

EXCURSUS 1

William V. O'Brien on ISRAEL'S "JUST WAR": I

The Israeli attack on Iraq's Osirak reactor, justified as legitimate self-defense, will have profound effects on the Arab-Israeli conflict and on the Mideast strategic balance generally. And it makes for grim speculation about the effects of nuclear proliferation on the fragile prospects for peace and stability in a number of other conflict areas. But the attack poses an even more fundamental question: *What, if any, limits should be recognized on the right of a state to self-preservation?*

The issue has been raised often in discussions of international law, morality, and politics. But the general assumption is that most invocations of the right of self-preservation are exaggerated or downright hypocritical—like Germany's *Kriegsraison* concept of supreme military necessity called up for the invasion of neutral Belgium in 1914. Thus, it is argued, the limits of self-preservation may be debated abstractly, but in the real world the claim of self-preservation is to be rejected or ignored.

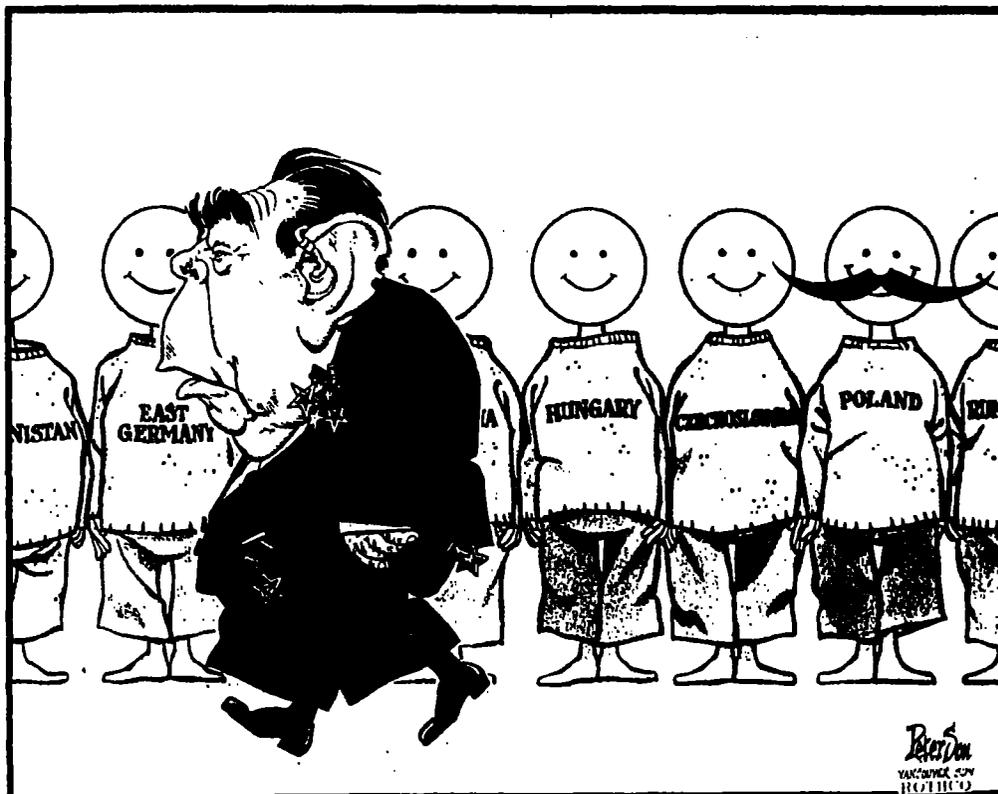
It is my contention that the Israeli claim of self-defense in the Osirak case—in reality a claim of self-preservation—is neither exaggerated nor hypocritical. The Israelis contended, quite plausibly, that Iraq has always been an enemy pledged to eliminate the "Zionist entity." Iraq's enmity was seen as particularly threatening in view of the character of its president, Saddam Hussein, whose propensity for violence in domestic and international politics is well known. Given Iraqi intentions, Israel could not accept a chain of events leading predictably to development of an Iraqi nuclear weapons capability. (In fact, this

was only one of a long series of Israeli claims that have been formulated in terms of legitimate self-defense but that actually rest on a valid invocation of the right of self-preservation.) Germany in 1914 suffered no threat even remotely comparable to that under which the Jewish state has been living since independence. The Osirak attack is a real test case for discussion of the normative limits of a state's right of self-preservation when its survival as a state and/or its physical existence as a society is actually threatened.

In contemporary international law—essentially the law of the U.N. Charter—states have renounced the right of recourse to military instruments (Article 2 [4]) except for individual and collective self-defense (Article 51). A widely accepted view of Article 51 is that it permits *preemptive* self-defense—that is, a first strike against an enemy clearly poised to attack, as in Israel's offensive at the start of the June, 1967, war.* But it is generally thought that *preventive* war—an attack on an enemy who does not pose an immediate, clear, and present danger—is not justified under Article 51.

Accordingly, it is a simple matter to say that Israel exceeded the limits of the right of self-defense by undertaking a preventive strike against the long-term threat posed by the Iraqi nuclear reactor. (Of course this can lead to some embarrassment about justifying the U.S. "quarantine" in the Cuban missile crisis—in many respects a less clear-cut case of self-defense/self-preservation than that faced by Israel.) But U.N. law is based on

*See D. W. Bowett, *Self-Defence in International Law* (Manchester University Press, 1958), pp. 187-89, 191-92; William V. O'Brien, "International Law and the Outbreak of War in the Middle East, 1967," in *The Arab-Israeli Conflict*, edited by J. N. Moore (Princeton, 1974), Vol. II.



"It has come to my attention that some comrades are attempting to have a more gloriously revolutionary nice day than other comrades..."

the assumption that there will be an effective collective security system to deter, repress, and punish aggression and also adequate machinery for the peaceful settlement of international disputes. How clearly the present case demonstrates the failure of such international restraints. In fact, the history of the international system since 1945 has been one of conspicuous failure at effecting pacific settlements of disputes—suggesting that there exists no real sense of a moral obligation to maintain a system of collective security.

The *moral* right of self-preservation is broader and deeper than a *legal* right of self-defense contingent on either an antecedent or imminent act of aggression. To be sure, rarely does a state and/or society face a true threat to its existence. But in a world that abounds in profound ideological, religious, and other conflicts, who can discount the possibility that a state may validly invoke the right of self-preservation?

Are there then no limits to the right of self-preservation? Were the old German *Kriegsraison* theorists correct in claiming that *raison d'état*—necessity—knew no law? The answer, of course, is that *raison d'état* does have limits. With respect to recourse to armed force these limits are set in the just war doctrine, which is deserving of revival and application.

Under just war doctrine all recourse to war, including measures justified by the ultimate claim of self-preservation, must be ordered by a competent authority. Defense measures must be based on a just cause, one that is proportionate to the costs of war fought in defense of that cause, calculated in the light of the probability of success. All peaceful alternatives must have been exhausted. A right intention must inform the just belligerent—that is, recourse to war must be solely for the purpose of defending the just cause and not out of selfish ambition or hatred of the enemy. Finally, the just war must be fought in accordance with the principles of proportion and discrimination, as well as other positive laws of war.

Unless these just war conditions can be met, even the right of self-preservation will not justify an act of war. The necessity of resorting to armed force is a prerequisite for fighting a just war, but it is not the sole condition under which a war may be called just.

It is clear to me that Israel met the just war conditions in its attack on the Iraqi nuclear reactor: The Begin government had competent authority to act; the cause—preservation of the state of Israel and of Israeli society—was just; the means contemplated—a counterforce strike—were proportionate to the cause; there was good reason to expect success. Years of futile diplomacy, both to end the intractable hostility of confrontation states like Iraq and to prevent Iraq's acquisition of a nuclear weapons capability, had exhausted prospects for peaceful alternatives to armed self-help. The attack on the Osirak reactor was carried out in such a way as to comply with the requirements of proportion and discrimination. Efforts to avoid collateral damage were successful.

The case of Israel is extreme but not *sui generis*. As nuclear weapons proliferate, the willingness to unleash wars of extermination may be encountered by other states—elsewhere in the Mideast, on the Indian subcontinent, in Africa and Southeast Asia. Clearly the issue of the moral limits of self-preservation is no longer an abstract one. It is the principal moral issue of international relations in the 1980s.

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Stephen E. Lammers on ISRAEL'S "JUST WAR": II

As Israel argues the case for its Osirak raid, Iraq, a notably virulent opponent of Israel's existence, was in the final stages of completing a nuclear reactor whose purpose, advertised as production of power, appeared on good evidence to be production of radioactive material for nuclear weapons to use against Israel. For one thing, the fuel to be supplied was of weapons grade, far higher in quality than necessary for mere nuclear power production. What is more, the Iraqi leadership had already indicated Iraq's intention to produce nuclear weapons to use against Israel. Israel had pointed this out to the French Government and had tried to persuade the French not to deliver weapons-grade material to the Iraqis. In the view of the Israeli leadership, to have allowed the reactor to be completed would have been to allow to develop a serious threat to Israel's existence. The French, contractors for the project, were not acting responsibly. Israel had no choice but to attack.

This is the claim. How do we assess it? *First*, is it correct that the burden of proof falls upon Israel? Although Iraq and Israel are technically in a state of war, I maintain that the burden is Israel's to meet. Indeed, one of the interesting features of this whole affair is that the Israelis are proceeding as if the burden is theirs to meet; another is how they have tried to meet it.

Second, the burden of justification not only falls upon Israel but is all the heavier for the fact that Israel itself possesses nuclear weapons. If Israel had no weapons or lacked the ability to make them quickly, then Israel could have made an excellent case for preventive action, arguing that no one should unilaterally introduce nuclear weapons in this part of the world. The issue is actually even *more* complex, because Israel opposed the very creation of a nuclear-free zone in the Middle East. In any event, the issue is not the introduction of nuclear weapons as such.

Third, what are the criteria a state should use in such a case? This appears to be an instance of preventive military action, and the most appropriate criteria would be the ones developed for the discussion of preventive war. These criteria are three: (a) The danger must be serious before one can act; (b) one must be able to show not only that the danger is serious, but that the enemy intends the serious danger; (c) the danger must be imminent—waiting would simply increase the danger. Note that all these criteria demand judgments: What is serious? How do we know the other party intends the danger and is not bluffing? How near must the danger be in order to be called imminent?

Israel can make a good case that the danger was serious and that Iraq intended harm, but the critical judgment then concerns the timing of the raid. The matter of timing has at least two aspects: (1) Is there a further threat to my territory or political independence if I wait? (2) Is there anything else I might do to avoid war, any other reasonable options to pursue? Little noticed in America is that the debate in Israel actually focused on the second point: Shimon Peres, who led the Labor party in the recent Israeli election, was arguing that the new French government of François Mitterrand ought to have been contacted about the supply of weapons-grade fuel for the reactor. In Peres's view, Israel still had time before the reactor went "hot" to pursue other avenues of action. On this reading, with which I agree, Israel fails to make the case for timing that it must make to justify the raid. (At the