The change of state practice in regards to preemptive self-defense in the presence of nuclear threat: the possibility of preemptive attack by China against North Korea, US invasion of Iraq (2003), Israel bombing Osirak in Iraq (1981) and Israel bombing Al Kibar (2007)

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Master’s Project


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ABSTRACT
The problem that the project discusses is: state practice in the presence of a nuclear threat challenges self-defense requirement under Article 51 of UN Charter “the occurrence of an armed attack”. In fact, states claim that the imminence of the nuclear threat and necessity of an armed attack regulate their practice in handling it. This is based on Caroline Case principles 1837.

The project hypothesis is in the presence of a nuclear threat state practice changes into preemption consistent with Caroline principles. The hypothesis is elaborated in four case studies based on Theory-Guided methodology. The possibility of conducting a preemptive self-defense attack by China against North Korea, United States invasion of Iraq 2003, Israel Bombing Osirak 1981 and Israel bombing Al Kibar 2007 are the case studies. The hypothesis states that the four case studies create a new norm of preemption based on Caroline case.

The findings do not support the hypothesis. The project interprets that China abides by Article 51 of United Nations, NPT and IAEA regulation in the case of North Korea. Israel and United States practice diverge from International Law and Customary International law requirements of self-defense in the presence of a nuclear weapons threat. In other words, their practices are based on Begin and Bush Doctrines. There is no new norm of preemption consistent with Caroline case in the presence of a nuclear threat.
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TABLE OF CONTENTS

Abstract...........................................................................................................................................2
Acknowledgments............................................................................................................................3
Table of Contents............................................................................................................................4
Chapter One
   Introduction.......................................................................................................................................5
   Research Question..........................................................................................................................8
   Background........................................................................................................................................9
   Client Description..........................................................................................................................12
Chapter Two
   Literature Review..........................................................................................................................14
Chapter Three
   Methodology and Case or Data Selection.....................................................................................28
Chapter Four Analysis of the Data
   Possibility of an Armed Attack by China against North Korea.................................................34
   US Invasion in Iraq 2003..............................................................................................................40
   Israel Bombing Osirak 1981.........................................................................................................53
   Israel Bombing Al-Kibar 2007.....................................................................................................69
Chapter Five Conclusion, Implications and Recommendations
   Discussion of the Case Studies and Recommendations.........................................................76
References..........................................................................................................................................81
APPENDIX A
CHAPTER ONE

I. Introduction

“We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries... The greater the threat, the greater is the threat of inaction — and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively.”

— George W Bush
United States National Security Strategy, 2002

Inspired by the enormous capability of a nuclear threat, this project examines the impact of this threat on state practice. The project studies four cases: the possibility of an attack by China against North Korea, US invasion of Iraq 2003, Israel bombing Osirak reactor in Iraq 1981 and Israel bombing Al-Kibar 2007. It questions whether or not the change in state practice in the cases creates a new norm of preemptive self-defense based on Caroline Doctrine. To be specific, the project query is: Does the change in state practice in the presence of a nuclear threat creates preemptive self-defense norm consistent with Caroline principles? The hypothesis indicates that the occurrence of a nuclear menace encourages the development of a new norm of preemption under Caroline case 1837 requirements.

Arend (2003) in his article *International Law and the Preemptive Use of Military Force* identifies the two criteria for preemptive self-defense under Caroline case: necessity and proportionality of an attack (Arend, 2003). Both Caroline case and Article 51 of UN Charter principles are examined in each case to evaluate whether the change in state practice towards a nuclear threat was based on Caroline case or Article 51.

Comparative Analysis of Nuclear-Armed States argue that not all nuclear weapons have the same effect on states repercussions. Some nuclear weapons can reach neighboring countries and others can reach distant countries (Early and Asal, 2014). Secondly, Sagan (2002) op cit in Early and Asal (2014) argues that any mistake or error concerning the elimination of the threat can have the capacity to jeopardize the safety of the states\(^1\) (Early and Asal, 2014).

Given the hazardous consequences of nuclear weapons, the Non-Proliferation Treaty (NPT) regulates nuclear weapons and non-nuclear weapons states. The Nuclear Threat Initiative discusses NPT treaty. “Nuclear Weapon states (NWS) are not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices and not to assist, encourage, or induce any non-nuclear weapons states (NNWS) to manufacture or otherwise acquire them” (NTI, n.d.). In addition, the NPT provides safeguards mechanism. “NNWS must place all nuclear materials in all peaceful nuclear activities under IAEA safeguards” (NTI, n.d). The NPT encourages states to exchange nuclear weapons for peaceful purposes (NTI, n.d.). One of the main obligations under NPT is disarmament. In other words, “All parties must pursue negotiations in good faith on effective measures relating to the cessation of the nuclear arms race and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control” (NTI, n.d.).

Nonetheless, Ford (2007) critically evaluates Article VI under the NPT in his article Debating Disarmament: Interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons. Article VI is the main article that demands disarmament. It mentions


From a legal perspective, the legality of the threat or use of nuclear weapons under International Court of Justice advisory opinion is neutral. It did not determine whether or not the use of nuclear weapons is legal (icj-cij.org, 1996). Weise (2012) highlights the consequences of NPT failure:

> Continued failure to address shortfalls of current nonproliferation law and the international prohibition on the use of force hurts the international legal regime in two ways. First, international law is undermined by international leaders who believe that unilateral military action is necessary and morally justified, regardless of its legality…Second, the international legal regime is hurt by states that violate their non-proliferation and disarmament obligations under customary international law and the NPT (Weise, 2012).

The limitations that are found in nonproliferation law and the international prohibition on the use of force, therefore, encourage states to act preemptively against a nuclear threat. The possibility of an attack by China against North Korea, US invasion in Iraq 2003, Israel bombing Osirak in 1981 and Israel bombing Al-Kibar 2007 are mere examples. To examine if the resort to preemptive self-defense in the four cases created a new norm consistent with Caroline principles or not, the project elaborates the development of customary international law. In fact, customary international law norms are created if they meet specific criteria. The International Committee of the Red Cross in its article, *Customary IHL – Introduction* stipulates the two main elements of customary international law:
It is generally agreed that the existence of a rule of customary international law requires the presence of two elements, namely State practice (*usus*) and a belief that such practice is required, prohibited or allowed, depending on the nature of the rule, as a matter of law (*opinio juris sive necessitatis*) (icrc.org, n.d.).

II. The Research Question

The objective of this project is to analyze state practice in regards to preemptive self-defense in the presence of a nuclear threat. In particular, does state practice in regards to countering an emerging threat of nuclear weapons suggests a change in customary international law that permits preemptive self-defense in presence of nuclear threat?

Consequently, the project answers the following questions:

1. What are the norms historically on preemptive self-defense?
2. What defines the limits on state behavior in terms of self-defense when a nuclear weapons threat is present?
3. What conventions are in place to mitigate?
4. Do states trust these or is there evidence of states acting preemptively?
5. What are the requirements for creating a new norm?

The main hypothesis is that in the presence of nuclear threats, state practice diverges from international law as expressed in UN Charter. The following three case studies: Israel bombing Osirak 1981, US invasion in Iraq 2003 and Israel bombing Al-Kibar 2007 have two common factors: the occurrence of preemptive self-defense and the presence of a nuclear threat. In the fourth case, the possibility of an attack by China against North Korea has not been an attack yet but a nuclear threat exists.

When measuring the gradual change of state practice in the case studies, the project concentrates on customary law (state practice and *opinio juris*) and self-defense legal requirements in Article 51 under the United Nations Charter. Also, the project focuses on the customary law requirements of pre-emptive self-defense stated in the Caroline Case: necessity and proportionality of the attack. Greenwood (2003) in his article *International
Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq, maintains that the threat must be “A necessity of self-defense, overwhelming, leaving no choice of means and no moment for deliberation” (Greenwood, 2003). Arend (2003) indicates that the attack should be proportional to the threat under Caroline criteria of preemptive self-defense (Arend, 2003).

III. **Background**

*Article 51 of United Nations and International Law are Ambiguous In Regards to Nuclear Threats*

The text of Article 51 of UN Charter suggests that the right of self-defense is legal under the condition of the occurrence of an armed attack first.

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 (U.N. Charter art. 51).

The interpretation of Article 51 is not clear. Should states wait until an armed attack takes place or act before the attack destroys them? Neither the International Court of Justice nor the Security Council decided on the precise meaning of the article. Furthermore, “the Nicaragua case, the ICJ made a point of noting that, because the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised … the Court expresses no view on the issue”[^2] (Arend, 2003).

In addition, nuclear weapons threats are not addressed by traditional international law. Odomovo (2013) in his research *New Security Threats, Unilateral Use of Force, and the*

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International legal Order, examines the role of international legal system in handling new threats through the use of force (Odomovo, 2013). “International law, as embodied, in the UN Charter is concerned more with the maintenance of peace and security and less with the legal rules of the use of force” (Odomovo, 2013). Thus, state practice in handling new threats violates and changes international law (Odomovo, 2013). “Although these changes still lack the status of binding international law, as they are at the level of individual state practice, they have set a legal precedent to which other states would lay claim in the future” (Odomovo, 2013). However, it can be binding if the violations are accepted (Odomovo, 2013).

Indeed, “the emergence of more elusive and deadly threats posed by the convergence of terrorism and WMD has rendered dangerous such restrictive standards of international law as “imminence” because the threat of nuclear attack is always imminent” (Odomovo, 2013). Likewise, “Neither WMD nor terrorist actors were envisioned in this framework” (Arend, 2003). Nuclear weapons in particular were secretly reserved; therefore, the UN Charter did not include them (Arend, 2003). “John Foster Dulles would later observe, the UN Charter was a “pre-atomic” document” (Arend, 2003). Nuclear weapons are exceptional threats. “It can be very difficult to determine whether a state possesses WMD, and by the time its use is imminent, it could be extremely difficult for a state to mount an effective defense” (Arend, 2003). As a result, states may attack the source of the threat before it becomes imminent (Arend, 2003). To conclude, “without meaningful reforms incorporating a more flexible and holistic view of states’ right of

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self-defense against terrorism and WMD, international law regulating the use of force will become irrelevant in the face of emerging security threats” (Odomovo, 2013).

**Customary International Law**

Scharf (2014) in his paper *Accelerated Formation of Customary International Law*, discusses customary international law. Customary international law plays a critical role in international law. “First, in some ways, customary international law possesses more jurisprudential power than does treaty law” (Scharf, 2014). Customary international law binds unlike treaties all states “so long as they did not persistently object during its formation” (Scharf, 2014). The rules of customary international law are extended “to those States that have not yet ratified the treaty” (Scharf, 2014). In addition, independent states are bound by customary international law existing “upon the date they become sovereign states” (Scharf, 2014). Unilateral withdrawal is not recognized under customary international law (Scharf, 2014). Secondly, the creation of customary international law does not take much time in comparison to treaties (Scharf, 2014). “Customary international law often forms at a much faster pace, especially with respect to areas of technological or other fundamental change” (Scharf, 2014). Finally, some believe that treaties provide “detailed articulations in legal obligations but this is not always the case. Rather, the provisions of treaties, especially multinational conventions, are also often subject to what H.L.A. Hart called a penumbra of uncertainty”⁴ (Scharf, 2014).

In fact, Ferreira et al. (2013) in their article *Formation and Evidence of Customary International Law*, elaborate the elements of customary international law. “The

combination is traditionally referred to as two element theory” (Ferreira et al., 2013). The two elements are state practice and *opinio juris* (Ferreira et al., 2013). “In analyzing state practice, the following issues must be taken into consideration: whose practice is relevant, which forms may practice take, how uniform must it be, for how long must it be observed and what is the role of specially affected states” (Ferreira et al., 2013). Moreover, *opinio juris* is determined either through evidence of state practice or more positive evidence of the belief that a given practice is legally obligatory (Ferreira et al., 2013). In each case study, international community response will be determined in order to notice whether or not there is an evidence of *opinio juris*.

The project consists of five chapters. Chapter one describes the topic. It includes the research question, background, client description and preview of findings. Chapter two demonstrates the literature review that presents a comprehensive survey on the literature used in the project; it underlines crucial works, major school of thought and gaps. Chapter three discuss the methodology that is applied in the project and the data collected to answer the project question. Chapter four analyses and interprets the four case studies; The Possibility of an attack initiated by China against North Korea, US invasion of Iraq 2003, Israel bombing Osirak 1981 and Israel bombing Al-Kibar 2007. Finally, Chapter five concludes the project and gives recommendations for further studies.

IV. **Client Description**

The project targets officials and states in the United Nations, Non-Proliferation Treaty (NPT) and International Atomic Energy Agency. Also, it targets states that use nuclear threats to justify preemptive self-defense attacks and states that proliferate nuclear

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5 Brownlie (2008), 8-9 quoted in Ferreira et al. (2013) in their article “Formation and Evidence of Customary International Law”
weapons. From the four case studies that are analyzed in the project, the governments of Israel, United States and China are selected. The UN Charter and customary international law are the bases of the argument. The findings in the project identify state practice in the presence of nuclear threats. Another outcome of the project is highlighting the illegality of preemptive self-defense and use of force through the change of state practice in four different cases in different times with the presence of nuclear threat.

This project positively adds to security studies, explains United Nations General Assembly Resolutions and International Atomic Energy Agency role in the presence of a nuclear threat. It illustrates United Nations Security Council Resolutions, adds to world legal institutions and maintains the role of regional and international organizations.

The project is significant because it improves our understanding of state practice in regards to preemptive self-defense and its relation to nuclear threats. It is important to know more about preemptive self-defense in International Law.
CHAPTER TWO

Literature Review

The concern must be indicated by the failure of researches to examine the need for a new norm that combats nuclear weapons threats consistent with preemption under Caroline case. Little research reached down to the change in state practice due to the effects of nuclear threats.

Pre-emptive Self-Defense Under Article 51 of United Nations:

Pre-emptive self-defense is a limited act under Article 51 of United Nations Charter. Mulcahy and Mahony (2006) in their article discuss the basic articles that govern the use of force under the UN Charter: Articles 2(4) and 51 (Mulcahy and Mahony, 2006). “The resort to armed force is prohibited under international law, except where the UN Security Council gives permission or where Article 51 permits the use of force if used as a means of self-defense” (Mulcahy and Mahony, 2006). Following this, “an armed attack must have occurred before a state can lawfully act in self-defense” (Mulcahy and Mahony, 2006). Indeed, there are two different explanations among scholars regarding Article 51. The main debate surrounds the interpretation of “if an armed attack occurs”.

Some scholars affirm that Article 51 of United Nations allows self-defense attacks if an armed attack occurred only (Mulcahy and Mahony, 2006):

The strengths of the restrictionist legal argument emanates from the wording of Article 51 which explicitly affirms nothing in the present charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member state of the UN (Mulcahy and Mahony, 2006).

Although there are two perspectives on Article 51, the restricted view is applied in the four case studies of the research. It examines the change in state’s practice into pre-emptive self-defense according to the UN Charter.
The Type of The Threat: Nuclear Weapons

This section discusses the nature of nuclear weapons and why might nuclear weapons change state practice into preemptive self-defense consistent with Caroline Doctrine principles.

Nuclear Weapons Threats are different:

Some scholars argue that nuclear weapons threats are different due to certain factors. Firstly, Early and Asal (2014) believe that “Some countries possess nuclear weapons arsenals capable of wiping out the planet while others possess small arsenals capable of damaging only a limited number of targets” (Early and Asal, 2014). Nuclear weapons can challenge the existence and the survival of states. “Nuclear weapons are fundamentally different from other security threats because they have the potential ability to quickly and completely annihlitate their targets’ militaries, populations, and infrastructure” (Early and Asal, 2014). Technically, nuclear weapons have mass destruction effect in infrastructure, physical objects, human beings and other areas. “Nuclear explosions can be many thousands (or millions) of times more powerful than the largest conventional detonations…the temperatures reached in a nuclear explosion are very much higher than in a conventional explosion” (Atomic archive, n.d.). Consequently, states believe that it is necessary to handle the threat preemptively, in other words, before launching nuclear weapons.

Secondly, nuclear weapons are decisive threats and any mistake or error concerning their elimination can imperil state safeness. Sagan (2002) (op cit in Early and Asal, 2014) claims that history witnessed many incidents where nuclear threats could have destroyed humanity. An example according to Sagan was an event between the USSR and USA that took place during the cold war:
Stanislav Petrov, a commander of a Soviet early-warning bunker, was told by his computer that the United States had launched a nuclear assault. Given that the response time was less than 20 minutes, it would have made perfect sense for Petrov to have immediately issued an alert that would have very likely led to a hail of nuclear missiles being directed at the United States. Luckily, Petrov gambled on the unlikely nature of a nuclear strike from the United States that would involve fewer than five missiles and decided not to issue an alert—a risky gamble in his position, to say the least. Nonetheless, he decided not to issue an alert (Early and Asal, 2014).

Given the nature of the nuclear threat, the Soviet Union could have initiated an anticipatory self-defense based on Caroline principle: necessity of the attack.

Furthermore, the type of governments arguably can threaten the security of states when facing nuclear weapons threats. Sagan (2002) (op cit in Early and Asal, 2014) adds to previous arguments. “These risks are apt to be much higher, though, in states suffering from endemic corruption or experiencing drastic leadership changes, mutinies by their armed forces, or regime collapses” (Early and Asal, 2014). Specifically, when the governments are unstable and corrupted, the control of the nuclear arsenals will be unstable compared to other governments. For instance, United States in 2003 considered Saddam as a dictator who was supporting terrorism and acquiring WMD.

Finally, some scholars believe that acquiring nuclear weapons enhances the ability to control events and decisions. Schelling (op cit in Early and Asal, 2014), states “Nuclear weapons can change the speed of events, the control of events, the sequence of events, the relation of victor to vanquished, and the relation of homeland to fighting front”(Early and Asal, 2014). In the article The Bargaining Chip and SALT, Bresler and Gray (1977) claims that one way of controlling events is to use nuclear weapons as a bargaining chip. Nuclear weapons threat can be justified as a diplomatic advantage in negotiation (Bresler and Gray, 1977). To sum up, the nature of nuclear threats is imminent, overwhelming,
leaving no moment of deliberation and no other choice in the sense that it manipulates events and decisions therefore, states tend to initiate preemptive strikes based on Caroline Doctrine to combat it. States establish a series of actions that might be acceptable in the face of such a threat; For instance, Israel bombing Al-Kibar in 2007.

The Role of Non-Proliferation Treaty, United Nations Security Council and Legal System in Handling Nuclear Weapons:

Given how dangerous these weapons are, the Non-Proliferation Treaty (NPT) and United Nations regulate the usage of nuclear weapons. On one hand, the Non-Proliferation Treaty according to Aboul-Enein (2010) is the main treaty that encourages nuclear disarmament. “… NPT remains the only international instrument that not only seeks to prevent the proliferation of nuclear weapons but that also embodies a firm legal commitment to eliminate these weapons” (Aboul-Enein, 2010). However, in the three case studies Israel and United States disregarded the Non-Proliferation Treaty requirements and they used preemptive self-defense to handle the nuclear threat due to nuclear weapons different nature.

Asadov in her thesis The Efficacy of the Nuclear Non-Proliferation Regime stipulates that:

The state possessing nuclear weapons is that which has manufactured and exploded a weapon or device before January 1, 1967 (USSR, USA, UK, France, and China). It orders to the nuclear powers not to transfer to anyone nuclear weapons and control over them, not to help the non-nuclear weapon states in production or acquisition of such weapons (Asadov, 2012).

The Non-Proliferation Treaty bans any transfer of nuclear weapons:

Devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices (NPT, 1970).
The NPT consists of six sections. It is divided between not to transform nuclear weapons to non-nuclear states and the "inalienable right" for peaceful usage of nuclear weapons:

The first three articles forbid the participants to transmit nuclear weapons to non-nuclear weapon states, create nuclear weapons except the case when it has been already done, and distribute nuclear materials without international safety measure. The following three articles launch the "inalienable right" of all parties to progress in nuclear energy for peaceful purposes. In addition, it provides that all parties must enable, and have right to take part in the potential interchange of "equipment. Lastly, the NPT directs all parties to "pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament"; that is, the nuclear weapon states had to terminate their "vertical proliferation in exchange for an end to horizontal proliferation" (Asadov, 2012).

Moreover, Article III in the NPT provides an inspection mechanism that supervises the adherence of member states to the treaty. In other words:

The functioning of the NPT is monitored by the International Atomic Energy Agency (IAEA). It was founded in the late 1950s in Vienna to assist developing countries in acquiring access to nuclear energy and ensuring its safe use. After entry into force of the NPT, the IAEA has signed agreement with the non-nuclear states, after which the Agency’s international inspectors got the right to visit and inspect the facilities of the states declared as a nuclear developing state. (Asadov, 2012).

Arms Control Association (2012) adds in The Nuclear Nonproliferation Treaty (NPT) at a Glance article, “Article III tasks the International Atomic Energy Agency with the inspection of the non-nuclear- weapon states' nuclear facilities. In addition, Article III establishes safeguards for the transfer of fissionable materials between NWS and NNWS” (Arms Control Association, 2012). This article is breached in the case studies especially in Iraq case 2003. Although in Iraq 2003 some states request United States to wait for more inspections, the United States reacted preemptively.
Limitations of Non-Proliferation Treaty, United Nations Security Council and Legal System in Handling Nuclear Weapons:

The International Court of Justice did not decide on the legality of the threat or use of nuclear weapons. Bello and Bekker (1997) in their article *International Decision: Legality Of The Use By A State Of Nuclear Weapons In Armed Conflict, Advisory Opinion* quoted the International Court of Justice Advisory Opinion regarding the legality of the threat and the use of nuclear weapons. They state that the court had not accepted nor refused the threat or the use of nuclear weapons (Bello and Bekker, 1997). The final decision was “there is no law within international or customary that authorizes using or threatening to use nuclear weapons” (Bello and Bekker, 1997). This is considered one weakness of the international law in handling nuclear weapons threats. In the project, this point is used as a justification for the change in state practice in the presence of nuclear weapons.

Moreover, the NPT according to Ford (2007) is “…often alleged or insinuated that the United States is in violation of its obligations under NPT Article VI to undertake nuclear disarmament” (Ford, 2007). Another main weakness to the NPT is Article VI:

> Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control (NPT, 2005).

However, the language of the article is misleading and gives vague meaning, for example “negotiate in a good faith” and “cessation of the nuclear early date” (Ford, 2007).

Secondly, in dissenting opinion of Judge Koroma on the Advisory Opinion regarding the legality of the threat and the use of nuclear weapons, he argued against the court findings:

> Such a finding, he maintained, could not be sustained on the basis of existing international law, or in the face of the weight and abundance of evidence and
material presented to the Court. In his view, on the basis of the existing law particularly humanitarian law and the material available the Court, the use of nuclear weapons in any circumstance would at the very least result in the violation of the principles and rules of that law and is, therefore, unlawful (Legality of the threat or use of nuclear weapons, 1996).

Judge Higins in her dissenting opinion on the Advisory Opinion regarding the legality of the threat questioned the ICJ findings:

…The Court had not applied the rules of humanitarian law in a systematic and transparent way to show how it reached the conclusion in the first part of paragraph 2 E of the dispositive: Nor was the meaning of the first part of paragraph 2 E clear (Legality of the threat or use of nuclear weapons, 1996).

Finally, Security Council does not have the mechanisms of enforcement. Weise (2012) in his article critiques the Security Council “The lack of action by the Security Council is likely due to its structure, where any permanent member can veto a Security Council resolution. One permanent member can prevent any substantive resolution from passing, even if a majority of permanent and non-permanent members support the resolution” (Weise, 2012). Even when states vote on decisions banning the usage of nuclear weapons, the five member states (leading nuclear powers) veto the decisions due to their economic and political interests. For instance:

Prior to the Gulf War, France and Russia opposed Security Council resolutions calling Iraq into compliance with previous Security Council resolutions because such action would hurt France’s and Russia’s economic interests in the region. In another example, China has until recently refused to implement the tough sanctions necessary to bring Iran to the bargaining table because China’s missile technology trade with Iran is lucrative (Weise, 2012).

These are examples of the ineffectiveness of Security Council in handling nuclear weapons threat. Indeed, the nature of the threat and the limitations within the NPT and Security Council encourage states to initiate preemptive strikes in the presence of nuclear threats. The four case studies are mere examples.
Pre-emptive Self-Defense Under Caroline Case:

Indeed, Caroline case has been contested in the literature. Crawford, Pellet, Olleson & Parlett in their book *The Law of International Responsibility* present different point of views on preemptive self-defense under Caroline case. Firstly, some scholars as Ago in his Eight Report on state responsibility refused Caroline case “Self-defense can not exist at all in a legal system which does not prohibit the recourse of force” (Crawford, Pellet, Olleson & Parlett, 2010). Secondly, some scholars uphold that the “Caroline incident is not a case of self-defense, it is a case of necessity” (Crawford, Pellet, Olleson & Parlett, 2010). Preemptive self-defense is a limited act under customary international law. Indeed, Caroline case is part of customary international law and the origin of pre-emptive self-defense doctrine. It states the requirements of pre-emptive self-defense: necessity and proportionality of the attack. According to Greenwood (2003) pre-emptive self-defense under customary international law allows an attack when it is necessary. In other words, “a necessity of self-defense, overwhelming, leaving no choice of means and no moment for deliberation” (Greenwood, 2003).

Necessity:

The prominent principle of Caroline case is the necessity to strike against the threat. Tsaguourios (2011) in his article quoted Daniel Webster opinion in the Caroline case as: ‘the act justified by the necessity … must be limited by that necessity and kept clearly within it” (Tsagourias, 2011). Furthermore, Remler (n.d.) in his article *The Right of Anticipatory Self – Defense and the Use of Force* argues that “Necessity further means that the state threatened must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force” (Remler, n.d.).
However, the relationship between necessity and imminence factors is not clear. “The threat of an attack must be demonstrably imminent and the use of force to respond must be necessary” (Remler, n.d.). Akande and Lieflander (2013) add the challenge of conceptualizing “imminence” to Remler’s (n.d.) argument. “…Imminence describes a certain pressuring quality that a threat must have for anticipatory self-defense to be lawful” (Akande and Lieflander, 2013). Bethlehem in (Akande and Lieflander, 2013) notes that new threats demand to redevelop the concept of imminence” (Akande and Lieflander, 2013).

In order to analyze a threat, Bethlehem in (Akande and Lieflander, 2013) highlights four main components. “(1) type—what kind of attack is threatened? (2) likelihood—how probable is it that the attack will occur? (3) gravity—how severe will the attack be? and (4) timing—when will the attack occur?” (Akande and Lieflander, 2013). In fact, necessity of the attack is a central point to discuss states perception of the nuclear threat in the three case studies and to discuss the necessity of the attack in the aftermath.

*Proportionality:*

The second principle of a legal pre-emptive self-defense attack under Caroline case is proportionality. There are three trends regarding proportionality (Akande and Lieflander, 2013). Some scholars figure that “it may simply be used to describe the requirement that the defending state use no more force than is necessary” (Akande and Lieflander, 2013). Likewise, Fitzgerald (2008) defines proportionality as “nothing unreasonable or excessive may be done because the act must be distinctly limited by the necessity causing it” (Fitzgerald, 2008). Proportionality completes necessity as an element for preemptive self-defense under Caroline Doctrine. Another group of scholars believe that
quantitatively the attack must be equal to the threat (Akande and Lieflander, 2013). The last group of scholars demonstrates that “proportionality may require that the damage inflicted in self-defense not be disproportionate in comparison to the pursued objective” (Akande and Lieflander, 2013). In the project, the first trend of proportionality that allows a pre-emptive self-defense attack targeting the threat only is used in the project because it can be measurable in the cases. Indeed, nuclear weapons have this imminence and urgency that makes preemptive action warranted provided that action is proportional and confined to targeting the threat. This means that Israel bombing Osirak was proportional to the nuclear threat in Iraq 1981 because it attacked the nuclear reactor. However, the US invasion was not proportional to the threat in 2003.

**Pre-emptive Self-Defense Norms**

For the purpose of the project, this part concentrates on the relationship between Caroline Doctrine and Article 51 of UN Charter. Greenwood (2003) in his discussion of self-defense notes that United Nations Charter did not create self-defense right. “…it is a customary law right… and is said to be inherent in the concept of Statehood… but the conditions for its exercise are mostly to be found in the provisions of Article 51” (Greenwood, 2003). In other words, Article 51 “preserved the inherent right” and did not create it (Greenwood, 2003). In fact, there is a close relationship between customary international law of the right of self-defense and provisions of Article 51 “this has been confirmed by the International Court and are not a matter of controversy” (Greenwood, 2003). In order to consider lawful use of force, “the use of force must not exceed what is necessary and proportionate in self-defense” (Greenwood, 2003). The United States and

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United kingdom according to Greenwood (2003) always maintain that self-defense right is also applies when the threat is imminent even if an armed attack did not take place yet (Greenwood, 2003). This can be traced back to Caroline Doctrine (Greenwood, 2003). Since 1945, the right of self-defense preserved the right to use force in the presence of “imminent armed attack” (Greenwood, 2003). Therefore, Caroline principles coexist beside the Article 51 of UN Charter.

The Creation of New Norms Under Customary International Law:

Scharf (2014) in his article states that “The text of Article 38 reflects the view that customary international law is composed of two elements: 1) general State practice, termed the objective element; and 2) some sort of attitude towards practice (be it acknowledgment as law or consent), termed the subjective element” (Scharf, 2014). In the project, both elements of customary international law are applied to question the creation of new norm consistent with pre-emptive self-defense consistent with Caroline principles. “The judgments of the Permanent Court of International Justice (PCIJ) (the forerunner of the ICJ) and the ICJ have been consistent in stating that a customary rule requires the presence of both of these elements” (Scharf, 2014). Similarly, in 1969 North Sea Continental Shelf, the ICJ ruled that the two elements of customary international law bind states however, “with the exception of persistent objectors, without it being necessary to show that the particular State allegedly bound by the rule has participated in its formation or has otherwise accepted it” (Scharf, 2014).
State Practice (The Objective Element): 

Who’s Practice Counts?

This part focuses on different forms that reflect state practice. In an article by Ferreira, Carvalho, Machry and Rigon (2013), they discuss the formation and evidence of customary international law. There are two scholar views. Scholars in the 20th century believed that only “those entitled to express the state’s consent to be bound” (Ferreira et al., 2013). Other scholars consider state’s domestic courts and international tribunals are considered act of state’s practice. Scharf (2014) in his article adds to (Ferreira et al., 2013) analysis that there are many forms that reflect state practice:

State practice can be reflected in the acts of the judiciary, legislature, or executive branch of government. It comes in many forms, including: Diplomatic correspondence; declarations of government policy; the advice of government legal advisers; press statements, military manuals, votes and explanation of votes in international organizations; the comments of governments on draft texts produced by the ILC; national legislation, domestic court decisions; and pleadings before international tribunals (Scharf, 2014).

State statements are one of the core sources that indicate state practice. ICJ Judge Richard Baxter mentions that:

The firm statement by the State of what it considers to be the rule is far better evidence of its position than what can be pieced together from the actions of that country at different times and in a variety of contexts (Scharf, 2014).

Besides, state’s actions or its absence are another critical source that display state’s practices. “We look to words as well as deeds, and to silences as well as inactions” (Scharf, 2014). To sum up, states statements and actions analysis state’s practices in the research.

State’s Practices Generate New Norm:

Based on the objective element in customary international law, some scholars believe that state’s claim and response create new norm. Myers McDougal School notes that new norms under customary international law are generated through state’s claim and response by other states (Scharf, 2014). “Some states may imitate the practice and others
may passively acquiesce in it” (Scharf, 2014). However, the state that initiated the claim has no guarantee that its actions will formulate a new binding custom; there are cases where states repudiate the claim (Scharf, 2014):

The repudiation could constitute a reaffirmation of existing law, which is strengthened by the protest. Or, the claim and repudiation could constitute a stalemate, which could decelerate the formation of new customary international law. The reaction of Third States is also relevant. Out of this process of claim and response, and third party acquiescence or repudiation, rules emerge or are superseded (Scharf, 2014).

Other scholars believe that state’s articulations create new norm. Professor D’Amato, (op. cite in Scharf, 2014) redefines the principles that develop new norms. In his own words, “the articulation can either accompany the initial act (what McDougal called the “claim”), or it can be embodied in a treaty, draft instruments of the ILC, or resolutions of the U.N. General Assembly. Acts that follow and are consistent with the articulation will crystallize the policy into a principle that takes on life as a rule of customary international law” (Scharf, 2014). In fact, “McDougal’s claim and response concept is backward looking” and “D’Amato’s conception is more like treaty law, proscribing rules for the future” (Scharf, 2014).

Yet, of the two approaches, “many scholars believe McDougal’s claim and response concept better reflects the authentic world of politics, rather than some ideal world which may owe more to rhetoric than to reality” (Scharf, 2014). Subsequently, in the project claim and response concept are used to identify state practice that create new norms.

Secondly, Michael Barton Akehurst notes “a small amount of practice is sufficient to prove the existence of such rule, resting the burden of disproving its existence on the objecting party” (Scharf, 2014). Consistent with this, “scholars who have carefully dissected the judgments of the ICJ have concluded that most customs are found to exist
on the basis of practice by fewer than a dozen States” (Scharf, 2014). This been said, the project focuses mainly on states in the four case studies because their interests are endangered and because the project questions the change in their state practice.

Thirdly, customary international law provides voluntary acceptance of new norms. “A State which manifests its opposition to a practice before it has developed into a rule of customary international law can, by virtue of that objection, opt out from the operation of the new rule” (Scharf, 2014). However, there are certain limitations: States should make objections before the emergence of the general rule, “customary international law rules are binding on new States and existing States that are newcomers to a particular type of activity” and “the rule does not apply to peremptory norms (jus cogens)” (Scharf, 2014).

Regarding state practice, there are 3 conditions that are maintained by ICJ cases:

(i) **Generality**

There needs to be sufficient practice on the part of a sufficient number of states. But *North Sea Continental Shelf* at paragraph 73 specifies States whose interests are specially affected.

Even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected (*North Sea Continental Shelf* at paragraph 73)

(ii) **Consistency and Uniformity**

*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (1986)

ICJ Rep 14, at paragraph 186 states:

[It is] sufficient that the practice of States should in general be consistent with such rules and instances of State conduct inconsistent with the rule should have been treated as breaches of that rule and not as indications of the recognition of a new rule (*Military and Paramilitary Activities in and against Nicaragua v USA*, paragraph 186, 1986)
**Duration of State’s Practice:**

Customary international law usually takes some time to develop. However, a shorter period could be sufficient but the conditions in this case are even more difficult to meet.

*North Sea Continental Shelf* stipulates at paragraph 73 and 74:

As regards the time element, the Court notes that it is over ten years since the Convention was signed, but that it is even now less than five since it came into force in June 1964, and that when the present proceedings were brought it was less than three years, while less than one had elapsed at the time when the respective negotiations between the Federal Republic and the other two Parties for a complete delimitation broke down on the question of the application of the equidistance principle. Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved (*North Sea Continental Shelf* stipulates at paragraph 73 and 74)

**Opinio Juris (The Subjective Element):**

*Asylum Case (Colombia/Peru)*, ICJ Rep 1950, p. 266 at p. 276-77 maintains:

The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a *constant and uniform usage* practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom "as evidence of a general practice accepted as law" (*Asylum Case*, paragraph 266, 1950)

*More North Sea Continental Shelf* (1969) ICJ Rep 3, at paragraph 77:

Two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.... The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g.,
in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.

Scholars traditionally emphasized the role of the objective element in the creation of customary norms. It was not an easy task to ascertain state’s belief rather than its practice (Scharf, 2014). However, “with the introduction of the U.N. and other bodies where multilateral diplomacy is conducted in the open, the situation has in fact reversed” (Scharf, 2014). In fact, there are two scholar views on Opinio Juris. On one hand:

The voluntarist thesis maintains that, since States are sovereign, they cannot be bound by legal obligations (whether through treaty or customary law) without their consent. Consistent with this, voluntarists view the subjective element of customary international law as a manifestation of consent (Scharf, 2014).

On the other hand, “belief” thesis maintains that custom’s binding force is based in the States’ belief in the legal necessity or permissibility of the practice in question” (Scharf, 2014).

The project is consistent with the voluntarist thesis. Mendelson suggests that “in the early formation stage “acceptance” means consent to an emerging rule, and in the later stage “acceptance” means acknowledgment that the rule has gained the force of law” (Scharf, 2014).

Evidence of Opinio Juris:
There are different sources to assist in deducing state’s consent: Treaties and Role of Judicial Decisions:

A particular treaty might well contain some provisions meant to reflect existing customary law, and others, which constitute progressive development. Sometimes a treaty will expressly declare that its provisions, or certain of them, are declaratory of existing customary law (Scharf, 2014).

Moreover, “judicial decisions can also have a formative effect on custom by crystallizing
emerging rules and thus influencing state behavior” (Scharf, 2014). In fact, “General Assembly Resolutions and judgments of international tribunals often play a heightened role in “crystallizing” the newly emergent rule” (Scharf, 2014). Consequently, the project will evaluate the response of United Nations and NPT after each attack in the three case studies. In the case studies, In the four case studies, how the state perceived the threat is discussed first. Then, the project discusses if the state worked through the Security Council and the NPT or preemptively attack other state based on Caroline requirements. Also, the project questions if there is consistent practice and consent over time may be new norm is created.
CHAPTER THREE

V. Methodology

The project tackles the research question by looking for evidence of state practice and *opinion juris* with regards to preemptive self-defense and nuclear weapons threats. The project’s theory is that state practice has evolved from upholding the Charter’s prohibition on preemption and reliance on conventions like NPT towards a policy of preemption that is more consistent with the Caroline principles. It traces this hypothesis through four case studies: the possibility of an attack by China against North Korea, US invasion of Iraq in 2003, Israel Bombing Osirak 1981 and Israel bombing Al-Kibar 2007. Evidences of *opinion juris* and state practice are: official discourse and UN resolutions. The project targets state practice and *opinion juris* therefore Theory-guided process tracing is suitable for it. Firstly, Theory-guided process integrates historical events with social sciences theories (Falleti, n.d). Secondly, This process correlates theories with outcomes. According to George and McKeown “…this method does not solely rely on the comparison of variations across variables in each case, but also investigate[s] and explain[s] the decision process by which various initial conditions are translated into outcomes”7 (Falleti, n.d). Moreover, in a paper that was presented at the American Political Science Association annual meeting *What is process tracing actually tracing? The three variants of process tracing methods and their uses and limitations*, Beach and Pedersen (2011) note that there are three types of process tracing (PT). The Theory Testing Process Tracing as identified by Beach and Pedersen (2011) tackles the project’s

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question. However, the common factor to the three types is the casual mechanism. “Causal mechanisms can be defined as, …a complex system, which produces an outcome by the interaction of a number of parts (Glennan, 1996:52)” (Beach and Pedersen, 2011).

This methodology demonstrates X and Y through “…existing conjectures about a plausible mechanism or … deducing one from existing theorization relatively easily” (Beach and Pedersen, 2011). The main steps in the theory testing process are conceptualization and operationalization of the elements that cause Y. Conceptualization is to define the elements of the case study and the theory. Operationalization is to assure that all or some of the theory elements are present in the case (Beach and Pedersen, 2011). Then, Beach and Pedersen (2011) adds:

Once the mechanism is conceptualized and operationalized, the analyst proceeds to step 3, where she collects empirical evidence that can be used to make causal inferences, updating our confidence in 1) whether the hypothesized mechanism was actually present in the case, and 2) whether the mechanism functioned as predicted, or whether there were only some parts of the mechanism that were present (Beach and Pedersen, 2011).

The project targets the two main criteria that create new norms: state practice and *Opinio juris*. In other words, the replication of the same act by states in the presence of a nuclear threat consistently and maintaining state’s consent.


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“*What is process tracing actually tracing? The three variants of process tracing methods and their uses and limitations*”
different interpretations of state practice and *opinion juris*. One view states that state’s actions help in determining the change in its practices. Anthony D’Amato and Michael Akehurst as (op. cit in Kammerholf, 2004) claim“ … What is crucial for him is not the making of a claim, but ‘enforcement action’ — ‘what the state will actually do’. This category also includes decisions not to act in situations where the state could have acted, as well as commitments to act”\(^9\) (Kammerholf, 2004). Another view mentions that state’s statements are a form of its practices. Michael Akehurst argues, in contrast to Anthony D’ Amato, that state’s actions may overlap “with those other states during different times and governments”\(^10\) (Kammerholf, 2004). Therefore, it is important to depend on both statements and actions when discussing state practice.

In addition to state practice, *Opinio juris* constitutes a new customary norm. The essential components of *Opinio juris* that exist under customary international law are: states consent and believing in its legality.

The theory of consent requires that every state needs to agree to being bound by a norm of customary international law. It is said that this theory can easily describe intentional customary law making (as may have happened with the 1945 Truman Proclamations) — the processes of ‘initiation, imitation and acquiescence’ (Kammerholf, 2004).

However, “It is unlikely that the majority of states actively participate in the making of any one norm of customary international law. Most of them will neither consent nor protest developments” (Kammerholf, 2004). Consequently, the project focuses on states in the case studies and states that are affected by the attack in the region. The leading

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sources are judicial decisions of the International Court of Justice (ICJ), United Nations Resolutions and Non-Proliferation Treaty (NPT).

In determining whether state practice is consistent with Caroline self-defense principles or not, the project focuses on the necessity and the proportionality of the attack. Necessity demands that the danger be: “instant, overwhelming, leaving no choice of means, and no moment for deliberation” (Fitzgerald, 2009). In addition, proportionality means that “nothing unreasonable or excessive” may be done because the act must be distinctly limited by the necessity causing it” (Fitzgerald, 2009). Under the restrictive view of Article 51 of the United Nations Charter, an armed attack should take place first (U.N. Charter art. 51). The principle sources are states speeches, international journals, international institutions reports, world organizations that publish reports and studies, UN, NPT, and IAEA. These will help in searching for evidence of permission for pre-emption.

**Case Studies**

In fact, four case studies are elaborated in the project. The possibility of an attack by China against North Korea, US invasion of Iraq 2003, Israel bombing Osirak reactor 1981 and Israel bombing Al Kibar 2007. The common factor in the four cases is the occurrence of nuclear threats. In the first case, preemptive self-defense is still a possibility and in the second, third and forth cases preemptive self-defense took place.

The possibility of an attack by China against North Korea is important to evaluate. Both states have nuclear weapons. North Korea is not part of the IAEA safeguards anymore. The insecurity in the region is alarming. Furthermore, the change of alliances and the domestic environment concern China.
US invasion of Iraq 2003 is a compelling case. Three main objectives are highlighted according to President Bush: Toppling of Saddam regime, Fighting terrorists and Dismantling Saddam weapons of mass destruction. However, the project focuses mainly on the nuclear weapons threat. Ibp (2005) published *US Defense Policy Handbook*. It explains that the Bush administration formulated a new security policy called “Bush Doctrine” or the “Emerging Threat”. “… A new policy was necessary to prevent the proliferation of weapons of mass destruction among rogue states and terrorist groups …” (Ibp, 2005). This doctrine replaces one of the main elements of Caroline principles: the imminence of the threat (Mulcahy and Mahony, 2006). In other words, the new policy or “The Emerging Threat” doctrine acknowledged was intended to develop preemption under customary law to target new threats as WMD. The international community condemned US invasion and considered Bush Doctrine illegal.

Israel bombing Osirak in 1981 is a vital case. In fact, Feldman in his article *The Bombing of Osirak* describes the attack as the first preemptive strike against a nuclear facility. In order to demonstrate the change in Israel’s practice, the project analysis the following: How Israel perceived before the attack and in the aftermath? Did they admit it? Did they say it was a right to do so and based on what? And how International Community reacted? However, the international community after the attack condemned Israel action in 1981.

The turning point was in 2007. Israel bombed Al-Kibar reactor in Syria with the encouragement of United States. The most notable part is the aftermath of the attack. The International community did not condemn Israel bombardment of Al-Kibar reactor in 2007. In other words, the international community was silent regarding Israel attack.
In fact, in the project Israel, United States and China perspectives are only considered to evaluate their change in practice before their attack. Then, the project evaluates the aftermath of each case study. Moreover, all the cases are chosen because there is a nuclear weapons threat and a self-defense attack is initiated without the occurrence of an armed attack based on Article 51 of United Nations. The prominent sources for the case studies are World Legal Information Institutes, law libraries, security studies databases, United Nations Resolutions and Non-Proliferation Treaty.
CHAPTER FOUR: THE CASE STUDIES

This chapter discusses four instances of state practice that have two common elements. They involved a claim of preemptive self-defense used against a nuclear weapons threat. This part starts with China’s case because it is consistent with international law and customary international law requirements of self-defense in the presence of a nuclear threat. Then, the project discusses the cases that exceeded the limits of self-defense in international law and preemptive self-defense in customary international law.

Case Study One: The Possibility of An Attack by China Against North Korea

North Korea Nuclear Problem:

I. Nuclear Tests:

In the Fact Sheet: North Korea’s Nuclear and Ballistic Missile Programs published by Kim (2013) in The Center For Arms Control And Non-Proliferation, North Korea nuclear weapons capabilities are set forth:

North Korea currently possesses between four and eight nuclear weapons. It has carried out three nuclear tests since 2006. It has developed and tested a range of short- and medium-range missiles, but has yet to successfully test a long-range missile or ICBM. It is generally believed to have not yet developed the capabilities needed to miniaturize a nuclear device for missile delivery (Kim, 2013).

The number of nuclear weapons in North Korea is not clear. However, “the total plutonium production suggests between four to eight nuclear weapons” (Kim, 2013). In fact, North Korea exercised nuclear testing three times since 2006.

On October 16, the U.S. Director of National Intelligence confirmed North Korea conducted an underground nuclear explosion in the vicinity of P’unggye on October 9, 2006. The explosion yield was less than a kiloton, and later said it was apparently more successful. One kiloton is far less than other nuclear states’ first tests of 10-20 kt. The international community has called the North’s test a failure (Kim, 2013).
Again in 2009, US intelligence claimed that North Korea exercised nuclear test. Nonetheless, “there is a lack of conclusive physical evidence in open sources that proves the test was a nuclear one. Official and unofficial reports vary on estimated yield but it is generally regarded as higher than its 2006 test” (Kim, 2013).

The turning point took place in 2013. North Korea exercised a nuclear testing that it claimed “…successful and widely deemed successful” (Kim, 2013). However, no confirmation on the material that was used. “The estimated yield remains unclear, In addition, some experts speculated that the test involved uranium, rather than plutonium as in the case of the last two tests, but there has been no official confirmation regarding which material was involved in the test” (Kim, 2013).

It is important to mention that it is not confirmed that North Korea achieved the nuclear bomb.

US Defense Intelligence Agency asserted that it had moderate confidence that North Korea had developed this ability. However, this claim has not been corroborated by other US or South Korean intelligence agencies. In a May 2013 analysis, the Arms Control Association’s Greg Thielmann, a Senior Fellow at the Arms Control Association, wrote that, Although [North Korea] has hundreds of operational short- and medium-range ballistic missiles, there is no evidence that it has achieved the miniaturization of a nuclear device necessary for arming these missiles (Kim, 2013).

This uncertainty affects China’s perception towards the threat.

II. Article 10 Under NPT and North Korea

Bunn and Rhinelander in their article The Right For Withdraw From The NPT: Article X is not unconditional state that:

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. [Article X.1, the Treaty on the Non-Proliferation of Nuclear Weapons] (Bunn and Rhinelander, 2005).

North Korea withdrew from the NPT since 2006. It gave notice of its withdrawal since 1993 (Bunn and Rhinelander, 2005). “The IAEA Board of Governors had referred North Korea's noncompliance to the Security Council” however:

China could not be persuaded to agree with the other P-5 permanent members of the UN Security Council (France, Russia, United Kingdom, and United States) that the Council should take action to restrain North Korea. All that could be agreed was that the Council should call upon North Korea to permit IAEA inspections, which North Korea then refused to do (Bunn and Rhinelander, 2005).

The reasons that North Korea stated for its withdrawal were deemed inadequate and unclear but still China supported North Korea:

North Korea's stated reasons for withdrawal were apparently deemed inadequate by most if not all the permanent members of the Council; since the discussions among the P-5 have not been made public, we cannot know for certain the positions taken by China in 1993 and 2003. However, it appeared in 1993 that China wanted to stimulate negotiations by the United States with North Korea and so refused to give the United States the assurance that it would not veto a Security Council resolution against North Korea if one was presented. By 2003, political tensions had increased, and although negotiations were continuing periodically, it appears that Kim Il Jong decided that they were not producing enough value for North Korea to stay within the NPT. So it withdrew (Bunn and Rhinelander, 2005).

III. **Regional Dimensions:**

The Following is a summary of the regional problems that North Korea cause based on Smith in his book: *Reconstituting Korean Security A Policy Primer*

- **Cross-Border Illegality and People Smuggling:**

The economic conditions within North Korea are not stable. Poverty is found all over North Korea. Therefore:

The social safety net cherished under the Kim Il Sung development project has all but disappeared. Inequality and absolute poverty serve to keep the threat of starvation acute for probably the majority of North Koreans and propel various kinds of cross-
border illegality: economic migration to China, trafficking in women, armed robbery and night-time theft, and smuggling (Smith, n.d.)

- **Fear of US:**

All governments in the region fear US intervention in North Korea:

South Korea fears the annihilation of Seoul and the crippling of its economy, not to speak of the killing, maiming and devastation that would be suffered by millions of Koreans. China does not want a war on its borders – especially when it is making such profound efforts to develop its north-eastern provinces that border Korea. Neither China nor Russia relishes the prospect of being drawn into a hot conflict with the United States. Public opinion in both countries would be outraged if the United States even attempted a limited “surgical strike” against the North Koreans. Both countries have friendship treaties with the DPRK, and China is still formally committed to some form of active support of the DPRK in times of war. Even Japan, whose alliance with the United States forms the foundation of its foreign policy and its existence as a democratic state, has given strong signals to the United States that it prefers conflict resolution through negotiation, not confrontation (Smith, n.d.)

- **Japan:**

North Korea feared Japan given its relationship with the United States and “Tokyo has never fully come to grips with its imperialistic past” (Japan and North Korea: Bones of Contention, 2005). Moreover, Japan Defence Agency Director Norota Hosei in March 1999 asserted:

Japan had the right to launch defensive air strikes against North Korean missile bases, a position echoed four years later by his successor, Ishiba Shigeru. While such pronouncements may not form a doctrine of pre-emption, as some observers believed, they are a new potential threat for North Korea to guard against (Japan and North Korea: Bones of Contention, 2005).

**How China Perceived North Korea Nuclear Weapons?**

*North Korea’s Nuclear Threat Challenges China’s Security:*

Based on Plant and Rhode (2013) article *China North Korea and the Spread of Nuclear Weapons, Survival: Global Politics and Strategy*, one main challenge that China faces regarding North Korea nuclear program is: the possibility of supplying non-state actors
with nuclear weapons for financial gain (Plant and Rhode, 2013). China “recognizes that, in the event that North Korean weapons or HEU were used abroad, the damage to Chinese interests could be severe” (Plant and Rhode, 2013). Nuclear terrorism in other words challenges China’s security (Plant and Rhode, 2013). This causes another threat that indirectly challenges China: the possibility of refuge flows if North Korea nuclear weapons caused a conflict in the region or a major war.

If North Korean HEU does come into the hands of a terrorist group, that group will almost certainly try to use it in an improvised nuclear device against civilians, most likely in a major city. Even if the HEU were not immediately identified as North Korean (current nuclear forensic techniques entail a certain delay before the origin of material can be confirmed), any government that had suffered such a devastating attack would be under irresistible political pressure to retaliate almost immediately. Such a response might or might not itself involve nuclear weapons, but it would most likely be overwhelming. It is easy to foresee how a military response could escalate into a major war (Plant and Rhode, 2013).

Tiezzi (2014) in her article *China Responds to North Korea’s Nuclear Threat* explores China’s position towards North Korea’s nuclear weapons program. “China’s spokesperson Hong Lei told reporters that China has a clear and firm position on the Korean nuclear issue, that is, we should stay committed to realizing denuclearization of the Korean Peninsula” (Tiezzi, 2014). Tiezzi further adds that China’s policy towards North Korea changed especially after its nuclear test in 2013. U.S. “Secretary of State John Kerry recently expressed appreciation for China’s efforts to send a very clear message to the North Koreans that [the continued development of a nuclear program] is unacceptable to the Chinese” (Tiezzi, 2014).

Glaser and Billingsley in their article *Reordering Chinese Priorities on the Korean Peninsula*, elaborate China’s options regarding North Korea’s nuclear weapons program. The following are different measures that China took to pressure North Korea. In 2005 a
former Foreign Ministry official said, “in our official exchanges, whenever we talk to the North Koreans no matter what issue an official is responsible for, the nuclear issue is raised by the Chinese” (Glaser and Billingsley, 2012). Furthermore, “Chinese leaders have used more forceful language with North Korea leader after 2006 nuclear test…” (Glaser and Billingsley, 2012). In the Security Council, China supports resolutions that condemn North Korea’s nuclear program (Glaser and Billingsley, 2012).

To sum up, China perceived North Korea’s nuclear program a threat to its security but not an imminent one given the uncertainty about the program, as mentioned before.

**However, Plant and Rhode (2013) interpret that China is reluctant to react towards North Korea threat.** This is because of two reasons: China and North Korea are considered allies and not to provoke its “troublesome neighbor” (Plant and Rhode, 2013).

*Would It Be Necessary to attack?*

It is mentioned above that North Korea poses a threat against China’s security; however, there are reasons that prevent China from taking action. Moreover, China has other options than preemptively strike North Korea.

*China’s Influence Over North Korea:*

In order to prevent North Korea from selling its nuclear weapons to the non-state actors, China believes that there is “no need to impose the deeply coercive measures it fears could precipitate such a crisis, and may even be able to avoid upsetting its relationship with Pyongyang. Such tools, to be sure, have been effective in the past and should not be neglected entirely” (Plant and Rhode, 2013).
Glaser and Billingsley (2012) claim that China has leverage over North Korea. “China’s potential leverage over North Korea is significant, since without the extensive aid that Beijing provides, the regime in Pyongyang would be unable to survive” (Glaser and Billingsley, 2012). Glaser and Billingsley quoted the Chinese Foreign Ministry official after North Korea’s nuclear test in 2006; “one lesson that Beijing drew after North Korea conducted its first nuclear test in May 2006 was that pressure was necessary to persuade Pyongyang toward denuclearization” (Glaser and Billingsley, 2012).

The International Atomic Energy Agency and Security Council Resolutions Regarding North Korea’s Nuclear Weapons Program:

Based on the IAEA organization fact sheet, North Korea has been in non-compliance with the IAEA since 1993. In 2002, the IAEA questioned the implementation of the safeguard; however, North Korea did not co-operate (iaea.org, 2014). Then, the IAEA passed a resolution requesting North Korea to cooperate with the agency (iaea.org, 2014). However, “the DPRK Foreign Minister Paek Nam Sun expressed his disappointment about the Agency’s unilateral and unfair approach… it ordered the IAEA inspectors to leave the country” (iaea.org, 2014). The IAEA repeated its request “compliance with the safeguards” again in 2003. As a result, North Korea’s withdrew from the NPT on January 2003. The IAEA organization implied that:

No agreed statement on the matter has been issued by the NPT States Parties, or by the NPT depositary States (Russia, UK and USA), or by the UN Security Council. (Article X.1 of the NPT says that a State Party in exercising its national sovereignty has the right to withdraw from the Treaty... 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... [and] shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.) (iaea.org, 2014).
This does not mean that North Korea will abandon its safeguards. “NPT States Parties’ comprehensive safeguards agreements with the IAEA provide that such agreements would remain in force as long as the State is party to the Non-Proliferation Treaty” (iaea.org, 2014).

After North Korea withdrawal, the IAEA referred the issue to the Security Council in February 2003. “The UN Security Council expressed its "concern" over the situation in North Korea and said it will keep following developments there. UN Secretary-General Annan additionally has appointed a Special Advisor on the North Korea issue” (iaea.org, 2014).

Moreover, in 2005 the IAEA director general Mohamed El Baradei welcomed the six party talks issue. “The Democratic People’s Republic of Korea (DPRK) would abandon its nuclear program in exchange for economic aid and security guarantees” but in 2006 North Korea launched ballistic missiles (iaea.org, 2014).

Indeed, inspections continued since 2006 but in 2009, North Korea suspended all cooperation with the IAEA (iaea.org, 2014).

The Arms Control Association determines that the Security Council passed three resolutions; they condemn North Korea nuclear testing and requesting it to abide by the safeguards system: Resolution 1718, 1874 and 2087. The three resolutions called North Korea to rejoin the NPT and to return for negotiations “six-party”. To this date, “UN Security Council resolutions have been largely unsuccessful in preventing North Korea from advancing its nuclear weapons and ballistic missile programs, although the sanctions have slowed development in these areas. The United Nations continues to closely monitor these programs” (armscontrol.org, 2013).
Therefore, neither the IAEA nor the Security Council stopped North Korea from developing Uranium or seeking for the bomb.

In Conclusion

North Korea nuclear program threatens China’s security; however, China does not perceive it as (imminent (instant), overwhelming and leaving no moment of deliberation) threat. China follows United Nations self-defense requirements in North Korea’s case. In other words, China prefers to utilize different strategies: release economic sanctions and provides economic aid given that they are allies before initiating a preemptive self-defense attack. The IAEA and Security Council are not effective regarding North Korea’s nuclear program. However, China respects international law and customary international law requirements for preemptive self-defense.

Case Study Two: United States Invasion of Iraq 2003 (Operation Iraqi Freedom):

The United States Invasion of Iraq 2003:

Bassil (2012) in his article The 2003 Iraq War: Operations, Causes, and Consequences demonstrates the reasons for the war, its consequences, and United States true intentions.

Bassil gives a detailed description of the attack:

It began on March 20, 2003 with the invasion of Iraq known as "Iraqi Freedom Operation" by the alliance led by the United States against the Baath Party of Saddam Hussein. President George W. Bush has officially declared its completion on March 20, 2003, under the banner Mission Accomplished. The invasion led to the rapid defeat of the Iraqi army and the capture and execution of Saddam Hussein. The United States occupied Iraq and attempted to establish a new government. However, violence against the alliance forces rapidly led to an asymmetrical war between the insurgents, the U.S. military, and the new Iraqi government (Bassil, 2012).

US invaded Iraq for three main reasons: Toppling Saddam, Fighting Terrorism and Dismantling the Weapons of Mass Destruotions (WMD). Although the research concentrates on the nuclear weapons threat, facing terrorism and having a dictatorship regime increased nuclear weapons hazard, as mentioned before.

**How The United States Perceived Iraq’s Threat?**

United States encountered a nuclear threat that is **imminent, overwhelming, left no moment of deliberation and no other choice** based on US perception of the threat. The following is a detailed discussion on the necessity of the attack based on US perception.

*Instant (Imminent) and Overwhelming:*

To start, the United States considered Iraq a dictatorship that pose a great danger to the world for seeking weapons of mass destruction. The terrorist groups that Iraq supports can use these weapons to either strike United States and its allies or use them for leverage. On January 29, President George Bush characterized Iraq as one of the three evil states: Iraq, Iran, and North Korea. Iraq based on President Bush Description:

…Has something to hide from the civilized world. States like these and their terrorist allies constitute an axis of evil, arming to threaten the peace of the world. By seeking weapons of mass destruction, these regimes pose a grave and growing danger. They could provide these arms to terrorists, giving them the means to match their hatred. They could attack our allies or attempt to blackmail the United States. In any of these cases, the price of indifference would be catastrophic (Bush State of the Union address, 2002).

Then, in 2003, President Bush gave a speech that reflected US concerns regarding Iraq lethal weapons published in the Guardian (2003). “Intelligence gathered by this and other
governments leaves no doubt that the Iraq regime continues to possess and conceal some of the most lethal weapons ever devised” (The Guardian, 2003). President Bush speech in Cincinnati stated “If the Iraqi regime is able to produce, buy, or steal an amount of highly-enriched uranium …it could have a nuclear weapon in less than a year” (George W. Bush: The Iraqi Threat, 2002).

Moreover, the US Administration considered Saddam Hussien as the source of the threats. President Bush made it clear in his speech in the American Enterprise Institute regarding the future of Iraq in 2003:

> In Iraq, a dictator is building and hiding weapons that could enable him to dominate the Middle East and intimidate the civilized world -- and we will not allow it. (Applause.) We hope that the Iraqi regime will meet the demands of the United Nations and disarm, fully and peacefully… If it does not, we are prepared to disarm Iraq by force. Either way, this danger will be removed (Applause) (George W. Bush: American Enterprise Institute, 2003).

In fact, Iraq used weapons of mass destruction previously against Iran and the Kurdish civilians (The Guardian, 2003). Therefore, it would not be impossible for them to use it again; “the danger is clear: using chemical, biological or, one day, nuclear weapons, obtained with the help of Iraq, the terrorists could fulfill their stated ambitions and kill thousands or hundreds of thousands of innocent people in our country, or any other”(The Guardian, 2003).

Consequently, the United States argued that it faced an **instant (imminent)** and an **overwhelming** threat that has the ability to jeopardize American’s safeness. President Bush made this clear when he approached the public in his speech 2003:
The safety of the American people depends on ending this direct and growing threat. Acting against the danger will also contribute greatly to the long-term safety and stability of our world. The current Iraqi regime has shown the power of tyranny to spread discord and violence in the Middle East. A liberated Iraq can show the power of freedom to transform that vital region, by bringing hope and progress into the lives of millions. America's interests in security, and America's belief in liberty, both lead in the same direction: to a free and peaceful Iraq (Applause) (President George W. Bush Speaks at AEI’s Annual Dinner, 2003).

In fact, President Bush felt the **urgency** to preempt Iraq. “Instead of drifting along toward tragedy, we will set a course toward safety. Before the day of horror can come, before it is too late to act, this danger will be removed” (The Guardian, 2003). To be specific, President Bush described the urgency of the threat in his speech in 2002 on Iraqi Threat:

> Some ask how urgent this danger is to America and the world. The danger is already significant, and it only grows worse with time. If we know Saddam Hussein has dangerous weapons today -- and we do -- does it make any sense for the world to wait to confront him as he grows even stronger and develops even more dangerous weapons? (President George W. Bush: The Iraqi Threat, 2002).

**Iraq’s Nuclear Threat Left No Moment Of Deliberation:**

Iraq’s threat did not give according to President Bush any **moment of deliberation** to prevent it. President Bush explained the significance of Iraq’s weapons of mass destruction threat in his speech in the Iraqi Threat speech in 2002:

> It gathers the most serious dangers of our age in one place. Iraq's weapons of mass destruction are controlled by a murderous tyrant who has already used chemical weapons to kill thousands of people. This same tyrant has tried to dominate the Middle East, has invaded and brutally occupied a small neighbor, has struck other nations without warning, and holds an unrelenting hostility toward the United States (President George W. Bush: Iraqi Threat, 2002).

Iraq’s nuclear threat left no moment of deliberation because time is a critical element especially in the presence of nuclear threats. On January 14 the President stated in his
speech that “time is running out for Iraq to disarm, adding that he was sick and tired of its games and deceptions”\textsuperscript{11} (Copson, 2003).

\textit{United States in the United Nations:}

United States brought Iraq’s threat to the United Nations:

In confronting Iraq, the United States is also showing our commitment to effective international institutions. We are a permanent member of the United Nations Security Council. We helped to create the Security Council. We believe in the Security Council -- so much that we want its words to have meaning. (Applause) (The American Enterprise Institute: AEI’s Annual Dinner, 2003).


The Administration and its supporters assert that Iraq was in defiance of 17 Security Council resolutions requiring that it fully declare and eliminate its weapons of mass destruction (WMD). Further delay in taking action against Iraq, they argued, would have endangered national security and undermined U.S. Credibility (Copson, 2003).

Given that inspectors withdrew from Iraq and it was uninspected from 1998 till 2002 (Katzman, 2003), President Bush gave an important speech that requested the Security Council to involve more in Iraq:

The global threat of proliferation of weapons of mass destruction cannot be confronted by one nation alone. The world needs today and will need tomorrow international bodies with the authority and the will to stop the spread of terror and chemical and biological and nuclear weapons. A threat to all must be answered by all. High-minded pronouncements against proliferation mean little unless the strongest nations are willing to stand behind them -- and use force if necessary. After all, the United Nations was created, as Winston Churchill said, to "make sure that the force of right will, in the ultimate issue, be protected by the right of force (Bush, 2003).

Then in 2002, the United Nations Security Council adopted one of the main resolutions that targets Iraq’s WMD “Resolution 1441”. The following are the main provisions:

1. Declaring Iraq in material breach of pre-existing resolutions;
2. Giving Iraq 7 days to accept the resolution and 30 days (until December 8) to provide a full declaration of all WMD programs;
3. Requiring new inspections to begin within 45 days (December 23) and an interim progress report within 60 days thereafter (no later than February 21, 2003);
4. Declaring all sites, including presidential sites, subject to unfettered inspections;
5. Giving UNMOVIC the right to interview Iraqis in private, including taking them outside Iraq, and to freeze activity at a suspect site;
6. Forbidding Iraq from taking hostile acts against any country upholding U.N. resolutions, a provision that would appear to cover Iraq’s defiance of the “no fly zones;” and
7. Giving UNMOVIC the authority to report Iraqi non-compliance and the Security Council as a whole the opportunity to meet to consider how to respond to Iraqi non-compliance” (Katzman, 2003).

Iraq accepted the resolution, allowed inspections and submitted its declarations on nuclear weapons materials. However, “after comparing the Iraqi declaration to U.S. intelligence assessments, the Bush Administration said on December 19, 2002 that there were material omissions that constitute a further material breach of Iraq’s obligations” (Katzman, 2003). Moreover, United Nations considered Iraq as “failing to clear up outstanding questions, although the United Nations did not call the declaration a material breach of Resolution 1441” (Katzman, 2003).

The IAEA head announced in the Security Council that Iraq did not adhere to UN Resolution 1441. However, it “has been providing more active cooperation over the past month and that inspections were making progress, including some substantive disarmament destruction of the Al Samoud II missile” (Katzman, 2003).

In fact, the United Nations criticism towards Iraq’s nuclear weapons benefited President Bush:

In his State of the Union message on January 28, and in subsequent statements, President Bush has used U.N. criticism, as well as citations of U.S. intelligence
findings, to assert that Iraq is not disarming voluntarily and would be disarmed, by force if necessary, with or without U.N. authorization (Katzman, 2003).

The turning point was on February 2003 when Colin Powell went to the Security Council in the United Nations and showed the members: “several pictures of vehicles used as mobile biological research laboratories, satellite photos of military plants, chemical weapons bunkers, and a recording of a conversation between the officers of the Iraqi Republican Guard who speak about weapons of mass destruction” (Bassil, 2011). However, Russia, China, and France threatened to use their veto to prevent military intervention in Iraq (Bassil, 2011).

Although the United States had other peaceful methods to handle Iraq’s threat as more negotiations and inspections, the U.S decided to attack Iraq without the approval of the Security Council.

The Aftermath of The Attack

The United States Invasion of Iraq 2003 Was Not Necessary (Instant, Overwhelming, No Moment Of Deliberation and No Other Choice):

According to WMD in Iraq: evidence and implications report by Cirincione, Mathews, Pekovich & Perkovich (2004), Iraq’s weapons of mass destruction was “a long-term threat but not an imminent threat to the United States, to the region, or to global security” (Cirincione, Mathews, Perkovich & Orton, 2004). In fact, Iraq’s Weapons Of Mass Destruction program was dismantled before (Cirincione, Mathews, Perkovich & Orton, 2004). The report maintained that:

The dramatic shift between prior intelligence assessments and the October 2002 National Intelligence Estimate (NIE), together with the creation of an independent intelligence entity at the Pentagon and other steps, suggest that the intelligence community began to be unduly influenced by policymakers’ views sometime in 2002 (Cirincione, Mathews, Perkovich & Orton, 2004).
Regarding United States claims that Iraq supported terrorists and support them with Weapons of mass destruction: “There was and is no solid evidence of a cooperative relationship between Saddam’s government and Al Qaeda. There was no evidence to support the claim that Iraq would have transferred WMD to Al Qaeda and much evidence to counter it” (Cirincione, Mathews, Perkovich & Orton, 2004).

There are three main points that the United States disregarded when it invaded Iraq 2003. Firstly, “treating nuclear, chemical, and biological weapons as a single WMD threat the conflation of three distinct threats, very different in the danger they pose, distorted the cost/benefit analysis of the war” (Cirincione, Mathews, Perkovich & Orton, 2004). Secondly, US did not have evidence for its claims and it considered that “Saddam Hussein would give whatever WMD he possessed to terrorists” as a given truth (Cirincione, Mathews, Perkovich & Orton, 2004). Finally, the report accused United States of using the findings to turn “threats from minor to dire” (Cirincione, Mathews, Perkovich & Orton, 2004).

Moreover, Sifris (2003) in his article Operation Iraqi Freedom: United States V Iraq-The Legality of the war evaluates Iraq 2003 invasion based on legal requirements of self-defense. Sifris (2003) states that “It seems that in the 2003 war against Iraq, as with the Israeli bombing of the Iraqi nuclear reactor in 1981, the use of force was employed to counter attacks that the US deemed likely to occur at an unspecified time in the future, and was not employed to counter an imminent threat” (Sifris, 2003). Sifris (2003) quoted Greenwood articulation “If there was no threat of an imminent attack and the United States was merely trying to counter attacks which it considered likely to occur at
some unspecified time in the future, the raid would not have been a lawful exercise of self-defense” (Sifris, 2003).

**Other Options For The United States:**

In fact, the United Nations could have solved Iraq threat without United States military intervention in 2003. It could have been better if US waited for more inspections by the United Nations. In other words, “The UN inspection process appears to have been much more successful than recognized before the war. Nine months of exhaustive searches by the U.S. and coalition forces suggest that inspectors were actually in the process of finding what was there. Thus, the choice was never between war and doing nothing about Iraq’s WMD” (Cirincione, Mathews, Perkovich & Orton, 2004). Other means to dismantle Iraq could have taken place; for instance, sanctions, more investigations and control mechanisms on import and export (Cirincione, Mathews, Perkovich & Orton, 2004). One of the criticisms to the United States is ignoring scientists and UNMOVIC experts who have worked in Iraq (Cirincione, Mathews, Perkovich & Orton, 2004). Cirincione, Mathews, Perkovich & Orton in (2004) maintained that there were two options for US rather than military intervention:

> Considering all the costs and benefits, there were at least two options clearly preferable to a war undertaken without international support: allowing the UNMOVIC/IAEA inspections to continue until obstructed or completed, or imposing a tougher program of “coercive inspections” backed by a specially designed international force (Cirincione, Mathews, Perkovich & Orton, 2004).

**To sum up,** United States invasion of Iraq did not meet the necessity factor for preemptive self-defense.
United States Invasion of Iraq 2003 was not Proportional To The Threat:

The death toll in Iraq after US invasion of Iraq 2003 is discussed by Roberts (2004) in his article Mortality Before and After The Invasion of Iraq in 2003. The article states that:

Whatever figure is quoted for deaths, it seems that the civilian casualties of the war in Iraq run into many thousands and the number is still mounting. What is undisputed is that thousands of families in Iraq have lost loved ones to violent deaths. The psychological effects of the shock-and heavy bombardment and what it implies for the Iraqi nation will only become clear when Iraqis have the chance to think and life returns to some degree of normality, which might be a long time from now (Roberts, 2004).

Bassil in his article assist the consequences of the US invasion of Iraq. He maintains that “In 2008, the total cost of operations was about $3000 billion which has already surpassed that of twelve years of the Vietnam War, and twice the cost of the Korean War” (Bassil, 2011). Moreover, insecurity took place in Iraq after the invasion. In other words, “An increase in the general insecurity in Iraq including terrorist attacks, theft, assault, murder, hostage taking… An unstoppable humanitarian crisis in Iraq… A Setback or progress of law including in international law, and in human rights” (Bassil, 2011).

United States Invasion of Iraq is Not Consistent With Article 51:

In fact, the United States invasion of Iraq violated the United Nations Charter. Hamauswa and Manyeruke in their article A Critique of United States’ Application of Article 51 of the United Nations Charter in Iraq and Afghanistan, criticize the use of force concept especially in US invasion of Afghanistan and Iraq. According to Hamauswa and Manyeruke (2013), resolution 1441 of the Security Council considered Iraq breached its obligations under previous resolutions and that there were consequences of this act (Hamauswa and Manyeruke, 2013). Consequently, “US took the responsibility of the UN Security Council though the UN Charter does not provide for such an action.
The world will not be safe if a single country can supersede the international collective security” (Hamauswa and Manyeruke, 2013). Article 51 of United Nations specified that an attack should take place first in order to initiate a self-defense attack. However, Iraq did not attack the United States. Secretary-General of the United Nations Kofi Anan in an interview *Lessons of Iraq war underscore importance of UN Charter*, he maintained that United States attack was illegal and not consistent with Article 51 of United Nations (UN Service Section, 2004). Anan added "And I hope we do not see another Iraq-type operation for a long time " (Lessons of Iraq war underscore importance of UN Charter – Annan, 2004).

**Therefore, United States attack is not consistent with Article 51 of United Nations. The invasion of Iraq was not based on preemptive self-defense under Caroline Doctrine and it was not based on Article 51 of United Nations. In fact, United States attack is considered illegal under International Law.**

**United States Interpreted the Attack Based On The Bush Doctrine:**

Bush doctrine was formulated after September 11, 2001 attacks. “ The kernel of the doctrine is that unilateral preemptive force may be used even in instances where an attack by an enemy has neither taken place or is imminent” (Mulcahy and Mahony, 2006). In fact, Bush doctrine targets states and terrorists that are developing weapons of mass destruction (Mulcahy and Mahony, 2006). Arend (2003) states that Bush doctrine replaces one main element of Caroline principle: necessity of the attack. “…It seeks to relax the traditional requirement of necessity”(Arend, 2003). The Bush Administration’s National Security Strategy in (Mulcahy and Mahony, 2006):

We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorists do not seek to attack us using
conventional means... if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries the US will if necessary act preemptively (Mulcahy and Mahony, 2006).

Abraham Sofaer (op cit in Mulcahy and Mahony, 2006), admits that “…While it is generally accepted that the nature of warfare has changed over the past six decades… One can reasonably conclude that the emerging threat doctrine conflicts with both the UN Charter and also the pre-charter customary law” (Mulcahy and Mahony, 2006). Moreover, Eckert and Mofidi (op cit in Mulcahy and Mahony, 2006) conclude that Bush Doctrine is not “comport” with Article 51 of United Nations Charter from both liberal and restrictionist’s point of view (Mulcahy and Mahony, 2006).

Record (2003) in his article *The Bush Doctrine and War With Iraq*, evaluates the doctrine that US used within the Iraqi war 2003. Accordingly, Bush Doctrine demonstrates that “Cold War concepts of deterrence and containment do not necessarily work against WMD-seeking rogues states and are irrelevant against terrorist organizations” (Record, 2003). Therefore, United States invasion in Iraq 2003 was based on Bush Doctrine. “According to the Bush Doctrine, rogue states are a double threat; they not only seek to acquire WMD for themselves but also could transfer them to terrorist allies” (Record, 2003). In fact, “The USANSS made it clear that the US was not going to wait for its enemies to attack first. This again makes sense when there is a serious threat from an enemy with nuclear weapons” (Hamauswa and Manyeruke, 2013).

**International Community Responses**

*European Countries and China*

France, Russia, and Germany were the main states that refused the military intervention by United States in Iraq 2003. “On February 10, at a press conference in Paris with
President Putin of Russia, Chirac said nothing today justifies war. Speaking of weapons of mass destruction, Chirac added I have no evidence that these weapons exist in Iraq”\(^\text{12}\) (Copson, 2003). They as well as China preferred more inspections (Copson, 2003). After the US invaded Iraq, “on March 19, Russia’s Prime Minister Vladimir Putin charged that this military action cannot be justified in any way”\(^\text{13}\) (Copson, 2003).

**The United Nations and IAEA Response:**

In March 2003, the Security Council held First Debate On Iraq Since Start Of Military Action; Speakers Call For Halt To Aggression, Immediate Withdrawal. It “called on to end the illegal aggression and demand the immediate withdrawal of invading forces, by an overwhelming majority of this afternoon’s 45 speakers”\(^\text{Resolution 7705, 2003}\). Moreover, members of the council maintained that United States invasion was a violation of international law and United Nations Charter (Resolution 7705, 2003). Then, Koffi Annan in the first debate on Iraq stated:

> Faith in the United Nations could only be restored if the Council was able to identify and work constructively towards specific goals, he said. He urged the five permanent members, in particular, to show leadership by making a concrete effort to overcome their differences. He emphasized two guiding principles, which should underpin all the Council’s future decisions on Iraq. The first principle was respect for Iraq’s sovereignty, territorial integrity, and independence. The second, which flowed logically from the first, was respect for the right of the Iraqi people to determine their own political future and control over their own natural resources (Resolution 7705, 2003).

**Iraq and The Arab World Response:**

The Arab countries and Non-Aligned Movement requested the Security Council in Resolution 7705 to “urge the international community to ensure that the sovereignty and


The integrity of Iraq were fully preserved. The right of the Iraqi people to determine their political future and exercise control over their natural resources should also be fully respected…” (Resolution 7705, UN). Furthermore, Mohamed El Douri, Iraq representative, gave a strong speech condemning the attack:

Sanctions, which have lasted for almost 13 years, were also having a terrible effect on the country. The goal of changing the regime in his country, which had been proclaimed by the United States, constituted a blatant violation of international law and the Charter of the United Nations… The Council must take action to make sure that the rules of international law were observed, he continued. While the aggressors said that their goal was disarmament of Iraq, everybody knew that they were not the ones tasked with that mandate. The inspections during several months had found no evidence of weapons of mass destruction or proscribed activities within Iraq. The real reason was occupation of the country, its re-colonization and controlling its oil wealth (Resolution 7705, 2003).

In a Nutshell, the international community condemned United States invasion in Iraq 2003. It considered the military invasion an aggression and a violation under international law.

**Conclusion**

The United States invaded Iraq for three main reasons: Toppling Saddam, Fighting Terrorism and Dismantling the Weapons of Mass Destrucions (WMD). However, these threats were not imminent and they left other choices to the United States rather than the military intervention. The invasion was not proportional to the threats that United States perceived. United States military intervention was not based on Caroline Principles or Article 51 of the United Nations. Nonetheless, it was based on Bush Doctrine. The international community condemned the invasion. Therefore, United States invasion in Iraq 2003 violated international law.
Case Study Three: Israel Bombing Osirak Reactor in Iraq (Operation Opera) 1981

Israel Attacked Osirak Reactor in 1981:

Ford (2004) in his thesis Israel’s Attack On Osiraq: A Modern For Future Preventive Strikes elaborates Osirak Attack. According to Ford (2004), the conflict started since 1975 when Iraq approached France to acquire a nuclear weapons reactor (Ford, 2004). “Hussein perceived Iraq an oil-rich nation, needed a nuclear weapon to balance against Israel and as a status symbol”(Ford, 2004). However, Israel refused this decision. Uri Bar-Joseph (op. cite in ford, 2004) demonstrates that Israel rejection was “because of Israel’s vulnerability and the nature of the Arab regimes-especially that of Saddam Hussein”14 (Ford, 2004).

Moreover, Brower (2008) in his thesis Preemption and Precedent: The Significant of Iraq (1981) and Syria (2007) for an Israeli Response to An Iranian Nuclear Threat precisely describes the Israeli attack on Osirak as:

Israel sent Eight F-16As, each carrying two Mk-84 2,000 lb. bombs with delayed fuses, along with six F-15As… The F-16 dove at the Osirak reactor to release their bombs. Seven of the eight pilots successfully deployed their bombs directly on the reactor’s dome … and returned much the same way they had come 15 (Brower, 2008).

In an Israeli statement according to The Osirak Attack article (n.d.), the Israeli government announced that “sources of unquestioned reliability told us that it was intended, despite statements to the contrary, for the production of atomic bombs ” (The Osirak Attack, n.d.).

In fact, Ford (2004) considers Israel attack as one of the most significant attacks in the twentieth century (Ford, 2004). “Every nation seeking to acquire nuclear weapons took notice, especially those in the Middle East. This strike added fuel to a region already ablaze with the turmoil” (Ford, 2004). In addition, Kirschenbaum (2010) in his article *Operation Opera: an Ambiguous Success* explains Israel strategic objectives and their effects on Iraqi Capabilities. Kirschenbaum induces that “While there is no scholarly consensus on the relative success or failure of the Israeli operation, it was certainly a tactical masterpiece and a strategic enigma” (Kirschenbaum, 2010).

**How Did Israel Perceive Osirak Threat?**

**Israel Considered The Attack Necessary:**

Based on Israel perception of Iraq’s nuclear threat, Israel faced a nuclear threat that is *instant, overwhelming, left no moment of deliberation and no other choice*. Israel decision to attack the Osirak reactor was largely influenced by two reasons; namely, Israel survival and monopoly of nuclear weapons in the region. The following is a detailed discussion on Israel perception of Iraq’s threat.

**Iraq Threat was instant (imminent) and overwhelming:**

Israel survival was the Target. The Osirak Attack (n.d.) article and Boudreau (1993) in his article *The Bombing of The Osirak Reactor* mention that Israel was the target (The Osirak Attack, n.d; Boudreau, 1993). In an Israeli Statement of 8 June stated that:

> The goal for these bombs was Israel this was explicitly stated by the Iraqi ruler. After the Iranians slightly damaged the reactor, Saddam Hussein remarked that it was pointless for the Iranians to attack the reactor because it was being built against Israel alone (The Osirak Attack, n.d.; Ford, 2004).

Moreover, Menachem Begin feared the repetition of the Holocaust catastrophe as a worst-case scenario. Ariel Sharon, in the Ministry of Defense 1981, maintained that it
was a matter of survival. “The third element in our defense policy for the 1980’s is our
determination to present confrontation states from gaining access to nuclear weapons…
for us it is not a question of a balance of terror but a question of survival” (Bourdeau,
1993).

In fact, the severity of the threat was reflected in Begin’s statement of 8 June:

Within a short time, the Iraqi reactor would have been in operation and hot. In
such conditions, no Israeli Government could have decided to blow it up. This
would have caused a huge wave of radioactivity over the city of Baghdad and its
innocent citizens would have been harmed (The Osirak Attack, n.d.).

Looking back to Israel-Iraq history: “Iraq has never signed a cease-fire or recognized
Israel as a nation and has never joined in any peace effort” (Feldman, 1982). Therefore,
Iraq could have had the intention to use the bomb against Israel. Ford (2004) adds “ Iraq
also proved its hostility toward Israel by remaining outside the 1949 Armistice agreement
and not recognizing the legitimacy of Israel as a state” (Ford, 2004). The relationship
between the two states did not allow any cooperation. Ford (2004) quoted Iraqi
Ambassador statement before the Arab summit in 1978 “Iraq does not accept the
existence of a Zionist state in Palestine the only solution is war”\(^{16}\) (Ford, 2004).
Moreover, Iraq used chemical weapons against its neighbors previously so it would be
possible to attack Israel as well:

During the Iran-Iraq war, Israel observed Iraq’s merciless use of chemical
weapons. Hussein took no care in launching the deadly poison as long as he
received benefit from its use. Israel noted that Hussein’s use of these weapons
was against people whom he professed not to hate. How much more devastating
would an attack be on those whom he professed to hate? (Ford, 2004)

Israel considered it a threat against its Monopoly of Nuclear Weapons and its position
within the region. Power (1986) elaborates Israel perceptions towards Iraq in The

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Baghdad Raid: Retrospect and Prospect. Power (1986) explains that:

The tap root of the Osiraq strike was the perception of Israeli Labour and Likud-led coalition governments that Iraq's emerging nuclear activities would sooner or later conflict with Israel's Middle Eastern nuclear-bomb monopoly (Power, 1986).

Indeed, Marshall (1980) in his article *Iraqi Nuclear Program Halted by Bombing* explores the effects of air strikes wars against nuclear plants. Marshall (1980) proclaims that Israel feared the creation of the first Arab bomb in the Middle East or training generations that will eventually build the bomb (Marshall, 1980). Therefore, “Israel military specialists are convinced that if the 1981 air strike had not been undertaken, such a capability would have meant a totally different strategic balance facing US, moderate Arabs, Western Nations” (Bourdreau, 1993).

To conclude, *Israel survival and its monopoly of nuclear weapons in the region maintain the imminence and the Overwhelming of the threat.*

*Iraq’s Nuclear Threat Left No Moment of Deliberation:*

The Israeli government knew the date for the completion of the reactor. “Highly reliable sources gave us two dates for the completion of the reactor and its operation: the first, the beginning of July 1981, the second, the beginning of September this year”(The Osirak Attack, n.d.). In other words:

The Israeli Government justified the timing based on intelligence reporting that Osirak was soon to receive its first shipment of fuel and commence operations. According to Begin, once active, the reactor's destruction would have spread radiation fallout throughout Baghdad 17 although there are scholars who questioned the time (Kirschenbaum, 2010).

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17 Government of Israel, "The Iraqi Threat," p.2. "[The] timing was dictated by the fact that the reactor was due to become critical between July and September of 1981, after which radioactive release could have entailed injury to civilians." cited in Kirschenbaum (2010) “Operation Opera: an Ambiguous Success.”
The Aftermath of The Attack

*The Attack was not necessary: The threat was not (Instant (imminent), Overwhelming and No Moment of Deliberation and left other options:*

Greenwood (2003) maintains the lack of an imminent threat in Iraq 1981:

Although international reaction to the 1981 Israeli attack on Iraq’s nuclear reactor, on the other hand, was generally condemnatory of Israel, in most cases that reaction was based on a conclusion that Israel had failed to demonstrate that there was an imminent threat from Iraq and had thus failed to demonstrate Caroline requirements… (Greenwood, 2003)

Israel followed different paths to prevent Iraq from acquiring the nuclear weapons; however, Saddam Hussein “joined the nuclear club” (Ford, 2004; Brower 2008). Israel options included: media and information campaign, diplomatic pressures, International Atomic Energy Agency (IAEA), United States assistance, and Economic Sanctions (Ford, 2004; Brower, 2008). **However, Israel did not bring the issue to the Security Council in United Nations and the International Atomic Energy Agency (IAEA).**

1. **Media and Information Campaign:**

Media was one of the overt routes that Israel targeted. Israel initiated a campaign to spread awareness of Iraq’s nuclear threat (Ford, 2004). The following are different examples:

London Daily published on January 10, 1976, Iraq is soon liable to achieve a capacity for producing nuclear weapons. One of the most unstable states in the Arab world would be the largest and most advanced in the Middle East. The paper added that France would be powerless to impose effective control over the use to which the Iraqis would put it18(Ford, 2004). Also, A London newspaper reported on March 20, 1980: Next year, Iraq will be capable of manufacturing a nuclear bomb with the assistance of France and Italy. France provides the enriched uranium, Italy: the know-how and technology (Ford, 2004). During July 1980, U.S. Media published a startling declaration by President Carter: The United States would not attempt to impose it views upon states with a nuclear capability

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such as France— with regard to the Mideast (Ford, 2004).

Furthermore, Israel initiated an information campaign in France to pressure and inform the public of the nuclear threat of Osirak reactor (Brower, 2008). “The committee’s chairman Moshe Arens, argued for persuading Western countries to induce them to prevent Iraq from going nuclear” however, with no tangible effect (Brower, 2008).

Israeli Director General Prime Minister’s Office Matti Shmuelevitz, told the German newspaper *Die Welt* that “Israel cannot afford to sit idle and wait until an Iraqi bomb drops on our heads” (Brower, 2008).

2. Diplomatic Pressure:

Since the announcement of a deal between France and Iraq, Israel focused on diplomatic pressure (Marshall, 1980). According to Ford (2004), Israel engaged in six to seven years of diplomatic pressure to prevent Iraq from getting the reactor (Ford, 2004; Brower, 2008). The diplomatic pressure was mainly on France, West Germany and Italy (Ford, 2004; Bower, 2008). “The most important part of Israel’s diplomatic effort is the sheer number of attempts Israel made to convince France to abandon its support of Iraq” (Ford, 2004); For example:

The Israeli Foreign Minister, Yigal Alon, paid a working visit to Paris as the draft Franco-Iraqi agreement reached its final stages of completion…In his talks with the three main pillars of the French administration, Pres. Giscard, Premier Chirac and Foreign Minister Jean Sauvagn argues, Alon conveyed Israel’s concern over the possibility of Iraq’s misuse of the nuclear technology and fuels whose purchase it was negotiating with France. They all gave the official French position though not a party to the NPT, France would continue (Ford, 2004; Brower, 2008).

Additionally, personal appeals were used to stop Iraq-France deal however, Israel failed.


Shimon Peres, a close friend of Chirac’s, personally asked him to cancel his recent contact with Hussein. But Chirac was unwilling to turn his back on the deal in which Iraq guaranteed oil contracts, weapon purchases, and automobile purchases in exchange for the Osiris nuclear reactor and seventy-two kilograms of weapons-grade, enriched uranium for start-up fuel (Brower, 2008).

3. Economic Sanctions:

The economic means were not used by Israel in preventing Iraq from acquiring the threat because no economic ties existed with Baghdad (Brower, 2008). Subsequently, Israel had to encourage other states and the Security Council to impose economic sanctions on Iraq (Brower, 2008). However, Israel failed in pushing the United Nations to impose economic sanctions on Iraq because Iraq is part of the Non-Proliferation Treaty and the organization did not record any violation against Iraq21 (Brower, 2008).

4. Assistance From United States:

Israel diplomatic efforts targeted US to convince them of the danger of Osirak reactor (Ford, 2004). However, Israel lost faith easily in the United States (Ford, 2004):

President Carter reversed plans in July 1980. He claimed his administration would not interfere with other nuclear-equipped countries and their Mideast affairs. Also in 1980, U.S. policymakers decided to continue unfruitful diplomatic approaches to France instead of backing direct Israeli pressure on Iraq (Ford, 2004).

5. Israel Perception of International Atomic Energy Agency:

Israel is not part of the NPT treaty and IAEA. The International Atomic Energy Agency was not effective according to Israel Atomic Commission to handle Iraq’s nuclear threat. The Israel Atomic Energy Commission in (Feldman, 1982) challenges the effectiveness of the IAEA. Firstly, it lacks measures that detect experiments: “… No inspection procedures exist for monitoring experiments within the reactor core itself making it

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possible for Iraq to produce weapons-grade plutonium within the reactor in a manner unobservable to IAEA” (Feldman, 1982).

Secondly, in conducting researchers according to Israel states do not have to clarify their reasons to the inspectors. Accounts of the declared fuel are the required data by the inspectors (Feldman, 1982):

With respect to a large MTR such as Osiraq, this limitation permits the insertion of various targets, including undeclared natural uranium for which the reactor operation is not accountable to the inspector” (Feldman, 1982). Besides, Inspections were intended to account for the HEU fuel and related activities. For this reason, Israel worried that the natural uranium targets, produced from yellowcake freely and legally purchased on international markets, would be outside the purview of the IAEA's inspectors (Kirschenbaum, 2010).

The effective method according to Israel Atomic Energy Commission is “…round the clock, continuous on the spot control” (Feldman, 1982). Finally, Israel believed that Iraq could have unloaded its natural uranium before every inspection especially that “ IAEA inspections are intermittent and advance notice must be given prior to the inspectors arrival” (Feldman, 1982). In addition, the IAEA does not provide inspections based on accusations and Israel thought that Iraq would withdraw from the NPT before having the bomb (Boudreau, 1993).

**To sum up, it was not necessary to strike Osirak. Israel did not notify the Security Council and the IAEA, but it notified the international community that it would reconsider its options to address Iraq’s nuclear threat.**

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Israel Attack Against Iraq’s Nuclear Reactor was Proportional to the Threat:

Physical Results:

Basically, Israel attacked only the reactor. The following is a detail description of the attack:

The attack destroyed the complex, comprising a French-built Osiris-type Materials Testing Reactor (MTR), as well as a smaller adjacent reactor. The two reactors were known in Iraq as Tammuz-I and Tammuz-II. The Israeli jets returned to their bases unscathed, and Iraq, which was in the midst of a war with Iran (which had the year before bombed but not destroyed the site), did not retaliate militarily (Kirschenbaum, 2010).

In order to minimize the number of casualties, Israel initiated a limited war.

…Destroying the reactor, attacking on a quiet Sunday afternoon with few people present, immediately leaving the airspace following the attack and bombing before the introduction of fissile material into the reactor23 (Weise, 2012).

To be precise, Israel “…hit the research site about 10 miles from the center of Baghdad. They damaged an auxiliary building and forced the French technicians working on the project to leave”(Marshall, 1980). An Iraqi scientist who worked on the Osirak reactor, Khidhir Hamza, (op cit Ford, 2004) describes the consequences of the attack; the attack totally destructed the reactor24 (Ford, 2004). The attack was proportional in terms of reaching its target; namely, destroying the reactor. It succeeded in destroying plutonium that is used in developing the bomb (Ford, 2004). The effects of the attack is determined by Ford (2004):

This process was more time-consuming and wrought with expensive, sophisticated, and scarce scientific material. The Osiraq reactor alone had cost the Iraqi government $300 million dollars to purchase from the French government. Iraq was now funding two wars, one against the Iranians and the other against

23 See Eichensehr, supra note 28, at 73, 76 (noting the presence of the first three criteria, and stating that “Israel bombed the Osiraq reactor one month before it was to become operational . . . . Israel defended the timing of its action by claiming that it attacked at the last time when bombing the reactor would not have caused release of nuclear radiation that could have endangered civilians in Baghdad.”) quoted in Weise (2012)
nuclear non-proliferation (Ford, 2004).

Marshall (1980) declares that as a consequence of the attack, Iraq’s program was stopped for one or two years (Marshall, 1980). Similarly, Fieldman (op cit in Ford, 2004) claims “Osiraq’s destruction slowed the pace of Iraq’s nuclear program. Even if Iraq could replace its loss with an identical reactor, which now seems likely, some 3 to 4 years will have been gained”\textsuperscript{25} (Ford, 2004). Therefore, the Israel act was restricted by the necessity causing it.

The Attack is not Consistent With Article 51 of United Nations:

Many scholars considered Israel attack as an act of aggression. In other words, “…the plea of self-defense is untenable where no armed attack has taken place or is imminent”(Brower, 2003). Pogany(1981) evaluates in his article “The Destruction of Osirak: A Legal Perspective” Israel justification for the attack through applying Article 51 of UN and Caroline principles to the attack. Since both states are members of the United Nations, they are obliged to abide by the Charter (Pogany, 1981). Article 2(4) according to Pogany (1981) is breached by Israel attack. In addition, Israel did not submit the issue to the Security Council before launching the attack (Weise, 2012). Pogany (1981) on the legality of the attack mentions:

It seems clear that the Israeli action was in breach of these provisions. The destruction of the Iraqi reactor cannot be deemed a 'peaceful' means of settling a dispute, and it has clearly endangered international peace and security. Moreover, the Israeli operation was a use of armed force, within the meaning of Article 2 (4), which violated both the territorial integrity and political independence of Iraq (Pogany, 1981).

Furthermore, “A literal interpretation of Article 51 would suggest that the right of self-defense may only be invoked in the event of an 'armed attack'. On this analysis, the

Israeli operation would be unlawful as it was not preceded by an armed attack on Iraq” (Pogany, 1981). Weise (2012) summed up the attack:

Israel’s bombing of Osirak would be illegal under the proposed standard. Though Iraq was illegally proliferating and Israel was specifically threatened by the Iraqi proliferation, Israel failed to bring the issue to the Security Council. Moreover, Israel is not in good standing with its international non-proliferation obligations (Weise, 2012).

**Subsequently, Israel attack was not consistent with Article 51 of the United Nations Charter. The attack was illegal under International Law**

**Israel Interpretation of the Attack**

Begin released a statement to the public defending his state’s right of preemptive self-defense after the attack. Indeed, Begin’s statement is mentioned in Spector and Cohen’s article *Israel’s Airstrike on Syria’s Reactor: Implications for the Nonproliferation Regime*:

> We chose this moment: now, not later, because later may be too late, perhaps forever. And if we stood by idly, two, three years, at the most four years, and Saddam Hussein would have produced his three, four, five bombs… Then, this country and this people would have been lost, after the Holocaust. Another Holocaust would have happened in the history of the Jewish people. Never again, never again! Tell so your friends, tell anyone you meet, we shall defend our people with all the means at our disposal. We shall not allow any enemy to develop weapons of mass destruction turned against us (Spector and Cohen, 2008)

Then, in an interview within a CBS News television, Begin confirmed that this practice will be applied in future even with different governments. “This attack will be a precedent for every future government in Israel… [E]very future Israeli prime minister will act, in similar circumstances, in the same way”(Spector and Cohen, 2008).

**Begin’s Preemptive Self-Defense Doctrine:**

After Israel attacked Osirak reactor, scholars believed that Israel adopted preemptive self-defense doctrine called “The Begin Doctrine”. According to Brom (2005), Begin’s
Doctrine started before attacking Osirak and then it was generalized as an Israeli doctrine (Brom, 2005). Shai Feldman (op cit in Brom, 2005) analysis the change in Israel practice into “Begin Doctrine” however Feldman questions the effect of the doctrine on the long term (Brom, 2005):

Shai Feldman, for example, describes how, in its June 9 announcement of Osirak’s destruction, Israel’s government articulated its belief that, had Iraq’s President Saddam Hussein acquired nuclear bombs, he would not have hesitated to drop them on Israeli cities and population centers. The Israeli government then went on to a general preventive doctrine: “under no circumstances would we allow the enemy to develop weapons of mass destruction against our nation; we will defend Israel’s citizens, in time, with all the means at our disposal26.” Feldman adds that this theme soon was crowned as a “doctrine,” not only because it was immediately viewed as such by numerous observers worldwide, but also because Israel’s leaders have since repeated it on numerous occasions (Brom, 2005).

Begin’s Doctrine, in other words, advocates the usage of preemptive self-defense in the presence of an existential threat. “Israel would not tolerate its enemies’ acquisition of nuclear weapons, as an existential threat, it will take military action to destroy the threat if no other means are available which offer a high probability of success” (Brower, 2008).

**International Community Response After The Attack**

**International Atomic Energy Agency Response:**

The International Atomic Energy Agency (IAEA) condemned bombing Osirak. The IAEA considered Israel attack as an act of aggression against its trust climate and mechanisms. Iraq has been a party to the treaty on the NPT since 1970 and it accepted IAEA verification mechanisms (Bourdreau, 1993). “The IAEA concluded their 1981 inspections of Iraqi facilities to be adequate” (Bourdreau, 1993). According to Pogany (1981), “The International Atomic Energy Agency, which inspected the Iraqi installations in January 1981, stated that it found no evidence that the reactor would be

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26 Ha’aretz, Israel, June 9, 1981 quoted in Brom (2005) “Is The Begin Doctrine Still A Viable Option For Israel?”
used to produce nuclear weapons\(^\text{27}\) (Pogany, 1981). Consequently, they demanded as the Security Council to end all assistance to Israel and to open its facilities to inspections within one year (Bourdreau, 1993).

**United Nations Response:**

The United Nations Security Council condemned Israel attack in Resolution 487. UNSC describes it as an act of aggression against the UN and the norms of International Conduct. One of the main points in the resolution called upon states to stop providing Israel with weapons (Resolution 487, 1981). Also, the Security Council in the resolution requested to put Israel nuclear facilities under investigation (Resolution 487, 1981) and demanded Israel to pay compensation to Iraq (Resolution 487, 1981). However, “… reactions to Resolution 487 were mixed. Israel rejected the resolution as biased and argued that by removing the nuclear threat to its existence, Israel was exercising its right to self-defense” (Brower, 2008). Similarly, Iraq rejected it because Iraq requested imposing sanctions against Israel. “Iraq’s Foreign Minister said the motives behind Israel’s attack were to cover up its possession of nuclear weapons and to prevent Arab nations from acquiring scientific or technical knowledge\(^\text{28}\)” (Brower, 2008).

**Iraq Response:**

To start, Saddam Hussein directed a speech after the attack to the international community. “He called on all peace-loving nations of the world to help the Arabs in one way or another acquire atomic weapons in order to offset Israel’s nuclear

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\(^{27}\) Weekly Hansard H.C., Vol. 6, No. 116, col. 262. (9 June 1981). See, also, the statement of Mr Hurd, Minister of State at the Foreign & Commonwealth Office: “... it is a pity that some Israelis continue to use the tragic memories of the holocaust as a justification for breaking international law.” ibid., Vol. 7, No. 127, col. 243. (24 June 1981) cited in Pogany (1981)” *The Destruction of Osirak: A Legal Perspective*”
capability”²⁹ (Brower, 2008). Following, Saddam accused France of assisting Israel in the attack (Brower, 2008). Saddam accused the Iraqi Atomic Energy administration of “failing to anticipate the strike”(Brower, 2008). After more than thirty years, Iraq still demands Israel compensate for destroying the reactor (Brower, 2008):

On 6 January 2010 an Iraqi parliamentary member explained, Prime Minister Nouri al-Maliki is looking into plans that would compel Jerusalem to pay billions of dollars in compensations for its 1981 attack on the Tammuz nuclear reactor.”³⁰ (Arng, 2008) In fact, the United States confirms Iraq request and demanded the formation of a neutral committee to assess the damage (Brower, 2008).

**Arab Responses:**

The Arabs condemned the attack. “ A number of Arab states introduced a draft resolution to expel Israel from IAEA” (Feldman, 1982); in addition:

Arab state and non-state actors including Kuwait, Jordan, the Palestine Liberation Organization, Syria, the United Arab Emirates (UAE), Bahrain, and Morocco denounced Israel’s attack on Iraq’s sovereign territorial... The league of Arab states denounced Israel attack and affirmed states right for peaceful usage of nuclear programs and it called on nations to stop supporting Israel³¹ (Brower, 2008). Moreover, Egypt asked the American government to reconsider its military assistance to Israel (Brower, 2008).

**United States Reaction:**

The United States had different responses towards the attack. President Ronald Regan was pro-Israel. “When initially told of the attack by National Security Advisor Richard V. Allen, Reagan asked… Why do you suppose they did it?... Not waiting for a response, Reagan answered himself, Well, boys will be boys”(Brower, 2008). Nonetheless, Secretary of Defense Caspar Weinberger and Secretary of State Haig had mixed feelings. Secretary of Defense Caspar Weinberger describes the attack as a mere

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violation of US “Arms Export Control Act” (Brower, 2008). He demanded the United States to impose sanctions based on their violation of Arms Export Control Act (Brower, 2008). As a result, “Secretary of State Haig announced that America was suspending the sale of F-16s to Israel, including four that were currently at General Dynamics awaiting delivery. However by September 1981, the sale of F-16s to Israel quietly resumed” (Brower, 2008).

**France Response:**

France condemned the attack on Osirak reactor. “French Foreign Minister Claude Cheysson argued that the strike was unacceptable, dangerous, and a serious violation of international law” (Brower, 2008). France in the United Nations claimed that the France-Iraq deal was for scientific research and not for military uses32 (Brower, 2008). Also, France started leaking significant information on Dimona reactor which France assist Israel in building33 (Brower, 2008).

**Conclusion**

Israel perceived Iraq’s nuclear reactor as a threat to its survival and against its position as a powerful nuclear weapon state in the region. In fact, the attack was not necessary because the threat was not imminent and Israel had other options than launching a preemptive attack: notifying the Security Council and International Atomic Energy Agency. Israel act was proportional to the threat because it attacked only the reactor. There was not any attack by Iraq against Israel. Therefore, the attack cannot be considered self-defense under Article 51 of United Nations based on the restrictive view.

Subsequently, the presence of Iraq’s nuclear threat in 1981 led Israel to change its

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practice into a preemptive self-defense that is not consistent with Caroline case or with Article 51 of United Nations. In other words, Israel practice changed into preemptive self-defense in 1981 that is illegal under international law. The attack was based on “Begin Doctrine”; it allows Israel initiate preemptive self-defense strikes against Weapons of Mass Destruction in the region due to their grave effects; a main example that took place later is Syria 2007. Israel attack in 1981 was criticized by different states, United Nations, and IAEA because it breached International Law. This means Israel act in 1981 violates the second element that creates new norms: *Opinio Juris*.

**Case Study Four: Israel Bombing Al-Kibar Nuclear Reactor in Syria 2007**

**The Attack:**

Spector and Cohen (2008) demonstrate Israel bombardment of Syrian reactor. “ On September 6, 2007, in a surprise dawn attack, seven Israeli warplanes destroyed an industrial facility near al-Kibar, Syria, later identified by the CIA as a nearly completed nuclear reactor secretly under construction since 2001.”(Spector and Cohen, 2008). In 2006, Israel bombed Al-Kibar nuclear reactor in Syria. Makovsky (2012) in his article *The Silent Strike* describes the attack as “it marked the rise of the Begin doctrine, named for Israeli Prime Minister Menachem Begin, which held that no Israeli adversary in the Middle East should be allowed to acquire a nuclear weapon” (Makovsky, 2012). The main reason for bombing Al-Kibar was to stop North Korea, Iran, and Syria from cooperating “multinational nuclear weapons” (Spector and Cohen, 2008). There is not

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34 “Background Briefing With Senior U.S. Officials on Syria’s Covert Nuclear Reactor and North Korea’s Involvement,” April 24, 2008, available at dni.gov/interviews.htm; Ronen Bergman and Ronen Solomon, “Al-Asad’s Atom Program,” Ye’diot Achronot, April 4, 2008.
much discussion on Israel reasons for the attack, but the most important part of bombing Al-Kibar is the aftermath of the attack.

The Aftermath

“The international silence continued even after the CIA on April 24, 2008, provided a 12-minute video and an extensive briefing that made a strong case that the target was a North Korean-built reactor designed for producing weapons-usable plutonium” (Spector and Cohen, 2008). The international community did not condemn Israel attack against Al-Kibar in Syria.

The Arab world was largely silent following the IAF’s attack at al-Kibar. Because of the media blackout in Israel and speculative reports worldwide, Arab nations were unsure of exactly what had occurred. Moreover, the IDF had not invaded Syria with a large conventional force; instead they conducted a surgical strike which resulted in little collateral damage and no human loss. If the Arab world demanded punitive action from the UN or mounted a counteroffensive, then those nations might be seen as complicit in the building of the al-Kibar reactor. Lastly, many Arab states tacitly approved of the strike because a nuclear-equipped Syria would further destabilize the region” (Brower, 2008).

Moreover, cooperation between US and Israel is reflected in the Syrian case. Olmert asked Bush to attack the reactor however US demanded to submit the issues to the IAEA. But then, Olmert requested US to remain silent about the attack and US respected that:

Bush recalled, this was his operation and I felt an obligation to respect his wishes. I kept quiet, even though I thought we were missing an opportunity (to isolate Assad’s regime)33” (Brower, 2008).

The United Nations reaction towards Israel in 2007 is not the same as in 1981. The attack was not discussed either in the Security Council or General Assembly (Brower, 2008). “In fact, Israel uncovering and destroying Syria’s covert site at al-Kibar caused increased IAEA scrutiny of Syria’s nuclear program whose efforts continue to this day” (Brower,
The IAEA condemned the attack however without imposing sanctions on Israel. 

El Baradi demonstrates:

> It is deeply regrettable that information concerning this installation was not provided to the Agency in a timely manner and that force was resorted to unilaterally before the Agency was given an opportunity to establish the facts, in accordance with its responsibilities under the NPT and Syria’s Safeguards Agreement. He went on to stress, however, that Syria, like all States with comprehensive safeguards agreements, has an obligation to report the planning and construction of any nuclear facility to the Agency. We are therefore treating this information with the seriousness it deserves, noting that an IAEA inspection team would visit Syria June 22-24, 2008. Nonetheless, the IAEA’s official summary of the meeting does not indicate that the matter was further debated, a silence on the matter that at least one official present confirmed (Spector and Cohen, 2008).

**Begin’s Doctrine:**

Syria’s reactor was not an imminent threat. There were other options for Israel but it decided to bomb the reactor. In other words, it was not necessary for Israel to bomb Syria in 2007. Also, the attack breached article 51 of the United Nations Charter. **Indeed, there are similarities between the conditions identified in Begin and Bush Doctrine and the attack.**

Israel’s strike on al-Kibar in September 2007 was, in effect, a clear application of this internationally disfavored doctrine. Given that the al-Kibar reactor had not started to operate and, according to the CIA, Syria’s fuel fabrication and reprocessing facilities had not been discovered and might not yet have been completed, Syria was unquestionably some time away from producing fissile material for nuclear weapons and still further from producing the weapons themselves (Spector and Cohen, 2008).

However, there was not international condemnation against Israel bombardment of Osirak.

**Why No Condemnation?**

One view presented by Egyptian Ambassador Nabil Fahmy in 2008 in a forum that took place in Washington (op cit in Spector and Cohen, 2008) is:
Governments in the region had refrained from commenting because so little authoritative information was originally provided officially by the governments involved. He added that the episode had also been overshadowed by other events in the region and that governments would be more likely to speak to the issue once the IAEA had completed its initial investigation of the incident. Yet, the reasons behind the international silence appear to be considerably more complex and could indicate a broader concern about the underlying weakness of the NPT regime (Fahmy op cit in Spector and Cohen, 2008).

The second view is that political reasons encouraged Israel to attack Al-Kibbar and encouraged the silence of the international community. Syria was viewed as:

An isolated state with close ties to Iran, Syria is perceived as a disruptive influence in the region, even within the Arab community, making it a decidedly less sympathetic victim of Israeli pre-emption than Iraq in 1981. Also, the specific details of the al-Kibar case itself, coupled with the as yet ineffective efforts to enforce the NPT in the case of Iran, have undoubtedly influenced thinking in foreign capitals (Spector and Cohen, 2008).

Finally, it is believed that Security Council failed regarding Iran ending its uranium program (Spector and Cohen, 2008). In fact, the team that the IAEA sent to investigate the reactor concluded that it was not clear whether the reactor was for nuclear or peaceful means (Spector and Cohen, 2008).

In Conclusion

Israel attack against Al-Kibar was not consistent with Caroline Case requirements because the attack was not necessary and it violated Article 51 of the United Nations requirements for self-defense. There are similarities between the conditions identified in Begin and Bush Doctrine and the attack. Therefore, it breached the international law. The most important part is that the international community was silent in contrast to Israel attack against Osirak 1981 and US invasion in Iraq 2003. In other words, providing little information by the governments, the need for isolating Syria’s regime and the ineffective efforts to enforce the NPT encouraged international community silence after the attack.
Table 1: The Perceived Threat, The Breached Limits and International Community Reaction

<table>
<thead>
<tr>
<th>The Case Studies</th>
<th>The Perceived Threat</th>
<th>The Breached Limits (Caroline Case and Article 51 of UN Charter)</th>
<th>International Community Reaction</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Possibility of An Attack By China Against North Korea</td>
<td>The possibility of supplying non-state actors with nuclear weapons for financial gain and the possibility of refuge flows if North Korea nuclear weapons caused a conflict in the region or a major war</td>
<td>There is not an armed attack yet. China prefers to decrease economic sanctions and increase economic aid; therefore, Article 51 is still in force. China influences North Korea through economic pressure therefore preemptive self-defense attack is not necessary. In other words, China will not attack North Korea based on Caroline Case requirements. China respects Article 51 of UN Charter; however, North Korea left the NPT and disregards Security Council.</td>
<td></td>
</tr>
<tr>
<td>US Invasion of Iraq 2003</td>
<td>Dictatorship that has weapons of mass destruction and assists terrorist groups</td>
<td>Breached Caroline Case Requirements (imminence of the threat, necessity and proportionality of the attack). Breached Article 51 of UN Charter requirement for self-defense attack (no attack took place). Disregarded Security Council and IAEA Decisions. The Attack is based on Bush Doctrine</td>
<td>General Condemnation</td>
</tr>
<tr>
<td>Israel Bombing of the Iraqi Reactor “Osirak” 1981</td>
<td>Development of nuclear weapons which threatens its security, survival and position in the Middle East</td>
<td>Breached the imminence element under Caroline requirements and Israel. Breached Article 51 of UN Charter requirement for self-defense attack (no attack took place). Disregarded Security Council and IAEA. The attack is based on Begin’s Doctrine</td>
<td>Condemnation</td>
</tr>
</tbody>
</table>
Israel Bombing of the Syrian Reactor “Al-Kibar” 2007

Development of nuclear weapons which threatens its security, survival and position in the Middle East

No much Discussion on this attack. Same as Israel Bombing Osirak in 1981. It disregarded both Security Council and IAEA. There are similarities between the conditions identified in Begin and Bush Doctrine and the attack.

Providing little information by the governments, the need for isolating Syria’s regime and the ineffective efforts to enforce the NPT encouraged international community silence after the attack. Given the international condemnation, There is no opinio juris. Therefore, no new norm of preemption consistent with Caroline Principles coexists.

Table 2: Similarities and Differences Between the Four Cases

<table>
<thead>
<tr>
<th>Similarities Between The Cases</th>
<th>Differences Between The Cases</th>
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</thead>
<tbody>
<tr>
<td>• US and Israel before initiating the three attacks assumed that the nuclear threat is imminent, overwhelming, leaving no other choice and no moment of deliberation. In other words, they assumed that their attacks are based on Caroline case requirements.</td>
<td></td>
</tr>
<tr>
<td>• After initiating the three attacks, the project elaborates that the threat was not imminent and it was not necessary to initiate an attack. There was not an imminent threat, in other words.</td>
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<tr>
<td>• In all the four cases there is not any armed</td>
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<tr>
<td>• Since China did not attack North Korea yet, it respects Security Council and IAEA decisions. Then, Article 51 in this case is respected in contrast to the other three cases.</td>
<td></td>
</tr>
<tr>
<td>• China decreases economic sanctions and increases economic aids in the North Korea case in contrast to Bush and Begin Doctrine that allows preemptive attacks.</td>
<td></td>
</tr>
<tr>
<td>• The US invasion of Iraq is generally condemned because it violates both elements under Caroline case (necessity and proportionality) and Article 51 of UN</td>
<td></td>
</tr>
</tbody>
</table>
attack that took place before initiating the self-defense attack. In the second, third and forth case studies there are a violation of Article 51 of UN Charter.

- US and Israel used Bush and Begin Doctrine that have the same goal “not to wait to be attacked by their enemies especially in the presence of WMD” to initiate self-defense attacks.
- US and Israel disregarded International Law through violating Security Council resolutions and IAEA decisions.
- US, Israel and North Korea is in violation with International Law.
- Iraq and Syria accepted the IAEA inspections however Israel and North Korea are not part of the IAEA.
- The violation of NPT and IAEA is a common element in the four case studies
- Proportionality as an element under Caroline Case is respected in the two Israeli attacks in 1981 and 2007.
- Israel in the two case studies is condemned because it violated the necessity of the attack under Caroline principles and it is condemned for not respecting Article 51.
- Israel and US in the three case studies diverged from the international law and customary law requirements of self-defense.

| US and Israel used Bush and Begin Doctrine that have the same goal “not to wait to be attacked by their enemies especially in the presence of WMD” to initiate self-defense attacks. |
| US and Israel disregarded International Law through violating Security Council resolutions and IAEA decisions. |
| US, Israel and North Korea is in violation with International Law. |
| Iraq and Syria accepted the IAEA inspections however Israel and North Korea are not part of the IAEA. |
| The violation of NPT and IAEA is a common element in the four case studies |
| Proportionality as an element under Caroline Case is respected in the two Israeli attacks in 1981 and 2007. |
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Charter.
CHAPTER FIVE
CONCLUSION AND RECOMMENDATIONS

Major Interpretations of the Case Studies:

State practice in the presented case studies show a tendency in the presence of the nuclear weapons threat to exceed self-defense requirements which is not supported by international law and customary international law. Unfortunately, the Security Council and IAEA have been ineffective in the three case studies.

In the North-Korean case, the Chinese government chose not to resort to preemptive self-defense. China has other options given its influence over North Korea; namely, reducing economic sanctions and increasing economic sanctions. China decided to abide by international law requirements of self-defense. It is important to mention that the IAEA and SC consider North Korea in noncompliance since 1993, but no military action is taken against North Korea until now.

The 2003 US invasion of Iraq exceeded the limits of preemptive self-defense under Caroline case and Article 51 of UN Charter. The attack is based on Bush Doctrine that states “...the US was not going to wait for its enemies to attack first...” (Hamauswa and Manyeruke, 2013). US perceived Iraq’s threats as imminent (instant), overwhelming, left no moment of deliberation and no other choice. The threats are Saddam Hussein, Iraq linkage with Terrorists and Weapons of Mass destruction. The aftermath of the attack explains that the threats claimed by the United States were not: instant, overwhelming, leaves no moment of deliberation and leaving no other choice. United States had other options than invading Iraq: more inspections and sanctions. The invasion was not proportional to the threats stated by the US. As a consequence, United States invasion is
not consistent with Caroline requirements for preemptive self-defense. Although the United Nations passed seventeen resolutions condemning Iraq’s Weapons of Mass destruction program one of which is Resolution 1441, it did not authorize any attack against Iraq. Nonetheless, United States attacked Iraq without the approving of the Security Council. Iraq did not attack the United states therefore United States invasion in Iraq is not consistent with Article 51 of UN Charter requirement for self-defense. Subsequently, United States invasion of Iraq 2003 is not consistent with Caroline case principles for preemptive self-defense and not consistent with Article 51 of United Nations requirement for self-defense.

The Israeli bombing of Osirak in 1981 was justified as based on Begin’s Doctrine. However, preemptive self-defense under Caroline case requires the threat to be imminent, overwhelming, leaving no choice and no moment of deliberation. In this case, Israel attack did not meet the requirement of necessity in preemptive self-defense under Caroline case. According to Israel, it has the capability to jeopardize Israel’s survival and monopoly of nuclear weapons in the region. Iraq’s threat in 1981 left no moment of deliberation given the timing of the bomb. The aftermath of the attack explains that the threat was not imminent and Israel did not consume all means before the initiating the attack. Israel did not bring the issue to the Security Council or the International Atomic Energy Agency. However, the attack was proportional. Israel interpreted the attack as an act of preemption under “Begin’s Doctrine”. Furthermore, the international community condemned the attack: the United Nations passed Resolution 487, International Atomic Energy Agency condemned the attack, Iraq, Arab countries and the United States condemned Israel bombing Osirak 1981. Caroline Doctrine allows preemptive self-
defense when the threat is instant, overwhelming, no moment of deliberation and leaves no other choice. However, Israel attack did not meet Caroline principles. As a result, Israel attack against Iraq in 1981 is not a preemptive self-defense act under Caroline Doctrine. In fact, Iraq did not attack Israel to allow an act of self-defense under Article 51 of United Nations Charter. Consequently, the attack breached International Law requirement for self-defense: Article 51. Subsequently, Israel attack against Iraq’s reactor “Osirak” is not consistent with Caroline case principles for preemptive self-defense and not consistent with Article 51 of United Nations requirement for self-defense. The attack is based on “Begin’s Doctrine” that states in the presence of a nuclear weapons threat in the region, Israel will act preemptively. The international community condemned Israel act in 1981.

**The conclusion does not support my hypothesis.** After analyzing the case studies, it is clear that in the presence of a nuclear threat, United States and Israel change their practice into preemptive self-defense that is illegal under international Law. US and Israel preemptive self-defense practice, in other words, are not consistent with Caroline principles or with Article 51 of United Nations. US and Israel preemptive self-defense attacks are based on the assumption that they will act preemptively in the presence of a nuclear threat regardless of the international law or international community condemnations. In other words, not all states are allowed to use preemptive self-defense under “Bush Doctrine”; only states that United States trust are allowed to initiate preemptive self-defense under “Bush Doctrine” even if, the international community refuses these attacks mainly Israel. In the possibility of an attack by China against North Korea case, it is highlighted that China will not initiate a preemptive self-defense attack
against North Korea. China and North Korea are considered allies. Furthermore, China has leverage on North Korea; namely, economic aid and economic sanctions. Therefore, China will not attack preemptively North Korea even when the IAEA and SC maintain that North Korea is in non-compliance. Indeed, there is no new norm that allows preemptive self-defense under Caroline case in the presence of a nuclear weapons threat.

State practice and *Opinio Juris* are the main factors that create new norms. However, in the case studies international community condemned the attacks: Israel attack 1981 and US invasion of Iraq 2003; as a result, the case studies lack the *Opinio Juris* element and general practice.

Indeed, self-defense consists of the necessity of the attack, proportionality and conditionality of an armed attack under international law. In other words, states are allowed to defend themselves as long as the discussed elements existed. These elements distinguish self-defense from other types of use of force.

**Recommendations:**

- United States and Israel are members of the United Nations therefore they have a legal obligation to discuss their security issues there first before any military action.
- Major penalties that include economic sanctions should take place in case of any breach of international law.
- United States should start an initiative of disarmament to prevent preemptive self-defense attacks.
- The rules and laws of international law should be reconsidered to adapt to the nuclear threat. “To remain relevant, international law must adapt to the times and circumstances in which it is involved. Thus in the current era, where the combination
of WMD and terrorism pose a threat barely conceived of during the post-World War II formulation of the UN Charter, international law is in the process of undergoing a paradigm shift...” (Sifris, 2003). For instance, the imminence of the nuclear threat should be revisited.
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APPENDIX A

The Four Case Studies

<table>
<thead>
<tr>
<th>North Korea Problem</th>
<th>How China Perceived</th>
<th>Would It Be Necessary To Attack?</th>
<th>IAEA and Security Council Resolutions Regarding North Korea</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exercised 3 nuclear tests since 2006- (Uncertainty ) It withdrew from the NPT 2006 The increase of Insecurity in the region</td>
<td>Selling the NW to non-state actors For financial gains &amp; ref In case of war against DPRK</td>
<td>No. Allies&amp; Other options: Decrease economic sanctions &amp; Increase economic aid</td>
<td>DPRK left the NPT &amp; Disregarded SC Resolutions: 1718, 1874 and 2087</td>
</tr>
</tbody>
</table>

The Case Studies  | How they Perceived The Threat? |
|------------------|--------------------------------|

91
<table>
<thead>
<tr>
<th>The Case Studies</th>
<th>The Aftermath</th>
<th>Consistent with Article 51?</th>
<th>Attack Based on what?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Imminent</td>
<td>Overwhelming</td>
<td>Leaving No Moment of Deliberation</td>
</tr>
<tr>
<td>US invasion in Iraq 2003</td>
<td>Yes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Israel Bombing Osirak 1981</td>
<td>Yes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Israel Bombing Al-Kibar 2007</td>
<td>Yes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>The Case Studies</td>
<td>IAEA / NPT / SC</td>
<td>International Community Respond</td>
<td></td>
</tr>
<tr>
<td>Israel Bombing Al-Kibar 2007</td>
<td>Did not notify IAEA/SC</td>
<td>Did not Condemn</td>
<td></td>
</tr>
</tbody>
</table>