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| Noel Lateef: | Good evening. I'm Noel Lateef, President of the Foreign Policy Association, and I'm delighted to welcome you to this Centennial Lecture in our Centennial Year. I'm pleased that the United Nations Institute for Training and Research, UNITAR, is our joint venture partner this evening, and I would like to recognize Ambassador Marco Suazo, Director of UNITAR's New York office. |
|  | It gives me great pleasure to introduce our speaker this evening, Professor Michael Reisman, Myres S. McDougal Professor of International Law at Yale Law School. It has been said that the heart of the law is the heart of the judge. I think it would be more accurate to say that the heart of the law is the heart of the teacher who shapes the future judge. Our speaker is such a teacher, shaping thousands of law students by his instruction and by his example. |
|  | I remember first meeting Professor Reisman when I had the audacity, as a first-year law student, to knock on his door, and to ask him to write a forward to a book I had just completed on economic development in Sub-Saharan Africa. Without hesitation, Professor Reisman accepted to do this. I subsequently asked him to sponsor a student-initiated seminar on law and economic development, and again, he said yes without hesitation. |
|  | For now almost 40 years, I have been a great admirer of Michael Reisman. When I have taught, I have tried to be as supportive of my students as Michael was of me. I am in awe of Michael's devotion to his own teachers. At Yale, they included such towering figures as Harold Laswell and Myres McDougal. Michael is one of the foremost practitioners of public international law in the world today. He is the rare individual who produces definitive scholarship, and yet finds time to act upon the world. |
|  | He has served as President of the Inter-American Commission on Human Rights, of the Organization of American States, Vice-President of the American Society of International Law, and he has served as arbitrator and counsel in numerous landmark international law cases. Michael has been a leader in promoting our mission and achieving our goals at the Foreign Policy Association, coming up on two decades of service on the FPA Board of Directors. He exemplifies all that a board member should be. |
|  | Please join me in welcoming our Centennial speaker, Professor Michael Reisman. |
| Michael Reisman: | Yale is a remarkable place to teach and the students are extraordinary, but it's very few students who come and say, "I've just written a book. Would you write an introduction for it?" I remember Noel vividly, and I've been an admirer of his career ever since. His public service is well-known and admired by many. Thank you very much for all you've done, Noel. |
|  | Those of you who attend the lectures of the Foreign Policy Association may recall that 15 years ago, Noel Lateef convened the FPA for a discussion of something that was called "Preemptive Force: When Can it be Used?" The subtitle of the meeting was, "Implications for Iraq and North Korea." We've been here before, as in 15 years ago, we were on the eve of a preemptive war against Iraq, and I believe the meeting was fraught with the sense that preemption is not something that rests well with the American conscience. The attack on Pearl Harbor, which Franklin Roosevelt called "the day that would live in infamy," was a preemptive attack. Perhaps one of the reasons why President Kennedy rejected Dean Atchison's suggestion and promotion of a preemptive attack on the Soviet missiles in Cuba in 1962 might have been an aversion to preemptive war. In 1964, two years after the quarantine instead of a preemptive attack, William Buckey proposed that there be a nuclear attack, a preemptive nuclear attack on communist China, and it was notable for the lack of support that it received. |
|  | Three months after the meeting of the FPA 15 years ago, in March of the same year, the United States launched a preemptive attack on Iraq, ostensibly to rid Iraq of a nuclear arsenal that it was developing. Three months later, the President declared that the war was over. The declaration was premature, because we're still engaged in Iraq. |
|  | I don't suggest for a moment that preemptive actions are always unlawful, and I'm going to try to explain to you why this is such a difficult subject in international law and international politics, and how the United States has struggled with this going back to President Reagan's administration. Finally, I'll conclude by talking a bit about several preemptive attacks to control or limit the development of a nuclear facility in another state, and the way the international system reacted to them. Ladies and gentlemen, we have a great deal to cover. |
|  | Let me start with North Korea in the windshield, with Iraq in the rear view mirror, the way that international law has tried to clarify a policy with respect to preemptive actions of self-defense. The international law laying down the conditions for the use of military force took shape about 1945. Part was created in the United Nations Charter, part was an incorporation of principles that had been evolving in the previous generation. In a nutshell, the unilateral and discretionary use of offensive military force, which until then had been permissible, was henceforth prohibited. Reactive or self-defensive military force was confined to measures after suffering an armed attack, and all uses of armed force were to be necessary, proportional, and discriminating between belligerents and civilians. |
|  | Several factors made the new regime that prohibited anything other than limited self-defense acceptable to those charged with defending their states. Foremost was the undertaking by the Big Five, the permanent members of the Security Council, succumbed to the assistance and defense of a victim of aggression. Yet even those who believed that the Security Council would discharge its function could have had no illusion that it would be instantaneous. Still, delay would have seemed less important then. Adversaries, arsenals contained largely kinetic weapons of relatively limited range, often requiring significant time for pre-positioning. Prior to the exclusive development of mechanized, and especially aerial and ballistic warfare, the weapons were usually limited in reach to the perimeters or peripheries of the territories of the various communities that might come under attack. While an armed attack would be costly to its victim, in theory, it would not be decisive, and could still be repulsed. |
|  | Just as important was the common assumption that critical weapon systems were only available in militarily significant quanta to other states, and that their elites, however different their cultures and values, all shared an interest in the maintenance of the state system. Each elite's territorial base made it at once a beneficiary, as well as a hostage to the state system, each subject to the implicit promise of reciprocity and the implicit threat of retaliation which is the basis of the effectiveness of deterrence. |
|  | But the advent of vastly more destructive and rapidly delivered weapons soon began to undermine one of the assumptions of the legal regime. The opportunity for meaningful self-defense might be irretrievably lost of an adversary, poised to attack with more destructive weapons, had to be allowed to accomplish its attack before the victim's right of self-defense came into operation. This development prompted a claim to expand the right of self-defense from an armed attack to encompass a customary right of self-defense in anticipation of an armed attack. Anticipatory self-defense would ensure the security of the intended victim in a weapons environment in which it might otherwise sustain an irretrievable defeat. |
|  | Indeed, in 2004, the UN's high-level panel on Threats and Challenges confirmed, and I'm quoting, "A threatened state, according to long-established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it, and the action is proportionate." This change addressed the defensive need to the potential victim in the face of new weapons technology, but anticipatory self-defense also invited abuse. The objectively verifiable requirement of an armed attack was supplanted by the self-identified victim's subject of judgment that a threat of such attack was so palpable, so imminent and prospectively destructive that the only meaningful defense was its preventive action. Obviously such a judgment could be self-serving. |
|  | The other assumption that made the international law's new restrictions palatable was if the most effective weapons were concentrated in the hands of territorial elites who were subject to the dynamic of reciprocity and retaliation. This dynamic does not operate with the same force for non-state actors, for without a territorial base, they are less susceptible to deterrents. But as long as non-state actors did not have significant arsenals, this was inconsequential. The miniaturization and increased destructiveness of conventional weapons, and the prospect of the proliferation of WMD weapons capable of rapid or covert delivery, eroded the second assumption. Now, plausible scenarios, if not actual incidents, came to involve clusters of non-state actors able to deliver highly destructive weapons to soft targets. Deterrents, as I said, can not operate if there is no address to which to deliver the deterrent. |
|  | These developments gave rise to a claim of preemptive, as opposed to anticipatory, self-defense. By contrast to anticipatory self-defense, which acts to forestall an imminent military attack, preemptive self-defense is a claim to use, without prior international authorization, high levels of violence to arrest not an imminent attack, but an incipient development that is not yet operational, imminent, or directly threatening. The justification is that if this incipient development is permitted to mature, it could be seen by the potential preemptor as susceptible to neutralization later, if at all, only at a higher cost. Anticipatory self-defense can point to a palpable and imminent threat of an armed attack. A claim for right of preeminent self-defense can point only at a possibility among a range of other possibilities. One future, among many possible contingent futures. A contingency. |
|  | As the UN panel that I quoted earlier conceded, "The problem arises where the threat in question is not imminent, but still claimed to be real. For example," I'm quoting, "the acquisition with allegedly hostile intent of nuclear weapons making capability." As one moves from an actual armed attack as the requisite threshold of self-defense, to the palpable and imminent threat of attack, which is the threshold of anticipatory self-defense, and from there to the conjectural threat of the mere possibility of an attack at some future time, which is the threshold of preemptive self-defense, the interpretive latitude of the would-be self-defender becomes ever wider, yet the nature and quantum of evidence that can satisfy that burden of proof becomes less and less defined, and is by the very nature of the exercise extrapolative, conjectural, and speculative. |
|  | But I want to emphasize, this does not mean that a case can not be made for preemptive self-defense. The evolution of weapons systems that are ever more rapid and destructive, and that may be initiated without warning, or with very narrow warning windows, is the predicate of the claim to preempt. The paradox is that without a right of preemptive self-defense, states may have no meaningful and internationally lawful defense for the gravest dangers. Its Achilles' heel is the reliability of the assessment by the risk-averse security specialists of one international actor of the intentions of another who may acquire the weapons and their means of delivery. That the US invasion of Iraq in 2003 was, in part, an exercise of preemptive military self-defense, underlines how colossally wrong the speculation can be. |
|  | In an international system marked by radically different cultures, religious values, and as a consequence, factual perceptions and their strategic assessments, an act of preemptive self-defense based upon one actor of self-perceived good faith conviction will often strike other actors as the serious or hysterical misjudgment, madness to still others, and like either cynical and opportunistic naked aggression to still others. Still, an unqualified doctrine of preemptive self-defense is fine if the only self is you, but there are many selves in the international arena. It's worth recalling that in 2003, in the context of an earlier chapter of the continuing saga of North Korea's nuclear program, its foreign ministry declared that North Korea was entitled to launch a preemptive strike against US forces rather than wait until the American military was finished with Iraq. The Deputy Director of the Foreign Ministry said, quote, "The United States says that after Iraq, we are next, but we have our own countermeasures." Preemptive attacks are not the exclusive right of the US. |
|  | The point is that if writ large and legally available in international law, a right of preemptive self-defense could even more than anticipatory self-defense lead to more resort to violence by further lowering the threshold of unilaterally determined contingencies that warrant reactive acts of violence. This could create an imperative for all latent adversaries to strike sooner in order to strike first, raising the general expectation of violence, and increasing the likelihood of its eventuation. And yet security specialists have to worry about this, and can not ignore the claim of self-defense. Let me talk briefly about the way that previous administrations grappled with this issue, to see whether or not there's been an evolution in US policy and where we stand at the moment. |
|  | The claim to a right of preemptive defense of uses of military force against another state is attributed to the administration of George W. Bush. In fact, earlier administrations pressed claims, but largely for non-state actors practicing terrorism. As is characteristic of democracies we'll see, policy evolved in reaction to events and perceived dangers more than as a result of rational public discourse. In 1984, President Reagan issued a classified national security directive outlining his administration's preemptive response to terrorism. That evolved two years later because of suspicions that the Libyan government was supporting terrorist attacks. A classified directive raised the prospect of unilateral military action to prevent such attacks. In what later became known as the Shultz Doctrine, Reagan's Secretary of State, George Shultz, urged limited military action to address terrorist threats while they were still quote-unquote "manageable." |
|  | The claim to a right of preemptive self-defense was not a Republican monopoly. In 2000, the Clinton Administration issued an ambitious new security document in which more attention was given to terrorism. With respect to non-state actors, the administration, following its predecessors, stated, "Whenever possible, we use law enforcement, diplomatic and economic tools to wage the fight against terrorism." But then observing that these tools would often not suffice, the document warned, "As long as terrorists continue to target American citizens, we reserve the right to act in self-defense by striking at their bases and those who sponsor, assist, or actively support them, as we have done over the years in different countries." The message was that the United States had, and would continue to preemptively attack terrorists who were in a foreign state, with or without that state's permission. |
|  | But with respect to possible nuclear attacks from a symmetrical state adversary, Clinton did not claim a right of preemptive self-defense. That self-defense policy continued to be reactive. Quote, "Our military planning for the possible employment of US strategic nuclear weapons is focused on deterring a nuclear war, and it emphasizes the survivability of our nuclear systems, infrastructure, and command and control communications system necessary to endure a preemptive attack, yet still deliver an overwhelming response." |
|  | September 11, rather than engaging a radical change in strategy, mainly reinforced incipient trends. Most of the later references to preemptive action were against terrorists, non-state actors. While this may have raised constitutional questions, it fit an international legal category. As terrorists were now regularly condemned at the international level, the legal context of attacking them preemptively was akin to attacking what international law calls "hostis humani generis." They are the generic enemies of humanity, with whom all states are in a constant state of war. The implication was that those terrorists were actively waging war against us, so there was no call to await their attack, nor to alert them when we counterattacked wherever they were. |
|  | To be sure, there were some initiatives of a new preemptive policy against the state acquiring WMD weapons. A Pentagon draft doctrine for joint nuclear operations suggested that the United States could deploy nuclear weapons in self-defense, to preempt the WMD attack. Congressional leaders and arms control experts criticized the draft rather quickly, and an administration official dialed back, emphasizing that the doctrine had not yet been finalized. |
|  | By 2006, the Bush Administration had slid back to the Clinton position, essentially reserving preemptive action for non-state actors, a quote, "hard core of terrorists who can not be deterred," and therefore must be, quote, "tracked down, killed, or captured." By contrast, quoting the Bush doctrine, "Taking action to prevent proliferation of weapons of mass destruction need not involve military force. Our strong preference and common practice is to address proliferation concerns through international diplomacy in concert with key allies and regional partners." That was 2006. That year, the national security strategy showed less appetite for preemption in practice, if not in policy, particularly with respect to Iran and North Korea. Large-scale attacks on states appeared to be less favored than strategic preemptive strikes against weapons of mass destruction or terrorist training camps. |
|  | When Barack Obama was awarded the Nobel Peace Prize in 2009, one sentence in his acceptance speech must have startled the audience in the Oslo City Hall. He said, "There will be times when nations acting individually or in concert will find the use of force not only necessary, but morally justified." Despite that Theodore Rooseveltian declaration, Obama's national security statement in the following year was comparatively moderate in tone. The preferred method of implementation were diplomatic and economic rather than military. He said, "We led international efforts to stop the proliferation of nuclear weapons, including by building an unprecedented international sanctions regime to hold Iran responsible for failing to meet its international obligations, while pursuing a diplomatic effort that had already stopped the progress of Iran's nuclear program and rolled it back in key respects." |
|  | Five years later, Obama stated the short-term objective in simple terms. "Keeping nuclear materials from terrorists and preventing the proliferation of nuclear weapons remains a high priority." Then with respect to North Korea, Obama stated, "Our commitment to the denuclearization of Korean Peninsula is rooted in the profound risks posed by North Korean weapons development and proliferation." But the preferred method for achieving this objective was implied in the mode by which the Iran agreement was secured. That was, "Having reached the first step arrangement that stops the progress of Iran's nuclear program in exchange for limited relief, our preference is to achieve a comprehensive and verifiable deal that assures Iran's nuclear program is solely for peaceful purposes. This is the best way to advance our interests, strengthen the global non-proliferation regime, and enable Iran to access peaceful energy. However, we retain all options to achieve the objective of preventing Iran from producing a nuclear weapon." |
|  | But in 2015, Barack Obama took a longer view, an almost prophetic view. He wrote, "We therefore seek the peace and security of a world without nuclear weapons. As long as nuclear weapons exist, the United States must invest the resources necessary to maintain without testing a safe, secure, and effective nuclear deterrent that preserves strategic stability. However, reducing the threat requires us to constantly reinforce the basic bargain of the nuclear non-proliferation treaty, which commits nuclear weapon states to reduce their stockpiles while non-nuclear weapon states remain committed to using nuclear energy only for peaceful purposes. For our part, we are reducing the role and number of nuclear weapons." Ladies and gentlemen, I'll return to this particular vision in a few moments, but I ask you to keep it in mind. |
|  | One of the curious things about the Obama Administration's national security statements was that, despite the fact that he is a trained lawyer and sometime law professor, his national security statements, unlike their predecessors, make scant reference to international law claims to self-defense. In retrospect, it's now clear that far from ignoring it, the administration was working behind the scenes with close allies to clarify and adjust the scope and limitation of preemptive action against non-state actors. In 2012, Sir Daniel Bethlehem, a former legal advisor the Foreign and Commonwealth Office, published a set of principles relevant to the scope of the state's right of self-defense against an imminent armed attack by non-state actors. Sir Daniel averred that the principles were a distillation of the views of many governments. |
|  | The first Bethlehem principle was the, by then, widely accepted norm that states have a right of self-defense against an imminent or actual armed attack by non-state actors. That norm is what we recalled had been endorsed by the high-level panel of the United Nations. The eighth Bethlehem principle unpacked the meaning of the word "imminent." Whether an attack may be regarded as imminent would depend on the nature and immediacy of the threat, the probability of attack, whether it was part of a concerted pattern, the likely scale of the attack, and the likely scale of the [inaudible 00:34:24] loss or damage that would result, and whether or not there would be collateral damage. Then it said that the absence of specific evidence of where an attack will take place, or of the precise nature of an attack, does not preclude a conclusion that armed attack is imminent for purposes of the exercise of a right of self-defense. You will notice that a lot has been packed into the word "imminent." |
|  | Professor Victor Kattan of the National University of Singapore, mining documents released through WikiLeaks, found that the US government played a not insignificant role in the formulation of the Bethlehem Principles. It was no surprise when Brian Egan, the State Department Legal Advisor in the Obama Administration, in an address to the annual meeting of the American Society of International Law, confirmed that the United States analyzes a variety of factors, including those identified by Sir Daniel. You will note that the Bethlehem Principles, which the United States had adapted, focused on preempting non-state actors and not other states. To be sure, many of the principles in other restatements of the law also include preemptive actions within the territory of other states in which terrorist non-state actors are operating, but the right to preempt, which it formulates, does not extend to taking action against another state developing nuclear weapons. |
|  | The Trump Administration in 2017, in its national security strategy, spoke somewhat greater length of the threats facing the nation, but in terms of methods used, it was comparable to previous administrations with respect to non-state terrorists. But with respect to North Korea, the Trump document stated, quote, "Missiles and weapons threaten the United States and our allies. The longer we ignore threats from countries determined to proliferate and develop weapons of mass destruction, the worse such threats become, and the fewer defensive options we have." But this security statement did not go beyond this. |
|  | President Trump's State of the Union used harsh language, and implied but did not spell out a different approach. He called North Korea's approach "reckless," and said, "I will not repeat the mistakes of past administrations that got us into this dangerous position." But it was Mr. Trump's speech to the United Nations which mixed celebrations of collective international action with threats of brutal unilateral responses, that went further. He said to the assembled General Assembly, "The United States has great strength and patience, but if it is forced to defend itself or its allies, we will have no choice but to totally destroy North Korea," which raises some international problems in its own right. |
|  | Now I ask you, as an audience that has an interest in international relations, and influences the formation of our national foreign policy, if the United States views a smaller state's acquisitions of operational nuclear and missile arsenals as a danger so grave as to warrant action in self-defense, what are the options short of a military preemptive action? Some of those have been proposed by the Secretary of State, Mr. Tillerson. Though sometimes disparaged by Mr. Trump, it's worth assessing their possible application in the North Korea case. First is the model of the Iran Agreement. Getting to yes in a negotiation requires understanding the worldview of the other party, and the factors which it believes compel it to acquire a nuclear deterrent. The prospect of securing an agreement turns on the extent to which they can be accommodated. |
|  | There are small states for whom losing a war is not merely a matter of suffering casualties and territorial adjustments. For some states, the stakes are existential. Losing may mean extinction. For such states, in the absence of meaningful incredible alliances or other associated modes of guaranteeing their security, a nuclear arsenal as a deterrent becomes the foundation of their national security. Once a [French 00:40:00], as the French call their arsenal, "a force for dissuading," is acquired, it means that another stage, or one of its allies that threatens to move on it will incur an unacceptable cost to itself or its allies. Yet because the dissuasive force or arsenal can be vulnerable to a preemptive strike, the newly nuclear state is compelled to expand its nuclear arsenal to the point at which it will survive a first strike and will still have the capacity to deliver a destructive second strike. Without that, an adversary will not be deterred from trying to preempt, and ineluctably, the small state becomes part of a mad world. |
|  | The United States has its own minimum requirements, some of which may be incompatible with those in the smaller, and now nuclear and missile-endowed state. That state will, thanks to its deterrent arsenal, now have more space to pursue other political objectives, which Washington may see as dangerous adventures. Another fallout may be that competing states in the region will feel compelled to acquire their nuclear and missile arsenals, and each new nuclear and missile state expands the dark market for nuclear and missile technology to other states, and most critically to non-state actors who may be animated by apocalyptic visions which descry in a nuclear holocaust precipitating Armageddon, a divine plan. |
|  | Negotiators can fashion arrangements which accommodate minimum requirements, but ultimately an international settlement requires reciprocal trust and the credibility and bona fides of both sides. Here, in the hypothetical negotiation with North Korea, each side has problems with the other. With respect to North Korea, verification methods have to be embedded to ensure compliance as prior agreements have not been honored. This credibility gap may be closed by incorporating an honest broker, such as the role with the International Atomic Energy Agency performs in the implementation of the Iranian Agreement, as well as sanction spring-back mechanisms in the agreement itself. As for the credibility of the United States, concerns about its reliability will probably weigh heavily in Pyongyang's calculations, and in light of the shrill political attacks on the 2015 agreement with Iran, and in light of the US action against Muammar Gaddafi despite his relinquishment of his own nuclear program. |
|  | Economic measures impose costs on the target state, and often pain on the most vulnerable strata of its population, but they're unlikely to change policy if the targeted political establishment does not have an independent economic elite, as was the situation in apartheid South Africa, or a politically relevant merchant class, as is the case in Iran. Neither of these conditions would appear to obtain in North Korea. Other measures short of war may intensify the effect of economic sanctions. I mentioned the quarantine or blockade, which President Kennedy imposed in 1962. The outcome of that particular exercise was averted by a diplomatic settlement. In any case, it's difficult to envision such an action against North Korea. A security council authorized blockade would make the sanctions bite, but despite two unanimous security council resolutions against North Korea, the likelihood of a consensus for a Naval blockade is most remote. |
|  | May I digress for a moment and talk about Yugoslavia? In the course of the violent dissolution of Yugoslavia, reports of Serbian atrocities committed in Kosovo broiled public opinion in America. The security council condemned the violations, but China and Russia opposed authorizing NATO to use force to compel Belgrade to desist. Nonetheless, NATO proceeded to bombard Serbia from March to June, 1999, until Belgrade capitulated. Some 500 civilians were reported to have been killed. NATO's action, in which the United States was a prominent participant, was a plain violation of the UN Charter, and European Parliaments struggled to come to terms with it and its implications for the United Nations' prohibition on unauthorized unilateral military action. The report of the House of Commons Foreign Affairs Committee concluded that NATO's military action, quote, "if of dubious legality in the current state of international law, was justified on moral grounds." |
|  | In several other official postmortems of the bombardment of Serbia in European Parliaments, there was a general feeling that it was the right thing to do. It seems that in international law, as in other sectors of light, the right thing to do can sometimes be the wrong thing. Can that ever apply to a preemptive attack against another state which is not self-defense, and would otherwise be a fundamental violation of international law? |
|  | Some overt preemptive military actions and some covert operations against another state's nuclear facilities and research programs seem to have been tolerated, or at least not effectively condemned. After the fact, some came to be viewed with relief. Depending on the circumstances, could a preemptive self-defense action against the nuclear facilities of another state be deemed illegal, and like the bombardment of Yugoslavia, the right thing to do in the circumstances? |
|  | In 1981, Israel preemptively destroyed the Osirak Reactor, a French-built facility in Iraq. The security council passed a unanimous resolution condemning Israel, and Israel was widely condemned by many national officials and in the world media. Then, Prime Minister Begin doubled down and stated that the attack was the implementation of continuing Israeli policy. Indeed, in September 2007, Israel destroyed a Syrian nuclear facility. Syria did not protest the attack, and Israel did not acknowledge it. This time, the world community seemed content to overlook the incident, or more generally may have acquiesced in the Begin doctrine. |
|  | Not all the attacks on nuclear facilities have been overt. Mention may be made in this regard of the covert sabotage of some projects, and the assassinations of Iranian nuclear scientists, for which Israel is suspected. While international lawyers are divided over whether cyber attacks are armed attacks within the meaning of the United Nations Charter, reference must be made to the so-called "Stuxnet cyber attack" on Iranian centrifuges sometime after 2005, which is believed to have been carried out by Israel and the United States. |
|  | None of these attacks threaten the existence of the targeted state, or was a prelude to a full-scale invasion. None was carried out by an oxymoronic "low yield nuclear device." Each was confined to a very small area of the targeted state, and apparently did not cause extensive collateral damage. None was followed by a military response by the state whose facility had been attacked. Only the Osirak attack led to resounding international condemnation. While the nuclear cooperation agreements with France supposedly excluded military uses, the secretive Syrian facility built by North Korea appeared to have a military purpose. |
|  | Ladies and gentlemen, what, if anything, do the features of these incidents suggest may have contributed to insulating a preemptive strike against the nuclear facilities of another state from long-term condemnation, and it is legally innocuous, if not unlawful? None of the incidents triggered a large reaction. For none was a targeted state the beneficiary of a mutual defense treaty with another nuclear power, or covered by the nuclear umbrella of another state. While the targeted states had some friends, they were comparatively isolated and viewed by many of their neighbors as pariahs. Technically, the targets were in a state of war with the preemptor. The target of the preemptive action was deemed not in compliance with its treaty obligations and other international legal obligations. |
|  | In both cases of open military attack, the preemptive strike seemed to have met the international law criteria of military necessity, proportionality, and discrimination. In the Osirak incident, compensation was reportedly paid to the family of a foreign technician who perished in the attack. In none of the incidents was the target's state facilities operational, and the risk of nuclear contamination from the destroyed facilities was minimal. None of the actions took a heavy toll of collateral and environmental damage, and if none of the states' targets were operationally nuclear, there was minimal if any risk from a retaliation using weapons of mass destruction. None of the target states was able to counterattack the preemptor or its allies. |
|  | In the circumstances, North Korea, by contrast, it's doubtful that a preemptive attack on its nuclear facilities could be retrospectively seen as justified. North Korea's nuclear facilities are fully operational, and it possesses an arsenal of nuclear weapons and delivery systems. Any preemptive attack, even one which is successfully confined to its nuclear facilities, and not, as in the case of Iraq, the excuse for a regime change, would have a high risk of radioactive contamination, and a retaliatory nuclear attack against North Korea's neighbors, or even against the United States. Thus it's questionable whether a preemptive strike with such dire, potentially worldwide consequences would be deemed after the fact as the right thing to have done, as were arguably the two cases that I've mentioned. |
|  | I'd like to look beyond this in my concluding remarks. Until now, what one might call the operational code, with respect to the deployment of nuclear weapons, has differed from that of other weapons systems. Wholly apart from the presence or absence of formal, no-strike commitments, and putting aside the question of their credibility, a system of mutually-assured destruction, or MAD, has effectively deterred any preemptive gamble as between the major nuclear powers. For these states, essential national security has come to rest on the ability to ensure that an adversary's first strike will not disable the target state, which would still be able to respond with devastating effect on the attacker. Any sort of vantage of a first strike is this, guaranteed to be pyrrhic. This odd, counterintuitive, and even morally perplexing system of self-defense must assume first a world of effective and not failed or faux states. Second, it must assume the rationality of the principal actors, and third, it must assume the capacity of their own early warning systems to both timorously detect attacks, as well as to avoid false positives. |
|  | According to Murphy's Law, whatever can go wrong will go wrong. Today, only near-misses both in the United States and Russia have been reported, but it does not take great imagination to construct plausible scenarios which either because of human error, technical glitches, or sabotage, do not have happy endings. The peril of unhappy endings increases exponentially in two interrelated scenarios. First, the proliferation of nuclear states, and second, the possible emergence of nuclear capable non-state actors. To stem the proliferation of nuclear states, the major nuclear powers share an interest in preserving their monopoly. That also requires the cooperation of non-nuclear states, part of which was secured by a commitment by the major nuclear powers to cooperate in reducing their own nuclear arsenals and moving toward nuclear disarmament. Article six of the non-proliferation treaty states this explicitly. |
|  | Although the Obama Administration, as I noted earlier, took some initial steps to comply with this obligation, no intention has been expressed by the new administration to pursue this goal. President Trump's draft nuclear review goes in the other direction. He's reported to have said that he would add, quote, "a nearly tenfold increase in the US nuclear arsenal." End quote. President Putin, not to be outdone, has trumpeted his own new weapons. In the meanwhile, thanks to statements that have been made, the credibility of alliances, which until now have reassured some non-nuclear states, may be eroding. |
|  | The more nuclear states, the more likely there will be more nuclear states. The more nuclear states, the greater the likelihood that fissile material may reach non-state actors, a security specialist's nightmare. That nightmare scenario would argue for preemptive action if it promised to stem such proliferation, but it's well to remember that the leakage of nuclear and missile material to nuclear [inaudible 00:57:24] has not come only from North Korea. Under international law, preemptive attacks against illegal WMD facilities in rogue states are prohibited, but in the two incidents on record, they were deemed in retrospect to have been the right thing to do, based upon their circumstances and the potential implications of not acting. Both succeeded in preventing the proliferation of nuclear weapons. When, however, the objectives of the military operation were broader, to include regime change, preemptive actions ostensibly in the self-defense of the actor may leave one net less, rather than net more secure. That is not to minimize the dangers of allowing proliferation, but simply to acknowledge that preemptive action under the guise of self-defense may, by itself, be an insufficient tool upon which to rest national and global security. Thank you. |
| Noel Lateef: | Michael, thank you for those insightful remarks. We have time for just a few questions. Sir? |
| Speaker 3: | Yeah. You can give short answers, because that was impossibly long. Could you classify a pretext in my mind, and maybe you consider it truly preemptive. One was the German attack of the Soviet Union in '41. Another, the Israeli attack on Egypt in '67. Basically, the Russian attack in the [inaudible 00:59:22], in 2014. You could dispense of it very quickly, if you want to or not. |
| Michael Reisman: | Well, I think none of those were preemptive attacks against nuclear facilities- |
| Speaker 3: | No. |
| Michael Reisman: | ... which is my focus. I think all of them were unlawful. Some were condemned that ... The earlier examples were condemned in Nuremberg, and the condemnation of the seizure of Ukraine and the invasion of Eastern Ukraine, the seizure of Crimea, and the occupation of Eastern Ukraine, have been widely condemned. The presence of Russian Security Council precludes a condemnation there. |
| Speaker 4: | Thanks. Is there any effective recourse against what seems to be less and less respect for international law by both state actors and non-state actors? The trend seems to be away from international law. |
| Michael Reisman: | Well, I'm called upon as an international law professor to come to the defense of international law. There's some sectors that are flourishing. Public attention focuses on dramatic erosions of international law, but there are many sectors where it continues to be quite viable, and under structure of the global economy. International law is a difficult challenge, but I think it will surprise you on occasion and rise to the challenge. You look skeptical. |
| Noel Lateef: | [inaudible 01:01:21]. |
| Speaker 5: | Thank you very much, Professor Reisman. I've just learned a lot tonight. In relation to the preventive strike, or the preemptive philosophy from a state, whatever it may be, the justification, self-defense, in the General Assembly, there was a resolution calling on the opinion of the International Court of Justice, about the use or threat of use of nuclear weapons in international relations. How, in a state, after the opinion of the ICJ, can put forward a doctrine of preemptiveness in international relations? Justify about that. |
| Michael Reisman: | I'm not a great admirer of the advisory opinion on the legality of nuclear weapons, because the conclusion of the court, with the president casting the deciding vote, was that nuclear weapons are not illegal, and a state can use them in extremis. I don't think that that advances the purpose that I think you and I share, of trying to have a denuclearized world. |
| Noel Lateef: | Professor Reisman, thank you so much. Please join us for a [inaudible 01:02:52]. |