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THE RIGHT OF SELF DEFENSE UNDRE INTERNATIONAL LAW: FOCUSING ON IRAN/ISRAEL CONFLICT OVER IRANIAN NUCLEAR PROGRAM

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ADDIS ABABA, ETHIOPIA

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CHAPTER ONE

SELF-DEFENCE IN GENERAL

1.1 DEFINITION AND CONCEPT OF SELF DEFENSE

Before we embark upon the definition of self-defense, we have to acquaint ourselves with the concept of Self-preservation from which self-defense was derived. Self-preservation is the widest right enjoyed by states to resort to force. The right of self-defense, intervention necessity, protection of the right of citizens abroad, protection of property of citizens abroad, and the like were all considered aspects of the right of self-presentation. Generally, it is inclusive of all actions to enforce legal rights and vital interests.

This wide concept of self-preservation permits states to violate all norms of international law; hence violating the right of other states when it deems it necessary to avert an impending injury to its interests. In other words, the state can protect its rights against actual or impending dangers or violation of its vital interests even when there is no illegal attack or imminent danger to its rights. The right to self preservation is so wide that a state could do whatever it deems proper to preserve its existence even at the expense of another innocent state so in light of the right of self-preservation action taken by a state against another to protect its interest from threatened injury no matter how remote of how far in the future the threat might be would be legal.

However, some writers use the term self-preservation and self-defense interchangeably. Other regard the right of self-preservation as identical with the right of self-defense, while still others treat the latter as an aspect or

subdivision of the former. A few regard self-defense as the application of the right of self-preservation in case of attack or in case of apprehended attack. [1]

Having said this much about self-preservation let's turn our attention to self-defense. No matter how self-defense is related to self-preservation it's obvious that the former is derived from the latter. It's through the development of society that the widest right of self-preservation was mounded and the exercise of the right of self-defense limited to cases of actual or imminent attack only as a proper and legal ground to resort to force.

The right of self defense has almost never been questioned, for a state, like an individual may protect itself against an illegal or illegitimate attack commenced or impending. As Thomas said the right of self-defense is:-

> *Recognized by national law as applicable to individual and by international law as applicable to nations. It is impossible for any system, national or international to prevent all illegal attacks upon its subjects, and in case of such an attack if the attacked subject were* ***in all cases*** *forced to wait for the enforcement authorities to take action, that will be absurd.*[2]

Therefore, self-defense may be defined as a lawful use of force, in principle counter force, under conditions prescribed by international law in response to a previous unlawful use or at least the threat of use of force. [3] As such self-defense is confined to situations where a state responds with lawful force to an unlawful force or at least to a threat of use of force. Though there is controversy as to the extent of the right, all writers agree that self-defense is a legitimate right of use of force against an illegal use of force.

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[1] Lav Brownlie, **International Law and the Use of Force by States**, 1963, p46
[2] Annvan Wgnew Thomas and A.J Thomas, **Non-Intervention: The Law and its imports in the Americas,** (1956), p.82
[3] Id… p.79

1.2 HISTORICAL DEVELOPMENT OF SELF DEFENSE

1.2.1 State practice Before the League of Nations.

When we refer to the state practice until the period before the First World War, we mostly observe that states resorting to war assert their action by reference to the right of self-defense or self-preservation or such other defenses as necessity, protection of vital interests and the like. Up till the First World War what was observed from state practice therefore, is the mixture of the concept of self-defense and self-preservation. During the period approaching the First Would War, the ultimate right to resort to war begun to change. As Brownie puts it:-

> It's true that in the latter part of the period between the Congress of Vienna and the world war the doctrine that war was an ultimate means of enforcing legal rights, peaceful modes of settlement having failed had developed in the practice of states. [4]

The most prominent state practice that has held the status of customary international law is the Caroline Case. This case is supposed to have laid down a standard, on which any use of force is based. The parties to the dispute were The UK and the USA, in which case, the British subjects destroyed the American ship, the Caroline, killing two men. [5] The British alleged that the Caroline was lending assistance to decedents in the Canadian territory. [6]

[4] Supra note 1., page 79

[5] Commander Byard Q. Clemmons & Major Gary D. Brown, Rethinking International Self-Defense: The United Nations' Emerging Role, 45 NAVAL L. REV. 217, /1998/, p.221

[6] ibid

Through an exchange of diplomatic notes, the dispute was resolved in favor of the Americans. [7]

In this case the secretary of state Webster defined self-defense and expressed the requirements for resorting to self-defense as" …. Instant, overwhelming necessity. Leaving no choice of means and no moment of deliberation.[8] State practice and works of authorities then after cited the Caroline doctrine as an authority.

1.2.2 The League of Nations

It was by the document of the Versailles treaty that the League of Nations was created. The existence of numerous peace plans, the proposal by statement to draft a coherent law and the bad experience of the war led statesmen and representatives of different governments that gathered in Paris for the peace conference to bring into being a new era in international relations. As such a drafting committee was elected and in February 1919 brought the draft proposal. After discussing it and making necessary changes, the proposal was finally adopted as the League of Nations on 28 April, 1919.

Though from the legal point of view the document was unsatisfactory, [9] it can be said that it had radically changed the overall foundation of the world organization as it was the first attempt to create permanent machinery for the settlement of disputes between states. The objectives of the league as is set forth in the preamble is the prevention of war, promotion of international cooperation among nations and the maintenance of international peace and security.

[7] ibid
[8] Malcom N. Shjaw, **International Law**. (2nd ed). 1986, p.539)

[9] ibid

The Covenant derogated from the customary law in restricting resort to war[10] This is so because it provided in Articles 10-15 for the prohibition of resorting to war as a means of settlement of dispute and stipulated peaceful means for the resolution of conflicts. Article 10, 12 and 15/1/ prohibited wars of aggression between member states.

The freedom to resort to war however remained as it was to non members and between a member and a non-member. The criteria of illegality adapted in Articles 12 to 15 were purely formal with the result that the covenant introduce a distinction between permissible and prohibited wars.[11] This distinction is entirely based on the observance of the procedures for pacific settlement laid down in the Covenant of the League.

Due to the failure of the covenant to define war, "resort to war", and aggression, states usually resorted to war justifying their action alleging that no state of war existed between them or without declaring war. Generally we can say that the Covenant did not satisfactorily outlaw war and resort to force.

The covenant remained silent regarding self-defense. In fact Article 12 provides that members shall submit their dispute to arbitration or judicial settlement or to the council of the league for examination. They were prohibited from resorting to war until the passage of three months until the award is given by the arbitrators. Article 15 paragraphs 7 also provides that member states have the right to take such actions as they shall consider necessary for the maintenance of right and justice.

[10] ibid
[11] Yoram Dinstein, **War Aggression and Self-Defense**, (1988), p.166

Inspire of this, we have to inquire if these provisions were enough to protect from aggressive war. What if the aggressor could not wait until the award is given and starts to invade the other state? What is meant by the maintenance or "right" and "justice" in Article 15? Could it allow states to resort to force as a means of self-defense.

Considering all possible ways we could not arrive at the conclusion that the League provisions allowed resort to force as a means of self-defense. But when we see the practice of states after the League, we observe that the inherent right of self-defense was unimpaired. Brownie says that it was universally agreed that the right of legitimate defense was impliedly resaved by members. [12] What we can conclude is then the fact that the Covenant of the League did nothing to the development and legitimization of self-defense.

1.2.3 The Pact of Paris

A radical change in the international law of war rose due to the signing of this treaty which is also called the Pact of Pairs. Unlike prior customary law and the covenant of League, this pact renounced the resort to war as an instrument of national policy. This general treaty came into being due to the negotiations of France and the USA.

It was on April 6, 1927, that the French Minister of foreign Affairs, Mr. Briand, sent a message to his American counter part revealing his intention to sign a mutual agreement for the outlawry of war. The negotiation between the USA and France begun when Mr. Kellogg sent a letter to the French government dealing with the proposal for the renunciation of war on December 28,1927. Kellogg rather proposed that.

> *The two government instead of contenting themselves with a bilateral declaration, might make a more signal contribution to the world peace by joining in an effort to obtain the adherence of all*

[12] Supra note1., p 61

> *the principal powers of the world to a declaration renouncing war as un instrument of national policy, with a view to the conclusion of a treaty among the principal powers of the world, open to signature by all nations…..*[13]

Though Kellogg's original idea was to renounce war as a whole, he latter assured the French Ambassador that the outlawry, would not deprive the signatories of the right of legitimate defense. [14]

After the phase of exchange of letters and ideas has lapsed, both governments begun to send notes and draft texts to other governments for comment and approval. The great powers began to reply for the notes and drafts. Great Britain, Germany, Italy and Japan replied favorably but they all reserved the right of self-defense to themselves addressing the reservation of the different countries. Mr. Kellogg on 23 June, 1928 sent a message explaining the construction of the draft to 14 countries. In his letter he said:-

> *There is nothing in the American draft of anti-war treaty which restricts or impairs in any way the right of self defense. That right is inherent in any sovereign state and is at all times and regardless of the treaty provision to defend its territory from attack.*[15]

All powers agreed to the proposal and the note of Kellogg and on August 27, 1928 the pact was signed by the representatives of the fifteen powers. The pact had only two articles in addition to the preamble. The preamble states the agreement of the parties to the treaty to resort to pacific means to solve dispute and a signature which shall seek to promote its interest by resorting to war should be denied the benefits furnished by this treaty. [16]

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[13] Ahmed M. Rifaat. **International Aggrtession. A study of the legal concept: Development and Definition in international law** (1979), p.65

[14] ibid
[15] ibid
[16] ibid

Under Article one, the contracting parties solemnly declared that they condemn recourse to war for the solution of controversies and renounce it as an instrument of national policy in their relations with one another. In Article two they agreed that the settlement of all disputes with each other shall never be sought except by pacific means. [17] Due to the invitation of the USA for other countries to adhere to the pact not less than 65 states of the international community were bound by the pact up to 1933. Since this number is quite beyond the number of signatories of the League, the pact had assumed a universal status by the time the Second World War broke out.

Neither in the preamble nor in the two provisions could we find mention of the concept of self-defense. But as we have here in above discussed, the signatories signed the treaty by reserving the right to themselves through the formal notes they exchanged before the pact. As such we can say that when the pact renounced all forms of violence or resort to war, it has left self-defense as an exception. Besides, the scope of this exception was to the effect that states were to decide and judge for themselves whether a situation had arisen which needed to be cured by such violent action. [18]

The shortcomings of the pact are three. One is the fact that the pact addresses only the signatories. Though the pact has assumed a universal character, it only addressed the members as such. The non-members were still allowed to resort to war what so ever. The second is the absence of competent body to determine whether a state employing force was acting in self-defense or in Brach of the pact. [19] This power was given to each state according to the final note of Mr. Kellogg. The third one is the absence of enforceable sanction. Though it is implied in the preamble that any state derogating from the treaty will not benefit from the pact, this is not an enforceable provision as it is not an integral part of the treaty.

[17] ibid
[18] ibid
[19] ibid

1.3 DEVELOPMENT OF SELF-DEFENSE UNDER CUSTOMARY INTERNATIONAL LAW

From the ancient times till the Covenant of the League of Nations there was a presumption of the legality of unrestricted right to resort to war. As such even societies which were at a relatively more civilized stage were ready to resort to war even for the slightest reason. There was no authority to resort to and there was no sanction to be imposed upon the violator.[20] So in those early times force was considered as a legitimate right of individual states. Hence under customary international law of that period only might made right and use of force was completely un-regulated.

Customary international law with regard to self-defense was further developed by the positivist approach. The positivist view self-defense as a legal right which necessarily excludes use of force against self-defense. The positivists are of the opinion that by prohibiting the use or the threat of use of force they could avoid the unrestrained freedom to resort to force except in self-defense. So from the period in which the use of force was unrestricted customary law reached a period where resort to force was prohibited except in self-defense.

[20] Tsige Alemayehu, Self-defence under contemporary International Law (1989), unpublished, AAU, p.61

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First and for most, I would like to thank God for making all this possible. I would also like to extend my deepest gratitude to my advisor, Elis Nalbandian, for her tireless assistance and very constructive comments and advice.

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CHAPTER THREE

ANTISIPATORY SELF DEFENCE AND THE IRAN-ISRAEL TENTION

3.1 The Doctrine of Anticipatory Self-Defense:

Most scholars point to Secretary of State Daniel Webster's statements in the 1837-1842 disputes between the British and the United States regarding a British attack on the American ship *Caroline* while it was in U.S waters as the origin of the concept of anticipatory self-defense.[1] In 1837, the Caroline allegedly supplied Canadian forces during Canada's rebellion against the British. [2] Daniel Webster, noting that the British acted when the Caroline was anchored and not preparing an attack on the British, stated that:

> *"When it is admitted that exceptions growing out of the great law of self-defense do exist, those exceptions should be confined to cases in which the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.[3]*

The early writings of Grotius and Vittles refer to the right of anticipatory self-defense. Grotius noted that the danger " must be immediate and imminent in point of time, but those who accept fear of any sort as justifying anticipatory slaying are themselves greatly deceived, and deceive others.[4] Vittles stated that a nation has "the right to prevent an injury when it sees itself threatened with one."[5]

As has been discussed in the preceding discussion, the right of self-defense would include anticipatory self-defense in earlier times. But after the coming in to force of the Charter of the U.N. as many suggest, the doctrine of anticipatory self-defense has lost its universal importance, because the charter overrides its

[1] Stanimir A. Alexandrov. Self-Defense against the Use of Force in International Law, 1996. P.36
[2] ibid
[3] ibid
[4] H. Lauterpacht, ed., Oppenheim, International Law, A Treatise, 1952, p. 184

[5] ibid

applicability.[6] The customary right of self-defense prior to the UN Charter, which would contain forcible reprisal, has been effectively changed as to exclude it by the drafters of the Charter.[7]

This right was framed in such a way that it become wide so that it could include the right to act in collective self-defense, in addition to individual right to act in accordance therewith.[8] The legitimate right to act in self-defense currently is posed when "an armed attack" occurs; and this right has come to means to subsist until the Security Council takes the necessary measures in pursuance to Article 39.[9]

The right of self-defense is a right, which gives a green-light to a state to use force when it finds itself put at danger. This right, as provided for by the charter of the United Nations, is applicable *when there is an armed attack*. Even if there are views taking the position that the right of self-defense should be exercised anticipatorily, seen from the perspective of the purpose of the United Nations, such kind of exercise of the right of self-defense will go contrary to the goal of the organization, which will in turn bring about disorder in the international peace and security. The state which alleges to have been attacked or threatened should immediately report the fact that it has been attacked to the Security Council so that the Security Council can take measures necessary for the protection of international peace and security.

3.2. Nuclear Threat and Anticipatory Self-defense

"It was an extremely sad sight beyond the description of a burning hell… and beyond all imagination of anything here to fore known in human history." [10] goes the statement of five individuals who brought suit against Japan for the damages they have incurred due to the bombing of Hiroshima at the end of the

[6] Supra note 1, p. 39
[7] ibid
[8] Bruno Simma the Charter of the U.N. A commentary 1995, p. 691
[9] ibid
[10] Miriam Sapiro, Iraq: The Shifting Sands of Preemptive Self-defense, 97 AJIL, V.600, 2003.P.91

Second World War. This allegation can show us how sever the pain of nuclear bombing is and how extreme the suffering of the victims of the bomb could be. From the time of its discovery, the notion of nuclear attack has been hunting the world community.

With regard to anticipatory self-defense and the use of nuclear weapons, there has been a lot of controversies among international lawyers. This controversy relaters to the need for anticipating nuclear attack and the need to defend pre-emotively. There are two major opposing positions one in favor of the taking of appropriate pre-emptive defense in anticipation of nuclear attack and the other against this position.

The basis of these two positions is in interpretative variance of Article 51 and Article 2 paragraph 4 of the United Nations Charter. Especially with the phrase *'if an armed attack occurs'* in Article 51 and *'threat of attack'* in Article 2 (4), One that has been strongly argued is that "in the day of nuclear weapons and the ever present possibility of sudden devastation, nations can not wait for an armed attack to occur."[11] With this regard the United States Government in 1940 has said that "the term armed attack should be defined to include not merely the dropping of a bomb, but certain steps in themselves preliminary to such action."[12]

It is argued that a threat of attack by nuclear weapons should also give the right to pre-emotively strike. They even say that the term *threat of attack* gives states the right to defend themselves with out an actual armed attack taking place. The proponents of anticipatory self-defense say that "States faced with a perceived danger of immediate attack, can not be expected to wait the attack like sitting ducks."[13] It's also argued that:

> *The fear of surprise attack, the advantages of a first strike, the possibilities of incontrovertible intelligence reports of an enemy plan to*

[11] ibid
[12] ibid
[13] ibid

> *attack, the vulnerability of a counter strike capacity and the speed of missile delivery system constitute rational basis for recourse to preemptive of preventive strategies.*[14]

Generally those who argue for anticipatory self defense say that the Charter should be read to permit anticipatory self-defense in case of imminent threat of attack by nuclear weapons.

In response to this line of argument, others say that, "the existence of nuclear missiles has made it even more important to maintain a legal barrier against pre-emptive strike and anticipatory defense" [15] They further argue that, "If the Charter originally permitted force in self-defense only if an armed attack occurs, today's weapons hardly argue for extending the exception. The original reasons for barring anticipatory self-defense in regard to old fashioned war apply even more to the new war."[16]

It is contended that Article 51 says if an armed attack occurs and this should not be extended to included future attack and new definitions should not be fabricated. To permit anticipatory self-defense night in the final analysis destroy the whole rule against the use of force. They say that:

> *To permit anticipation may virtually destroy the rule against the use of force leaving it to every nation to claim anticipation and unleash the fury. Nations will not be prevented or deferred by the fear, that later - if there is any one left to judge - some one may determine that there has in fact been no threat of an armed attack, legitimately anticipated.*[17]

Both lines of argument seem plausible, however, for the safety of the nations and the world as whole, states should resort to a more peaceful means of resolving conflicts. It is the view of the writer that the charter of the UN that allows an act of self defense only when there is an actual armed attack should be respected and it must not be re-defined everytime a new means and methods of warfare are discovered. It is the view of the writer that when the

[14] Id.,p97
[15] ibid
[16] ibid
[17] ibid

charter prohibits the use of force in the relation between states its objective is to avoid war and the suffering of human beings in consequence.

Therefore, no matter what the means and methods of warfare are involved, the international law obligation of states not to use force against the other should be obeyed. Because, if it is not obeyed and if it is re-defined from time to time, a new definitions of the obligation will be fabricated as new means and methods of warfare are discovered.

3.3 Nuclear Program of Iran

The nuclear program of Iran was launched in the 1950s with the help of the United States as part of the Atoms for Peace program.[18] The support, encouragement and participation of the United States and Western European governments in Iran's nuclear program continued until the 1979 Iranian Revolution that toppled the Shah of Iran.[19]

After the 1979 revolution, the Iranian government temporarily disbanded elements of the program, and then revived it with less Western assistance than during the pre-revolution era. Iran's nuclear program has included several research sites, two uranium mines, a research reactor, and uranium processing facilities that include three known uranium enrichment plants.[20]

Iran was known to be reviving its civilian nuclear programs during the 1990s, but revelations in 2002 and 2003 of clandestine research into fuel enrichment and conversion raised international concern that Iran's ambitions had metastasized beyond peaceful intent.

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[18] Roe, Sam (January 28, 2007). "An atomic threat made in America". Chicago Tribune. http://www.chicagotribune.com/news/nationworld/chi-061209atoms-day1-story,0,2034260.htmlstory..

[19] "Iran Affairs: Blasts from the Past: Western Support for Iran's Nuclear program". 2008. http://www.iranaffairs.com/iran_affairs/2006/05/blasts_from_the.html.

[20] "Iran Plans 19 Nuclear Power Plants". December 24, 2007.http://www.foxnews.com/story/0,2933,318198,00.html.

Iran has consistently denied allegations it seeks to develop a bomb.[21] Yet many in the international community remain skeptical. Despite a U.S. intelligence finding in November 2007 that concluded Iran halted its nuclear weapons program in 2003, the Bush administration warned that Iran sought to weaponize its nuclear program, concerns the Obama administration shares. Nonproliferation experts note Iran's ability to produce enriched uranium continues to progress but disagree on how close Iran is to mastering capabilities to weaponize.[22]

The September 2009 revelation of a second uranium enrichment facility near the holy city of Qom--constructed under the radar of international inspectors--deepened suspicion surrounding Iran's nuclear ambitions.[23] The West's fears were confirmed in mid-February 2010 when the IAEA released a report that detailed Iran's potential for producing a nuclear weapon, including further fuel enrichment and plans for developing a missile-ready warhead.[24]

3.4 International Atomic Energy Agency (IAEA) and Iran nuclear program

An IAEA report to the Board of Governors on August 30, 2007, states that Iran's Fuel Enrichment Plant at *Natanz* is operating "well below the expected quantity for a facility of this design," and that 12 of the intended 18 centrifuge cascades at the plant are operating.[25] The report states that the IAEA has "been able to verify the non-diversion of the declared nuclear materials at the enrichment facilities in Iran and has therefore concluded that it remains in peaceful use," and that longstanding issues regarding plutonium experiments and HEU contamination on spent fuel containers were considered "resolved."[26]

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[21] ^ "Council on Foreign Relations: Iran's Nuclear Program"., http://www.cfr.org/publication/16811/.
[22] Supra note 2
[23] Supra note 2
[24] International Atomic Energy Agency: Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions 1737 (2006), 1747 (2007), 1803 (2008) and 1835 (2008) in the Islamic Republic of Iran. 18 February 2010.
[25] "GOV/2007/48 – Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran" (PDF). http://www.iaea.org/Publications/Documents/Board/2007/gov2007-48.pdf..
[26] ibid

However, the report adds that "the Agency remains unable to verify certain aspects relevant to the scope and nature of Iran's nuclear program.

The report also outlines a work plan agreed by Iran and the IAEA on August 21, 2007.[27] The work plan reflects agreement on "modalities for resolving the remaining safeguards implementation issues, including the long outstanding issues." According to the plan, these modalities "cover all remaining issues and the Agency confirmed that there are no other remaining issues and ambiguities regarding Iran's past nuclear program and activities."[28]

The November 15, 2007, IAEA report found that on nine outstanding issues listed in the August 2007 work plan, including experiments on the P-2 centrifuge and work with uranium metals, "Iran's statements are consistent with ... information available to the agency."[29]

The IAEA report also stated that Tehran continues to produce uranium. Iran has declared it has a right to peaceful nuclear technology under the NPT, despite Security Council demands that it cease its nuclear enrichment. [30]

On November 18, 2007, President Ahmadinejad announced that he intends to consult with other Arab nations on a plan, under the auspices of the Gulf Cooperation Council, to enrich uranium in a neutral third country, such as Switzerland.[31]

The IAEA issued its report on the implementation of safeguards in Iran on February 22, 2008. According to the report, the IAEA shared intelligence with Iran recently provided by the US regarding "alleged studies" on a nuclear weaponization program. The information was allegedly obtained from a laptop

[27] ibid
[28] ibid
[29] http://www.iaea.org/Publications/Documents/Board/2007/gov2007-58.pdf.
[30] ibid
[31] "President Ahmadinejad: Iran to consult about uranium enrichment in neutral third country". . http://www.iht.com/articles/ap/2007/11/18/africa/ME-GEN-Saudi-Iran-Nuclear.php.

computer smuggled out of Iran and provided to the US in mid-2004.[32] The laptop was reportedly received from a "longtime contact" in Iran who obtained it from someone else now believed to be dead.[33] A senior European diplomat warned "I can fabricate that data," and argued that the documents look "beautiful, but is open to doubt".[34] The United States has relied on the laptop to prove that Iran intends to develop nuclear weapons.[35] In November 2007, the United States National Intelligence Estimate (NIE) believed that Iran halted an alleged active nuclear weapons program in fall 2003.[36] Iran has dismissed the laptop information as a fabrication, and other diplomats have dismissed the information as relatively insignificant and coming too late.[37]

The February 2008 IAEA report states that the Agency has "not detected the use of nuclear material in connection with the alleged studies, nor does it have credible information in this regard."[38]

On May 26, 2008, the IAEA issued another regular report on the implementation of safeguards in Iran. According to the report, the IAEA has been able to continue to verify the non-diversion of declared nuclear material in Iran, and Iran has provided the Agency with access to declared nuclear material and accountancy reports, as required by its safeguards agreement.[39]

The report stated that the IAEA had requested, as a voluntary "transparency measure", to be allowed access to centrifuge manufacturing sites, but that Iran had refused the request. IAEA itself had not detected evidence of actual design

[32] Broad, William J.; Sanger, David E. (2005-11-13). "Relying on Computer, U.S. Seeks to Prove Iran's Nuclear Aims – New York Times". *The New York Times*. http://www.nytimes.com/2005/11/13/international/middleeast/13nukes.html?_r=2&pagewanted=print&oref=slogin&oref=slogin.
[33] ibid
[34] ibid
[35] ibid
[36] "Iran: Nuclear Intentions and Capabilities (National Intelligence Estimate)". http://www.dni.gov/press_releases/20071203_release.pdf.
[37] Supra note 15
[38] http://www.iaea.org/Publications/Documents/Board/2008/gov2008-15.pdf
[39] http://www.iaea.org/Publications/Documents/Board/2008/gov2008-15.pdf

or manufacture by Iran of nuclear weapons or components. The IAEA also stated that it was not itself in possession of certain documents containing the allegations against Iran, and so was not able to share the documents with Iran[40].

According to the September 15, 2008, IAEA report on the implementation of safeguards in Iran, Iran continued to provide the IAEA with access to declared nuclear material and activities, which continued to be operated under safeguards and with no evidence of any diversion of nuclear material for non-peaceful uses.[41] . Nevertheless, the report reiterated that the IAEA would not be able to verify the exclusively peaceful nature of Iran's nuclear program unless Iran adopted "transparency measures"[42]

In a February 19, 2009, report to the Board of Governors, IAEA Director General ElBaradei reported that Iran continued to enrich uranium contrary to the decisions of the Security Council and had produced over a ton of low enriched uranium.[43]

Regarding the "alleged studies" into nuclear weaponization, the Agency said that "as a result of the continued lack of cooperation by Iran in connection with the remaining issues which give rise to concerns about possible military dimensions of Iran's nuclear program, the Agency has not made any substantive progress on these issues."[44] The Agency called on member states which had provided information about the alleged programs to allow the information to be shared with Iran. The Agency said Iran's continued refusal to implement the Additional Protocol was contrary to the request of the Security Council[45]. The Agency was able to continue to verify the non-diversion of

[40] ibid
[41] ibid
[42] ibid
[43] http://www.iaea.org/Publications/Documents/Board/2009/gov2009-8.pdf
[44] ibid
[45] ibid

declared nuclear material in Iran.[46] Iran says that for the six years the Agency has been considering its case, the IAEA has not found any evidence to prove that Tehran is seeking a nuclear weapon.[47]

3.5 Iran Nuclear Program and Israel; *Does Israel Have A Right of Self Defense?*

The nuclear program of Iran with its potential to develop nuclear weapons, together with the anti-Israel rhetoric of the President, Mahmoud Ahmadinejad, and his demand for "the regime occupying Jerusalem" to "vanish from the page of time", has led some Israelis to fear an eventual attack from Iran.[48]

In November 2003 a Scottish newspaper claimed that Israel *"warned that it is prepared to take unilateral military action against Iran if the international community fails to stop any development of nuclear weapons at the country's atomic energy facilities"* It cited Israeli defense minister Shaul Mofaz stating, *"under no circumstances would Israel be able to tolerate nuclear weapons in Iranian possession".*[49]

In December 2005, a British newspaper claimed that the Israeli military had been ordered by then Israeli Prime Minister Ariel Sharon to plan for possible strikes on uranium enrichment sites in Iran in March 2006, based on Israeli intelligence estimates that Iran would be able to build nuclear weapons in two to four years. It was claimed that the Special Forces command was in the highest stage of readiness for an attack. Ariel Sharon reportedly said, "Israel - and not only Israel - cannot accept a nuclear Iran. We have the ability to deal

[46] ibid
[47] John Pike. ""IRNA": IAEA's repetitious reports should be stopped: Iranian envoy".

[48] Family Feud: Israel v. Iran," *The Economist*, January 19, 2006.

[49] Uzi Mahnaimi and Sarah Baxter, "Revealed: Israel Plans Nuclear Strike on Iran," *The Times*, January 7, 2007, at *http://www.timesonline.co.uk/tol/news/world/article1290331.ece*

with this and we're making all the necessary preparations to be ready for such a situation."

The question that must be asked here is that would Israel's actions that it might take against Iran be justified under international law? Would it constitute a case of self defense?

As it is discussed in the previous chapter, use of force by a state on another state is prohibited under the charter of the United Nation. The only exception provided is the one that is provided under Article 51 of the charter. The Article reads "*Nothing in the present charter impairs the inherent right of individual or collective self-defense* ***if an armed attack occurs*** *against a member of the UN until the Security Council has taken a measure necessary to maintain international peace and security."*

When we see the Article literally, we observe that self-defense is only employed ***in response to a previous armed attack***. When we read the article in conjunction with Article 2(4) we realize that states were prohibited from threat or use of force against the territorial integrity and political independence which is the general rule from which self-defense is reserved.

This is an exception to a rule. The rule is prohibition of use of force, and the exception is the right of self defense of states only when there is an actual armed attack against them.

There is no an exception to this exception. No matter there is an anticipation of future attack or no matter the kind of anticipated threat is, i.e., whether is of a threat of a pistol or of a nuclear weapon, the rule is the same.

As we have tried to see earlier, the Iran's intentions to attack Israel is only anticipation. And there is no an actual armed attack made by Iran against Israel so far. As long as we obey international law and as long as we believe in

its existence, we must respect its rules. And the rule is no use of force unless in case of self defense against an actual armed attack.

Therefore, the writer of this paper believes that Israel do not have a right of self defense against Iran as long as an actual armed attack is not committed to it. The charter of the UN does not allow preemptive strike and we don't need to have an interpretation of the provision as long as it is clear.

It is the view of the writer that the charter of the UN that allows an act of self defense only when there is an actual armed attack should be respected and it must not be re-defined every time a new means and methods of warfare are discovered. It is the view of the writer that when the charter prohibits the use of force in the relation between states its objective is to avoid war and the suffering of human beings in consequence. If we make exceptions and try to justify the act of armed raid against states we are defeating the purpose of the UN itself.

As Grotius said, "…..those who accept fear of any sort as justifying anticipatory slaying are themselves greatly deceived, and deceive others".[50]

[50] Ian Brownlie, International Law and the Use of Force by States, 1963, p. 87

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CONCLUSION AND RECCOMMENDATIONS

The wide concept of self-preservation permits states to violate all norms of international law; hence violating the right of other states when it deems it necessary to avert an impending injury to its interests. It's through the development of society that the widest right of self-preservation was mounded and the exercise of the right of self-defense limited to cases of actual or imminent attack only as a proper and legal ground to resort to force.

The right of self defense has almost never been questioned, for a state, like an individual may protect itself against an illegal or illegitimate attack commenced or impending.

Therefore, self-defense may be defined as a lawful use of force, in principle counter force under conditions prescribed by international law in response to a previous unlawful use or at least the threat of use of force.

When we refer to the state practice until the period before the First World War, we mostly observe that states resorting to war assert their action by reference to the right of self-defense or self-preservation or such other defenses as necessity, protection of vital interests and the like.

it can be said that it had radically changed the overall foundation of the world organization as it was the first attempt to create permanent machinery for the settlement of disputes between states. The objectives of the league as is set forth in the preamble is the prevention of war, promotion of international cooperation among nations and the maintenance of international peace and security.

The Covenant derogated from the customary law in restricting resort to war. This is so because it provided in Articles 10-15 for the prohibition of resorting to war as a means of settlement of dispute and stipulated peaceful means for

the resolution of conflicts. Article 10, 12 and 15/1/ prohibited wars of aggression between member states.

Due to the failure of the covenant to define war, "resort to war", and aggression, states usually resorted to war justifying their action alleging that no state of war existed between them or without declaring war. Generally we can say that the Covenant did not satisfactorily outlaw war and resort to force.

Since the Covenant of The League was not able to prevent the Second World War from taking place the Charter was basically established to amend the failures of the league. As such in Article 2 paragraph 4, the Charter outlawed armed attack. In accordance with this article members are to refrain from the threat or use of force against the territorial integrity and political independence of any state.

The only exception to the general rule of prohibition from use of force is to be found in Article 51 wherein states were allowed to employ force in the form of individual or collective self-defense and in the case where it is authorized by the UN itself.

When we see the Article literally, we observe that self-defense is only employed ***in response to a previous armed attack***. When we read the article in conjunction with Article 2(4) we realize that states were prohibited from threat or use of force against the territorial integrity and political independence which is the general rule from which self-defense is reserved.

As an exception from this some infer that states are allowed to employ force in self-defense not only against an armed attack but also in threat to armed attack. This position is strongly condemned by many writers. The threats to attack refer to the future plans of state to employ force against another state

the right of self-defense would include anticipatory self-defense in earlier times. But after the coming in to force of the Charter of the U.N. as many suggest, the

doctrine of anticipatory self-defense has lost its universal importance, because the charter overrides its applicability. The customary right of self-defense prior to the UN Charter, which would contain forcible reprisal, has been effectively changed as to exclude it by the drafters of the Charter.

The right of self-defense is a right, which gives a green-light to a state to use force when it finds itself put at danger. This right, as provided for by the charter of the United Nations, is applicable *when there is an armed attack*. Even if there are views taking the position that the right of self-defense should be exercised anticipatorily, seen from the perspective of the purpose of the United Nations, such kind of exercise of the right of self-defense will go contrary to the goal of the organization, which will in turn bring about disorder in the international peace and security. The state which alleges to have been attacked or threatened should immediately report the fact that it has been attacked to the Security Council so that the Security Council can take measures necessary for the protection of international peace and security.

With regard to anticipatory self-defense and the use of nuclear weapons, there has been a lot of controversies among international lawyers. This controversy relaters to the need for anticipating nuclear attack and the need to defend pre-emotively. There are two major opposing positions one in favor of the taking of appropriate pre-emptive defense in anticipation of nuclear attack and the other against this position.

Both lines of argument seem plausible, however, for the safety of the nations and the world as whole, states should resort to a more peaceful means of resolving conflicts. It is the view of the writer that the charter of the UN that allows an act of self defense only when there is an actual armed attack should be respected and it must not be re-defined everytime a new means and methods of warfare are discovered. It is the view of the writer that when the charter prohibits the use of force in the relation between states its objective is to avoid war and the suffering of human beings in consequence.

Therefore, no matter what the means and methods of warfare are involved, the international law obligation of states not to use force against the other should be obeyed. Because, if it is not obeyed and if it is re-defined from time to time, a new definitions of the obligation will be fabricated as new means and methods of warfare are discovered.

There is a wide consensus among the international community, especially the western world, that Iran is developing a nuclear weapon. Iran, though it admitted that it is developing nuclear facilities for peaceful purposes, it has consistently denied allegations it seeks to develop a bomb. Yet many in the international community remain skeptical.

It is with these facts at hand and The nuclear program of Iran with its potential to develop nuclear weapons, together with the anti-Israel rhetoric of the President, Mahmoud Ahmadinejad, and his demand for "the regime occupying Jerusalem" to "vanish from the page of time", has led some Israelis to fear an eventual attack from Iran.

Because of these Israel is claiming to have a legitimate right of preemptive self defense under international law. And the question that this paper tried to answer is whether Israel could legitimately invoke self defense and attack Iran or not.

It is the opinion of the writer that the provision of the UN Charter prohibiting use of force unless in case of self defense against an actual armed attack is prohibited. Therefore, Israel could not invoke a legitimate self defense and attack Iran as long as Iran did invade the sovereignty of the nation and wage an actual armed attack against it; not just attack by words or by anticipation.