

ISRAEL'S AIR STRIKE AGAINST THE OSIRAQ REACTOR: A RETROSPECTIVE*

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Imagine if Iraq had been armed with nuclear weapons during the Gulf War. At least some of its forty or more Scud missiles that bombarded Israel and Saudi Arabia would then have had thermonuclear warheads that would have killed millions of innocent people—vastly more than the deaths resulting from the atomic bombing of Hiroshima and Nagasaki in 1945. Even if the Scuds had been intercepted in flight by the Allied “Patriot” interceptors (and most were not), nuclear blasts in the atmosphere would have done almost as much damage to the dense Mideast population.

But the forgoing scenario would not have occurred. Instead, the threat to Israel and its neighbors would have been so great that Operation Desert Storm against Iraq probably would not have been mounted by the United States and other countries. Instead, Saddam Hussein would probably have gotten away with his aggression against Kuwait. And if *that* had happened, Saddam's dementia combined with vast oil wealth and a nuclear capability could have altered for the worse the course of human history. Israel's preemptive strike against the Iraqi nuclear installation in Osiraq ironically benefited Kuwait and Saudi Arabia even more than itself.

These retrospective and counterfactual speculations make it clear that Israel did the world a great service on June 7, 1981, in its air strike against the Osiraq nuclear reactor. But Monday morning quarterbacking is easy. We ought to take the perspective of 1981 and ask two questions: (1) Could the importance of Israel's action have been assessed years before the Persian Gulf War? and (2) Was Israel's air strike permissible under international law?

I. THE IMPORTANCE OF ISRAEL'S AIR STRIKE

The importance of Israel's air strike against the Iraqi nuclear reactor was contemporaneously assessed in two Op-Ed pieces in the *Washington Star* on June 11th and 15th, 1981, both of which were reprinted and cited extensively in Congressional hearings on the incident.¹ In the first of these, Representative Stephen J. Solarz argued that “once the Iraqis actually had nuclear weap-

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1. See Stephen J. Solarz, *Israel Had No Other Way to End Nuclear Threat*, WASH. STAR, June 11, 1981, reprinted in 127 Cong. Rec. E2948 (daily ed. June 12, 1981) [hereinafter Solarz]; Anthony D'Amato, *Imagining a Judgment in the Case of Iraq v. Israel*, WASH. STAR, June 15, 1981 [hereinafter D'Amato Op-Ed]; *The Israeli Air Strike, 1981: Hearings Before the Senate Comm. on Foreign Relations, 97th Cong., 1st Sess. 85-88 (1981)* [hereinafter D'Amato Testimony] (testimony of Anthony D'Amato).

ons, it would have been too late to do anything about it.”² If Israel had not acted, the “acquisition of nuclear weapons by a militant and murderous Baathist regime in Baghdad” would not only have endangered the “survival of Israel” but also “the peace and stability of the entire world.”³ In the second Op-Ed essay, I argued that Iraq “is currently in violation of international law for its war of aggression against Iran and its treatment of Assyrian minorities in northern Iraq.”⁴ Iraq, I added, was “an unstable state” that has “publicly called for the annihilation of Israel.”⁵ Iraq even stated publicly in September, 1980, when Iranian planes caused minimal bomb damage to its nuclear reactor, that the reactor was not intended to be used against Iran but against the “Zionist enemy.”⁶

In short, it was not overly difficult at the time to understand the importance to world peace of Israel’s air strike against the Iraqi reactor. Events since 1981 have only served to underline and reinforce those early perceptions.

II. ISRAEL’S AIR STRIKE DID NOT VIOLATE INTERNATIONAL LAW

Within two weeks of Israel’s air strike the U.N. Security Council passed a resolution which “*strongly condemns* the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct.”⁷ International scholars were nearly unanimous in agreeing that Israel had violated international law. My colleagues on the Board of Editors of the American Journal of International Law were surprised by my unconventional view expressed in the Op-Ed essay and in my testimony before the Senate Foreign Relations Committee.⁸ To further spell out my position, I wrote an editorial for the American Journal,⁹ gave a speech in Canada,¹⁰ and devoted a chapter of a book published in 1987 to the general subject.¹¹ (I cite this additional work because of a point about fairness in debate that I want to make at the end of this essay.)

The main legal arguments about the legality or illegality of the Israeli air strike under international law can be collected under four headings. Let me summarize them briefly and add some present observations.

2. Solarz, *supra* note 1.

3. *Id.*

4. D’Amato Op-Ed, *supra* note 1.

5. *Id.*

6. *Id.*

7. UNSC Res. 487, 36 UN SCOR, 2288th mtg., UN Doc. S/RES/487 (1981).

8. See D’Amato Op-Ed and D’Amato Testimony, *supra* note 1.

9. See Anthony D’Amato, *Israel’s Air Strike Upon the Iraqi Nuclear Reactor*, 77 AM. J. INT’L L. 584 (1983) [hereinafter D’Amato Editorial].

10. Anthony D’Amato, *The International Law Aspects of the Israeli Air Strike*, Address Before the Canadian Professors for Peace in the Middle East, The University of Toronto (May 11, 1987).

11. ANTHONY D’AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* 75 (1987) (author referring to Chapter Four entitled *Use of Force Against Nuclear Installations*).

A. "Anticipatory Self-Defense"

Representative Solarz argued in his Op-Ed essay that Israel's air strike "must be considered an understandable and legitimate act of self-defense."¹² My Op-Ed essay in the same newspaper took the opposite position:

Such an argument would invoke the same provision [Article 51 of the U.N. Charter] that attorneys for the U.S. Department of State used to justify the blockade of Cuba in 1962 during the Cuban missile crisis. However, the argument now is no better than it was then. The self-defense provision of Article 51 comes into effect only 'if an armed attack occurs.' There was no armed attack on the U.S. in 1962 anymore than there was on Israel in 1981.¹³

To be sure, all general legal proscriptions are vague. But vagueness is not the same as meaninglessness. "Self-defense" and "anticipatory self-defense" are vague but not vacuous. Unless we want to do violence to language, those terms simply cannot apply to Israel's preemptive strike on an Iraqi nuclear reactor facility that was not even operational at the time of the strike.

Yet even now some scholars are invoking the notion of "anticipatory self-defense" to justify Israel's action. In an essay published in this journal, Louis Rene Beres and Yoash Tsiddon-Chatto correctly define anticipatory self-defense as an entitlement to strike first when the danger posed is "instant, overwhelming, leaving no choice of means and no moment for deliberation."¹⁴ In claiming that this language actually describes Israel's air strike, they only succeed in impairing their own credibility.

B. "A State of War"

Another argument advanced by Representative Solarz at the time of the Israel air strike is the following:

Iraq is still in a technical state of war against Israel, never having signed the Armistice Agreement, as did Egypt, Jordan, the Lebanon, and even Syria, in 1949. Indeed, to this day, Iraq still has not recognized Israel's right to exist and continues to call for the elimination of the 'Zionist entity.'¹⁵

The point is that if a war exists between Iraq and Israel, Israel's bombing of the Osiraq nuclear reactor is just a normal and legitimate part of the general conduct of war.

My reply to Representative Solarz was that resort to war has been illegal under international law since the Kellogg-Briand Peace Pact of 1928. It fol-

12. Solarz, *supra* note 1.

13. D'Amato Op-Ed, *supra* note 1.

14. Louis Rene Beres & Yoash Tsiddon-Chatto, *Reconsidering Israel's Destruction of Iraq's Osiraq Nuclear Reactor*, 9 *TEMPLE INT'L & COMP. L.J.* 437, 438 (Fall 1995).

15. Solarz, *supra* note 1. An armistice agreement does not terminate a state of war, as Professor Beres and Colonel Tsiddon-Chatto point out. Beres & Tsiddon-Chatto, *supra* note 14, at 439. See also John Quigley, *Israel's Destruction of Iraq's Nuclear Reactor: A Reply*, 9 *TEMPLE INT'L & COMP. L.J.* 441, 443 (Fall 1995).

lows that a nation cannot derive a legal entitlement from an illegal war. Whether or not Israel or Iraq, or both, regarded themselves as being in a state of war, any hostilities between them would amount to separate breaches of the peace in the eyes of the international community and would subject either country to forcible intercession by the U.N. Security Council.

C. *The Security Council Resolution*

I have already quoted the U.N. Security Council resolution which “*strongly condemn[ed]*” Israel’s air strike.¹⁶ But there is less here than meets the eye. In the first place, the Security Council is not empowered to create international law; it is not a world legislature. Hence its resolutions can only be an expression of the opinion of its members, and not constitutive of international norms. Secondly, since the sponsors of the resolutions *know* that resolutions are not norm-creating, they are afforded a diplomatic opportunity to have their cake and eat it too—to condemn something while secretly applauding it. The Security Council resolution condemning Israel may have seemed tough in its wording, but its importance lies in what it omitted. There was no mention of punishment in the resolution. There was no call for reparations to be paid by Israel. There was no call for damages. No enforcement machinery under the Charter was set in motion (as it was, for example, ten years later in respect of Iraq’s invasion of Kuwait). Any informed observer looking at the action of the Security Council would have been justified in calling it a gentle pat on the wrist. In actual effect, though not in wording, the resolution can only be seen as covert support for Israel’s air strike. My guess is that the international community, via the resolution, was breathing a collective sigh of relief.

D. *Systemic Considerations*

Given the contemporaneous arguments that I made about the Israel air strike—that Israel had no “self-defense” justification and no “state of war” entitlement—the present reader may wonder what was left that could justify the air strike as permissible under international law. The argument I made at the time, and which I continue to believe is valid, is that Israel acted as a proxy for the international community. In short, the justification for Israel’s air strike cannot be found in considerations peculiar to Israel, but it can be found in globally inclusive considerations:

International law that has evolved over thousands of years as a system for stabilizing the interactions of states and governments by defining presumptions of legality arising out of the customary acts of the states themselves. The purpose of international law is to create the precondition for peace and human rights.¹⁷

In a subsequent expansion of this idea, I included the uniqueness of nuclear weapons as a threat to systemic stability:

16. UNSC Res. 487, *supra* note 7 (emphasis added).

17. D’Amato Op-Ed, *supra* note 1.

The destructive potential of nuclear weapons is so enormous as to call into question any and all received rules of international law regarding the transboundary use of force. Many of the old rationales for these rules no longer apply. At the same time, the shared values underlying the rules apply more emphatically than ever, for the stake is global survival.¹⁸

There are several constraints implicit in the foregoing arguments:

- (1) The preemptive strike has to be against a nuclear weapons facility, and not against any other kind of weaponry;
- (2) The target state must be a rogue state in the sense that it is unstable and is likely to use its nuclear weapons for international blackmail and aggrandizement;
- (3) The preemptive strike must be limited to the nuclear facility target and must be carried out with the least possible loss of life; and
- (4) The international community must be *de facto* disabled from carrying out the strike itself, thus implicitly authorizing an attack state to act as proxy for the international community.

As I realized subsequent to my writing on the Israeli air strike, the idea of multilateral disability for carrying out inclusive objectives resulting in giving a state a unilateral proxy can also apply to the quite different area of humanitarian intervention. I argued in the cases of U.S. intervention in Grenada¹⁹ and Panama²⁰ that when fundamental human rights are in jeopardy and the international community for whatever reason does not take action, a state is authorized to take limited military incursion to prevent additional violations of fundamental human rights, provided that the attacking state withdraw as soon as possible and makes no attempt to interfere with the territorial integrity or political independence of the target state.²¹ I happened to be attending an international law conference on the day that the United States sent its troops into Saudi Arabia as a show of force against the Iraq army which had just overtaken Kuwait and was threatening to march into Saudi Arabia. Many of the conferees were asked about the legality of the unilateral action of the United States (this was, of course, months before the actual launching of Operation Desert Storm). My brief comment, perhaps because it seemed pithy, was picked up and aired on CNN's Headline News every twenty minutes for the next twenty-four hours. I said that "multilateral action is better than unilateral action, but unilateral action is better than no action at all." This fairly sums up my position not only with respect to the Kuwait invasion, but also as to Grenada, Panama, and the Israeli strike against the Osiraq reactor.

18. D'Amato Editorial, *supra* note 9, at 588.

19. See Anthony D'Amato, Letter to the New York Times (Sun., Oct. 30, 1983).

20. See Anthony D'Amato, *The Invasion of Panama was a Lawful Response to Tyranny*, 84 AM. J. INT'L L. 516 (1990).

21. See ANTHONY D'AMATO, INTERNATIONAL LAW AND POLITICAL REALITY 180-91 (1995).

Although my international law colleagues may not agree with my general position on these matters, it is a source of comfort to me that many of them have recently acknowledged that I was right in 1981 in defending the legality of Israel's air strike against the Iraqi nuclear reactor. It is clear, they say, that if Saddam Hussein had had a nuclear capability at the time of his invasion of Kuwait, the consequences would have been unimaginably terrifying for global peace.

3. Fairness in Academic Debate

As I have already mentioned, Professor Louis Rene Beres and Colonel Yoash Tsiddon-Chatto have contributed an essay on the Israeli air strike in a recent issue of this Journal.²² I appreciate the new details on the raid itself that they have provided. However, they strive to create the impression that their arguments are new. They call for a reconsideration of Israel's legal position. They proceed to argue the issues of anticipatory self-defense and state of war that I have presented above, all along implying that these arguments are now being made for the first time. Their lengthy footnotes create the appearance that their research has been thorough and exhaustive.

Nowhere do they mention that their arguments have been previously ventilated. Nowhere do they cite my work nor even take up without attribution the merits of my replies to the arguments about self-defense and state of war. Any reader who is new to the debate about the Israeli air strike is therefore not told that the arguments of Professor Beres and Colonel Tsiddon-Chatto are unoriginal and have been challenged in the past. If these authors had felt constrained by the standards of fair scholarly debate, their essay might have been improved; they might have been inspired to respond to existing arguments. Instead, for reasons of their own, they chose to repackage old goods and pass them off as new. In my opinion, the dialectics of scholarship can only work over time to approach the ideal of truth if each scholar gives scrupulous attention and credit to the work of his or her predecessors in the debate, fairly summarizes that work, and proceeds to build upon that work by adding new insights and facts that will assist the reader in the overall process of consideration and assessment.

22. Beres & Tsiddon-Chatto, *supra* note 14, at 437.