The Newport Papers

Eleventh in the Series

The International Legal Ramifications of United States Counter-Proliferation Strategy

Problems and Prospects

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NAVAL WAR COLLEGE, NEWPORT, RHODE ISLAND

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Printed in the United States of America

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Foreword

In this Newport Paper, Frank G. Goldman questions the adequacy of traditional nonproliferation strategies to deter the spread of nuclear weapons. While the subject is sensitive and the proposed solution perhaps radical, Mr. Goldman's argument is one that merits discussion. He examines counter-proliferation as an alternative, supplemental strategy—a potentially valuable approach which the nation should not dismiss. Acknowledging the severe obstacles in the way of its employment, he contends that counter-proliferation offers a way to fill an important policy void.

Mr. Goldman's careful and responsible exploration of the international legal aspects of counter-proliferation makes this work especially valuable. Its publication should stimulate productive thought and generate insight on a subject vital to the security community, precisely the goals of the Naval War College's Newport Papers.

J.R. Stark
Rear Admiral, U.S. Navy
President, Naval War College

Acknowledgments

I would like to express my gratitude to the individuals without whose help this project could not have been completed. First, the guidance of Dr. Joseph Pilat of the Center for National Security Studies at the Los Alamos Nuclear Laboratory was crucial to the production of this paper. Dr. Pilat provided advice on the study's framework, analysis, and conclusions. Professor David Wippman of Cornell Law School was extremely helpful in directing me toward the sources of international law that play a role in the counter-proliferation equation. Professor Jeremy A. Rabkin of the Government Department at Cornell University provided commonsense advice throughout the project, as did Dr. Mitchell Reiss of the Woodrow Wilson Center. Dr. Bruce Blair of the Brookings Institution also furnished direction as the project approached completion. Thank you to Dr. Lawrence Scheinman of the U.S. Arms Control and Disarmament Agency for sparking my initial interest in the area of nonproliferation during my undergraduate days at Cornell University.

Of course, any flaws in this study, either factual or analytical, are solely those of the author.

I would also like to thank the following individuals for their support throughout this sometimes tortuous process: Lynne Wurzburg, Esq., Dr. William G.D. Frederick, Roland Young, Esq., Ms. Maria Kelly, and Sarah A. Wagman, Esq. I also must express my deepest gratitude to Mrs. Geralyn Frederick, whose strength throughout her son's academic career has been an inspiration.

This study is dedicated to Henry Goldman, M.D.

I

Counter-Proliferation: Reconsidering the Traditional U.S. Approach to Nuclear Nonproliferation

FOR NEARLY THREE DECADES the United States, in cooperation with many nations, has sought to prevent the proliferation of nuclear weapons. The premise of this endeavor has been that this nation, its allies, and the entire international community are most stable when as few states as possible possess these weapons. By and large, nonproliferation efforts have proved successful inasmuch as only a handful of states[1] have developed a nuclear capability since the signing of the Non-Proliferation of Nuclear Weapons Treaty (NPT).[2] The Clinton administration, as its predecessors, has promised to maintain this commitment. In a 1993 address to the United Nations, President Bill Clinton announced his intention to make nonproliferation a priority of the administration.[3] He reiterated this commitment to the nonproliferation regime and the NPT in a foreign policy address in March 1995.[4]

However, with the conclusion of the Cold War and the dismantling of the political foundation that it provided, questions have surfaced about the continued viability of this "nonproliferation regime." Given the changes in the international political order, can the traditional nonproliferation strategies succeed? What alternatives or supplements to these traditional strategies may the United States and the world community implement as they attempt to fortify the nonproliferation regime? This paper explores the international legal ramifications of one suggested supplemental strategy: counter-proliferation.

Counter-proliferation may be defined as measures ranging from economic embargoes to military intervention designed to inhibit, restrain, or destroy the nuclear development programs of a potential proliferant.[5] These methods include passive measures such as export controls designed to delay the weapons design program of a potential proliferant. They also may include more aggressive techniques such as the surreptitious introduction of computer viruses designed to disrupt the proliferant's computing capacity. Most dramatically, counter-proliferation efforts include the use of military force against those nations or groups devoted to the development of a nuclear weapon. This study addresses all of these matters but focuses on this last, most aggressive form of counter-proliferation.

The traditional nonproliferation regime concentrates on inspections and the accounting of fissionable material by the International Atomic Energy Agency (IAEA) in addition to the use of unilateral and multilateral export controls which are designed to limit the unregulated spread of nuclear materials. The traditional regime also relies upon the commitments of nonnuclear states, pursuant to the NPT, to forego the construction of nuclear weapons.[6] In contrast to these relatively passive forms of nonproliferation, which require the cooperation of the nonnuclear states, counter-proliferation measures, if implemented, would be designed to prohibit directly the acquisition, development, manufacture, testing, and deployment of a nuclear weapon by the potential proliferant.

A strategy of counter-proliferation would break with traditional U.S. nonproliferation efforts by aggressively seeking to prevent the development of nuclear weapons. U.S. policy makers currently are studying this strategy as an alternative or supplement to the present reliance on the traditional regime.[7] The U.S. Department of Defense, through its Counter-Proliferation Initiative, is exploring what role counter-proliferation strategies and tactics will play in post-Cold War U.S. defense policy.[8]

This study posits a three-part thesis. First, after an analysis of the current tenets of international law, the study argues that a unilateral U.S. application of an aggressive counter-proliferation strategy is inconsistent with current norms of international law. Second, despite this inconsistency, policy makers in the United States should not abandon the counter-proliferation strategy, because an occasion may arise when the United States will be unable to tolerate the imminent development of a nuclear weapon by an adversary with goals adverse to the vital interests of this nation. Third, however, the study contends that U.S. policy makers should not attempt to mold international law through diplomacy so that counter-proliferation

becomes normatively acceptable throughout the international community. While such an endeavor is attractive at first blush, such a strategy, if successful, would be counterproductive to U.S. interests because it would permit nations other than the United States to legitimately launch counter-proliferation attacks, perhaps even against U.S. allies. While unilateral counter-proliferation efforts risk the condemnation of the international community, any attempt to legitimize counter-proliferation internationally might provide other states with the type of political cover needed to launch military attacks that are adverse to U.S. interests.

II

The Traditional U.S. Approach to Nonproliferation

BEFORE COMMENCING a detailed examination of counter-proliferation, this paper must explain the workings of the traditional U.S. approach to nonproliferation and why this strategy, standing alone, may no longer be viable.

U.S. Reliance on the Non-Proliferation of Nuclear Weapons Treaty (NPT)

Two prongs comprise the traditional American approach to nonproliferation. The first relies on the NPT to ensure that signatory nations do not develop nuclear warheads. Nonnuclear states that submit to the NPT promise to forego the development of nuclear weapons.[9] In exchange for this commitment, the nuclear states promise not to transfer nuclear weapons or assist other states in the manufacture of these weapons.[10] The NPT also requires that parties submit to IAEA safeguards,[11] which take an accounting of the fissionable material possessed by each nonnuclear signatory state. The IAEA's task is to confirm that these states have not diverted fissionable material to a weapons development program.

Generally, the NPT has been successful in achieving its goal that nonnuclear states will not clandestinely develop nuclear warheads. However, the record of the NPT regime has not been flawless. First, a few nations have not signed the Treaty and thus are outside its purview. India, which exploded a "nuclear device" in 1974, and Israel, which reportedly possesses

a small nuclear arsenal, have not signed the Treaty. Moreover, some states that have signed and ratified the NPT have resisted its provisions. Iraq clandestinely pursued a weapons development program during the 1980s. The IAEA only discovered the extent of this program in the aftermath of the 1991 Persian Gulf War. Iran, another NPT signatory, also has pursued a nuclear capability.[12] Most recently, North Korea has proven reluctant to abide by its NPT commitments, having prevented IAEA inspectors from thoroughly examining North Korean nuclear facilities to ensure that the North Koreans are not diverting fissionable material to a weapons development program. The United States, South Korea, and North Korea negotiated a framework to resolve this issue in October 1994. This agreement provided that North Korea would curtail its nuclear program in exchange for a $4 billion light-water nuclear reactor. The Korean Peninsula Energy Development Organization (KEDO), comprised of representatives from the United States, South Korea and Japan, was established to iron out the details of this agreement. Since its founding in March 1995, KEDO has grown to nine members, including Australia, New Zealand, Finland, Canada, Indonesia and Chile. Since its inception, KEDO has received over $87 million from its members, including $31.5 million from the United States.[13]

In May 1995, the international community extended the NPT indefinitely. This extension represents a constructive development for the current nonproliferation regime. President Clinton noted that the indefinite extension "testifies to a deep and abiding international commitment to confront the dangers posed by nuclear weapons."[14] While the NPT extension reinforces the current nonproliferation regime, the treaty's ability to contain the spread of nuclear weapons still is uncertain. Several nations remain outside its scope, most notably India and Israel. Several other states have skirted its provisions. Consequently, while the NPT is an important element in the international community's endeavors to control the spread of proliferation, it can not and will not guarantee that rogue nations will forego their pursuit of nuclear weapons.

Export Controls

The use of controls to limit the export of sensitive technologies which nations could employ in the production of nuclear weapons represents the second prong of the traditional U.S. nonproliferation strategy. The United States has implemented these controls both unilaterally through domestic

legislation and multilaterally in cooperation with other states concerned about proliferation risks. An example of a multilateral organization that assists in the nonproliferation effort is the Nuclear Suppliers Group, which seeks to control the export of fissionable material to potential proliferants. Another multilateral organization that might have been employed to assist in the nonproliferation effort is the Coordinating Committee for Multilateral Export Controls (COCOM). Though this organization concentrated its efforts on limiting technological exports to the Soviet Bloc, its controls could have been used against states pursuing the nuclear option. However, COCOM disbanded on 31 March 1995.[15] Thus, controls on the export of dual-use technology have weakened.[16] In September 1995, negotiations for a replacement to COCOM were negotiated in Paris. This new organization, called the "New Forum," includes Russia among its members. While Russian participation may be useful, doubts exist about that nation's commitment to the control of the spread of nuclear technology. "As the case of the Russian-Iranian reactor deal graphically demonstrates, Moscow has proven reluctant to deny its clients whatever hardware they want. At a minimum, Moscow can be expected to serve as the middleman for transfers of any technology that might yet be denied the likes of Iraq and North Korea but that can be sold to the former Soviet Union."[17] China is not a member of the New Forum, due largely to U.S. concerns about its exports to Pakistan and Iran. The New Forum, while a useful organization, does not possess the means to enforce its provisions.

The United States also takes unilateral measures in an attempt to control proliferation. For example, the Export Administration Act of 1979 establishes limits on the type and amount of sophisticated technology that U.S. manufacturers may export.[18] Additionally, the Department of Commerce controls the export of sensitive nuclear technologies pursuant to the Nuclear Non-Proliferation Act of 1978.[19] However, the Clinton administration, which has set the expansion of trade as one of its primary goals, has lifted export controls over certain sophisticated products. Furthermore, in 1993, the standards that control the export of U.S. mainframe computers were eased to allow greater exports. Thus, the U.S. commitment to certain categories of export controls appears to be wavering.

Moreover, two factors cast doubt on the ability of export controls to prevent the spread of sophisticated technology. First, many types of technologies are applicable to both civilian and military purposes. Preventing the export of such "dual use" items because they might be used in a weapons development program is both difficult and costly to U.S. business interests.

Second, in an increasingly competitive global economic environment, exporters from other nations less concerned about proliferation risks might fill any void created by the unwillingness of the U.S. government to allow the export of sophisticated American technology.

Weakening the Prongs

The force of recent events has weakened both prongs of the traditional U.S. nonproliferation strategy. On the one hand, the NPT has not succeeded fully in calming fears of proliferation. On the other, the United States has eased its export control programs in order to enable a competitive trade policy. Given these realities and the fact that the geopolitical landscape differs markedly from the days of the Cold War, when both superpowers could influence their allies and client states on nonproliferation issues, the Clinton administration has identified a need to examine alternatives to traditional American nonproliferation approaches. Hence, the administration has decided to explore the area of counter-proliferation. On 7 December 1993, Secretary of Defense Les Aspin announced the Defense Counter-Proliferation Initiative. The Initiative explores the possibility of developing a more aggressive U.S. stance on nonproliferation.[20] As part of this initiative, the Pentagon is to study new weapon systems specifically designed to destroy the assets of a potential proliferant.[21] For example, the Pentagon is researching weapon systems that could destroy hidden development sites.[22] The Initiative also created an office within the Department of Defense to articulate and implement this strategy.[23]

The current interest in counter-proliferation raises serious policy issues regarding both its status pursuant to international law and its political legitimacy in the post-Cold War world. These issues provide the framework for this study. This study will not address the likelihood of success of any U.S. counter-proliferation strike, for that question is beyond the scope of the paper, and research was not conducted on the likelihood of success or failure of such a strike. Rather, the paper concentrates on the international law aspects of counter-proliferation, assessing for those purposes whether a counter-proliferation strategy is advisable. Of course, U.S. policy makers must take into account the tactical and strategic as well as the legal particulars of any application of a counter-proliferation strategy.

III

Counter-Proliferation: Defining the Issues

The Legal Issues

DEFINED BY ONE SCHOLAR as "the body of rules and principles of action which are binding upon civilized states in their relations with one another,"[24] international law is vital to the United States. This country, as a preeminent economic and military power, relies upon the rule of international law to provide a stable framework in which to conduct its international affairs. Without the existence of these rules, the United States, along with the other nations of the international community, could not conduct its affairs with any degree of certainty. The absence of such rules would create a chaotic environment in which nations would act without guidelines, and the possibility of violent conflicts would increase substantially. The existence of these legal norms creates a relatively stable environment in which members of the international community may conduct their affairs with some confidence.

However, the implementation of a strategy of counter-proliferation would raise serious questions of international law, particularly in the public international law areas of intervention and self-defense, as well as in the area of the law of war and armed conflict. These questions include:

- Would the world community recognize the counter-proliferation strategy as lawful?
- If so, under what circumstances?
- May an aggressive counter-proliferation policy exist in a world community predominantly based on the international legal norms

of sovereignty and nonintervention? Or have these norms deteriorated to the point where a counter-proliferation action would be legitimate under certain mitigating circumstances?

- How are such measures addressed by international legal instruments, such as the Charter of the United Nations and the NPT?
- What type of precedent would a counter-proliferation endeavor set for future acts of intervention conducted either unilaterally or multilaterally?
- What recent precedents provide lessons for those nations considering the counter-proliferation strategy?

The *Realpolitik* Questions

Beyond these legal questions are several *realpolitik* issues which U.S. policy makers must address before implementing a counter-proliferation strategy. These questions include:

- Would a counter-proliferation policy be desirable even if legally untenable? If legally tenable?
- What are the likely consequences of either exercising or announcing a counter-proliferation policy?
- Should the United States implement a counter-proliferation strategy unilaterally, or should it attempt to build a multilateral coalition willing to undertake such endeavors?[25]
- More generally, what political costs are associated with counter-proliferation?

Without an understanding of the political dimensions of this issue, U.S. defense planners might develop a comprehensive counter-proliferation military strategy which, for practical political reasons, would be impossible to implement.

IV

Intervention and Counter-Proliferation

ACTING SOLELY OR AS A MEMBER of a multilateral coalition, the United States may attempt to justify a counter-proliferation action on the international legal theories of justified intervention and preemptive self-defense. Broad international acceptance of these theories as applied to counter-proliferation might enable the United States or a multilateral coalition to employ these techniques without violating the norms of international law.[26] Alternatively, if these theories are not accepted, broad international condemnation can be expected. Consequently, U.S. defense planners must address these critical legal issues if they are to make accurate assessments regarding the international acceptability of counter-proliferation. Moreover, the acceptability of counter-proliferation measures may depend on whether they are conducted unilaterally or multilaterally. Thus, it is important to analyze these legal questions from both perspectives.

Intervention Generally

International law generally prohibits intervention. As Lori Fisler Damrosch notes:

> International law has condemned and sought to constrain [intervention] because of a conviction that important values are served by allowing each polity to develop in its own way within internationally recognized boundaries. The legal rules against intervention are especially cherished by those who see them as essential safeguards for

> smaller states against abuses at the hands of states that can wield vastly superior power.[27]

Article 2(4) of the U.N. Charter[28] reflects this conviction. It states, "All Members 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."[29]

Historically, intervention has not always been universally condemned despite its present status. Before World War I, when the Great Powers of Europe[30] dominated the international landscape, a tacit system existed that permitted each Great Power to intervene in conflicts outside of Europe so long as that Power conducted the action within its own imperial domain. In other words, intervention was permissible so long as one Great Power did not explicitly violate the interests of another.[31] In exchange for the freedom to intervene in their areas of national interest beyond Europe, each Power implicitly agreed to respect existing boundaries on the Continent itself. The system reflected the mutual interests of the elite states of Europe in dominating an undeveloped world through colonialism, while promoting continental stability. Intervention became a tool in the pre-First World War balance-of-power system.

This system came crashing down around the Great Powers when they ceased to respect the established borders of Europe.[32] However, the existence of this bifurcated system permitting colonial intervention while prohibiting continental invasion demonstrates that the international community has not always accepted the current norm compelling universal nonintervention. "It is important to note . . . that the present means of law enforcement available to states is considerably more restricted than that provided for in the classical period of international law."[33]

The current norm is the product of a perceived need by post-World War II leaders to protect the principle of sovereignty. These leaders attributed the cause of World War II to the refusal of Germany and Japan to respect international borders. Following the war, leaders of the Allied nations recognized a need to construct international institutions that would prevent future erosion of sovereignty by making unilateral intervention illegitimate. Not surprisingly, the creators of the United Nations fashioned a legal system that could deal effectively with the type of problems, such as invasion, which sparked World War II; however, this system, with its emphasis on the principle of sovereignty, necessarily limits the ability of

states to deal with different dilemmas, including the proliferation of nuclear weapons.[34] As Jost Delbrück notes:

> The responsibility of states for the enforcement of international *erga omnes* norms and the responsibility of the community of states for the enforcement of international law protecting public international community interests do not provide a legal basis for military enforcement measures outside the U.N. Charter's system.[35]

The U.N. Charter codifies this strategy. Article 2(1) states that "The Organization is based on the principle of the sovereign equality of all its Members."[36] Given the fundamental premise that one state is neither better nor worse than another, and sovereignty is paramount, intervention becomes illegitimate. Article 2(4), quoted above, reflects this conviction. Article 2(7), which prohibits intervention by the United Nations, except in instances when the Security Council deems necessary, further reinforces the prominence of sovereignty by generally permitting governments to handle internal disputes without outside interference.[37]

Consequently, when examined in historical terms, as Marc Trachtenberg points out, "intervention should generally be thought of as part of a system. . . ."[38] That system, as codified by the U.N. Charter, traditionally has frowned upon intervention.[39] However, just as the system prior to World War I became outdated by world events, the possibility exists that the present system has outlived its usefulness. The time may be ripe for the most powerful of the international community to consider whether intervention should become acceptable for limited purposes.

Unilateral Intervention and Counter-Proliferation

Under present tenets of international law, the world community likely would condemn an instance of unilateral intervention to destroy the weapons development programs of a potential proliferant. The one explicit example of the use of unilateral force to destroy the nuclear facilities of another state produced such a reaction.[40] When Israeli F-16s destroyed the Osirak nuclear reactor under construction near Baghdad in June 1981, the international response was immediate, and the United Nations condemned the Israeli action.[41] Despite the threat posed to the region by the nascent existence of an Iraqi nuclear program, the international community felt compelled to depict the Israeli action as violative of international law. While the status of Israel within the international community casts doubt

upon the value of this precedent, at a minimum, the condemnation should give pause to any nation contemplating similar action.

Given this precedent, the likelihood that a unilateral counter-proliferation effort would draw the ire of the international community is great. After all, the U.N. Charter explicitly condemns unilateral intervention. Nonintervention is the norm, and states, particularly those of the Third World, are unlikely to see the cause of strict nonproliferation, despite its importance to the industrialized world, as a justification for unilateral action. As Virginia Gamba explains, "[P]owerless states have come to view intervention with deep misgivings, either because they have been direct recipients of it or because they have had to condition their options so as to avoid it.... Intervention has become associated with the loss of freedom."[42] Forced to make the choice between conceding a portion of their sovereignty or sacrificing a strict nonproliferation regime, less powerful states dependent upon the present norm are likely to opt for the latter. A unilateral counter-proliferation effort initiated by the United States, for example, would create a precedent that many developing, less powerful states might find unacceptable.

One must bear in mind that the prospect of proliferation chiefly concerns the current nuclear powers.[43] These nations in particular have classified proliferation as a threat to international peace and security. While the possibility of proliferation also concerns less developed states,[44] the poorer nations are unlikely to surrender a portion of their sovereignty solely for the sake of the current order upon which the present nuclear powers depend.[45] The developed states, particularly those which possess nuclear weapons, have a greater interest in maintaining the nonproliferation regime. First, states equipped with nuclear weapons are thought to be less subject to pressure from states without a nuclear capability. Second, while the developed states, by and large, are less subject to pressure by the international community, smaller states employ the concept of sovereignty as a shield from pressures placed upon them by the industrialized world. These smaller states—greatly in the majority of the General Assembly—are unlikely to accede to a weakening of the sovereignty concept.

For the United States, these priorities mean that the international community likely would condemn unilateral counter-proliferation efforts involving U.S. military forces for which the United States does not have U.N. authorization. In conducting a counter-proliferation attack, the United States would be in *prima facie* violation of several provisions of the U.N. Charter, including Article 2(3),[46] Article 2(4), and Article 33(1),

which demands that parties attempt to settle their disputes peacefully.[47] The fact that the United States has a veto in the U.N. Security Council would do little to change the perception in the world community that the counter-proliferation act was *de facto* illegal. Unilateral intervention designed to save an imperfect nonproliferation regime, despite laudable goals, is incompatible with current international law.

Multilateral Intervention and Counter-Proliferation

If U.S. policy makers deem unilateral intervention unacceptable, one alternative they might pursue in their quest to prevent proliferation would be to expand the scope of any counter-proliferation effort from a unilateral endeavor to a multilateral one. The approval and participation of the international community would enhance the legitimacy of any intervention designed to prevent proliferation. As Robert Pastor observes, "Just as congressional consent for a U.S. military action gives the president a cushion of support, collective action is, in the long term, more effective than unilateral action in forging an international community."[48]

Currently, the legitimacy of multilateral intervention for any purpose is being debated widely among international lawyers and scholars.[49] The protection of human rights, for example, is often proposed as a basis that would justify multilateral intervention. The entrance of forces sanctioned by the United Nations into Somalia in 1992 was predicated upon the need for humanitarian assistance to its threatened civilian populace.[50] However, multiple legal barriers, including many of those standing in the path of unilateral intervention, exist in the pursuance of a workable multilateral strategy.

The first such obstacle is the U.N. Charter itself, which, as noted above, rests upon a presumption prohibiting intervention. Chapter VII of the Charter does provide for U.N. intervention in limited circumstances. Specifically, Article 42 states, "Should the Security Council consider that measures provided for in Article 41 [measures not involving the use of force] would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."[51] The United Nations has employed this power sparingly, generally due to the fact that the United States and the Soviet Union were at odds in many of the disputes in which the United Nations might have played a

role. Each superpower either utilized a veto or threatened to utilize one to block collective U.N. initiatives.

However, with the collapse of bipolarity, the United Nations has taken a more active role in the use of its intervention powers. The support by the United Nations of the U.S.-led coalition which ousted Iraqi forces from Kuwait in 1991 provides an example of this increased willingness to support intervention. As part of the action to free Kuwait, a coalition of military forces led by the United States and supported by the United Nations attacked Iraqi nuclear assets. Thus, counter-proliferation became one of the elements employed to justify coalition action against Iraq.[52]

Overall, the ability of the United Nations to exercise its intervention powers appears to be growing.[53] Perhaps someday the Security Council will have the ability to call on its own dedicated forces pursuant to Article 43 of the Charter to intercede against potential proliferants.[54] Still, legal restraints on the use of U.N. forces continue to frustrate U.N. measures. For example, even if multilateral, intervention carries with it an element of imperialism. As Marc Trachtenberg states, "[T]he powerful states at the center of the system will never themselves be the target of interventions of this sort."[55]

It remains to be seen whether the United Nations could exercise these powers to prevent the proliferation of nuclear weapons. First, the political problems of building multilateral coalitions to take military action are substantial. One need only examine the difficulty in building a coalition to intervene in the hostilities in the Balkans to understand the political difficulties inherent in coalition construction. Even the U.S.-led coalition against Iraq had limited objectives.[56] While the United States considered expanding the goals of the coalition to include the ouster of Iraqi President Saddam Hussein, U.S. leaders ultimately decided not to initiate such an action, and Hussein remains in office.

Moreover, a multilateral endeavor often does not accomplish its tasks as efficiently as a unilateral effort. Coalition-building requires compromises which may prevent optimal counter-proliferation operations. An examination of the effort against Iraq is illustrative, as the U.S.-led coalition ceased offensive operations before ousting Saddam Hussein in order to ensure the political continuity of its multilateral force.[57] President George Bush and his advisors believed that marching to Baghdad would have gone beyond the Security Council's specific authorization, jeopardizing the coalition's integrity, particularly among its Arab partners which might not have accepted a wider mandate against Iraq.

Alternatives

Since unilateral acts of counter-proliferation cannot lawfully exist within the current international framework, and acts of multilateral intervention, which themselves have legal difficulties, often fail to accomplish their objectives, the question arises as to what options U.S. defense planners possess when confronted with a rogue state on the verge of acquiring or developing a nuclear weapon. When faced with this scenario, policy makers are left with three alternatives, none of which is without flaws. The first is to abandon the strategy of counter-proliferation entirely, due to its apparent illegality. The second option is to pursue the strategy in spite of the present norm against unilateral intervention and the barriers to multilateral intervention. The third choice is to attempt to forge an updated norm creating an alternative legal framework which would permit the strategy, whether implemented unilaterally or multilaterally, to coexist with present international legal rules. Each alternative possesses potential costs and benefits. This section analyzes the strategy's respective strengths and weaknesses, attempting to define and sharpen the legal issues so that policy makers will be able to make informed decisions which will further U.S. nonproliferation goals.

Abandoning the Counter-Proliferation Strategy. Abandoning the counter-proliferation strategy offers the first alternative to U.S. planners. The chief legal advantage of this approach is that it would provide the United States with an avenue to avoid the legal consequences that could result from intervention generally and counter-proliferation specifically. Among the possible adverse consequences facing the United States if it were to stage a counter-proliferation attack are that it risks international condemnation, alliance strain, threatens the nonproliferation regime and the NPT and, in its most extreme form, risks the initiation of war. If the United States desires to avoid these risks, then dismissing the counter-proliferation option would be the easiest course. The United States and its allies have a great deal invested in the current international legal order and the nonproliferation regime. Taking measures, such as the most aggressive form of counter-proliferation, that could jeopardize the canons of international law would create substantial dangers for those nations most dependent upon that system's survival.

On the other hand, if the United States were to abandon the counter-proliferation strategy, it would incur costs, including accepting the fact that

it would be unable to prevent the development of a nuclear weapon by a rogue state. For example, despite the recent fragile agreement between North Korea and the United States, at some point the United States, along with its allies in the region, might be forced to accept the existence of a North Korean nuclear weapon.[58] U.S. leaders may be willing to accept this result as the price for maintaining the current international legal order. Of course, the United States also might attempt to enforce the traditional norms against nonproliferation by imposing sanctions against the potential proliferant and urging other states to do the same. However, as noted earlier, the traditional nonproliferation strategies may not be adequate to the task of preventing the truly dedicated proliferant from producing a nuclear weapon.

Ignoring the Legal Consequences of Counter-Proliferation. The legal advantages (as opposed to any political or national security advantages) of ignoring the current international legal prohibition on intervention are difficult to detect. For reasons of national security, U.S. decision makers might be willing to make this sacrifice to halt proliferation. However, since the application of unilateral counter-proliferation measures is a *prima facie* violation of the U.N. Charter, no immediate legal advantage would result.

One potential long-term legal advantage, if one believes a policy of counter-proliferation is desirable, is that it would set the precedent for future counter-proliferation efforts. Basically, the first U.S. counter-proliferation strike would set the stage for future efforts, making them easier to justify. Such a counter-proliferation strike also might deter states considering the development of weapons of mass destruction from initiating a program. Finally, by demonstrating its willingness to use counter-proliferation, the United States might force potential proliferants to move their programs underground, thereby increasing developmental costs and extending the time needed to produce a nuclear weapon.

The costs of violating the norm would appear to be high. The international community likely would condemn the United States for violations of the U.N. Charter. Moreover, the counter-proliferation action would undermine, perhaps fatally, the nonproliferation regime by demonstrating that the NPT had failed, at least with respect to the nation subjected to the counter-proliferation strike. Despite these consequences, the United States might absorb the costs, which also might include alliance strain—and possibly war—if it firmly believed that the alternative of a nuclear-equipped rogue state is unacceptable.

Creating a Norm Permitting Counter-Proliferation. The third alternative involves an attempt by the United States to assist in the development of a new international legal norm permitting intervention for the specific purpose of destroying the weapons development programs of potential proliferants. The establishment of this new norm thereby would justify U.S. counter-proliferation activities. Intervention for these limited purposes would no longer violate international law. In undertaking this effort, the United States would have to maintain that the legal standards that have existed since the conclusion of World War II have become antiquated with the end of the Cold War. Consequently, the international community must develop updated norms addressing the problems of the post-Cold War era. Limited intervention to prevent the spread of nuclear weapons would become one component of this new system.

The benefits of the successful adoption of this strategy are that it would permit the United States to engage in necessary counter-proliferation activities without drawing the ire of the international community. Of course, convincing this community that counter-proliferation should become a norm in the international legal system would not be easy. The diplomatic task would be enormous, perhaps impossible, requiring a radical expansion in the interpretation of the U.N. Charter. In effect, an exception would have to be crafted into the Charter, allowing for unilateral intervention for the purpose of preventing nuclear proliferation. At a minimum, the U.N. Security Council would need to authorize a counter-proliferation strike, through some approval mechanism, presumably on a case by case basis. However, such authorization might be impossible to obtain in those circumstances when a permanent Security Council member protects the potential proliferant through the use of a veto. Thus, the Security Council might be able to authorize counter-proliferation actions against only the most isolated pariah states.

Even if the international community were to adopt this proposal, costs would still accrue. Its adoption also would demonstrate the failings of the nonproliferation regime's current dependence on the NPT. Moreover, the adoption of this scheme would drive a wedge between the nuclear "haves" and "have-nots." To a large extent, the scheme would resemble the system that existed in the international community prior to World War I, with the nuclear powers cast in the role of the Great Powers of Europe. Not without some justification, smaller, nonnuclear states could label this new system "nuclear imperialism."

Additionally, if a counter-proliferation exception to the prohibition against intervention were to exist for the United States, it would be difficult to condemn similar activities conducted by another state which felt compelled to take action against an adversary's weapons development program. Finally, the danger exists that counter-proliferation could become a convenient excuse for all types of intervention, whether justified or not. Taken together, these obstacles might prove too difficult to overcome to permit the creation of a counter-proliferation exception. The international community, believing that the potential costs of this updated system would outweigh any possible benefits, simply may be unwilling to expand the present tenets of international law to permit a strategy of counter-proliferation. If this conclusion proves true, then the United States (or any other state contemplating the adoption of a counter-proliferation strategy) either will have to accept the costs such a strategy entails or discover another justification for its actions.

V

Counter-Proliferation and the Concept of Anticipatory Self-Defense

WHILE THE CONCEPT OF INTERVENTION provides one avenue to explore in this examination of counter-proliferation, another legal concept meriting discussion is the doctrine of self-defense. Specifically, a nation facing the prospect that its historic adversary may develop a nuclear warhead in the near future may feel compelled to respond militarily to its adversary's nuclear program. The question becomes whether the international doctrine of self-defense justifies such a response. The following section analyzes the legal principles of self-defense to develop an answer.

The Hypothetical Case

Imagine that at some future time State X becomes concerned about the nuclear program of its historic adversary, State Y. While State Y claims that its program exists solely for peaceful purposes, State X, as well as much of the international community, is skeptical. Intelligence reports suggest that State Y is clandestinely developing the capacity to enrich uranium and reprocess plutonium. Furthermore, State Y is importing dual-use technology that can assist in the construction of a nuclear warhead. State X has expressed its concerns to the international community through the Security Council of the United Nations, but due to political considerations, the United Nations has taken no action. While the Security Council has

threatened to impose token sanctions, extensive measures that would prove effective are unlikely to be forthcoming.

Given these facts and perceiving a need to counter State Y's pending proliferation, State X feels compelled for reasons of national security to address the situation unilaterally. Fearing the development of nuclear weapons by State Y, State X attacks the nuclear facilities of State Y, destroying those facilities that it believes are integral components of an ongoing weapons development program. State X believes that its action is justified as an act of anticipatory self-defense. It reasons that the threat presented by State Y's nuclear program was unacceptable. A nuclear-armed State Y, in the opinion of the leaders of State X, would have attacked State X. Fearing this scenario, State X decides that it cannot afford to wait any longer to protect itself. Furthermore, given the mild efforts by the international community to stem State Y's activities, State X feels it cannot afford to await effective international sanctions.

International reaction to the news of the destruction of State Y's nuclear facilities is swift. The international community roundly criticizes State X. The Security Council censures State X for violating the U.N. Charter and threatens sanctions against State X. Many nations believe the attack threatens the nonproliferation regime, whose members renewed the NPT in 1995. The international community rejects State X's self-defense arguments, and the Security Council passes a resolution condemning State X for violating Article 2(3) and Article 2(4) of the Charter, as well as for endangering the integrity of the NPT.

A Question of Self-Defense

Although in this hypothetical scenario the international community condemns State X's action, one should inquire whether the preemptive attack truly was illegal pursuant to current norms of international law. When may a state rely on the concept of anticipatory self-defense to justify a preemptive strike?[59] Does the U.N. Charter prohibit anticipatory self-defense entirely? If not, under what circumstances may a state resort to anticipatory self-defense to solve a perceived risk to its national security? If international law does prohibit the use of unilateral anticipatory self-defense, is this ban sound in an era of heightened proliferation concerns? Or may a state justify its act of counter-proliferation on the basis of anticipatory self-defense? These questions are the focus of this section.

U.S. defense planners may feel compelled to take military action against a potential proliferant. If the concept of anticipatory self-defense justifies its action, the United States may be able to avoid international condemnation for violations of international law. Moreover, if the international community accepts a future claim of counter-proliferation as anticipatory self-defense, later acts may prove easier to justify, both for the United States and other nations considering counter-proliferation strikes.

Analytical Method

This portion of the paper analyzes whether the international law of anticipatory self-defense or the related concept of reprisal would support a U.S. strategy of counter-proliferation. First, it explores the current state of international law in the area of anticipatory self-defense. Two bodies of law, customary international law and the Charter of the United Nations, influence thought on anticipatory self-defense. Following this examination of the law, the 1981 Israeli attack on the Iraqi nuclear reactor known as Tamuz I near Baghdad is analyzed in an attempt to discover whether international condemnation following that attack was warranted. Another question examined is whether policy makers in the United States may utilize the concept of anticipatory self-defense as a tool to support a strategy of counter-proliferation. The potential barriers U.S. leaders would face in attempting to justify the strategy on this basis are described.

In Chapter VI the international legal concept of reprisal is analyzed, examining how this concept fits into the counter-proliferation framework. Although the international community generally denounces peacetime military reprisals, the community may need to reexamine their validity in an era when the perceived dangers of proliferation are increasing. Chapter VII studies counter-proliferation operations during war. Finally, Chapter VIII offers recommendations which the members of the international community might consider as they address the threat of nuclear proliferation. International legal norms need to be reconsidered if the nonproliferation regime is to meet its forthcoming challenges. The international community must decide which is more critical, maintaining the existing international legal norm on self-defense, although the problems of proliferation will tax it, or developing updated norms that will address proliferation concerns but which also might give nations greater license to take otherwise illegal offensive military action, thereby challenging the legitimacy of the U.N. Charter.

International Law and Anticipatory Self-Defense

The Definition of Self-Defense. Although seemingly obvious, the definition of self-defense is not necessarily clear. Self-defense, contrary to what some might believe, is not designed to punish an aggressor. Punishment is accomplished through reprisal, discussed below. Rather, as Richard J. Erickson explains:

> The purpose of self-defense is to preserve the status quo. . . . Self-defense does not seek the biblical eye for an eye; rather it seeks to preserve world public order which is threatened by permitting the use of force as an emergency measure "strictly confined to the removal of the danger." Thus, a nation acting in self-defense will apply force in a restricted fashion that is regulated in scope and objective. Methods and means, as well as targets, will be carefully selected to achieve the narrow preventative purpose of self-defense and will not be directed in such a manner as to be punitive in character.[60]

Unfortunately, the line between that which is defensive and that which is punitive is rarely bright. Nations often frame punitive actions in the guise of self-defense, and frequently the international community labels acts of self-defense as punitive because the community tends to prefer the avoidance of conflict to the implementation of justice.[61] To reduce this confusion, the history of international law on self-defense and its influence in shaping current views on the acceptance of anticipatory self-defense must be understood.

Customary International Law: The* Caroline *Case. Any discussion of a right to anticipatory self-defense should begin with an analysis of the *Caroline* case of 1837.[62] This case involved a dispute between the United States and Great Britain over the activities of British forces in the Canadian province of Ontario. An insurrection against British rule had occurred in Ontario, and British forces were attempting to eradicate it when an expeditionary patrol of the British army destroyed the privately owned U.S. vessel *Caroline*, which had been supplying the rebels with arms, in the American waters of Lake Ontario. The United States protested the British action, and the British government defended it on the ground that its forces were acting in self-defense.

In 1842, in a subsequent diplomatic exchange between the parties, U.S. Secretary of State Daniel Webster enunciated a doctrine designed to determine when an act of anticipatory self-defense would become acceptable. Recent commentators observe:

> This formulation, known as the *Caroline* doctrine, asserts that use of force by one nation against another is permissible as a self-defense action only if force is both necessary and proportionate. The first of these conditions, necessity, means that resort to force in response to an armed attack, or the imminent threat of an armed attack, is allowed only when an alternative means of redress is lacking. The second condition, proportionality, is linked closely to necessity in requiring that a use of force in self-defense must not exceed in manner or aim the necessity provoking it.[63]

Through international acceptance of this standard, anticipatory self-defense became legal in certain limited circumstances. In Webster's words, the threat of attack had to be "instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[64]

For much of the nineteenth and twentieth centuries the international legal regime accepted Webster's test. If a nation reasonably believed that an attack from an adversary was looming, it could preempt that attack so long as its use of force was reasonable. However, this standard was subject to abuse. Nations often defended patently offensive military actions with self-defense justifications. For example, the United States attributed its decision to invade Mexico in the 1846 Mexican-American War partially on grounds of self-defense. This "self-defensive" action led to the annexation of the modern states of the U.S. Southwest, including California.

The League of Nations and the Kellogg-Briand Pact. In the aftermath of the First World War, the international community sought to codify international law on the use of force. However, neither the 1918 Covenant of the League of Nations[65] nor the Kellogg-Briand Pact of 1928,[66] which were products of these efforts, altered the customary international law on self-defense. Both maintained the customary right, including the right to anticipatory self-defense when the threat was imminent and the response proportionate. While the League of Nations was designed to give nations a forum in which to discuss their disputes, and the Kellogg-Briand Pact was designed to prohibit resort to war "as an instrument of national policy,"[67] neither document was designed to prevent states under duress from taking effective defensive action to preempt an adversary's military aggression. Thus, through World War II, Webster's concept of anticipatory self-defense survived. However, the language of the U.N. Charter has clouded the concept's previous clarity.

The United Nations Charter

Article 51. Much of the controversy surrounding the right of a nation to engage in anticipatory self-defense centers on the language of Article 51 of the U.N. Charter, which states:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[68]

Two conflicting views of this language have provoked a debate regarding a nation's right to act in anticipatory self-defense.[69] One view holds that the language of Article 51 must be read restrictively, forbidding acts of self-defense except after an actual armed attack. Proponents of this view maintain that permitting states to resort to force before an adversary's attack would lead to errors in judgment, producing conflicts that otherwise might be avoided.[70] Furthermore, and taken to its extreme, this argument posits that once the Security Council takes "measures necessary to maintain international peace and security," any acts of self-defense, even if not initiated preemptively, must terminate.[71] Thus, according to the most restrictive reading of Article 51, once the Security Council takes action, perhaps by imposing only limited economic sanctions, any continued defensive action is invalid.

One illustration of how this interpretation would have applied is the Security Council's response to the 1990 Iraqi invasion of Kuwait. According to the most restrictive view, once the Security Council passed resolutions establishing economic sanctions against Iraq, "the Kuwaiti right to resist no longer existed. Accordingly, Kuwait would be forced to wait and see if the sanctions worked, or if the Security Council decided to take additional [military] action. . . ."[72]

Critics of this approach believe that this view overstates the meaning of Article 51,[73] contending that not only does the right to self-defense extend beyond the initiation of action by the Security Council, but also exists in anticipation of an armed attack. Support for this argument derives from the negotiating history (*travaux préparatoires*) of Article 51, which does not

purport to renounce the prior customary international law on self-defense.[74] "The negotiating history at the San Francisco Conference [which established the United Nations] reveals that Article 51 was intended to incorporate the entire customary law or 'inherent right' of self-defense. The comprehensive incorporation of the customary law includes reasonable and necessary anticipatory self-defense since this has always been a part of customary law."[75]

Thus, the Charter must be read in light of customary international law at the time of its creation in 1945. This reading suggests that the right to self-defense has remained virtually unchanged since Webster's formulation of the anticipatory self-defense standard in the 1840s.[76] The right to anticipatory self-defense continues to exist so long as the action satisfies the imminence and proportionality requirements first enunciated by Webster in the *Caroline* discussions. If overwhelming evidence exists that demonstrates an attack is forthcoming, then so long as preemptive action is proportional to the threat, it should be legal pursuant to international law. The United States has adopted this view, believing that anticipatory self-defense is permissible at least in certain contexts. In 1986, Secretary of State George P. Shultz stated that a country is "permitted to use force to preempt future attacks, to seize terrorists, or to rescue its citizens when no other means are available."[77]

The Advantages of Maintaining a Right to Anticipatory Self-Defense. While the U.N. Charter may or may not limit the right to anticipatory self-defense, the option has not been eliminated entirely. The problem that would be created by an overly restrictive ban on anticipatory self-defense is that it would treat all cases, from invasions by insurgent guerrilla forces to nuclear attacks, similarly.[78] In an era of modern weaponry, nations should not be compelled to await a potentially devastating first-strike before undertaking lawful measures of self-defense.[79] This is particularly true in the case of a pending nuclear attack when the potential for devastation is acute. As Beth Polebaum notes, "The Charter should not be read to require one nation to permit another the benefits of military armament, surprise attack, and offensive advantage, against which no defense may lie. If the Charter is to be an effective instrument, it must be read to accommodate the needs of the contemporary world."[80]

The challenge for the international legal regime is to create guiding parameters in which a nation could take anticipatory defensive measures with the reasonable expectation that the international community would accept them. However, this standard should not give nations a *carte blanche*

to cast offensive actions in the legitimizing glow of self-defense. Discovering the proper balance between these two extremes could prove daunting.

A Case Study in Counter-Proliferation: The Israeli Destruction of the Iraqi Nuclear Reactor Tamuz I

In an attempt to discover the elusive balance permitting anticipatory self-defense in the nuclear age, one should study the events of the most notorious instance of counter-proliferation to date: the Israeli attack on the Iraqi nuclear facility known as Tamuz I near Baghdad in 1981. The international community roundly condemned this attack. Why? Which elements of the attack made the Israeli government's self-defense justifications unacceptable? Was the conclusion of the international community made hastily? What lessons can these events offer regarding the requirements of a legitimate counter-proliferation action based upon the theory of anticipatory self-defense? The destruction of the Iraqi reactor offers valuable lessons for U.S. policy makers as they consider the development of U.S. counter-proliferation policy.

The Facts. On Sunday, 7 June 1981, eight Israeli F-16 fighter planes manufactured in the United States bombed the Iraqi nuclear reactor under construction near Baghdad. "The bombs were deposited with impressive precision, and within two minutes the reactor was destroyed."[81] The Israeli government, led by Prime Minister Menachem Begin, justified its action on the basis of self-defense.[82] In support of its position, the Israeli government claimed that "[s]ources of unquestioned reliability told us that [the reactor] was intended . . . for the production of atomic bombs. The goal of these bombs was Israel."[83]

The construction of the Iraqi reactor, undertaken with the assistance of French and Italian technicians, had concerned the international community prior to the Israeli attack. In 1980, Iran had attempted to destroy the facility during its war with Iraq.[84] The reactor's ability to produce weapons-grade fissionable material also concerned the United States.[85]

Israel conducted the raid secretly, not informing the United States or any of its other allies of the attack until its completion.[86] This lack of information led the Reagan administration to suspend delivery of four F-16s which Israel had previously purchased from the United States.[87]

International Reaction. International reaction to the daring Israeli raid was swift and overwhelmingly negative. The United States, France, the

Arab states and the Soviet Union condemned the attack as a violation of international law.[88] Kurt Waldheim, Secretary General of the United Nations, stated on the day following the raid that it was "[a] clear contravention of international law."[89] On 19 June 1981, the Security Council, in Resolution 487, condemned the raid and ordered Israel to make reparations to Iraq for the latter's losses.[90] The United States abstained when this vote occurred.[91] The international community rejected Israeli arguments that the strike was an act of self-defense.[92]

The international community also was concerned that the raid would weaken the nonproliferation regime. The raid suggested that despite a nation's acquiescence to IAEA safeguards,[93] its nuclear facilities still might be subject to an armed attack.[94] Members of the U.S. Senate, who were concerned about the future of the nonproliferation regime, made similar arguments.[95]

Why Not Self-Defense. The international rejection of the Israeli argument that the attack against the Tamuz I reactor was an act of self-defense requires further analysis.[96] Which element of the requirements for a legitimate exercise of anticipatory self-defense did Israel fail to satisfy? Alternatively, did the Israelis meet these requirements only to discover that the members of the international community chose to focus on external political considerations, such as Israel's isolated status in the world community, to justify their condemnation?

Imminence of Attack by Iraq. One of the chief weaknesses of the Israeli defense claim was the fact that most of the international community believed that Iraq was years away from developing a nuclear warhead. Consequently, an Iraqi nuclear attack against Israel could not be imminent.[97] Accordingly, the Israelis failed to pass the imminence requirement of the anticipatory self-defense test, as "[t]here is no legal authority empowering a state to employ coercion against a speculative or non-imminent threat."[98] However, the Israeli claim that circumstances dictated early destruction of the facility has some merit. The Israelis attacked the reactor before it went "critical," when nuclear material would be on site. The Israelis believed that this event would have occurred in the summer of 1981. A later attack would have risked the release of fissionable material, possibly spreading radiation over a wide area. Thus, according to the Israelis, for all intents and purposes, they were imminently subject to a nonnuclear attack by Iraq, and even if this were not the case, to have waited

until the reactor commenced production of nuclear fuel would have been irresponsible for both national security and environmental reasons.[99]

The Raid Did Not Respond to an Illegal Iraqi Activity. The next factor militating against justification of the Israeli attack is the fact that most of the international community believed that Iraq was in compliance with its international legal obligations, including IAEA safeguards.[100] The presumption that the Iraqi nuclear program was legal and safeguarded meant that the Israeli action was not defensive, but punitive.

The problem with this analysis is that Israeli intelligence had concluded that the Iraqis were in violation of their international accords and that the Iraqi government was committed to the clandestine development of a nuclear warhead.[101] Given the tradition of tense relations between Israel and Iraq,[102] the Israelis felt compelled to take action based upon their belief that Iraq was dedicated to constructing nuclear weapons.

Israel Failed to Exhaust Diplomacy. The strongest argument justifying condemnation of the Israeli action was the fact that Israel failed to exhaust diplomatic channels in an attempt to solve its security concerns prior to taking military action.[103] For example, Israel did not notify the United States of its intention to strike the reactor.[104] Nor did the Israelis attempt to convince the French and Italian governments of the need to augment safeguards at the Tamuz I facility.[105] Finally, Israel did not take its complaint to the United Nations for a hearing on the matter. Hence, Israel may have resorted to military action prematurely.

The Israelis could have demonstrated more patience. However, they also faced multiple dilemmas on the diplomatic front. First, a new French government had taken power only weeks before the raid.[106] Its ability to persuade the Iraqis to halt their program was questionable at best; only days before the attack, French Foreign Minister Claude Chepson had declared that, while not likely to engage in future nuclear programs with Iraq, the new French government would fulfill its predecessor's obligations.[107] Moreover, given the historic bias against Israel in the United Nations, taking its case to that multinational body did not seem a reasonable alternative for the Israeli regime. While the United States may have been able to make diplomatic efforts with the government in Baghdad, its influence probably would have been minimal. Finally, diplomacy takes time to accomplish its objectives. Lengthy diplomatic discussions would have given the Iraqis more time to complete the reactor, perhaps even allowing them to bring fissionable material to the site. Exhausting

diplomatic lines might have proven disastrous for the Israelis if negotiations had failed. The Iraqis would have bought time for their nuclear program while placating the international community.

Proportionality. International law required that the Israelis take action in proportion to the threat against them when they engaged in their attack. The extent of the Israeli strike satisfied this requirement.[108] In Polebaum's succinct evaluation: "[Israel] employed conventional weapons and destroyed only the reactor capable of producing nuclear bombs. . . . Baghdad was unharmed. Israel carried out the strike on a Sunday, when the reactor was presumably vacant, to ensure the safety of the French and Arab workers."[109] Had Israel possessed a less destructive means to accomplish its mission effectively, international law would have compelled it to try that method. This concept dictates that a mission of self-defense may incorporate only the minimal amount of force necessary to accomplish its goals. However, it is unclear by what standard one should measure such force. Should the standard be based on the number of casualties, the extent of the destruction, the amount of force employed, or some combination thereof? Presumably, the predominant goal of this standard is to limit casualties. Yet the amount of force employed does not necessarily correspond to the extent of casualties, as precisely guided, powerful munitions may cause fewer casualties than a less powerful weapon aimed erratically. The Israeli action caused little collateral damage and few casualties."[110]

The Lessons from the Destruction of Tamuz I. The Israeli raid offers numerous lessons applicable to the counter-proliferation debate. However, the political status of Israel in the international community in the early 1980s may dilute their value, as it is unknown whether the international community would apply the same standard to another nation. Despite this caveat, the raid and its subsequent discussion may lead us to posit that self-defense will fail as a justification of a counter-proliferation activity if it neglects any part of a rigorous legal standard. An attacker must satisfy the four elements of the anticipatory self-defense test. First, the counter-proliferation attack must come in anticipation of an imminent attack by an adversary. Second, the potential proliferant must violate some aspect of international law, whether it be the NPT or some other international norm. Third, the nation considering a counter-proliferation assault must exhaust all reasonable diplomatic efforts before commencing military action. And fourth, the counter-proliferation event, when it does occur, must be proportionate to the threat produced by the potential proliferation; the

military force employed should not exceed the minimum amount necessary to accomplish the counter-proliferation task, as excessive force violates international law.

Any nation contemplating a counter-proliferation action should not only understand it will be difficult to meet the anticipatory self-defense standards but also realize that it will prove difficult to convince the members of the international community that its action actually has passed that test. In other words, since international politics is a largely subjective arena, the attacker must not only pass the self-defense test, it also must prove it has passed. The attacker bears the burden of proof in such situations. "[T]he world community is likely to hold the acting state to a high standard if the international reaction to the Israeli raid on the Iraqi Osirak [Tamuz I] nuclear reactor is any indication."[111] The Israeli action arguably fulfilled all the requirements of the anticipatory self-defense standard, yet friend and foe alike condemned the action. Thus, drawing upon what admittedly is a less than perfect example, in order for a state to justify its counter-proliferation activity to a skeptical world community, its evidence must prove clear and convincing.

Another lesson one should take from the incident is that although a counter-proliferation strike may have high international legal costs, the price might be worth paying. The Israeli attack set back the Iraqi nuclear program; however, subsequent events demonstrated Baghdad's determination to build nuclear weapons. But for the attack on the reactor, Iraq might have been able to construct a warhead by the mid-1980s. Israel could not have accepted this possibility, yet it is unclear whether the Israeli government could have prevented Iraqi development of a warhead any later than 1981, especially if the reactor had gone critical. Thus, although the international community condemned Israel for an ostensibly illegal act, it is unlikely that Israel regrets the attack. Moreover, it is apparent that many other nations, including the United States, do not regret the Israeli attack. For example, in 1991, U.S. Secretary of Defense Richard Cheney publicly thanked the Israelis for their "bold and dramatic action."[112]

The Ability of the United States to Justify Counter-Proliferation on the Theory of Anticipatory Self-Defense

If the United States were to engage in counter-proliferation measures, it might attempt to justify its action on the basis of anticipatory self-defense. Would the United States be able to sustain this argument, or would it face

the same type of condemnation which Israel endured after its attack on Tamuz I? Inevitable obstacles would face the United States if it were to defend its counter-proliferation action on this basis. These barriers correspond to the requirements needed to justify any anticipatory action of self-defense. A failure to satisfy any of these criteria would make the action illegal pursuant to present norms of international law.

While evaluating the legality of any U.S. deployment of the counter-proliferation strategy depends somewhat upon unique circumstances, one may make a few assumptions regarding U.S. positions in a scenario in which it felt compelled to resort to the policy in its most violent form. The first assumption is that, at least for the foreseeable future, the United States will possess the more powerful military arsenal vis-à-vis any potential proliferant. Another assumption is that the United States would attempt to utilize the authority of the United Nations, at least initially, in order to support its action. Finally, given the principles of U.S. military strategy, the United States would employ substantial force to accomplish its counter-proliferation objectives. Redundancy is a hallmark of U.S. military tactics. The tactics employed during "Operation Desert Storm" demonstrated this tendency, as the U.S.-led coalition conducted over 100,000 air sorties against Iraq.[113] The United States is unlikely to abandon this practice in any foreseeable counter-proliferation scenario.

The Immediacy Requirement. The immediacy requirement poses an instant and severe threat to any U.S. justification of a counter-proliferation activity based upon the theory of anticipatory self-defense. With the end of the Cold War, the risk to the United States from nuclear attack has been reduced.[114] None of the usual proliferation suspects currently have the capacity to strike the United States.[115] Even the most pessimistic estimates believe that another decade will pass before a nation currently hostile to U.S. interests will have the capacity to strike the United States with a nuclear-tipped ballistic missile.[116] Consequently, the United States would have difficulty meeting the first condition of the anticipatory self-defense test.

The United States might argue that although these states cannot place the United States at imminent risk of nuclear attack, they might be able to threaten both U.S. allies and U.S. military forces deployed overseas. Thus, according to this reasoning, the counter-proliferation event could meet the immediacy requirement. Two problems confront this argument. First, while U.S. forces may be deployed overseas, their presence does not convert

the land which they occupy into U.S. territory. A significant difference exists between defending U.S. territory and U.S. forces, as the former represents an element of U.S. sovereignty, while forces deployed overseas do not, in and of themselves, command the same degree of legal protection. Second, if an imminent threat existed against an ally of the United States, that might give the ally a justification to engage in a counter-proliferation strike, but probably would not permit the United States to undertake the operation unilaterally.

For example, to attempt to justify a preemptive attack against North Korea's nuclear facilities, the United States would have to demonstrate that its counter-proliferation action had met two aspects of the immediacy test. First, U.S. leaders would have to establish that the North Koreans were on the verge of developing a nuclear warhead and that the counter-proliferation activity had to be conducted immediately to be effective. More importantly, the United States would have to demonstrate that if North Korea were permitted to develop its bomb, it could and would immediately attack the United States (an admittedly unlikely scenario), South Korea, or Japan.

The United States could argue that the counter-proliferation campaign was conducted not for the defense of the United States, but for the defense of South Korea and American forces located there. However, as noted above, these facts might legitimize a preemptive attack by the South Koreans, but might not suffice to justify unilateral American action. A combined U.S.-South Korean attack might pass muster, but the international community likely would scrutinize any U.S. involvement closely.

Any U.S. Action Must Respond to an Illegal Activity. To engage legally in an act of counter-proliferation, the United States must demonstrate that the target state is in breach of some aspect of international law. This requirement is met most easily when a state is clandestinely developing a nuclear warhead in violation of its commitment to the NPT. However, if the state is not an NPT member, or if it has withdrawn from the regime pursuant to its rights under Article X of the Treaty,[117] then the United States would need to base its counter-proliferation activity on some broader concept found within the body of customary international law. According to one official, the U.S. Department of Defense takes the position that an international norm exists which classifies the development of a nuclear weapon by a previously nonnuclear state as a violation of international law.[118] This theory of international law, however, might be unconvincing to an international community that perceives a reluctance on the part of

the current nuclear powers to reduce their arsenals and which has ignored the proliferation of nuclear weapons in non-NPT members such as Israel and India. Even if the international community has accepted this norm, the community has not constructed an effective enforcement regime which guarantees adherence to it.

In other words, violations of international law are rarely obvious. The United States might have to procure a resolution from the Security Council condemning the proliferation activity as a breach of international law to justify this element of the preemptive self-defense test. Such condemnation might be difficult to obtain and would not occur rapidly.

Obligation to Exhaust Diplomatic Options. The third obstacle which the United States must overcome to justify a preemptive counter-proliferation attack is the requirement to demonstrate that it had exhausted all reasonable diplomatic avenues before engaging in military action. This condition would prove easier to hurdle if the state in question completely refused to negotiate the proliferation issue. However, even the most reclusive pariah state normally does not completely isolate itself from the international community. Recent events involving North Korea demonstrate this point. If negotiations were ongoing but failing to make progress, then the United States might be able to argue that the potential proliferant was engaging in stonewalling tactics to delay the inevitable. Unfortunately, it is often difficult to discern when negotiations have failed and when they are merely stalled.

The diplomatic exhaustion requirement is not easily fulfilled. Given the prominent position of the United States in the international community, it might prove substantially more difficult for the United States to meet this requirement than for states of lesser international stature.

The Proportionality Requirement. The final requirement that the test for preemptive self-defense imposes upon a state engaging in a counter-proliferation attack is that it use no more force than necessary to accomplish its mission. This requirement, which seems only reasonable in diplomatic circles, is not necessarily consistent with current U.S. military dogma. When the United States employs force, it often does so redundantly. In other words, the United States tends to apply more force than the minimum necessary to guarantee that it accomplishes its military objectives. For example, in the Persian Gulf conflict, "[t]he Pentagon explained its strategy as applying overwhelming force at maximum efficiency. Coalition leaders were intent on achieving their objectives with minimum Coalition

casualties and maximum combat efficiency. If combat operations became necessary, the concept was to apply overwhelming force."[119] From a military perspective this strategy is sensible, because a military failure often is worse than not attempting to accomplish the mission in the first place. However, the use of "overwhelming" force to attain a military objective can create problems for the United States within the international community. In the context of anticipatory self-defense, it could be thought to violate international law.

U.S. military capabilities might assist in the fulfillment of the requirement, as the imposition of more force does not lead invariably to more destruction. Precision-guided munitions, for example, could destroy the target without causing extensive damage to the surrounding area. The international legal standard for proportionality is unclear in this regard. Does the standard prevent overwhelming force or overwhelming damage? If the use of disproportionate force does not result in disproportionate destruction, then the United States might be able to satisfy this requirement.

A condition related to the proportionality requirement considers the type of force applied in a given situation. The degree of force should not exceed the minimum necessary to accomplish the desired task. In other words, if the United States could reasonably expect to employ a successful nonviolent counter-proliferation approach, by the standards of international law it must attempt to do so before engaging in a violent attack. Thus this argument holds that, if possible, the United States should attempt to sabotage the weapons program of a proliferant through the introduction of a computer virus, for example, before bombing the proliferant's weapons development facilities.

Conclusions Regarding the Legality of Counter-Proliferation Pursuant to the International Law of Anticipatory Self-Defense

The requirements a state must satisfy to justify an act of anticipatory self-defense are stringent. They seek to prevent states from disguising unnecessary and illegitimate military attacks as acts of self-defense. The United States would face a daunting task to convince the international community that a violent act of counter-proliferation fell squarely within the legal requirements of the test for anticipatory self-defense. It is difficult to imagine many states accepting U.S. explanations that it was under the

threat of imminent attack by a Third World state producing its first nuclear weapon.

Beyond the imminence requirement lie the other requirements of preemptive self-defense. When examined collectively, they make it difficult to fathom how the United States could legally justify a counter-proliferation activity on the basis of anticipatory self-defense. This legal conclusion, however, should not (and will not) be the only factor U.S. leaders consider when deciding whether to engage in an act of counter-proliferation. The international community condemned Israel for its attack of Tamuz I.[120] However, in retrospect, it is doubtful that the government of Israel or other members of the international community regret that attack.[121] As Prime Minister Menachem Begin declared, "Despite all the condemnations in the last twenty-four hours, Israel has nothing to apologize for. It was a just cause. And it shall yet triumph; . . . it was an act of supreme moral and national self-defense."[122] The legal analysis, therefore, should not be dispositive when analyzing the counter-proliferation equation. Like Menachem Begin in 1981, U.S. leaders must determine whether the condemnation of the international community is a cost worth bearing to prevent a nation from going nuclear.

VI

Counter-Proliferation and the Concept of Reprisal

IF COUNTER-PROLIFERATION is unlikely to meet the requirements of anticipatory self-defense, then what other legal concept might describe a counter-proliferation event? Counter-proliferation perhaps best fits under the rubric of the international legal concept of reprisal.[123] However, while an act of counter-proliferation might fit within the definition of reprisal, this fact does not solve the problem for a state engaging in that act, for reprisals are *per se* illegal pursuant to current norms of international law.

The Legal Definition of an Act of Reprisal

While reprisal and self-defense are related concepts, since both are forms of self-help, reprisals differ from self-defense because the former are punitive. As Derek Bowett explains:

> The difference between the two forms of self-help lies essentially in their aim or purpose. Self defense is permissible for the purpose of protecting the security of the state and the essential rights—in particular the rights of territorial integrity and political independence upon which that security depends. In contrast, reprisals are punitive in character: they seek to impose reparation for the harm done, or to compel a satisfactory settlement of the dispute created by the initial illegal act, or to compel the delinquent state to abide by the law in the future.[124]

It is their punitive nature that precludes the legitimacy of reprisals before international law. They conflict with the language of articles 2(3) and 2(4) of the U.N. Charter, which requires that states settle their disputes by peaceful means and refrain from the use or threat of the use of force against other states. Thus, one commentator explains: "The general view is that articles 2(3) and 2(4) of the U.N. Charter have outlawed peacetime reprisals. U.N. General Assembly resolutions have called on states to refrain from its [*sic*] use."[125]

The prohibition against peacetime reprisals reflects the international community's desire to avoid conflict between states despite the possible legitimacy of a claim by one state against another. The hope of the founders of the United Nations was that disputing parties would bring their claims to either the U.N. Security Council or the International Court of Justice for peaceful settlement instead of engaging in destructive military operations to settle the score.[126] To further this aspiration, the language of the Charter implicitly forbids the use of reprisals.

Five reasons are commonly given to explain the general condemnation of reprisals. As Richard J. Erickson states, "First, forcible reprisal is a remedy available only to the strong over the weak. Second, it allows the injured state to both judge the wrong done against it and extract the reparation for that wrong. Third, reprisals connote an eye for an eye, revenge, and retaliation. Fourth, reprisals tend to embitter relations among states. Fifth, reprisals can result in counter-reprisals and escalation of the use of force between states."[127]

The test to determine whether a military strike qualifies as a reprisal contains three elements.[128] First, Nation X must commit a nonviolent wrong against the interests of Nation Y. Second, Nation Y must respond to this violation of its interest and international law by taking military action against Nation X to punish Nation X for its unlawful act and to have Nation X change its behavior. Third, Nation Y's military action must not fit within the acceptable legal definition of the right of self-defense.

Counter-Proliferation and Reprisals

Any counter-proliferation activity conducted by the United States almost certainly would fall within the legal definition of reprisal. The strike would meet the three requirements set forth in the reprisal definition. First, the United States would perceive a legal wrong to its interests, in this case a violation of the putative norm against proliferation. Second, by

employing military force the United States would attempt to coerce the target state to modify its policy. Finally, for the reasons outlined above, the U.S. action would not fit within the confines of the definition of a state undertaking an act of preemptive self-defense.

The Violation of International Law by the Target State. The situation in North Korea, despite the recent agreement with the United States and South Korea, provides a good example of how this analysis might apply. If the goal of its nuclear program were to construct a warhead, then North Korea would be in violation of its international treaty commitments by breaching the NPT. Even if North Korea were to withdraw from the NPT, its development of a nuclear warhead conceivably would violate a presumed international legal norm prohibiting the proliferation of nuclear weapons. Thus, the development program, as a *prima facie* violation of international law, would satisfy the first stipulation of the reprisal test.

The Response to the Violation. It is possible that in response to the alleged North Korean violation, the United States, unable to obtain the results it desires diplomatically and unable to convince the Chinese, for example, of the need for multilateral economic sanctions against North Korea, would conclude that it must take effective action to punish the North Koreans for their violations of both the NPT and the nonproliferation norm. Thus, the United States would attack those facilities which it believed were an integral part of the North Korean weapons development program.

The United States could support its action by employing two justifications. First, the United States could note that a North Korea in possession of a nuclear warhead would have posed an unacceptable threat to South Korea, Japan, and to American forces deployed throughout Asia. Second, the United States could assert that its attack will deter other potential proliferants from continuing their weapons development programs. These other nations, in effect, should learn the lesson that the United States will not tolerate nuclear proliferation and punishes those states that fail to heed their commitments to the NPT and to the international norm against proliferation. In this scenario, the counter-proliferation event passes the punishment element of the test for reprisal.

The Concept of Reprisal versus the Concept of Self-Defense. While the United States could argue that it conducted its counter-proliferation activity to defend U.S. forces deployed abroad, that argument is unlikely to succeed in classifying the action as one of self-defense for the reasons

outlined in Chapter V above. In these circumstances, the third stipulation of the test would be satisfied, and the United States would have committed an act of reprisal. In other words, the United States would have violated current international law and undermined its position within the international community. The United States might be willing to accept some international condemnation if it believed that the danger represented by a North Korean bomb was intolerable. U.S. policy makers may have to make that decision, but they should not deliberate under the illusion that, pursuant to current law, the international community will accept the legality of the decision. Perhaps if the United States were able to form a multilateral coalition, the action might be legitimate pursuant to article 42 or article 52 of the U.N. Charter;[129] however, as noted previously, forming multilateral coalitions to take preemptive action is not an easy task.

An Exception to the Reprisal Prohibition in Order to Combat Proliferation?

This analysis therefore finds that an act of counter-proliferation would violate current provisions of international law. However, it should not necessarily be concluded that the United States should abandon the counter-proliferation strategy. The time may have arrived for the international community to carve out an exception to the prohibition against reprisals in order to combat the proliferation of weapons of mass destruction. Multiple arguments in favor of the creation of such an exception exist. However, strong arguments against the establishment of an exception also exist. Both sides of the debate need to be examined.

Arguments in Favor of an Exception. Three arguments favor the creation of a reprisal exception. First, the destructive power of nuclear weapons makes their development a far greater threat to international peace and security than any other potential transgression of international law. The international community needs radical solutions to prevent states from acquiring these devices. Obtaining an effective international consensus that resolves the problem of proliferation has proven difficult in the past and is unlikely to become any easier in the near future. Thus, to preserve the norm against proliferation, it is important to give states greater leeway to take reprisals against those states illicitly developing nuclear warheads.

Second, the international legal norms developed in the aftermath of World War II do not adequately address the challenges of the New World

Order. In an era when fears of rampant proliferation are prominent, the time has arrived to reconsider the international preference for the absence of conflict over justice.[130] If nonproliferation provides the only justifiable course of the international community, then its members must have the requisite tools to combat the threat of the illicit acquisition of nuclear weapons.[131] Counter-proliferation, the argument runs, represents the most effective tool to combat the spread of these weapons.

Third, while reprisals may be illegal pursuant to international law, they do occur.[132] In fact, the international community frequently fails to condemn them. Anthony Clark Arend observes that:

> [W]hile states are formally unwilling to depart from the Charter paradigm, in justifying their actions they have expanded the notion of self-defense to include deterrence and even punishment. Such a broadened notion of self-defense, while perhaps politically and even morally commendable, seems to be clearly at variance with the Charter's ideal of peace over justice.[133]

Perhaps it is time to admit that the norm against reprisals has become archaic and that the international community should fashion an updated norm, which recognizes that reprisals have become accepted *de facto*, permitting limited reprisals against the most dangerous proliferants.

Arguments against an Exception. The arguments against establishing an exception to the reprisal prohibition hinge on the traditional reasoning that it would lead to an explosion of unchecked violence throughout the world. According to this position, it would be impossible to limit an exception to the nonproliferation context. Maintaining the current international law on reprisals is preferable to creating the inevitable "slippery slope" that an exception would produce, and the costs of establishing a reprisal exception greatly exceed any potential benefits. An exception would create a license to commit violence and would discriminate against the weaker states of the international community.

This argument also posits that despite the merits of a counter-proliferation strategy, it is inherently imperialistic. Establishing an exception for reprisals against proliferation would condone such imperialism. An exception would create a tool only for the strong and would violate the rights of weaker Third World nations. Furthermore, an exception would contain an element of hypocrisy, as those states calling for its creation would be the very states that currently possess nuclear arsenals or which are allied to the nuclear powers.

The creation of an exception also would undermine the current nonproliferation regime that it seeks to protect. The exception would demonstrate that the goals of the NPT had failed, and would show that the nuclear-weapons states have become unwilling to satisfy their treaty commitments. This might cause the collapse of the nonproliferation regime, leading states to deny inspection rights to the IAEA. States might feel compelled to place their nuclear programs underground, both literally and figuratively, where they would be safer from attack.

On a more cynical note, the United States may desire that these types of reprisals remain legally unacceptable, and yet conduct them nonetheless, reasoning that the gain from preventing the potential proliferant from obtaining a nuclear warhead dramatically outweighs the political toll incurred for violating the reprisal prohibition. The prohibition against reprisals would be sustained, theoretically preventing other states, which may possess interests adverse to those of the United States, from engaging in similar acts. In essence, the United States, like Israel before it, would accept condemnation as a type of international "cost of doing business" in an attempt to have it both ways, maintaining the norms against both proliferation and reprisal.

Conclusions on Self-Defense and Reprisal

The previous sections have classified counter-proliferation within the framework of international law on self-defense and reprisal, concluding that the United States would have difficulty justifying an act of counter-proliferation on the basis of anticipatory self-defense. The requirements of anticipatory self-defense are too arduous for a counter-proliferation strike to meet. Counter-proliferation fits more readily into the framework of reprisal. However, under current international law, reprisals are illegal. Consequently, if the United States wants to pursue this strategy, it must either choose to violate current international law or convince the international community that the time has come to change the legal norm against reprisal in order to supply that community with another instrument in its ongoing campaign against nuclear proliferation.

VII

Counter-Proliferation and War

THE PREVIOUS SECTIONS of this study have concentrated on the use of counter-proliferation measures as a tool to prevent the acquisition of nuclear weapons before the outbreak of war between a state developing a nuclear weapon and those opposed to that production. This section focuses on the problem during a time of war.[134] To what extent are counter-proliferation efforts acceptable in the wartime setting? This question grew in importance with the recent review of U.S. war plans in preparation for the possible outbreak of hostilities with North Korea.[135]

The Clinton administration is studying questions surrounding counter-proliferation in other regions as well, "ordering regional commanders to develop detailed plans for thwarting proliferation threats in their areas, among other measures."[136] For example, in the event of a conflict between the United States and Iran, U.S. military officials will need to address the Iranian weapons development program. The issue of what action to take against nuclear facilities in a time of war also could occur if a second conflict with Iraq were to break out. The United States, under the auspices of the United Nations, showed little reluctance during the 1991 Gulf War in striking the Iraqi nuclear program. Would the United States, acting alone or as part of a U.N.-sanctioned coalition, be justified in attacking Iraq's nuclear program a second time?

The pages that follow explore these questions from a legal perspective, concentrating on lessons drawn from three sources: customary international law, international accords on the law of armed conflict, and the

precedent of earlier conflicts. Unlike the previous sections of this study, which focused on international law regarding resort to the use of force (*jus ad bellum*), this section centers on the legal ramifications of the use of counter-proliferation measures during a time of war. Thus, an understanding of the laws of war (*jus in bello*), which limit the permissible military activities of forces embroiled in combat, is crucial. The Hague Convention of 1907,[137] the Geneva Conventions of 1949,[138] and the 1977 Additional Protocols to these Conventions[139] are particularly important, for these documents provide the most comprehensive representation of the current state of thinking regarding the laws of war.

These legal issues merit discussion because the United States depends on the international legal regime during periods of both peace and war. If the United States were to become embroiled in hostilities which required the use of counter-proliferations methods, it would want to conduct those efforts within the framework of the laws of war to maintain favorable standing within the international community. A wartime counter-proliferation endeavor would be far more likely to receive broad international support if the United States were to follow the requirements of the laws of war than if it were to violate these norms.[140]

The Customary Laws of War

The core legal principles which address the acceptability of attacks against military targets under the traditional laws of war have developed gradually over the centuries. However, through multilateral accords on the laws of war, the international community, particularly since the conclusion of World War II, has narrowed the range of targets legally subject to attack. Thus, while the basic test to determine the legality of attacks has remained essentially the same, the list of types of targets passing that standard has dwindled in an attempt to prevent civilian casualties.

Necessity. A two-part test identifies the requisite characteristics a target must possess before a belligerent may attack it. First, the target must possess some military value. The customary international laws of war, as well as subsequent international conventions, prohibit attacks against targets possessing little or no military value. For example, indiscriminate attacks against civilian populations are forbidden.[141]

The test to determine whether an objective is a legitimate military target depends upon the contribution its destruction would make to the ultimate outcome of the war. As L.C. Green explains:

> [T]he decision whether an objective is legitimate or not depends upon the contribution an attack on that objective will make to ultimate victory or the success of the operation of which the attack is part. But with objects normally devoted to civilian use, such as schools, hospitals or places of worship, if there is any doubt they are being used for such purposes or being put to military use, they shall receive the benefit of the doubt and not be subjected to attack.[142]

However, traditional interpretations of the necessity requirement have given nations wide latitude to conduct attacks against a broad range of targets, including, for example, enemy merchant ships and steel mines.[143] Belligerents have not found the necessity requirement difficult to satisfy.

Proportionality. In addition to the requirement that a nation conduct its attack against a military objective, the extent of that attack must be proportionate to the amount of force needed to destroy the target. Thus, "[e]ven if the destruction of a target satisfies the test of military necessity, excessive damage should be prohibited."[144] The justification for this part of the test is that it serves the goal of preventing unnecessary suffering on the part of noncombatants. The test to determine whether the force employed has been excessive is objective.[145] In other words, a nation may use that amount of force necessary to accomplish its mission which a reasonable nation would employ to accomplish a similar task. Hence, "it is not a breach of the law of armed conflict if civilians suffer injury incidental to attack upon a lawful military objective, so long as such incidental injury is not disproportionate to the military objective which it is sought to achieve. . . ."[146]

International Conventions on the Laws of War

The treaties and conventions dealing with the laws of war codify the customary requirements of necessity and proportionality. For example, the requirement of necessity may be found in Article 23(g) of the 1907 Hague Convention, which prohibits nations from taking action "[t]o destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."[147] The 1949 Geneva

Conventions echo this necessity requirement.[148] The proportionality requirement also has been codified into the conventional law of war.

> The principle of proportionality is embodied in Article 23(e) and (g) of the Annex to the Hague Convention No. IV of 1907. In addition, it is contained in several provisions of the 1977 Protocol I: Article 25, the first article of the section on methods and means of warfare, prohibits in paragraph 2 the employment of weapons, projectiles and material and methods of warfare of a nature to cause 'superfluous' injury or 'unnecessary' suffering.[149]

Lessons

The primary lesson military strategists should draw from both the customary and conventional provisions of the law of war is that attacks against any type of target must meet certain requirements. First, the strike must occur against only those targets that reasonably merit attack. An attack designed to destroy an enemy's economic infrastructure, for example, must bear some rational relationship to a military objective. Second, the attack must not cause damage that leads to enormous civilian casualties or other suffering. The intensity of the attack must correspond reasonably with the minimum amount of force necessary to ensure the accomplishment of the military mission. The military planner of a counter-proliferation mission during a time of war must keep these dictates in mind when deciding on, and devising, such an attack.

Protocol I

Particularly important to the discussion of counter-proliferation in the wartime setting is the 1977 Geneva Protocol I Additional to the Geneva Convention of 1949.[150] This document outlines the requirements which combatants must follow when engaged in armed conflict. Article 56 of the Protocol specifically addresses the targeting of nuclear reactors during conflict, restricting the ability of belligerents to attack installations that could release "dangerous forces" if destroyed. Other articles of the Protocol prohibit reprisals against civilians (Article 51) and attacks causing excessive harm to the environment (Article 35).[151]

Complicating any analysis of Protocol I is the fact that the United States has not ratified it.[152] President Ronald Reagan decided not to submit the Protocol to the Senate for ratification. In his letter to the Senate declaring

that he would not send the Protocol for ratification, President Reagan stated, "[Protocol I] contains provisions that would undermine humanitarian law and endanger civilians in war. One of its provisions, for example, would automatically treat as an international conflict any so-called 'war of national liberation.'. . . Finally, the Joint Chiefs of Staff have also concluded that a number of the provisions of the Protocol are militarily unacceptable."[153]

Despite the fact that the United States has not ratified the Protocol, several reasons warrant a study of its provisions. First, the United States is a signatory to the Protocol.[154] As such, pursuant to Article 18 of the Vienna Convention on the Law of Treaties,[155] the United States "is obliged to refrain from acts which would defeat [the Protocol's] object and purpose . . . until it shall have made its intention clear not to become a party to the treaty."[156] President Reagan's statement to the Senate might suffice as a clear proclamation that the United States did not intend to abide by Protocol I's provisions. However, it is also possible that this internal U.S. government communication did not provide adequate notice to the other parties of the Protocol that this country did not intend to abide by its provisions. It is possible that either the present or a future administration will submit the Protocol to the Senate for ratification. Moreover, according to the U.S. Department of Defense, Chairman of the Joint Chiefs of Staff Colin Powell noted that the law of war, including Protocol I, influenced decisions throughout the execution of the Persian Gulf War.[157] Such consideration demonstrates that the Protocol has at least some influence on U.S. policy makers.

Although the United States has not ratified the Protocol, several members of the North Atlantic Treaty Organization (Nato) have.[158] Since some Nato members are considering participation in the counter-proliferation initiative,[159] the limits placed on the members of Nato by Protocol I should concern U.S. military planners. Furthermore, South Korea, a key U.S. ally in Asia, has ratified the Protocol.[160] Finally, while the Protocol may contain flaws, it can provide useful guidance to military strategists on the limits of military force in the counter-proliferation equation.

Article 56. The key provision of the Protocol for the counter-proliferation discussion is Article 56, which states, in part:

> 1. Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such

> attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.
>
> 2. The special protection against attack provided by paragraph 1 shall cease:
>
> > . . . (b) for a nuclear electrical generating station only if it provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.
> >
> > (c) for other military objectives located at or in the vicinity of these works or installations only if they are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support. . . .
>
> 5. The Parties to the conflict shall endeavor to avoid locating any military objectives in the vicinity of the works or installations mentioned in paragraph 1. Nevertheless, installations erected for the sole purpose of defending the protected works or installations from attack are permissible and shall not themselves be made the object of attack, provided that they are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile action against the protected works or installations. . . .

The language of this article may place significant restrictions on a nation contemplating the destruction of the most attractive targets in a counter-proliferation scenario. However, the scope of the article is the subject of intense debate, and its meaning requires a thorough examination of its somewhat confusing text.[161]

While the article protects "dams, dykes and nuclear electrical generating stations," this list is not intended to be exhaustive, because the article is designed to protect any facility containing a "dangerous force" that could, if the facility were destroyed, cause "severe loss among the civilian population." Thus, an initial reading of the article appears to demonstrate that its language may protect a nuclear reprocessing plant containing fissionable material or a nuclear reactor devoted solely to the production of weapons-grade plutonium, since the destruction of such facilities could release radioactive material. This interpretation is reinforced by noting that even if the facility were used exclusively for military purposes, and

therefore normally would be a legitimate target, it does not necessarily sacrifice its protection from attack, as "even . . . military objectives" fall within the language of the article.[162]

However, before concluding that all nuclear facilities are off-limits, one must take the analysis of Article 56 a step further. As Burrus Carnahan notes, "there is no international standard for determining when civilian casualties become 'severe'; the party attacking a nuclear power station and the party defending it are likely to have very different ideas on that subject."[163] The article allows an exception to the prohibition for attacks upon a "nuclear electrical generating station only if it provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support." This phrase appears to allow an attack upon a nuclear reactor supplying power to a belligerent's armed forces; however, this provision is silent on attacks against other nuclear facilities if they provide fissionable material to a belligerent's weapons development program.[164] The article contains an exception allowing attacks against "other military objectives located at or in the vicinity of these works or installations only if they are used in regular, significant and direct support of military operations. . . ." However, this provision addresses attacks upon weapons systems, such as artillery and surface-to-air missiles, devoted to the defense of the facility containing the dangerous force. Consequently, the definition of "other military objectives" would not appear to include a reprocessing or an enrichment plant.

Not surprisingly, scholars have come to varying conclusions regarding Article 56 and its exceptions. Anthony Leibler, for example, believes that "the exceptions in Article 56 are discrete, specific and leave minimal scope for divergent interpretation."[165] On the other hand, W. Hays Parks believes that the article does not prohibit attacks against nuclear facilities utilized in a weapons development program,[166] while Burrus Carnahan simply concludes that "Article 56 seems more likely to produce confusion and mutual recrimination than any genuine protection for civilian populations in wartime."[167]

Article 56 does not establish whether attacks against facilities dedicated to the development of nuclear weapons are permitted. The language of this provision is too clouded to conclude definitively whether attacks against these facilities are prohibited. States which are parties to the Protocol will have to examine the question closely to determine an appropriate action.

From this analysis, one may conclude that a nation employing a counter-proliferation measure which attacks a facility containing nuclear material

will face allegations that it, in fact, has violated Protocol I. The United States may point to two factors to defend itself should it be subjected to such scrutiny. First, the United States, as noted above, has not ratified the Protocol, and consequently, its provisions should not apply to this country. Second, U.S. policy makers could note that the "rules embodied in Article 56 are not (at present) incorporated into customary international law."[168] Hence, the United States might argue that it may attack a belligerent's facility containing a dangerous force so long as that facility is a legitimate military objective.

While the United States may be able to defend itself adequately against allegations that it had violated Article 56, some of its allies that are members of Protocol I may face a more daunting task in defending themselves from similar allegations. South Korea, for example, as a member of the Protocol, may not be able to justify an attack against a North Korean nuclear facility if a restrictive interpretation of Article 56 is accepted. This fact could represent a substantial obstacle for any U.S. counter-proliferation endeavor against North Korea which involves the deployment of South Korean forces. If these forces are prevented from striking the North Korean nuclear program, it would then become questionable whether an ally which has come to the aid of South Korea, e.g., the United States, could attack the North's facilities in its stead. Similar concerns could face the Nato alliance if it were to take a counter-proliferation action against the weapons development programs of, for example, either Iran or Iraq.

Moreover, Article 85(3) specifies that a "grave breach" of the Protocol has transpired when a wilful attack releasing a dangerous force occurs against a facility protected by Article 56.[169] Article 85(5) of the Protocol states that such grave breaches "shall be regarded as war crimes." Thus, a breach of Article 56 could lead to serious consequences against those who ordered an attack resulting in the release of a dangerous force. Additionally, Article 91 of the Protocol mandates that offenders pay compensation to illegally attacked states.

Other Articles of Protocol I. Since Article 56 itself appears inconclusive regarding the permissibility of attacks against nuclear facilities, it becomes important to examine other articles of the Protocol to determine whether they can shed light on the issue. Again, while the United States has not ratified this accord, its provisions must have some influence upon the international community, since as of 1992 seventy-eight nations had either ratified or acceded to it.[170]

Article 57(2) (a) (ii) of the Protocol codifies the principle of proportionality found in customary international law,[171] by providing that:

> [T]hose who plan or decide upon an attack shall . . . take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event of minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects.[172]

The importance of this provision is enhanced when one evaluates it in relation to Article 35(3) of the Protocol, which prohibits the employment of "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment."[173] Unfortunately, the latter provision contains no explicit definition of what constitutes "severe damage to the natural environment."[174] However, a significant release of radiation or radioactive material which contaminates the surrounding area presumably would qualify as the type of "severe damage" contemplated by Article 35. As with the language of Article 56, a breach of Article 35 by a party to the Protocol could lead to severe consequences against those ordering and participating in an attack against a nuclear facility that released significant amounts of nuclear fallout upon destruction.

Article 52(2) of the Protocol provides a definition of what constitutes a military objective, thereby codifying the customary international law requirement of military necessity. Attacks are "limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage." Like the customary international requirement of necessity, the Protocol I standard is objective, demanding that an attacker employ reasoned judgment when deciding which targets to attack.

Other Attempts to Protect Nuclear Facilities

In addition to the provisions of Protocol I, other diplomatic efforts to establish accords to protect nuclear facilities from attack have transpired. None of these attempts have been successful; however, a portion of the international community has shown interest in establishing some type of convention prohibiting attacks against nuclear facilities, and thus, these efforts merit a brief discussion.

Swedish Proposals for a Treaty Prohibiting Radiological Weapons and the Release or Dissemination of Radioactive Material for Hostile Purposes. In 1980, the government of Sweden proposed a treaty that would protect nuclear facilities from attack during hostilities.[175] This initiative would have prevented both the use of radioactive material as a weapon as well as attacks against facilities that might release radioactive material.[176] The facilities protected by the accord were to have been listed on a register and subject to inspection by a multilateral agency similar to the IAEA.

The Swedish plan has not been accepted. As Burrus Carnahan argues, the United States has been particularly vocal in its opposition to the plan:

> The United States and its allies have refused to accept the inclusion of attacks on nuclear facilities in a radiological weapons convention, and Sweden and its supporters have insisted that this problem be covered. The Swedish proposal poses practical military problems, not the least of which are that it protects facilities that are legitimate military targets and would never permit an attack on a protected nuclear facility if radiation in any amount would be released.[177]

A second problem facing the Swedish proposal is that it would depend upon the credibility of safeguard inspections similar to those that have sought to protect the integrity of the NPT. Given the haphazard record of IAEA inspections in Iraq and the difficulties the IAEA has faced in guaranteeing North Korea's NPT compliance, it is unlikely that the international community would have much confidence in such a regime.

Other discussions have occurred which have had the goal of creating a ban on the use of radiological weapons. If adopted, such an agreement, known as the Radiological Weapons Convention, not only would prohibit the use of weapons such as the neutron bomb, but also would ban attacks against facilities which could result in the release of radiation. A counterproliferation attack against a nuclear facility would run afoul of such an accord. As yet, no agreement has been reached on the Radiological Weapons Convention, so attacks against these facilities have not been explicitly banned.

The* NPT *Review Conferences. Every five years the signatory states to the NPT hold a review conference to discuss issues relating to the treaty. At both the 1985 and 1990 conferences, the parties addressed the topic of attacks against nuclear facilities.[178] Egypt presented a paper at the 1985 conference linking attacks on nuclear facilities to articles III and IV of the treaty.[179] Article III details the establishment of the safeguards regime

under the NPT, while article IV gives each party to the treaty the right to pursue peaceful uses of nuclear energy. While the final conference report did not accept all aspects of the Egyptian proposal, it did state that an attack on a safeguarded facility would necessitate immediate U.N. Security Council attention.[180]

The 1990 review conference did not release a final report due to a dispute among the parties regarding the proposed adoption of a comprehensive ban on the testing of nuclear warheads. However, "[i]f a final declaration had been adopted, the 1990 review conference would have encouraged all parties to provide immediate assistance to any other party to the treaty whose safeguarded nuclear facilities were attacked, and would also have appealed to all states to consider the danger of releasing radioactivity when reviewing their military doctrines."[181]

While none of these initiatives has succeeded in establishing a prohibition against attacks on nuclear facilities, the possibility exists that the topic may be addressed again in the future, particularly if an attack on a nuclear facility were to occur, resulting in the release of significant amounts of radiation. The United States and its allies may face the prospect that some aspect of international law may expressly forbid strikes against nuclear facilities. Currently, the norms of the customary international law of war dictate that any attack against a nuclear facility not cause disproportionate damage to either the environment or noncombatants.

The Precedents

At least three incidents have occurred in the nuclear age in which weapons development facilities have come under attack during a time of war, not including the 1981 Israeli attack on Tamuz I discussed earlier. The three instances of attack were the Allied air strikes on the German atomic bomb program during World War II, attacks by Iran and Iraq upon one another's nuclear facilities during their war between 1980 and 1988, and the attacks conducted by U.S.-led coalition forces against Iraqi nuclear facilities during the Gulf War of 1991.

Allied Attacks against Nazi Atomic Facilities. During World War II, Allied forces conducted air strikes against German atomic facilities located in Norway.[182] The Germans were using these facilities to produce the heavy water needed for the production of an atomic bomb.[183] The Allied attacks, which occurred prior to the signing of the Geneva Conventions

and Protocol I, were subject to the customary requirements of necessity and proportionality.

Given the scope of the war and the need to prevent the construction of a German bomb, it is hard to dispute the need to attack these facilities. The existence of a German bomb could have altered the course of the war in Europe, perhaps compelling the Allies to settle with the Germans instead of striving for total victory. Hence, the Allied attacks satisfied the first element of the customary international law test. The Allies also fulfilled the proportionality requirement of this test. The destruction of the heavy water facilities did not release great amounts of radioactive material that could have caused severe civilian casualties in Scandinavia or throughout Europe.

Given the need for and the scope of the Allied efforts, it is probable that the attacks on the German facilities would have fulfilled the requirements of Article 56 of Protocol I had they existed during World War II.[184] First, the heavy water facilities did not possess the type of "dangerous forces" contemplated by the article. Second, even if they had, the need to attack the facilities as a military objective would have fit within the exception of Article 56(2)(c). Moreover, the attacks would have fit within the confines of both Article 52 on necessity and Article 57 on proportionality.

Attacks against Nuclear Facilities during the Iran-Iraq War. During the war between Iran and Iraq, waged from 1980 to 1988, at various times the Iranians attacked Iraqi nuclear facilities.[185] These attacks occurred after the signing of Protocol I; however, Iran, although a signatory, had not ratified the accord.[186] Theoretically, Article 18 of the Vienna Convention on the Law of Treaties required the Iranians to refrain from actions that could have defeated the Protocol's purpose.[187] For that reason, one can make the argument that the Iranians violated international law by ignoring their treaty commitments and violated Article 56 of Protocol I.

As for the attacks themselves, assuming that the parties were not constrained by the provisions of the Protocol, they too are judged by the standards of the customary international law of war, namely the concepts of necessity and proportionality. As noted above, the necessity requirement of this test is objective. Would a reasonable state similarly situated have determined that the Iraqi facilities were a legitimate military objective and made such an attack? An affirmative answer to this question seems appropriate. The international community was aware of the Iraqi interest in developing a nuclear weapon. Given the danger posed to Iran by the

development of an Iraqi nuclear weapon, it is reasonable to conclude that targeting the facilities was legitimate. Moreover, even had the attacks been conducted solely to destroy the electrical power capacity of Iraq, the Iranians could have justified these attacks on the basis of the need to disable Iraq's supply of energy to its war-sustaining infrastructure and military forces.

The test for proportionality presents a stiffer hurdle if the Iranian attacks are to be justified. The fact that a debate existed about the presence of nuclear material at the Iraqi facilities assists in justifying the Iranian action. Had the Iraqi nuclear facilities unmistakably possessed the type of "dangerous forces" contemplated by Article 56 of the Protocol, the Iranian attacks would be subject to closer scrutiny. While Iran had not ratified the Protocol, the effects of the attack could have violated the customary proportionality requirement. Had there been a significant release of radiation from the Iraqi facilities, it could have caused massive civilian casualties (including within Iran); however, given the fact that the Iranians were never capable of completely destroying the facilities and that the introduction of a nuclear capability could have changed the war's balance, the Iranian attacks pass the proportionality test. Fortunately, the attacks did not result in the release of significant amounts of radiation over the Iraqi countryside. Had such a calamity occurred, the analysis regarding the legality of the operation might have differed.

In light of this analysis, the attacks against the Iraqi facilities appear legitimate. As Frits Kalshoven concludes:

> There is . . . little evidence that customary law already prohibits attacks on nuclear power stations other than in terms of the general principles for the protection of the civilian population and civilian objects. It seems therefore safe to conclude that as between the parties to the [Iran-Iraq] Gulf War, an attack on a nuclear power station would have been perfectly proper if there were sufficient grounds to regard the object as a military objective and the attack could be carried out without unduly severe losses among the civilian population.[188]

The Iranian attacks satisfied both parts of this test. They should be considered legitimate pursuant to the present tenets of customary international law.

A similar analysis applies to Iraqi attacks against the nuclear facilities of Iran. The necessity and proportionality standards demanded that Iraq exercise a reasonable amount of restraint with respect to their attacks against Iranian nuclear facilities. Again, as Kalshoven notes, the Iraqi

attacks in all likelihood were proper pursuant to the international legal requirements of the day.[189]

Attacks against Iraqi Nuclear Facilities during "Operation Desert Storm." The U.S.-led coalition repeatedly attacked the nuclear facilities of Iraq during the Gulf War of 1991. U.S. fighter planes bombed two Iraqi research reactors located at Tuwaitha.[190] The U.S.-led coalition conducted these attacks to prevent the Iraqis from developing a nuclear device. Preventing Iraqi proliferation became one of the major aims of the United States. However, the legitimacy of these attacks should be examined. While the assumption of the United States was that they were legitimate, several issues should be examined to determine whether the U.S. conclusion was proper.

The first question is whether attacks against Iraqi nuclear facilities were part of the U.N. mandate to free Kuwait. No specific provision of any Security Council Resolution called for the destruction of Iraqi nuclear facilities.[191] Security Council Resolution 678 did authorize U.N. members to use force "to restore international peace and security"[192] to the region. Perhaps this phrase gave the coalition the requisite authority to attack the facilities. However, some have questioned this assumption. Burrus Carnahan, for example, suggests that the attacks were not authorized by Resolution 678, stating that the facilities targeted were not a major part of the Iraqi nuclear weapons development program, and hence the attacks were illegitimate exploitations of the Resolution.[193] Settlement of this debate goes beyond the scope of this paper.[194] However, the Resolution did not explicitly prevent members of the coalition from employing any type of force which they deemed necessary to implement the U.N. mandate.[195] The assumption might be that since the United Nations did not prohibit these attacks, "it is probably fair to say that the United States and allied forces conducted their operations in accordance with international law."[196]

Kuwait and the United States also justified the attacks on the basis of collective self-defense pursuant to Article 51 of the Charter. Since the adversaries were engaged in hostilities, this action would not fall under the rubric of anticipatory self-defense. Rather, this action would be classified within the parameters of traditional, non-anticipatory self-defense. Even if this justification were proper, the attacks would be required to meet the tests of the laws of war.

Thus, the analysis returns to the traditional legal principles on the laws of war, specifically those regarding the factors of necessity and

proportionality. Did U.S.-led forces comply with these requirements when conducting their attacks against the Iraqi facilities? Since the United States took the lead in these attacks, did it comply with international law during the raids? This discussion is further complicated by the fact that some members of the Gulf War coalition had ratified Protocol I, and thus theoretically were compelled to follow its provisions, including the mandates of Article 56 pertaining to the prohibition on the release of dangerous forces. This problem is mitigated to a degree by the fact that two of the major participants in the air attacks had not ratified the Protocol. The United States and the United Kingdom are not among its members. However, both Saudi Arabia, whose forces participated in these attacks and from whose territory the attacks were staged, and Kuwait, whose pilots participated in the attacks, had ratified the Protocol,[197] thereby endangering the legality of their participation.

For the United States, the permissibility of the attacks on the Iraqi facilities turns on their legality under the provisions of the customary international law of war. Once again, the requirements of necessity and proportionality provide the standards by which such attacks are judged. The necessity requirement in this case is met fairly easily, given the broad definition of the term "military objective" and the wide discretion states have in determining sites that qualify as targets subject to attack.[198] Since U.S. intelligence reports had concluded that the Iraqi facilities were being used for weapons research, it was reasonable for the United States to conclude that attacking the facilities was necessary. Although the facilities at Tuwaitha were subject to IAEA inspection,[199] given the Iraqi interest in clandestine nuclear weapons development, the attacks were justified.

The proportionality requirement, however, represents a sterner test, for a significant release of radiation from any of the Iraqi nuclear facilities was conceivable.[200] The United States and its Desert Storm allies had to "weigh the interests arising from the success of the operation on the one hand, against the possible harmful effect upon protected persons and objects on the other. There must, therefore, be an acceptable relation between the legitimate destructive effect and undesirable collateral consequences."[201] The amount of radioactive material at the Iraqi facilities subject to release by attack was unknown. It may be hoped that the United States and its allies seriously considered the possibility of a significant release of radioactive material before engaging in their attacks. If they did, coming to the reasonable conclusion that the potential for significant radioactive release was minimal, then the attacks may be considered justified. However, if the

United States failed to study the possibility of release, yet targeted the facilities nonetheless, the attacks might not pass the proportionality requirement (in spite of the fact that no radiation ultimately leaked), because a reasonable nation would have considered the possibility of a radiation release. The Iraqis accused the United States of attacking without regard to the possibility of the release of radioactive material. U.S. representatives denied the accusation.[202]

A Proposed Legal Test for Attacks against Facilities Containing Nuclear Material in a Time of War

These precedents provide several lessons for any nation contemplating an attack against another's nuclear facilities during armed conflict. These types of strikes are not always justified, because they may violate either part of the customary international law test for permissible attacks, being either not necessary or not proportional. Moreover, if the state has ratified Protocol I, it must consider whether Article 56 prohibits such attacks. If so, then, at least for legal purposes, the state must find some alternative means to eliminate the adversary's nuclear capability.

For the United States, which is not bound by the language of Article 56, the requirements are somewhat easier to satisfy; however, U.S. military planners still must obey the requirements of the customary international law of armed conflict. In light of this fact, the paragraphs below propose a three-part test designed to make easier any determination regarding the permissibility of an attack. Although other factors may contribute to a decision by the United States to attack another nation's nuclear facilities during war, this test will give U.S. policy makers some idea of the potential legal ramifications of their actions.

Is the Target a Legitimate Military Objective? If the target possesses no legitimate military value, then all forms of international law prohibit an attack against it. U.S. decision makers must establish that the target bears some rational relationship to the military capabilities of the adversary. This standard historically has not been difficult to meet.[203] If the target represents a legitimate military objective, despite the fact that it contains fissionable material, then international law permits the attack to this point. However, the inquiry does not end here, because the attacker still must satisfy the proportionality requirement.

Would the Attack Endanger Noncombatants? If the target were in an isolated area or if it were possible to destroy the target without causing a significant release of radioactive material, then the attack presumably would not endanger the lives of noncombatants on a significant scale. The attack would satisfy the proportionality requirement. The isolated location of these facilities would make the task of U.S. military planners far simpler. The attack would pass both the necessity and proportionality stipulations, and be legitimate.

Targets containing fissionable material are rarely in areas devoid of civilians. Often such facilities are located in areas with large populations. Furthermore, it might prove difficult to destroy the facility with confidence without accepting some chance that the attack would release at least some radioactive material. If such a release were to occur, planners must consider meteorological conditions in their calculations regarding an attack's permissibility. The question then turns on the extent of material released and the number of casualties reasonably expected due to the facility's destruction.

Are the Likely Casualties Disproportionate to the Need to Destroy the Facility? A high likelihood that destruction of a nuclear facility would produce severe civilian casualties would suggest that such an attack would violate international law. The losses would be out of proportion with the need to attack unless some overwhelming justification could be demonstrated. For the United States, such a requirement might prove virtually impossible to meet. The maintenance of the nuclear *status quo* would not justify an attack that caused the catastrophic loss of civilian life. Rather, the United States would have to provide evidence that the destruction of an adversary's nuclear facilities was the only way to prevent a devastating nuclear attack against its forces or population or those of an ally. The international community probably would find anything less than this justification insufficient to satisfy the proportionality requirement.

Conclusions Drawn from the Laws of War

Attacks against facilities containing nuclear material during a time of armed conflict must meet stringent conditions to satisfy the requirements of the laws of war. Although the United States has not ratified Protocol I, and therefore is not bound by its terms, the requirements of customary international law pose challenging obstacles to the use of armed force

against a facility containing fissionable material. If the United States desires to target such facilities, it should develop methods that would prevent the release of large amounts of radioactive fallout that could produce enormous environmental destruction and severe civilian casualties. Without such methods, the United States may have to attack support facilities and weapon delivery systems to accomplish its military objectives. The legal risks associated with a release of radioactive material may be too great to attempt attacks on a facility containing nuclear material during a time a war.

VIII

Conclusions and Recommendations

COUNTER-PROLIFERATION should become a key element in a comprehensive U.S. nonproliferation strategy. As part of this strategy, U.S. policy makers must prepare for the selective application of counter-proliferation in its most aggressive forms. While it may be hoped that such an application will prove unnecessary, it is in the interests of the United States to have this option available.

While the NPT and traditional nonproliferation schemes have worked reasonably well in containing the spread of nuclear weapons, economic and political pressures are building that are making it more difficult for the nonproliferation regime to survive. These pressures will continue to build even though the NPT was extended in 1995 for an indefinite period. The pressures on the nonproliferation regime include the spread of sophisticated technology applicable in both the civilian and military spheres; the dissolution of the Soviet Union, which has released into the global market both human expertise and poorly controlled fissionable material for use by potential proliferants; the limited resources and effectiveness of the IAEA; the limited scope of the language of the NPT; and the ongoing ambitions of a few states which are motivated for a variety of reasons to acquire a nuclear device.

In this environment, a time may arise when, despite its best efforts, the United States confronts a nation with adverse interests that is on the verge of obtaining a nuclear weapon. For example, given U.S. strategic interests in the Persian Gulf region and Iran's current antipathy toward the United

States, U.S. policy makers may be unwilling to tolerate an Iran armed with nuclear weapons. The present nonproliferation regime is designed to avoid this scenario; however, that regime might fail, and the United States must have options, including military options, to address this possibility.

The adoption of a counter-proliferation strategy fills that need. This paper has attempted to present the international legal challenges that the United States would face in the application of the counter-proliferation option. U.S. policy makers must recognize that the international legality of the application of counter-proliferation in its interdiction form is highly questionable under the present interpretations of international law and may jeopardize the position of the United States within the international community. Whether or not a norm prohibiting the proliferation of nuclear weapons may exist, particularly for signatories of the NPT, no accepted mechanism involving the application of force exists to enforce that norm.

A U.S. counter-proliferation strategy could fill this void; however, the introduction of the strategy will produce costs, including exposing the United States to allegations of an intentional violation of international law. Application of the strategy would endanger the viability of the NPT, especially if the nation subject to the strike were an NPT member and evidence of its nuclear ambitions were less than unquestionable, perhaps even admitted.

Despite these legal barriers, the United States should pursue the counter-proliferation strategy. Conceivably, the United States might seek to expend diplomatic capital in an attempt to legitimize the application of forceful counter-proliferation. Besides the fact that this effort would meet with resistance, such a change could be undesirable for the United States, because if the application of forceful counter-proliferation becomes acceptable within the international community, it would become available to states other than the United States. In such an environment, some nations might undertake a counter-proliferation strike that would be legitimate in the eyes of international community but adverse to U.S. interests. The United States would not want an international legal environment in which an Indian counter-proliferation strike against Pakistan, for example, were legitimate. Furthermore, other states might use counter-proliferation as a shield to justify otherwise illegitimate attacks.

Barring the establishment of a new norm permitting counter-proliferation strikes in their most aggressive form, any U.S. strike in a peacetime setting almost certainly would violate the current tenets of international law. Such a strike, depending upon its consequences, also might violate the laws of armed

conflict during war. While this would be unfortunate, the United States should not sacrifice a potentially valuable strategic tool that could stem proliferation and enhance U.S. national security simply to maintain perfect adherence to a set of international legal rules that in many ways may have become outdated. Such blind adherence would place concerns about the nation's stature within the international community above all other national security interests.[204] Abandoning the counter-proliferation option simply to conform to outdated international standards would be unwise.

International concerns have changed dramatically since the conclusion of the Cold War. No longer must the United States focus on containing the Soviet threat at the expense of other national security interests. Rather, this nation must fashion a modern security policy that addresses the dangers of the post-Cold War era. A strategy of counter-proliferation should play a part in this scheme; however, those who develop this policy must comprehend both its legal and political implications. Failure to do so will ensure that the adoption of a strategy of counter-proliferation not only will violate the stipulations of international law but also might sacrifice the nonproliferation regime and jeopardize the status of the United States within the international community without enhancing the security of the nation.

Notes

1. The United States, Russia, the People's Republic of China, Great Britain, and France developed nuclear warheads before the establishment of the 1968 Non-Proliferation of Nuclear Weapons Treaty (hereinafter NPT). The former Soviet Republics of Belarus, Kazakhstan, and Ukraine possessed nuclear weapons in the wake of the collapse of the Soviet Union. Each of these states has made commitments to return these weapons to Russia. India, which is not an NPT member, exploded what it deemed a "nuclear device" in 1974. Another non-NPT nation, Israel, reportedly has clandestinely developed a small nuclear arsenal. For a detailed account of the development of the Israeli bomb, see Seymour M. Hersh, *The Samson Option: Israel's Nuclear Arsenal and American Foreign Policy* (New York: Random House, 1991). In 1993, South African President F.W. De Klerk admitted that South Africa at one time possessed a small number of nuclear warheads; however, according to De Klerk, South Africa had dismantled those warheads by 1991. For a recounting of the South African nuclear program, see Mitchell Reiss, *Bridled Ambition: Why Countries Constrain Their Nuclear Ambitions* (Baltimore: The Woodrow Wilson Press, 1995), pp. 7-43. Finally, in April 1995, in a visit to the United States, Pakistani Prime Minister Benazir Bhutto admitted that Pakistan has the ability to build a nuclear weapon, but claimed that Pakistan had not actually done so. Thomas W. Lippman, "Bhutto Receives Clinton Promise of Aid," *Washington Post*, 12 April 1995, pp. A1, A31.

2. U.S. Treaties, etc. "Treaty on the Non-Proliferation of Nuclear Weapons (NPT)," *United States Treaties and Other International Agreements*, TIAS 6839 (Washington: U.S. Dept. of State, 1970). The U.S. Senate ratified the NPT in March 1969. The Treaty became effective on 5 March 1970.

3. U.S. President Bill Clinton, "Address to the United Nations (27 September 1993)," *New York Times*, 28 September 1993, p. A16.

4. Douglas Jehl, "Clinton Pledges to Reduce U.S. Nuclear Stockpiles by 200 Tons," *New York Times*, 2 March 1995, p. A6.

5. Paul Keifer (Colonel, USAF), "Changing the Currency of International Security: Counter-Proliferation of Nuclear Weapons (or The New Bipolarism)," in *Implications of Weapons of Mass Destruction (WMD) on USAF Operations: Working Group Meeting #4* (Washington: U.S. Air Force, 11 April 1993), p. 1.

6. Article II of the NPT compels a non-nuclear weapon State Party to forego the development or acquisition of "nuclear explosive devices."

7. For example, in the Spring of 1993, the U.S. Air Force conducted a study regarding the deployment of a counter-proliferation program. Keifer, p. 1. Additionally, in May 1994, the Office of the Secretary of Defense issued a report on its counter-proliferation initiative. U.S. Dept. of Defense, *Report on Nonproliferation and Counterproliferation Activities and Programs, Office of the Deputy Secretary of Defense* (Washington: 1994).

8. For a recounting of the formation of the counter-proliferation initiative, see David B. Ottaway and Steve Coll, "Rethinking the Bomb: U.S. Focuses on Threat of 'Loose Nukes,'" *Washington Post*, 10 April 1995, p. A1.

9. NPT, Art. II.

10. NPT, Art. I.

11. NPT, Art. III.

12. Chris Hedges, "A Vast Smuggling Network Gets Advanced Arms to Iran," *New York Times*, 15 March 1995, pp. A1, A8.

13. Director Of Nuclear Energy Organization Sums Up Progress to Date," BBC Summary of World Broadcasts, 12 September 1996.

14. U.S. Dept. of State, "Extension of the Nuclear Non-Proliferation Treaty," *LEXIS Database, Curnws File*, 15 May 95.

15. "COCOM: Controlling a Deadly Trade," *Economist*, 16 March 1994, pp. 52, 56.

16. Frank Gaffney, "Selling the High Technology Rope," *Washington Times*, 12 September 1995, p. A12.

17. Ibid.

18. U.S. Laws, Statutes, etc., "Export Administration Act of 1979, as amended," *U.S. Code, Title 50—War and National Defense*, 1988 ed. (Washington: U.S. Gov't. Print. Off., 1988), sec. 2401 et seq.

19. U.S. Laws, Statutes, etc., "Nuclear Non-Proliferation Act of 1978," *U.S. Code, Title 42—The Public Health and Welfare*, 1988 ed. (Washington: U.S. Gov't. Print. Off., 1988), sec. 2160.

20. "Proliferation—Cold War II," *Economist*, 11 December 1993, p. 28.

21. Ibid.

22. Ibid.

23. Ibid.

24. J. Brierly, *The Law of Nations*, 6th ed. (Oxford, England: Clarendon Press, 1963), p. 3.

25. As part of the Defense Counter-Proliferation Initiative, the United States is attempting to cooperate with the other members of the North Atlantic Treaty Organization (Nato). Ottaway and Coll, p. A16.

26. Complicating this analysis is the divide that currently exists between North and South. Nations of the Third World might be reluctant to accept counter-proliferation in any form. For a discussion of the implications of this split in the context of intervention generally, see Virginia Gamba, "Justified Intervention? A View from the South," Laura W. Reed and Carl Kaysen, eds., *Emerging Norms of Justified Intervention: A Collection of Essays from a Project of the American Academy of Arts and Sciences* (Cambridge, Mass.: Committee on International Security Studies, American Academy of Arts and Sciences, 1993), p. 115.

27. Lori Fisler Damrosch, "Changing Conceptions of Intervention in International Law," Laura W. Reed and Carl Kaysen, eds., p. 91.

28. Charter of the United Nations, 26 June 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153.

29. U.N. Charter Art. 2, para. 4.

30. The United Kingdom, France, Austria-Hungary, Russia and Germany.

31. For a comprehensive analysis of the history of intervention, see Marc Trachtenberg, "Intervention in Historical Perspective," Laura W. Reed and Carl Kaysen, eds., pp. 15-36. See also Jost Delbrück, "A More Effective International Law or a New 'World Law'?—Some Aspects of the Development of International Law in a Changing International System," *University of Indiana Law Journal*, 1993, v. 68, p. 721.

32. For a review of the events leading up to the initiation of hostilities in World War I, see James Joll, *The Origins of the First World War* (White Plains, N.Y.: Longman Pub., 1992).

33. Delbrück, p. 721.

34. The status of Pakistan offers a recent example where a concern for sovereignty was in tension with U.S. nonproliferation interests. Pakistan, which, according to intelligence reports, was developing a nuclear capability, was supplied with weapons from the United States in the wake of the Soviet invasion of Afghanistan in late 1979. Concerns about the security of Pakistan (along with a desire to arm rebel forces in Afghanistan) prompted the Reagan and Bush administrations to balance nonproliferation concerns with regional security concerns.

35. Delbrück, p. 724.

36. U.N. Charter, Art. 2, para. 1.

37. U.N. Charter, Art. 2, para. 7.

38. Trachtenberg, p. 30.

39. The system during the Cold War was imperfect, as both the United States and the Soviet Union intervened in various disputes throughout the world. However, the norm itself, that intervention is illegitimate, survived the actions of the superpowers and their respective proxies. It just so happened the norm often fell victim to the use of the veto by both powers in the U.N. Security Council.

40. U.S. Congress, Senate, Committee on Foreign Relations, *The Israeli Air Strike*, Hearings (Washington: U.S. Gov't. Print. Off., 1981), pp. 1, 4 (statement of Walter J. Stoessel, Jr., Acting United States Secretary of State) (hereinafter *Hearings*).

41. United Nations, Security Council, *Official Records: Resolutions and Decisions of the Security Council, 1981*, Resolution 487 (1981), S/Res/487 (New York: 1981).

42. Gamba, pp. 117-8.

43. The United States and the Soviet Union presented various drafts of the NPT throughout its original negotiating period in the 1960s to get as many states as possible to subscribe to its goals. William Epstein and Paul C. Szasz, "Extension of the Nuclear Non-Proliferation Treaty: A Means of Strengthening the Treaty," *Virginia Journal of International Law*, 1993, v. 33, p. 741.

44. The wide acceptance of the NPT itself provides evidence for the premise that most, but not all, nonnuclear states accept a norm against the development of nuclear weapons.

45. Virginia Gamba notes that many of the security concerns of the international community are largely security concerns of the great economic powers. These states set the international agenda and define the rules. This leads to the fear among weaker states that intervention will be employed as a tool to "crush the South's own definitions of security threats." Gamba, p. 118. The proliferation of nuclear weapons falls within this rubric, as leaders of potential proliferants see the possible value of the possession of nuclear weapons in regional disputes with their neighbors, whereas present nuclear powers see the threat of proliferation quite differently, fearing the loss of order in the region where the proliferation resides.

46. U.N. Charter Art. 2, para. 3. This article states, "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."

47. U.N. Charter Art. 33, para. 1. Article 33(1) states, "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation,

90. United Nations, Security Council, *Official Records: Resolutions and Decisions of the Security Council, 1981*, Resolution 487 (1981). S/IUF/37 (New York: 1981).

91. Ibid.

92. Anthony D'Amato, "Editorial Comment: Israel's Air Strike upon the Iraqi Nuclear Reactor," *American Journal of International Law*, v. 77, 1983, pp. 587-8.

93. Since no nuclear material was at Tamuz I, Iraq had not violated IAEA safeguards. Construction programs are beyond the powers of the IAEA, which simply safeguards nuclear material.

94. Burrus M. Carnahan, "Protecting Nuclear Facilities from Military Attack: Prospects after the Gulf War," *American Journal of International Law*, v. 86, 1992, p. 525.

95. See *Hearings*, p. 1.

96. For an analysis of this question, see Mallison and Mallison, p. 417.

97. Subsequent events demonstrated that Iraqi efforts to acquire a nuclear weapon were well underway by 1981.

98. Mallison and Mallison, p. 429.

99. For a presentation of the Israeli decision and subsequent justification, see Dan McKinnon, *Bullseye Iraq* [previously published as *Bullseye Reactor* and *Bullseye One*] (New York: Berkley Books, 1988), chapters 13 and 18.

100. This assumption proved unwarranted. However, in 1981, the international community assumed that the Iraqi nuclear program, while suspicious, was dedicated to peaceful purposes. The fact that the program was the subject of recurrent IAEA inspections augmented this belief.

101. The discoveries made after the 1991 Persian Gulf War established that these conclusions were correct. Newcomb, pp. 625-7.

102. Although not actively engaged in hostilities, Iraq and Israel were (and still are) in a state of war in 1981. Iraq never signed an armistice with the Israelis following their 1967 war. Hearings, p. 76. Moreover, Iraq, along with the Palestine Liberation Organization and the other Arab states with the exception of Egypt, had announced their commitment to the destruction of Israel.

103. Newcomb, p. 626.

104. *Hearings*, p. 76.

105. See Polebaum, pp. 223-6, for a detailed discussion of Israeli diplomatic efforts to impede the development of the Tamuz I reactor.

106. Ibid.

107. McKinnon, p. 115.

108. For a contrary view, see Mallison and Mallison, p. 432. "A present armed attack in response to an assumed future but not imminent armed attack, even if the latter is deemed to be nuclear, cannot meet the requirement of proportionality in even its most liberal formulation. This, however, is exactly what Israel claimed to be legally justified."

109. Polebaum, p. 226.

110. "The reactor was damaged severely and three Iraqi civilians and one French technician were killed." Mallison and Mallison, p. 418, citing interview with Iraqi President Saddam Hussein, *Issues and Answers*, 28 June 1981 (American Broadcasting Company television broadcast).

111. Erickson, p. 142. Again, one must consider that the Israeli action might be atypical due to Israel's status in the international community in the early 1980s.

112. Richard Cheney, "Remarks by Secretary of Defense Richard Cheney to the Jewish Institute for National Security Affairs Conference Dinner," *LEXIS, News library, Curnws file*, 28 October 1991.

113. For an overview of these statistics, see Normand and Jochnick, pp. 390-1.

114. While Russia and China still possess forces capable of targeting U.S. territory, tensions among these states have generally been reduced. For example, cooperation among the nuclear scientists of the three states has begun. For an overview of this relationship, see Steve Coll and David B. Ottaway, "Rethinking the Bomb: Secret Visits Helped Define 3 Powers' Ties," *Washington Post*, 11 April 1995, p. A1.

115. This analysis ignores the possibility of an accidental nuclear attack from one of the former republics of the Soviet Union or China. While this possibility certainly should concern U.S. leaders, the potential for an accidental attack is not the danger that leads to a preemptive strike.

116. Lewis A. Dunn, "Rethinking the Nuclear Equation: The United States and the New Nuclear Powers," *Washington Quarterly*, v. 17, Winter 1994, p. 17.

117. Article X(1) states: "1. Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests."

118. Personal confidential discussion with Department of Defense official, Washington, D.C., 30 March 1995.

119. Normand and Jochnick, p. 390, n. 8, citing *DOD Interim Report*, p. 2:7.

120. In the months of deliberations preceding the decision to order the air strike, Israeli leaders anticipated that the international community would censure the attack.

121. Cheney statement.

122. McKinnon, p. 5.

123. This discussion concentrates on peacetime reprisals, which forcefully punish an illegal act by a state before the commencement of military hostilities. Wartime reprisals, which occur after the outbreak of hostilities, are not the focus of this discussion.

124. Derek Bowett, "Reprisals Involving Recourse to Armed Force," *American Journal of International Law*, v. 66, 1972, p. 3.

125. Erickson, p. 121.

126. See Khan, pp. 440-1.

127. Erickson, p. 177.

128. Ibid., p. 176.

129. Article 52(1) states: "Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations."

130. See Arend, p. 6.

131. Some commentators have claimed that the traditional nonproliferation route is no longer worth traveling and that if more states actually possessed a nuclear capability, stability would be enhanced. For a discussion of this proposition in the context of the former

Soviet Republic of Ukraine, see John J. Mearsheimer, "The Case for a Ukrainian Nuclear Deterrent," *Foreign Affairs*, v. 72, Summer 1993, p. 50.

132. For example, it is possible to argue that the U.S. invasion of Panama in 1989 to oust Manuel Noriega should be considered an act of reprisal because it met all three elements of the reprisal test. The Noriega regime was violating international law in a number of ways. It was suppressing human rights. It also was assisting the suppliers of illegal drugs to ship their product to the United States. Finally, the Panamanian military mortally wounded a member of the U.S. armed forces, sparking the U.S. invasion. This action was taken to protect U.S. interests and to compel Panama to abide by international law. Deciding whether the U.S. action itself violated international law is beyond the scope of this study.

133. Arend, p. 15.

134. By "war," I mean either a congressionally declared war or a conflict similar to that waged by the U.N.-sanctioned coalition against Iraq in early 1991. A counter-proliferation action described in the previous sections of this paper could spark this type of conflict. Thus, the laws of war may become relevant in those scenarios as well. For a description of various definitions of the term "war," see Ingrid Detter De Lupis, *The Law of War* (New York: Cambridge University Press, 1987), pp. 1-18.

135. President Bill Clinton reportedly reviewed the Korean war plan, entitled USFK 50-27, with Secretary of Defense Les Aspin and Chairman of the Joint Chiefs of Staff General John M. Shalikashvili in a White House meeting on 10 December 1993. Barton Gellman, "Trepidation at Root of U.S. Korea Policy: Conventional War Seen Catastrophic for South," *Washington Post*, 12 December 1993, p. A1.

136. John Lancaster, "Aspin Vows Military Efforts to Counter Arms Proliferation," *Washington Post*, 8 December 1993, p. A7. See also *Report on Nonproliferation* (note 7).

137. Convention (IV) Respecting the Laws and Customs of War on Land, signed at the Hague, 18 October 1907; I Bevans 631, 36 U.S. Statutes at Large 2227.

138. There are four conventions which together comprise the Geneva Conventions. These are: Geneva Convention for the Protection of the Wounded and Sick in Armed Forces in the Field, opened for signature 12 August 1949; 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31; the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, opened for signature 12 August 1949; 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 85; the Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature 12 August 1949; 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135; and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature 12 August 1949; 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287.

139. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted by the Conference 8 June 1977, U.N. Doc. A.32/144; reprinted in 16 I.L.M. 1391 (1977) (hereinafter Protocol I). A second Protocol (Protocol II) was also signed in 1977. It dealt with the treatment of civilians during civil strife and is not of concern for this discussion on counter-proliferation.

140. For an analysis of the need to follow the laws of war when employing force, see Oscar Schachter, "In Defense of International Rules of the Use of Force," *University of Chicago Law Review*, v. 53, 1986, p. 113.

141. Richard I. Miller, *The Law of War* (Lexington, Mass.: Lexington Books, 1975), p. 90.

142. L.C. Green, *Essays on the Modern Law of War* (New York: Transnational Publishing Co., 1985), p. 143.

143. Carnahan, p. 529.

144. Anthony Leibler, "Deliberate Wartime Environmental Damage: New Challenges for International Law," *California Western International Law Journal*, v. 23, 1992-1993, p. 99.

145. Green, p. 143.

146. Ibid.

147. Hague Convention (IV).

148. Miller, p. 90.

149. Rainer Lagoni, "Comments: Methods or Means of Warfare, Belligerent Reprisals, and the Principle of Proportionality," Dekker and Post, eds., pp. 117-8.

150. Protocol I.

151. Ibid.

152. For an argument that the United States should ratify Protocol I, see Theodor Meron, "Editorial Comment: The Time Has Come for the United States to Ratify Geneva Protocol I," *American Journal of International Law*, v. 88, 1994, p. 678.

153. Ronald Reagan, 29 January 1987 message to the Senate transmitting Protocol II Additional to the Geneva Conventions of 12 August 1949 for advice and consent, including an explanation as to why Protocol I is not being submitted; reprinted in *American Journal of International Law*, v. 81, 1987, p. 911.

154. George H. Aldrich, "Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions," *American Journal of International Law*, v. 85, 1991, p. 1.

155. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27.

156. The United States has not ratified the Vienna Convention on the Law of Treaties. However, the Department of State recognizes the Convention as an authoritative guide to the structure of international law.

157. U.S. Dept. of Defense, *Conduct of the Persian Gulf Conflict*, p. O-1. This report cites Protocol I when discussing Coalition targeting, collateral damage, and civilian casualties.

158. Ten members of Nato have ratified the Protocol. They are Belgium, Denmark, the Federal Republic of Germany, Greece, Iceland, Italy, Luxembourg, the Netherlands, Norway and Spain. Edward K. Kwakwa, *The International Law of Armed Conflict: Personal and Material Fields of Application* (Hingham, Mass.: Kluwer Academic Pub., 1992), p. 64.

159. Secretary of Defense Les Aspin announced the establishment of the counter-proliferation initiative at an October 1993 meeting of Nato ministers in Germany. Peter Mackler, "U.S. Counter-proliferation Scheme Runs into Problems," *Agence France Presse*, 7 January 1994.

160. J. Ashley Roach, "Ruses and Perfidy: Deception during Armed Conflict," *University of Toledo Law Review*, v. 23, 1992, p. 396. The South Koreans have attached a reservation to the Protocol, but it does not specifically restrict the country's commitments to Article 56 regarding the release of dangerous forces. Telephone interview with Ho Jin

Chang, Political Officer, Republic of Korea Embassy to the United States, Washington: 5 April 1994.

161. Carnahan, p. 533.

162. Bernard K. Schafer (Major, USAF), "The Relationship between the International Laws of Armed Conflict and Environmental Protection: The Need to Reevaluate What Types of Conduct are Permissible during Hostilities," *California Western International Law Journal*, v. 19, 1988-1989, p. 310, n. 111.

163. Carnahan, p. 533.

164. Ibid.

165. Leibler, p. 108.

166. W. Hays Parks, "Air War and the Law of War," *Air Force Law Review*, v. 32, 1990, p. 210.

167. Carnahan, p. 533.

168. Leibler, p. 109.

169. Ibid., p. 115.

170. Ibid., p. 109.

171. Ibid., p. 99.

172. Protocol I. The United States posits that nations need only to take all "reasonable" precaution rather than all "feasible" precautions.

173. Ibid.

174. Richard Falk, "The Environmental Law of War: An Introduction," Glen Plant, ed., *Environmental Protection and the Law of War: A 'Fifth Geneva' Convention on the Protection of the Environment in Time of Armed Conflict* (New York: John Wiley & Sons, 1992), p. 88.

175. Sweden, "Working Paper, Proposals for Parts of a Treaty Prohibiting Radiological Weapons and the Release or Dissemination of Radioactive Material for Hostile Purposes, Conference on Disarmament Doc. CD/RW/WP.52," 1984, p. 1.

176. Carnahan, p. 533.

177. Ibid., p. 534.

178. Ibid., p. 536.

179. Ibid.

180. "Final Declaration, Ann. I, Conf. Doc. NPT/CONF. III/64/I (1985)," *U.N. Department of Disarmament Affairs, Disarmament Fact Sheet No. 43, The Third Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons* (New York: United Nations, 1985), pp. 14, 19.

181. Carnahan, p. 536.

182. Parks, p. 210.

183. Ibid.

184. Ibid.

185. Kalshoven, p. 106.

186. Ibid., p. 98.

187. Ibid.

188. Ibid., p. 106.

189. Ibid.

190. Carnahan, p. 524.

191. Ibid., pp. 526-7.

192. United Nations, Security Council, *Official Records: Resolutions and Decisions of the Security Council, 1990*, Resolution 678 (1990), (New York: U.N., 1990).

193. Carnahan, p. 527.

194. For other arguments that the United Nations, in fact, did not give such authorization, see N. Dombey, "US Attacks on Reactors Sets Dangerous Precedent," *Financial Times*, 25 January 1991, p. 17.

195. Carnahan, p. 527.

196. Khan, p. 435.

197. "Table of Ratifications and Accessions to the Geneva Conventions of 1949, the Geneva Protocols 1977 and the Weapons Convention 1981 as of 10th October 1988," Michael A. Meyer, ed., *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention* (London: The British Institute of International and Comparative Law, 1989), pp. 281-9.

198. Green, pp. 142-3.

199. Carnahan, p. 524.

200. In retrospect it turns out that Iraq possessed little weapons-grade material at the time of the Gulf War. However, coalition war planners did not possess specific knowledge of the amount of material in Iraq's possession. Consequently, the planners had to make their decisions relating to proportionality with incomplete information.

201. Green, p. 143.

202. Ann MacLachlan and Mark Hibbs, "U.S. Challenged at IAEA Board on Iraqi Attacks," *Nucleonics Week*, 28 February 1991, p. 5.

203. Carnahan, p. 529.

204. The U.S. dependence on nuclear deterrence and the U.S. reluctance to renounce any use of nuclear weapons provides an apt analogy to this analysis. The United Nations General Assembly has passed a resolution prohibiting the use of nuclear weapons and has called for nuclear disarmament. Despite this pronouncement, the United States is not about to disarm simply because the use of nuclear weapons might violate international law. Such disarmament would be adverse to U.S. national interests. Albeit on a smaller scale, sacrificing counter-proliferation also would be adverse to the national interests.

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Frank G. Goldman is an attorney with the Enforcement and Compliance Division of the U.S. Office of the Comptroller of the Currency. Before taking his current position, Mr. Goldman received his *juris doctorate cum laude* from Cornell Law School in Ithaca, New York, in 1994. From 1988 to 1991, Mr. Goldman was a member of the U.S. Air Force, stationed in Cheyenne, Wyoming. During his time in the Air Force, Mr. Goldman was a Minuteman III Missile Launch Officer. He received a master's degree in international studies from the University of Wyoming in Laramie, Wyoming, in 1991. His master's thesis addressed nuclear nonproliferation topics for the 1990s. From 1987 to 1988, Mr. Goldman was a John M. Olin Fellow at the U.S. Naval War College in Newport, Rhode Island. He received his bachelor of arts degree in government *cum laude* from Cornell University in Ithaca, New York, in 1987. Mr. Goldman currently resides in Bethesda, Maryland.

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