states from directly targeting noncombatants. The U.N. Charter outlined the prohibition of force except under limited circumstances and severely limited a nation's resort to unilateral force. The Geneva Conventions and other regional instruments embodied this ideal and sought to restrict deference to the conduct of states in warfare as well as protect fundamental human rights, paramount of which is the right to life. It is in this context that any state's activities are put under the microscope to ensure compliance with the ideals and standards of the international community. Israel's policy of assassinating Iranian nuclear scientists is assuredly illegal under international law. While a state may flaunt international rules and cite its sovereign authority, blanket statements, especially when used to justify assassination of civilians must not be tolerated. While bringing justice in the polarized politics of the Iran-Israel would be extremely

¹⁰⁶ Bednars and Bergman, *Mossad Zeroes In*.

¹⁰⁷ Many analysts have questioned the choice of targets because a few of the scientists killed were barely associated with Iran's nuclear program, if at all. See *Reuter's Report*.

difficult, the international community must openly and unambiguously condemn such policies and perhaps even threaten sanctions. Even in an election year, the United States, as Israel's closest ally, must lead the way in condemning the violence and pushing for diplomatic talks between Israel and Iran to thwart the very real possibility of larger conflict. Similarly, Iran's allies must push for talks as well and prevent an escalation of the conflict.¹⁰⁸

Israel exists in a region generally hostile to its existence. The threats it faces are real and cannot be easily discounted. Nonetheless, Israel – and its enemies – must act in conformity with international norms and minimize war's effect on civilians. When one nation starts attacking civilians, it opens the door for its enemies to claim the same right. This race to the bottom cannot be tolerated in the modern international world. Everyone human regardless of nationality or profession should enjoy the right to not be arbitrarily deprived of his or her life.

¹⁰⁸ The possibility of escalation is very real. After the latest Iranian scientist was assassinated, Iranian agents carried out attacks against Israeli diplomats and interests in India and Georgia. One attack was thwarted in Thailand. Robert Horn, *In Thailand, Iranian Suspected in Bomb Blasts*, TIME WORLD (Feb. 14, 2012) <http://www.time.com/time/world/article/0,8599,2106797,00.html>.