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Armed Attack on (Military) Nuclear Programs; A New Exception to the Prohibition of the Use of Force?

(Original Research)

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Abstract

To date, the world has witnessed five instances of the use of force against States' nuclear programs: the U.S. response to the Cuban missile crisis (1962), Israel's attack on Iraq's Osirak reactor (1981), the coalition States' military strike on Iraq's alleged weapons of mass destruction program (2003), Israel's attack on the Al-Kibar in Syria (2007), and most recently, the June 2025 Israeli attack—carried out in cooperation with the United States—on Iran's nuclear facilities. The attacking States claimed that their actions were justified on the basis that the nuclear programs of the targeted States, having allegedly deviated toward military purposes, had become an existential threat. Regardless of the accuracy of such claims, can the deviation of a State's nuclear program from peaceful purposes—and even the acquisition of nuclear weapons—be considered *per se* a threat to international peace and security, capable of justifying a preemptive attack aimed at destroying or halting that program? This article examines existing State practice and, the ICJ's case law to conclude that although the formerly consistent State practice rejecting such attacks has fragmented, the current divergence among States does not yet permit the emergence of a new exception to the peremptory norm of the prohibition of the use of force.

Keywords

Use of Force, Self-Defence, Nuclear Program, Customary International Law, Existential Threat.

Introduction

H.L.A. Hart, the renowned American lawyer, believed that those legal rules which "restrict the free use of violence" constitute the inherent rules of any legal order.[1] On this basis, some theorists argue that, since international law

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1. H.L.A Hart, *The Concept of Law*, 2nd ed (Oxford: Oxford University Press, 1994), 91.

has only gravitated toward such rules in its more recent development in the twentieth century, for much of its existence it could not truly be regarded as a legal system.[2] The reality is quite different. In fact, international law, from distant centuries to the present day, has contained rules aimed at limiting violence in international relations.[3] Article 2(4) of the UN Charter, which prohibits all forms of the use of force, represents the most comprehensive of such rules. Although this provision explicitly prohibited "threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the UN", the ambiguity inherent in the other relevant provisions of the UN Charter, particularly Article 51, along with a number of events have generated persistent challenges regarding the scope of this prohibition.[4] The most recent of these events were the attacks by Israel and the U.S. against Iran's nuclear, as well as missile facilities during operations "Rising Lion" and "Midnight Hammer" in June 2025. As this article will demonstrate, Israel and the U.S. sought to justify their actions by invoking a spectrum of arguments, including the alleged existential threat posed by Iran's nuclear program. This incident, standing alone, might not suffice to reshape the scope of the prohibition of the use of force; however, when considered alongside other precedents, the issue becomes more complex.

Indeed, prior to the recent strikes against Iran, there have been other instances of the use of force against the nuclear program of "*non-nuclear-weapon States*." According to Article 9 of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), States parties that had not conducted a nuclear explosive test before January 1967 are classified as *non-nuclear-weapon States* and are obligated not to receive or manufacture nuclear weapons. In the past half-century, the use of force operations have been employed five times against such States accused of breaching their nuclear obligations: the U.S. response to the transfer of nuclear missiles to Cuba (1962); Israel's attack on the Osirak reactor in Iraq (1981); the U.S.-led invasion of Iraq with more than 30 other States (2003); Israel's strike on Syria's Al-Kibar reactor (2007); and, most recently, the Israeli and U.S. attacks against Iran (2025). Given the fact that "the primary mechanism by which international legal rules are generated" revolves around States' activities and their consent,[5] these precedents raise a

2. Mary O'Connell, "The Prohibition of the Use of Force", in *Cover Research Handbook on International Conflict and Security Law*, ed. Nigel White and Christian Henderson (Massachusetts: Edward Elgar, 2013), 89.

3. Yoram Dinstein, *War, Aggression and Self-Defence*, 5th ed (Oxford: Oxford University Press, 2012), 63 *et seq*.

4. Richard Gray, International Law and the Use of Force, 4th ed (Oxford: Oxford University Press, 2018), 121 *et seq*.

5. Carmen E. Pavel, "The ethics of state consent to international law", in *Global Constitutionalism*, ed. Jo Shaw (Cambridge, Cambridge University Press, 2024), 1.

fundamental question: Has a rule emerged that permits the use of force against non-nuclear-weapon States which are accused of breaching their nuclear obligations? This article does not intend to address the issue of evidentiary assessment regarding the alleged diversion of the targeted States' nuclear programs toward military purposes—a matter distinct from the present analysis. At least in the cases of Iran[6] and Iraq,[7] a diversion toward a military program has not been confirmed. Undoubtedly, an attack against peaceful nuclear installations amounts to a blatant violation of international law.[8] This study seeks solely to answer the question of whether an "alleged" diversion of a State's nuclear program toward military ends could render the use of force aimed at neutralizing the threat posed by such a program lawful. Moreover, it explores whether—given the participation or support of nearly one-third of the members of the international community for the aforementioned examples—such practice might amount to the emergence of a new exception in the realm of the use of force.

The present analysis seeks to address these challenges in four parts. The first section examines the nature of the prohibition of the use of force and its exceptions. Considering the fact that the nature of this prohibition and its exceptions have already been extensively studied elsewhere,[9] this section will be concise and avoid delving into theoretical and practical controversies. The second section offers a factual analysis of the five episodes of the use of force against non-nuclear-weapon States, accompanied where appropriate by legal assessments. A more detailed and legal examination, however, is reserved for the third section, which explores the impact of these precedents on the structure of international law, particularly in light of the formation of customary rules, the law of State responsibility, and the jurisprudence of the International Court of Justice (Court or ICJ).

1. Epistemology of the Prohibition on the Use of Force

The prohibition of the use of force is recognized both as a customary and

6. Although the tone of the IAEA Director General's reports—particularly over the past three years—has become more critical regarding Iran's nuclear activities, the Director General has never claimed that Iran's nuclear program has been diverted toward military objectives. On 12 November 2025, in his latest report, the Director General merely asserted that "unless and until Iran assists the Agency in resolving these issues, the Agency will not be in a position to provide assurance that Iran's nuclear programme is exclusively peaceful." (IAEA, GOV/2025/65, 2025, para. 27).

7. M. ElBaradei, Director General IAEA, "Statement to the United Nations Security Council: The Status of Nuclear Inspections in Iraq – An Update", 7 March 2003, https://www.iaea.org/newscenter/statements/status-nuclear-inspections-iraq-update. (Last Seen: 19 Sep 2025).

8. IAEA, GC(XXXIV)/RES/533 (1990), 1.

9. See Olivier Corten, *The Law against War,* (Oxford, Hart, 2010), 50-125; Christian Henderson, *The Use of Force and International Law* (Cambridge, Cambridge University Press, 2018), 203- 346; Marc Weller, *The Oxford Handbook of the Use of Force in International Law*, (Oxford: Oxford University Press, 2015) 465-487; Tom Ruys and Olivier Corten, *The Use of Force in International Law: A Case-Based Approach,* (Oxford: Oxford University Press, 2018) 625 *et seq*; Yoram Dinstein, *War, Aggression and Self-Defence*195-378.

treaty-based rule of international law and – as will be discussed in section 1.1– occupies a distinct status in the hierarchical structure of international legal norms. The following section examines the normative features of this rule, followed by a discussion of its exceptions.

1-1. The Nature of the Prohibition of the Use of Force

The rule prohibiting the threat or use of force is one of the cornerstones of modern international law.[10] In fact, beginning in the twentieth century, international law increasingly developed concepts and rules designed to limit recourse to war. The devastation of the First and Second World Wars, on the one hand, and the need for the free movement of financial resources across borders, on the other, gave rise to a new discourse in international law, generally centered on strengthening international peace and security and prohibiting war.[11] As a result, it is believed that through this modern evolution of international law, "a system of war prevention" was created,[12] generally consisting of three principles: (1) the prohibition of the use of force; (2) collective measures to guarantee international peace and security, and; (3) the peaceful settlement of disputes. On this basis, the prevailing doctrine holds that Article 2(4) of the UN Charter, which enshrines the comprehensive prohibition of the threat and use of force, reflects customary international law.[13] The ICJ has also affirmed, in cases *Nicaragua*,[14] *Congo v. Uganda*,[15] *and the Wall Advisory Opinion*,[16] that the prohibition of the use of force as codified in the UN Charter constitutes part of customary international law.

Although the codification of a customary rule in a treaty does not affect the independent existence of that customary norm,[17] it may be said—despite

10. Oliver Dörr, Prohibition of Use of Force, Oxford Public International Law (2019), https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e427, (last seen: 10 Sep 2025).

11. Alireza Ebrahimgol and Siamak Karimi, "Dialectic of peace and barbarism: Studying and criticizing the liberal theory of international law", *Public Law Studied Quarterly* 47, 1, (2017): 182.

12. Oliver Dörr and Albrecht Randelzhofer, "Purposes and Principles, Article 2(4)", *The Charter of The United Nations: A Commentary*, Vol. I, Brunno Simma et. Al (Oxford: Oxford University Press, 2012), 205.

13. Michel Akehurst and Peter Malanczuk, *A Modern Introduction to International Law* 7th ed (New York, Routledge 1997), 309; Ian Brownlie, *International Law and the Use of Force by States* (Oxford, Oxford University Press, 1963) 74–75.

14. *ICJ, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgement*, paras 187-190.

15. *ICJ, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Merits, Judgement*, paras 148-165.

16. *ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, para. 87.

17. Seyyed Ghasem Zamani, "Contractual rights and the development of customary rules of procedure of International Court of Justice with an emphasis on Nicaragua Case", *International Law Review* 14, 20 (1995): 299.

various scholarly debates[18]—that both customary law and treaty law (the UN Charter) equally prohibit States from employing force.

Beyond its customary status, the prohibition of the use of force is regarded as a peremptory norm (*jus cogens*) within the hierarchy of international law. While some have argued that significant obstacles remain to classifying the prohibition of the use of force as a peremptory norm,[19] the normative and functional nexus between this prohibition and the contemporary discourse of international law—namely, the maintenance of international peace and security—confers upon it a constitutional and peremptory character. For this reason, the International Law Commission (ILC) has taken the view that the prohibition of the use of force constitutes a peremptory norm,[20] a finding that has also been implicitly endorsed by the ICJ.[21] The majority of scholars share this position,[22] and States themselves have, in certain Instances, expressly emphasized the peremptory nature of the prohibition of the use of force.[23]

Although Article 53 of the Vienna Convention on the Law of Treaties (VCLT) defines a peremptory norm as a rule "from which no derogation is permitted", the use of force, under both the UN Charter and customary international law, admits of two well-established exceptions. On this basis, some scholars contend that the existence of exceptions to the prohibition of the use of force is inconsistent with its classification as a peremptory norm, and thus regard these exceptions as evidence against its *jus cogens* status.[24] In contrast, it has been convincingly argued that such exceptions form an integral part of the prohibition of the use of force itself.[25] The ILC has similarly observed that: "a State exercising its inherent right of self-defence is not, even potentially, in breach of Article 2(4) of UN Charter."[26] In fact, it is crucial to distinguish between exceptions and derogations. As noted, "An

18. Oliver Dörr, "Use of Force, Prohibition of", *Max Planck Encyclopedias of International Law*, 2019, para. 10, https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e427 (Last Seen: 20 Sep 2025).

19. Mohsen Abdollahi and Keyvan Behzadi, "Impediments to Peremptory Status of Prohibition on Use of Force", *International Law Review* 37, 63 (2021): 171 et seq.

20. ILC Yearbook, 1966-II, p. 247.

21. *ICJ, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgement*, para. 190; *ICJ, Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion*, para. 81.

22. Ian Brownlie, *Principles of Public International Law* 6th ed (Oxford: Oxford University Press, 2003) 488–89; K Doehring and Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (Oxford: Oxford University Press, 2003) 323–56; Carin Kahgan, "Jus Cogens and the Inherent Right to Self-Defense", *ILSA Journal of International and Comparative Law* 3 (1997): 767.

23. For States practices see: James A. Green, "Questioning the Peremptory Status of the Prohibition of the Use of Force", Michigan Journal of International Law, 32 (2011): 241 *et seq.*

24. *Ibid*., 229-236.

25. Andre de Hoogh, "Jus Cogens and the Use of Armed Force" in *The Oxford Handbook of the Use of Force in International Law*, ed Mark Weller (Oxford: Oxford University Press, 2015), 1170.

26. ARSIWA, Article 21, para. 1.

exception is at the same level of generality as the rules…," whereas a derogation is a particular measure that applies only in specific circumstances and exclusively among the States concerned.[27] Accordingly, the prohibition of the use of force, taken together with its exceptions, is to be regarded as a peremptory norm.

Attributing peremptory status to the prohibition of the use of force entails two significant consequences that are central to the argument of this article. First, pursuant to Article 53 of the VCLT, any modification of a peremptory norm requires the consent of the international community of States as a whole. Second, under Article 41 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), in the event of a breach of a peremptory norm, third States are not only obliged to refrain from recognizing the situation resulting from the breach, but must also cooperate to bring that situation to an end. As will be discussed, this means that States cannot invoke past breaches of a peremptory norm as a justification for current violations, since such invocation would be inconsistent with their obligation not to recognize situations arising from breaches of *jus cogens* norms.

1-2. Exceptions to the Prohibition of the Use of Force

Despite the normative significance of the prohibition of the use of force, two exceptions of this rule are recognized under international law: self-defence and collective measures under Chapter VII of the UN Charter. Each will be examined in turn.

1-2-1. Self-Defence

Article 51 of the UN Charter recognizes the "inherent right" of self-defence in the event of an "armed attack." Prior to the emergence of the United Nations system, it was considered lawful to resort to force in response to the threat of an armed attack.[28] This article does not intend to engage with the controversy over whether contemporary international law permits self-defence in response to threats rather than the occurrence of armed attack. It suffices to note, however, that the legitimacy of such a possibility depends squarely on whether a right of self-defence survives beyond the strict terms of Article 51 of the Charter. The prevailing view among scholars is that Article 51 excludes any right of self-defence other than in the case of an actual armed attack.[29] The ICJ has explicitly confirmed this interpretation in the *Oil Platforms* case, where it held that the occurrence of an "armed

27. Sondre Torp Helmersen "The Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations" *Netherlands International Law Review* 167, (2014): 175–176.

28. Terry D. Gill and Kinga Tibori-Szabó, *The Use of Force and the International Legal System*, (Cambridge, Cambridge University Press, 2024), 7-27.

29. see, *e.g.* Ian Brownlie, *International Law and the Use of Force by States*, 272; Tom Ruys, *Armed Attack and article 51 of the UN Charter* (Cambridge, Cambridge University Press, 2010), 515.

attack" against the victim State is a necessary condition for invoking the use of force.[30] Nevertheless, in two other cases—namely *Nicaragua*[31] and *Congo v. Uganda*[32]—the Court emphasized that "the issue of the lawfulness of a response to the imminent threat has not been raised" and, thus, it "express[ed] no view on that issue."[33]

From the beginning of the present century, however, with the proliferation of weapons of mass destruction (WMD) capable of inflicting irreparable damage within a very short timeframe, doctrines supporting the legitimacy of self-defence against such threats gradually developed. Ultimately, the UN High-level Panel on Threats, Challenges and Change in 2004 endorsed this view, recognizing that recourse to force in response to imminent threats could fall within the framework of international law.[34] According to this line of reasoning, if the legality of self-defence against threats posed by WMD were conditioned upon the occurrence of an initial armed attack, the victim State might never have an opportunity to exercise its right of self-defence. The legitimacy of this idea will be discussed in section 3.

1-2-2. Collective Measures under Chapter VII of the UN Charter

Articles 12 and 24 of the UN Charter assign the primary responsibility for the maintenance of international peace and security to the Security Council. In fulfilling this responsibility, the Council, under Articles 39 and 42 of the Charter, may, upon determining the existence of a threat to the peace, breach of the peace, or act of aggression, take measures—including forcible measures—on behalf of the international community in order to restore international peace and security.

For this purpose, it was originally envisaged that the Security Council would conduct enforcement operations by relying on armed forces provided by member States through agreements concluded under Article 43 of the Charter. The Military Staff Committee, according to Article 47 of the UN Charter, was intended to assume the operational command of these forces. In practice, however, this mechanism has never been implemented and none of the UN member States have ever placed a unit of its armed forces at the disposal of the Council under any Article 43 agreement.[35] Instead, troops or military assets have only been made available by States on an *ad hoc* and voluntary basis in order to carry out Security Council decisions. In effect, the

30. *ICJ, Oil Platforms (Iran v. United States of America), Merits, Judgement*, para. 51.

31. *ICJ, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgement*, para. 194.

32. *ICJ, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Merits, Judgement*, paras 148-165.143.

33. *Ibid*.

34. UN Doc. A/59/565, para. 188.

35. Terry D. Gill and Kinga Tibori-Szabó, *The Use of Force and the International Legal System*, 79.

Security Council typically authorizes member States themselves to suppress threats to the peace, breaches of the peace, or acts of aggression. This has led some scholars to argue that no State is legally obliged to participate in forcible measures authorized by the Council.[36]

Nevertheless, since collective security measures under Chapter VII of the Charter constitute an exception to the prohibition of the use of force, it is essential that a Security Council resolution explicitly authorizes the use of force in order to legitimize recourse to force. In other words, it is insufficient for the Council merely to determine the existence of a threat to or breach of the peace or an act of aggression; it must also grant an authorization and to mention a forcible action in a sufficiently concrete manner.[37]

The next section will examine whether State practice has given rise to an additional exception to the two established exceptions to the prohibition of the use of force.

2. In Search of the Legitimacy of Attacks against (Military) Nuclear Facilities

As noted in the introduction, since the emergence of the UN Charter several instances can be found in State practice where military reactions were directed against the (military) nuclear programs of certain States. This section sifts through these instances to analyze whether the prohibition of the use of force has faced any developments.

2-1. The Cuban Missile Crisis (1962)

The first military reaction to the nuclear weapons program of a non-nuclear-weapon State that reached the level of the use of force was the U.S. response to the transfer of Soviet nuclear missiles to Cuba. In 1962, the Soviet Union decided to deploy, among other categories of military equipment, several nuclear-armed missiles to Cuba.[38] Operational control of these missiles was to remain with Soviet military personnel.[39] However, the U.S. interpreted the transfer of these weapons to Cuba as a serious security threat to itself and to the entire American continent, and insisted on preventing Cuba from obtaining such weapons.[40] To this end, the U.S. considered a range of options, three of which involved overt recourse to armed force: targeted airstrikes against

36. Yoram Dinstein, *War, Aggression and Self-Defence*, 354; Thomas Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge, Cambridge University Press, 2002) 24-27.

37. Jules Lobel and Michael Ratner, "Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime", *American Journal of International Law* 93 (1999): 127–30.

38. Abram Chayes, *The Cuban Missile Crisis* (Oxford, Oxford University Press, 1974), 8.

39. Laurence Chang and Peter Kornbluh (eds.), *The Cuban Missile Crisis 1962: A National Security Archive Documents Reader* (New York, The New Press, 1992), 353–61.

40. G. T. Allison, *Essence of Decision: Explaining the Cuban Missile Crisis* (New York, Little Brown, 1971), 59–60; Karl P. Mueller et al., *Striking First. Preemptive and Preventive Attack in U.S. National Security Policy* (RAND Project Air Force, 2006), 176–7.

missile-nuclear sites, an air campaign against multiple objectives, and ultimately a full-scale ground invasion of Cuba.[41] In parallel, some U.S. government lawyers advanced the view that the U.S. was entitled to neutralize the threat posed by the transfer of nuclear missiles to Cuba through a preemptive attack.[42] In the end, the measure chosen by the U.S., although amounting to the use of force within the meaning of the Definition of Aggression Resolution,[43] did not constitute an act of anticipatory self-defense. Rather, the U.S. opted to impose a naval blockade on Cuba's ports in order to obstruct the delivery of nuclear weapons and related material sent by the Soviet Union.[44]

Under Article 3(c) of the Definition of Aggression Resolution, the blockade of ports of another State constitutes aggression—that is, the most serious form of the use of force. Nevertheless, instead of referring to its action as a "blockade of ports," the U.S. employed the unconventional term "naval quarantine".[45] This change of terminology did not alter the legal characterization of the measure, and several international lawyers explicitly described it as a real naval blockade and thus a use of armed force.[46] Some States likewise regarded it as the use of force beyond the framework of the UN Charter.[47] Others, however, while acknowledging that the measure did amount to the use of force, expressly deemed it legitimate. In fact, the member States of the Organization of American States (OAS), relying on the Inter-American Treaty of Reciprocal Assistance (Rio Treaty)[48]—in particular Articles 6 and 8, which provide mechanisms for responding to threats to the peace and security of the American continent—interpreted Cuba's possession of nuclear missiles as such a threat. They accordingly adopted a resolution recommending that member States "take all measure[s], individually or collectively, including the use of armed force, which they may deem necessary to ensure that the Government of Cuba cannot continue to receive… military material and related supplies which may threaten peace and security of the Continent and to prevent the missiles in Cuba with offensive capability from ever becoming an active threat to the peace and

41. *Ibid*.

42. Terry D. Gill and Kinga Tibori-Szabó, *The Use of Force and the International Legal System*, 206.

43. Definition of Aggression General Assembly resolution 3314 (XXIX) 14 December 1974.

44. Public Papers of the Presidents of the United States: John F. Kennedy, 1962 (US Government Printing Office, 1963), 809–11.

45. *Ibid*.

46. Alexander Orakhelashvili, "The Cuban Missile Crisis – 1962", in Tom Ruys and Oliver Corten (eds.), *The Use of Force in International Law: A Case-Based Approach* (Oxford, Oxford University Press, 2018), 99–106.

47. Questions Relating to the Americas', UN Yearbook 1962, pt 1, Political and Security Questions, chap. 8, pp. 105–8; UN Security Council Official Records (SCOR), 17th year, 1024th meeting, UN Doc. S/PV.1024 (24 October 1962), paras. 74, 106–10.

48. Inter-American Treaty of Reciprocal Assistance (Rio Treaty), 02 Sep 1947.

security of the Continent."[49]

Thus, while States appeared to agree on characterizing the U.S. measure as involving the use of force, they diverged significantly when it came to assessing its legitimacy. In other words, although the American States unanimously supported the action, several other States rejected its legality.

2-2. The Israeli Bombing of the Osirak Reactor (1981)

Israel's 1981 attack on Iraq's Osirak nuclear reactor constitutes the second instance of State practice involving the use of force against the (military) nuclear program of a non-nuclear-weapon State. The arguments advanced by Israel in justifying this strike were similar to those invoked nearly twenty-four years later with respect to the use of force against Iran. At the time of the attack on the Osirak, Israeli officials claimed that Iraq was pursuing the production of nuclear weapons through the Osirak facility, and that by 1985 it would be capable of operating a nuclear explosive device.[50]

The airstrike, which resulted in the complete destruction of the Osirak reactor and the death and injury of ten persons,[51] was brought before the UN Security Council. Israel, in defending its actions, invoked self-defence "as understood in general international law and as preserved in Article 51 of the Charter of the United Nations".[52] Moreover, Israel's representative to the UN, citing public statements made by Saddam Hussein, argued that the ultimate purpose of the Osirak reactor was to enable an attack against Israel,[53] and declared that "the concepts of 'armed attack' and the threat of such an attack must be read in conjunction with, and are related to, the present-day criteria of speed and power, and placed within the context of the circumstances surrounding nuclear attack".[54]

In contrast, the overwhelming majority of legal scholarship regarded Israel's operation as falling outside the recognized exceptions to the prohibition of the use of force and thus as contrary to international law. For instance, Greenwood,[55] and D'Amato,[56] contended that Israel's justifications amounted to

49. UN Security Council, "Letter dated 23 October 1962 from the Secretary-General of the Organization of American States addressed to the Acting Secretary-General of the United Nations", (1962), UN Doc. S/5193.

50. UN Security Council, "Letter dated 8 June 1981 from the Permanent Representative of Israel to the United Nations addressed to the President of the Security Council", (1981), UN Doc. S/14510.

51. Karl. P. Mueller et al., *Striking First. Preemptive and Preventive Attack in U.S. National Security Policy*, 215.

52. UN Security Council, 36th session, 2280th meeting, 12 June 1981, UN Doc. S/PV.2280, para. 58.

53. UN Security Council, "Letter dated 8 June 1981 from the Permanent Representative of Israel to the United Nations addressed to the President of the Security Council", (1981), UN Doc. S/14510.

54. UN General Assembly, 36th session, 52nd plenary meeting, (11 November 1981), UN Doc. A/36/PV.52, para. 63.

55. Christopher Greenwood, "International Law and the Preemptive Use of Force: Afghanistan, Al-Qaida and Iraq", *San Diego International Law Journal* 4 (2003): 14.

a revival of pre-Charter doctrines; concepts that had lost their legal validity with the advent of the UN Charter. Furthermore, State reactions were consistent with this doctrinal assessment. Iraq denounced the strike as "clearly an aggression".[57] The U.S.—despite having itself undertaken a comparably hostile measure against Cuba two decades earlier—condemned Israel's action, characterizing it as contrary to international peace and security. The U.S. stressed that Israel ought to have pursued diplomatic means instead.[58] The U.S' belief in Israel's obligation to resort to non-military means implies that, from its perspective, the use of force to neutralize Iraq's nuclear threat lacked legitimacy. Similarly, its own conduct in response to the deployment of nuclear missiles to Cuba cannot be regarded as a practice giving rise to customary law, since the element of *opinio juris* was clearly absent on the part of this State. Other States likewise challenged the conformity of Israel's conduct with international law.[59] Ultimately, the Security Council unanimously adopted a resolution condemning the Israeli strike as a clear violation of the UN Charter and of fundamental norms of international conduct.[60] Accordingly, the firm and united response of the Security Council demonstrated that, at least up until 1981, no new exception to the prohibition of the use of force had emerged in connection with (in this instance; military) nuclear programs.

2-3. The Invasion of Iraq (2003)

In 2003, the U.S. forces, supported by a "coalition" of allied States, launched a large-scale military operation against Iraq that ultimately led to the occupation of the country and the overthrow of Saddam Hussein.[61] The scope and consequences of this operation prompted the legal arguments attempting to justify the use of force. These ranged from reliance on Security Council resolutions 687 (1991) and 1441 (2002), to invocations of anticipatory self-defence.[62] Yet, even those arguments premised on Security Council resolutions framed Iraq's non-compliance with its nuclear obligations as the decisive ground for legitimacy of the U.S. and allied operation.

As a matter of fact, paragraphs 11 and 12 of Security Council Resolution

56. Anthony D'Amato, "Israel's Air Strike against the Osiraq Reactor: A Retrospective", *Temple International and Comparative Law Journal* 10 (1996): 259–60.

57. UN Security Council, 36th session, 2280th meeting, 12 June 1981, UN Doc. S/PV.2280, paras. 48–51.

58. UN Doc. S/PV.2288, paras. 28–32.

59. UN Security Council, 36th session, 2282nd meeting, 15 June 1981, UN Doc. S/PV.2282, paras. 14–19; 2283rd meeting, 15 June 1981, S/PV.2283, paras. 23–7.

60. UN Security Council, Res 487 (1981), para. 1.

61. Kinga Tibori-Szabó, *Anticipatory Action in Self-Defence* (The Hague, Springer, 2011) 190–191; Christopher Greenwood, "Legality of the Use of Force: Iraq in 2003", in *Redefining Sovereignty: The Use of Force after the Cold War*, ed: Michael Bothe, Marry Ellen. O'Connell and Natalina Ronzitti (eds.), (New York, Transnational, 2005) 395.

62. *Ibid*, 399–404.

687, adopted in the aftermath of Iraq's invasion of Kuwait, explicitly required Iraq to adhere to its obligations under the NPT and to refrain from acquiring nuclear weapons.[63] More than a decade later, amidst rising tensions over Iraq's nuclear program, the Council in Resolution 1441 determined that "Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687."[64] This resolution further provided Iraq with "a final opportunity to comply with its disarmament obligations."[65] The resolution also stipulated that continued non-compliance "will be reported to the Council for assessment",[66] and warned that Iraq "will face serious consequences as a result of its continued violations of its obligations".[67]

Following the adoption of Resolution 1441, IAEA inspectors operating in Iraq, reported some irregularities but found no evidence of "proscribed activities".[68] The matter was never referred back to the Council for renewed assessment. Nevertheless, in March 2003, the invasion of Iraq commenced.[69] The absence of explicit Security Council authorization has therefore led many commentators to conclude that the legality of the invasion must be assessed outside the framework of UN resolutions, and therefore "the alleged existence of Iraqi nuclear, chemical and biological weapons programs in violation of relevant Security Council resolutions" served as the central justification for the war.[70]

Notably, at least thirty-seven States joined the U.S. in Operation Iraqi Freedom,[71] suggesting a somewhat broad alignment with the view that Iraq's deviation from its peaceful nuclear obligations warranted forcible action. For this reason, the 2003 Iraq War represents the most significant precedent for the emergence of a new exception to the prohibition of the use of force. It is worth mentioning that, in the months preceding the invasion, the U.S. articulated a new strategic doctrine that explicitly embraced the legitimacy of striking the capabilities and technologies of WMDs, including nuclear arms. According to this doctrine, the notion of an "imminent threat" in the context of self-defence had to be reinterpreted in light of "the use of weapons of mass

63. UN Security Council, Res 487 (1991), para. 11 and 12.

64. UN Security Council, Res 487 (1991), para. 1.

65. *Ibid*, para. 2.

66. *Ibid*, para. 4.

67. *Ibid*, para. 13.

68. M. ElBaradei, Director General IAEA, "Statement to the United Nations Security Council: The Status of Nuclear Inspections in Iraq – An Update", 7 March 2003, https://www.iaea.org/newscenter/statements/status-nuclear-inspections-iraq-update. (Last Seen: 19 Sep 2025).

69. "Timeline: Invasion, surge, withdrawal; U.S. forces in Iraq", https://www.reuters.com/article/world/timeline-invasion-surge-withdrawal-us-forces-in-iraq-idUSTRE7BE0EL/, (Last Seen: 19 Sep 2025).

70. Terry D. Gill and Kinga Tibori-Szabó, *The Use of Force and the International Legal System*, 210.

71. Stephen A. Carney, *Allied Participation in Operation Iraqi Freedom*, (Washington, Center of Military History Unites States Army 2011), 34 et seq.

destruction—weapons that can be easily concealed, delivered covertly, and used without warning".[72] The doctrine stressed that the existential danger posed by WMDs necessitated an expanded scope for pre-emptive defence.[73] Within this framework, the legitimacy of using force no longer required the occurrence of a prior armed attack—nor, critically, did it require the threat in question to be imminent. Rather, the very characterization of a threat as "existential" became sufficient. This was vividly expressed by George W. Bush, the then U.S. president, in his 2002 speech before the UN General Assembly, where he argued that Iraq retained the infrastructure necessary to produce nuclear weapons and could, if it obtained fissile material, develop such a weapon within "one year".[74] Accordingly, under this strategy, even a one-year gap *before* the actual manufacturing of a nuclear weapon—let alone its manufacturing—serves as a basis for legitimizing the resort to force, solely due to the existential threat it entails.

Although this strategy, which was endorsed by a considerable number of States during Iraq war, represents a fundamental departure from the current rules of the use of force in international law, the important point is that the part of its legal justification is rooted in interpretations of Article 2(4) of the UN Charter that had been advanced many years earlier. As recalled, that provision prohibits the threat or use of force "against the territorial integrity or political independence of any state." Some scholars have argued that the clause only prohibits those uses of force that culminate in occupation or impairment of territorial integrity or political independence. Accordingly, a narrowly targeted use of force, directed at eliminating a specific threat, would fall outside the scope of Article 2(4).[75] For this reason, among certain strands of doctrine, Israel's attack on Iraq's Osirak reactor, as well as other similar strikes that resulted in the removal of a specific threat, have been regarded as legitimate.[76] Certain instances of State practice also echoed this interpretation. Following NATO's intervention in the former Yugoslavia in 1999, the Federal Republic of Yugoslavia requested provisional measures

72. The National Security Strategy of the United States of America (September 2002), parrt V ('Prevent Our Enemies from Threatening Us, Our Allies, and Our Friends with Weapons of Mass Destruction'), p. 15; President G. W. Bush, State of the Union Address, 29 January 2002, https://tinyurl.com/2vcv253t; President G. W. Bush, Graduation Speech at West Point', 1 June 2002, https://tinyurl.com/53tkszvyl , (Last Seen 25 Sep 2025.)

73. Terry D. Gill and Kinga Tibori-Szabó, The Use of Force and the International Legal System, 210.

74. 'President's Remarks at the United Nations General Assembly' (12 September 2002), https://georgewbush-whitehouse.archives.gov/news/releases/2002/09/20020912-1.html (Last Seen: 19 Sep 2025).

75. Martha Brenfors and Malene Maxe Petersen, "The Legality of Unilateral Humanitarian Intervention – A Defence", *Nordic Journal of International Law* 69 (2000): 449.

76. Anthony D'Amato, "Israel's Air Strike upon the Iraqi Nuclear Reactor", *American Journal of International Law 77* (1983): 584.

before the ICJ, seeking to halt the NATO bombing.[77] While the Court finally declined jurisdiction on procedural grounds, Belgium argued, during the oral phase of request for the indication of provisional measures, that NATO's action "is not an intervention against the territorial integrity or independence of the former Republic of Yugoslavia. The purpose of NATO's intervention is to rescue a people in peril, in deep distress. For this reason, the Kingdom of Belgium takes the view that this is an armed humanitarian intervention, compatible with Article 2, paragraph 4, of the Charter…".[78] Similarly, in the *Corfu Channel Case*, the United Kingdom maintained that sending warships into Albanian waters did not violate Article 2(4), since the operation "threatened neither the territorial integrity nor the political independence of Albania. Albania suffered, thereby, neither territorial loss nor any part of its political independence".[79]

Although the 2003 attack on Iraq and the subsequent occupation of the country clearly amounted to an operation against its territorial integrity, as noted above, the resort to force with the aim of eliminating a threat—without resulting in occupation or the violation of a State's political independence—had already emerged in international law, and reached its most radical interpretation within the strategy pursued by the U.S. and its allies. The legitimacy of this doctrine will be further assessed in Section 3. For present purposes, it suffices to note that despite the opposition of certain States,[80] and legal scholars,[81] the involvement of more than thirty States renders it the most significant precedent in the context of the use of force against threats arising from nuclear (military) activities.

2-4. Israel's Airstrike on Syria (2007)

In 2007, the Syrian nuclear reactor at Al-Kibar was destroyed in an airstrike attributed to Israel.[82] Initially, neither Israel nor Syria issued any formal statements regarding the attack, and no legal justification was publicly

77. *ICJ, Legality of the Use of Force (Yugoslavia v. Belgium), Provisional Measures, Order of 2 June 1999*, para. 124.

78. *ICJ, Request for the Indication of Provisional Measures, Legality of Use of Force (Serbia and Montenegro v. Belgium), Oral Pleadings 1999/15 (Belgium) (10 May 1999) CR 15/99, 12*.

79. *ICJ, Oral Statement of 12 November 1948, Corfu Channel, Pleadings, Oral Arguments, (First Part),* 296.

80. "U.S.-Iraq War Should the US Have Attacked Iraq?", https://www.britannica.com/event/Iraq-War, (Last Seen 19 Sep 2025).

81. Kinga Tibori-Szabó, *Anticipatory Action in Self-Defence*, 197–198; R. N. Gardner, "Neither Bush Nor the Jurisprudes", (2003) *American Journal of International Law* 97, (2003): 588; Christan Henderson, "The Bush Doctrine: From Theory to Practice", *Journal of Conflict and Security Law* 9, (2004): 12; Vaughan Lowe, "The Iraqi Crisis: What Now?", *International & Comparative Law Quarterly, 52 (2003):* 865.

82. 'Israeli Nuclear Suspicions Linked to Raid in Syria', New York Times (18 September 2007), www.nytimes.com/2007/09/18/world/asia/18korea.html; (Last Seen 20 Sep 2025).

advanced.[83] Later, Syria characterized the strike as an act of aggression against its territory.[84] Other States largely remained silent. Although the operation bore similarities to Israel's strike on Iraq in 1981, unlike the strong Security Council response to the attack on Osirak, most States neither react nor issued any responses.[85]

Assessing the legal significance of State silence under international law—and whether inaction in response to a particular event can contribute to the formation of customary international law—lies beyond the scope of this article. Nonetheless, as the ICJ stated in *Pedra Branca* case that "silence may also speak".[86] In other words, silence may carry legal effects in some specific circumstances. The ILC Special Rapporteur on the "identification of customary international law" similarly observed that under certain conditions, inaction may indicate consent to the emergence of a legal norm.[87] Then the ILC elaborated in the final report that "failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction".[88] As has been observed, given the status of the prohibition of the use of force as a peremptory norm in international law, States must objectively hold a "belief" in the modification of that rule.[89] Consequently, the acceptance of modification of a peremptory norm cannot be assumed lightly.[90] Since "States, in general, do not need to expect changes to legal norms that are meant to embody fundamental values… failure to react to the practice or pronouncements of States that could be interpreted" as a modification or revision "of a peremptory norm cannot, in general, be regarded as acceptance of such change."[91] In other words, in accordance with Article 53 of the VCLT, the modifications of a peremptory norm require the emergence of contradictory norms of the same nature. "This presupposes near-universal state practice and a belief" on the part of the international

83. Lindsay Moir, "Israeli Airstrikes in Syria – 2003 and 2007", in Tom Ruys and Olivier Corten, *The Use of Force in International Law: A Case-Based Approach*, (Oxford: Oxford University Press, 2018): 666.

84. UN General Assembly and UN Security Council, "Identical letters dated 9 September 2007 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council", UN Doc A/61/1041–S/ 2007/537.

85. Lindsay Moir, "*Israeli Airstrikes in Syria – 2003 and 2007*", 666.

86. *ICJ, Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/ Singapore), Judgment*, para. 121.

87. Special Rapporteur Michael Wood, Third Report on the Identification of Customary International Law, A/CN.4/682, 2015, p. 10, paras. 21–25.

88. Draft conclusions on identification of customary international law, ILC Yearbook of the International Law Commission, 2018, vol. II, Part Two, Conclusion 10, para. 3.

89. Mehrdad Payandeh, "Modification of Peremptory Norms of General International Law" in *Peremptory Norms of General International Law (Jus Cogens)*, ed. Dire Tiladi (Leiden, Brill, 2021), 127.

90. J.H. van Hoof, *Rethinking the Sources of International Law* (Dordrecht, Kluwer, 1983), 166-167.

91. Mehrdad Payandeh, "Modification of Peremptory Norms of General International Law", 127.

community as a whole.[92] Consequently, it is exceedingly difficult to regard the silence of one or several States as both the state practice and the belief necessary for modifying a peremptory norm or for the emergence of "contradictory norms of the same nature." This approach has been endorsed by the ICJ. The Court has emphasized that the silence or inaction of a State carries legal effect only when "the conduct of the other state calls for a response"[93]. A State's response is called for only when the State concerned, first and foremost, have knowledge of the relevant circumstances.[94] As discussed, the targeted State, Syria, remained silent for some weeks regarding the attack on the Al-Kibar reactor. Therefore, it is assumed that other States were not aware of such an attack, and, as a result, could not take a position on it at that time. This conclusion is reinforced when one recalls that, in interpreting State practice for the purpose of identifying a change in the peremptory norms, caution and a restrictive approach must be adopted, and reliance should be placed on the positive conduct of States rather than on their inaction.

2-5. The U.S. and Israeli Attacks on Iran (June 2025)

On 13 June 2025, Israel launched a series of attacks against Iranian military installations, key personnel, as well as the country's nuclear facilities.[95] Eight days later, the U.S. joined these operations by striking three Iranian nuclear sites.[96] In its 17 June 2025 letter to the Security Council, Israel, in an effort to justify its attacks, referred to Iran's nuclear and missile program as a threat to its security thirteen times, and as an existential threat three times, emphasizing that its operations were undertaken as a "last resort" to maintain its security.[97] The U.S., in its 27 June 2025 letter to the Security Council, employed a combination of legal arguments, invoking the inherent right of collective self-defense, neutralization of threats posed by Iran to the U.S., and direct reference to Article 51 of the Charter, with emphasizing on "a

92. Paulina Starski, "Silence within the process of normative change and evolution of the prohibition on the use of force: normative volatility and legislative responsibility", Journal on the Use of Force and International Law 4, 1 (2017), 43.

93. *ICJ, Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/ Singapore), Judgment*, para. 121.

94. Danae Azaria, "State Silence as Acceptance: A Presumption and an Exception", *British Yearbook of International Law* 14, (2024): 6.

95. Matthew Levitt, "Israel Strikes Iran: Initial Assessments from Washington Institute Experts", *Washington Institute for Near East Policy*, https://www.washingtoninstitute.org/policy-analysis/israel-strikes-iran-initial-assessments-washington-institute-experts, (Last Seen: 20 Sep 2025).

96. Jesús Maturana, "US operation against Iran in detail: Bombs, planes and missiles used", *Euro News*, https://www.euronews.com/2025/06/22/us-operation-against-iran-in-detail-bombs-planes-and-missiles-used, (Last Seen: 20 Sep 2025).

97. "Letter to the UN Security Council, Israel Minister of Foreign Affairs", 17 June 2025, https://www.gov.il/BlobFolder/news/fm-sa-ar-s-letter-to-the-un-security-council-on-operation-rising-lion-17-june-2025/en/English_Swords_of_Iron_DOCUMENTS_Operation_Rising_Lion_FM_Saar_Letter_to_UN_Security_Council.pdf, (Last Seen: 20 Sep 2025).

series of armed attacks against U.S. personnel and facilities and Israel".[98]

Leaving aside substantive issues such as alleged prior Iranian attacks with the U.S. and Israel or Iran's purported nuclear weapons program, these letters reaffirmed both States' belief in the permissibility of using force against a potential nuclear weapons program. On the other hand, following Israel's attack on Iraq's Osirak reactor, this constituted the second relevant precedent that came before the Security Council. Unlike the former case, which was met with the Council's unequivocal condemnation, no comparable reaction was observed with respect to the Israeli and subsequently the U.S. strikes against Iran. The Council convened three meetings on 13, 20, and 23 June to consider the attacks but was unable to reach a decision due to divided opinions. In these sessions, Russia.[99] China,[100] Algeria,[101] Pakistan,[102] Iraq,[103] Guyana,[104] and Kuwait,[105] explicitly deemed the attacks inconsistent with international law. In contrast, the United Kingdom,[106] France,[107] Denmark,[108] Greece,[109] Panama,[110] and Somalia,[111] either invoked Israel's right to self-defense or highlighted the existential threat posed by Iran's nuclear program. The Republic of Korea refrained from taking a clear position but emphasized the general risks of nuclear capabilities.[112]

The doctrinal debate reflects a similar division of opinion. Some scholars argue that the attacks were in clear violation of the UN Charter,[113] while others have argued that "the only viable opportunity to defend when threatened with a nuclear armed attack is to act before the attack occurs…

98. "Letter to the UN Security Council, Permanent Mission of the United States of America", https://www.justsecurity.org/wp-content/uploads/2025/07/us-iran-article-51-letter-june-27-2025-nuclear-facilities.pdf, (Last Seen: 20 Sep 2025).

99. Security Council, 9936th meeting, (13 June 2025), S/PV.9936, 5.

100. *Ibid*., 12.

101. *Ibid*., 7.

102. *Ibid*., 14.

103. Security Council, 9939th meeting, (20 June 2025), S/PV.9939, 38.

104. Security Council, 9936th meeting, (13 June 2025), S/PV.9936, 18.

105. *Ibid*., 24.

106. *Ibid*., 16.

107. *Ibid*., 17.

108. *Ibid*., 13.

109. *Ibid*.

110. Security Council, 9936th meeting, (13 June 2025), S/PV.9936, 10.

111. *Ibid.*, 9.

112. *Ibid.*, 8-9.

113. Marko Milanovic, "Is Israel's Use of Force Against Iran Justified by Self-Defence?" *EJIL Talk*, https://www.ejiltalk.org/is-israels-use-of-force-against-iran-justified-by-self-defence/ (Last Seen 19 Sep 2025); Andreas Zimmermann, "The Iran-US Claims Tribunal and the Recent US Military Operation against Iran", *EJIL Talk*, https://www.ejiltalk.org/the-iran-us-claims-tribunal-and-the-recent-us-military-operation-against-iran/ (Last Seen 19 Sep 2025); Terry D. Gill, "Israel (and the United States) vs. Iran: Self-Defence and Forcible Counterproliferation", *Articles of War*, https://lieber.westpoint.edu/israel-united-states-iran-self-defence-forcible-counterproliferation/, (Last Seen 19 Sep 2025).

because acting after a nuclear strike may be practically impossible".[114] A detailed review of scholarly debate exceeds the scope of this article. Nevertheless, in the next section, we seek to determine, in particular, whether the diminishing condemnation of attacks against alleged military nuclear programs—from the 1981 strike on Iraq's Osirak reactor to the 2025 attack on Iran—may be indicative of a paradigm shift in international law.

3. State Practice through the Lens of International Law

The practices examined in the preceding section reflect attempts by certain States to gradually shift towards pre-emptive and unilateral resort to force aimed at preventing the development or acquisition of nuclear weapons by non-nuclear-weapon States. In order to reconcile these practices with international law, three questions must be addressed: First, assuming the legitimacy of pre-emptive resort to force, does the mere possession of nuclear weapons constitute an imminent threat warranting the use of force? Second, does the breach of the obligation not to acquire nuclear weapons entail punitive rules under the law of State responsibility? And finally, are the existing practices sufficient to modify the legal regime governing the exceptions to the prohibition of the use of force?

3-1. Nuclear Weapons: An Imminent Existential Threat?

The ICJ's *Nuclear Weapons* advisory opinion provides a starting point for addressing the first question. In that case, the Court noted "some States put forward the argument that possession of nuclear weapons is itself an unlawful threat to the use of force".[115] The ICJ responded that whether possession of nuclear weapons constitutes "a 'threat' contrary to Article 2(4) of the Charter depends on whether… the envisaged use of force would target the territorial integrity or political independence of a State, or the purposes of the United Nations".[116]

This clear answer demonstrates that the mere possession or development of nuclear weapons—even in breach of the obligations set forth in the NPT—cannot, by itself, reach the threshold of a threat contrary to the UN Charter, and that additional factors are required to attain such a threshold. For this reason, it has been stated that "the Court did not suggest that possession of nuclear weapons… would trigger the exercise of self-defense under Article 51 of the Charter".[117] Above all, "Since the production of

114. Nicholas Tsagourias, "Assessing the Legality of Israeli Action Against Iran Under International Law", *Articles of War*, https://lieber.westpoint.edu/assessing-legality-israels-action-iran-international-law/, (Last Seen 01 Aug 2025).

115. ICJ, Legality of the Threat or Use of Nuclear Weapons, para. 48.

116. *Ibid*.

117. Terry D. Gill and Kinga Tibori-Szabó, The Use of Force and the International Legal System, 218.

nuclear weapons typically takes years, an imminent threat of an armed attack cannot possibly materialize while the development process for such weapons is ongoing".[118]

Where there exists a customary or treaty-based obligation prohibiting possession of a particular weapon, acquisition or attempts to acquire such weapons constitute a breach of that obligation. Although the State concerned may intend to employ the weapon for an unlawful purpose, the mere violation of obligations relating to the possession of a particular weapon, within the framework of international law, does not carry an additional meaning, nor can it be interpreted as a threat contrary to the UN Charter or as an existential threat, unless convincing evidence exists establishing a link between the acquisition of the weapon and the threat of its use. This finding is reinforced by the ICJ's emphasis that the concepts of "threat" and "use" of force are intertwined: "If the use of force itself in a given case is illegal—for whatever reason—the threat to use such force will likewise be illegal".[119] Accordingly, even if the acquisition of nuclear weapons were to amount to a threat of force, such a threat would only be unlawful where the very use of force through nuclear weapons is itself unlawful. In other words, whenever the use of force is against international law, the threat thereof is likewise illegal. The ICJ, once again—albeit amid extensive criticism—stated that the mere use of nuclear weapons could not, *per se*, be regarded as unlawful.[120] Consequently, possession of these arms could not, in itself, constitute a prohibited threat. The ICJ's findings, namely that the possession of nuclear weapons, as one category of WMDs, cannot by itself amount to a threat contrary to international law, stand in contrast to the strategy under which the mere possession of WMDs is treated by some States as a threat warranting the use of force for its elimination.

3-2. Breach of Peremptory Norms and the Emergence of Customary International Law

As discussed in the introduction and in the first section, the exceptions to the prohibition of the use of force are limited to self-defense in the event of an armed attack or to collective measures under Chapter VII of the UN Charter. Nevertheless, this does not "exclude that subsequent practice concerning the scope and the limits of the rights of self-defense".[121] In fact, Article 31(3)(b) of the VCLT, which reflects customary international law,[122] considers subsequent

118. *Ibid*.

119. *ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, para. 47.

120. *Ibid*., 105.

121. Albrecht Randelzhofer and Georg Nolte, "Article 51", in The Charter of The United Nations: A Commentary, Vol. II, Bruno Simma et. Al (Oxford: Oxford University Press, 2012), 1404.

122. Mark E Villiger, Commentary on the 1969 Vienna Convention (Boston, Martinus Nijhoff, 2009), 424-426.

State practice as relevant to the interpretation of treaty provisions. Despite its normative and constitutional significance, the UN Charter is not exempt from the application of this interpretative tool. The ICJ also confirmed in the *Wall* advisory opinion that Charter provisions may be interpreted in light of subsequent practice of the UN.[123] Therefore, "Theoretically it is even possible that an additional exception to the general prohibition of the use of force could develop alongside Article 51",[124] through subsequent State practice.

For a practice to crystallize into a rule of customary international law, it must be sufficiently uniform to be considered an "established practice" and must reflect the *opinio juris* of States. As the ICJ emphasized, for a practice to be regarded as "settled practice," it must be "extensive and virtually uniform".[125] Although the ILC declared within the project of "identification of customary international law" that "universal participation [of States] is not required" in the process of making customary international rules, however, it is "important that…the various interests at stake and/or the various geographical regions" be considered.[126] However, given the peremptory character of the prohibition of the use of force, it follows that the international community as a whole must participate in such practice or, at the very least, not demonstrate opposition to it. The ICJ explicitly stated in the *Nuclear Weapons* case that "when the members of the international community are profoundly divided on [a specific] matter…the Court does not consider itself to find that there is an *opinio juris*."[127]

During the Cuban Missile Crisis, States were divided regarding the legality of the U.S. action. In the case of the Israeli attack on the Osirak reactor, States unanimously condemned the attack. Despite various justifications for the 2003 invasion of Iraq and the overthrow of Saddam Hussein, States' positions were clearly divergent. The Israeli strike on Syria's al-Kibar reactor, however, did not provoke opposition from States; nevertheless, as discussed, States were not in a position where their reaction was required, and thus their failure to condemn the attack cannot be taken as evidence of an emerging practice. In the case of the attack on Iran, although the level of condemnation had noticeably declined, a renewed wave of opposition from States and legal scholarship regarding the legitimacy of the strike could still be observed. Taken together, these instances of practice may indeed reflect early signs of an emerging customary rule, yet they remain at a significant distance from constituting "a settled practice".

123. ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, para. 28.

124. Albrecht Randelzhofer and Georg Nolte, "Article 51".

125. *ICJ, North Sea Continental Shelf (Federal Republic of Germany/Netherlands), Mertis, Judgment*, paras. 74 and 77.

126. Draft conclusions on identification of customary international law, ILC Yearbook of the International Law Commission, 2018, vol. II, Part Two, Conclusion 8, para. 3 of commentaries.

127. *ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, para. 67.

3-3. International Responsibility Regime and the Punitive Character

The theory justifying attacks on the nuclear technology of non-nuclear-weapon States is based on the assumption that these States have breached their obligations not to acquire nuclear weapons. For instance, on 12 June 2025, the IAEA Board of Governors, one day before Israel's Rising Lions operation, accused Iran of violating its nuclear commitments.[128] Article 1 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts 2001 (ARSIWA) provides that "every internationally wrongful act of a State entails the international responsibility of that State."

International responsibility bears certain consequences, as set out in Part Two of the ARSIWA. Under this part, the responsible State is obliged to cease the wrongful act if it is ongoing,[129] to make reparation,[130] and to provide assurances and guarantees of non-repetition if necessary.[131] Beyond these measures, the international responsibility regime does not prescribe additional consequences.[132] An armed attack on a State, allegedly in breach of its nuclear obligations under international law, introduces a new and punitive element to the existing framework of State responsibility. The absence of a punitive feature in the current international responsibility system stems from its foundational nature.[133] In fact, the primary purpose of the State responsibility regime is nothing more than ensuring compliance with primary rules.[134] The ICJ confirmed this in the *Congo v. Uganda* case, emphasizing that the international responsibility regime is compensatory in nature and should not be endowed with punitive characteristics.[135] Consequently, a military attack against a State that may have violated its nuclear obligations constitutes an unprecedented innovation in the regime of State responsibility, which currently lacks legal legitimacy. It should be recalled that in the *Allegations of Genocide* case (*Ukraine v. Russia*), in a different context, the ICJ faced the question of whether the use of force by Russia to end the violation of a *jus cogens* norm (*i.e.*, the genocide of the Russian minority in Ukraine) was lawful.[136] The ICJ responded negatively.[137]

128. IAEA Board of Governors resolution, (12 June 2025), GOV/2025/ 38, para. 3.

129. ARSIWA, Article 30 (1).

130. *Ibid.*, Article 31.

131. *Ibid.*, Article 30 (2).

132. James Crawford, *International Responsibility: General Rules*, (Cambridge, Cambridge University Press, 2013), 392.

133. *Ibid*.

134. Alain Pellet, "The Definition of Responsibility in International Law", in: *The Law of International Responsibility*, ed James, Crawford; Alain, Pellet; Simon Olleson, (New York, Oxford University Press, 2010): 9.

135. *ICJ, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Merits, Judgement*, para. 102.

136. Abdollah Abedini, "Use of Force to Prevent Genocide: A Legal Struggle between Ukraine and Russia in the International Court of Justice", *International Studies Journal* 20, (2023): 13.

By analogy, the Court's reasoning can be extended to the issue in this article: if the ICJ does not permit the use of force to stop a breach of a *jus cogens* norm, it, *a fortiori* does not allow the use of force to halt the violation of a non-*jus cogens* obligation, such as nuclear weapons development.

Conclusion

International law has, to date, observed five instances of the use of force in response to the alleged violation of nuclear obligations by non-nuclear-weapon States. Although in at least two of the cases examined in this article—namely the nuclear programs of Iran and Iraq—the governing legal instruments did not support the allegation that the respective States' nuclear programs had become militarized, this article demonstrated that, at present, the mere development of nuclear weapons, by itself and without integration with other factors, does not reach the threshold of a threat that would justify the use of force, even under the controversial theory of anticipatory self-defense. Furthermore, significant divergence among States and within the doctrine prevents these practices from constituting settled customary law. Nevertheless, the silence or inaction of some States regarding the two most recent cases—the strike on Syria's Al-Kibar reactor and the attacks on Iran's nuclear facilities may be interpreted as indications of a possible shift in the rules governing the use of force. On the other hand, the opposition expressed by a number of other States, together with the fact that the modification of a peremptory norm requires the emergence of another norm possessing the same character, leaves little doubt that, at least under the present circumstances, these reactions do not alter the characterization of such instances as unlawful.

According to this new alleged perspective, since a nuclear strike, due to its catastrophic effects, leaves no alternative for the threatened or attacked State to respond proportionally, the exceptions to the prohibition of the use of force should, compared with conventional threats, be interpreted less restrictively to allow the threatened State to counter the threat. Whether international law will, in its further development, embrace a new exception to the prohibition of the use of force, or continue to regard it as a violation of its norms, remains to be seen through time and subsequent practice. However, international law in its current context, at least in light of the peremptory character of the prohibition of the use of force, cannot recognize such interpretations as valid. Accordingly, even if international law were to accept changes in the body of rules governing the use of force in the future, until such time, all these interpretations and instances remain devoid of legitimacy.

137. *ICJ, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Provisional Measure, Order*, para. 59.

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