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The Ban on the Bomb – and Bombing: Iran, the U.S., and the International Law of Self-Defense

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Throughout 2005-2006, the world’s major powers engaged in difficult negotiations over the best way to respond to Iran’s nuclear ambitions. Part of their difficulty stemmed from uncertainty over basic facts. Negotiators have not known for certain whether Iran has been developing nuclear weapons or just a nuclear power capability. They have also been uncertain about the implications of various response strategies. Regarding one response, however, they need not have lost any time: international law clearly prohibits the use of force against Iran under the facts prevailing in late 2006. The use of force should come “off the table,” as diplomats search for a constructive way forward. 


2. According to the journalist Seymour Hersh, the use of armed force has been very much on the table, including the use of a tactical nuclear bomb. See Seymour Hersh, Last Stand; The Military’s Problem With the President’s Iran Policy, NEW YORKER, July 10,
The law governing the use of force is found in the United Nations (UN) Charter, in customary international law, and in the general principles of law. The rules emanating from these sources generally prohibit the use of force in international relations except in response to a significant armed attack or with Security Council authorization. Even where one of these exceptions permits a resort to armed force, the use of force must be necessary and proportional. Bombing Iranian nuclear research sites would be neither.

Under these rules, no use of military force can be justified against Iran for carrying out nuclear research. The great legal and moral imperative to preserve the peace requires finding alternative responses short of force in dealing with a situation like the one presented by Iran. The United States, the European Union, Russia, China, and many other states want Iran to comply with Security Council resolutions demanding that it stop enriching uranium and permit verification that it has done so.3 Iran is obligated under international law to comply with Council resolutions.4 By the same token, those states concerned with Iran’s nuclear program must also comply with international law and its prohibition on the use of force in how they respond to Iran.

This article focuses on the law regulating the use of force in the context of the Iranian nuclear situation in late 2006. Part I recounts certain salient facts that underlie the legal analysis. Part II lays out the classic legal principles on the use of force. Part III applies those principles in the case of Iran. We conclude that while it would be unlawful for Iran to acquire nuclear weapons, bombing Iran to prevent this would equally violate fundamental rules banning the use of force.

I. IRAN’S NUCLEAR PROGRAM

Iran is a non-nuclear party to the Nuclear Non-Proliferation Treaty.5

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2006, at 42, available at http://www.newyorker.com/fact/content/articles/060710fa_fact;


4. See U.N. Charter art. 25. See also, Press Release, Security Council, Security Council Demands Iran Suspend Uranium Enrichment by 31 August or Face Possible Economic, Diplomatic Sanctions, U.N. Doc. SC/8792 (July 31, 2006). In late 2006, Iran’s primary violation of international law with respect to its nuclear program was its failure to comply with S.C. Res. 1696.

5. Treaty on the Non-proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483,
As such, it is bound not to develop nuclear weapons, but may engage in peaceful nuclear activities. It may, for example, build nuclear power plants. Iran has announced an intention to do just that, but in February 2006, the International Atomic Energy Agency (IAEA) Board of Governors resolved that Iran suspend “all enrichment-related and reprocessing activities” in light of its finding that “Iran resumed uranium conversion activities at its Isfahan facility on 8 August 2005 and took steps to resume enrichment activities on 10 January 2006.” The Board requested that Iran “reconsider its position in relation to confidence-building measures,” and provide “credible assurances regarding the absence of undeclared nuclear material and activities in Iran.”

A report, also issued in February 2006, by the IAEA Director General revealed certain reasons for concern, including the discovery of an Iranian procedural handbook outlining aspects of the “the fabrication of nuclear weapon components.” In addition, the report cited a lack of transparency regarding “the scope and nature of Iran’s nuclear programme” after three years of intensive IAEA verification activity.

The Board subsequently voted to report Iran to the UN Security Council given the “absence of confidence that Iran’s nuclear program is exclusively for peaceful purposes resulting from the history of concealment.” In Resolution 1696 (July 2006), the Security Council demanded that Iran “take the steps required by the IAEA Board of Governors . . . which are essential to build confidence in the exclusively peaceful purpose of its nuclear programme and . . . suspen[d] . . . all [of its] enrichment-related and reprocessing activities, including research and development, to be verified by the IAEA.” The Council gave Iran until


7. Id. at 3.

8. IAEA, Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, Report by the Director General, at 4-5, Doc. GOV/2006/15, (Feb. 27, 2006) [hereinafter IAEA Director General Report]. Though the report is dated February 27, 2006, it was only de-restricted on March 8, 2006. Id. at 1.

9. Id. at 11. The Report goes on to stipulate that transparency, in this case, implies that Iran should actively cooperate with the IAEA and provide access to materials, documentation, military-owned workshops and R&D centers. Id.


the end of August 2006, to suspend uranium enrichment and permit IAEA verification. Iran missed the 31 August deadline.

II. INTERNATIONAL LAW’S RULES ON THE USE OF FORCE

The purpose of international law, like all law, is to allow human beings to live peacefully in community. Modern international law originated in 1648 with the Peace of Westphalia, treaties ending the bloody Thirty Years War in Europe. The treaties laid down certain principles designed to prevent new conflicts and instituted means to enforce them, including collective action against wrongdoers and a requirement to employ negotiation or arbitration before resort to force.12 By 1945, these basic principles had matured to become the general prohibition on the use of force by states found in Article 2(4) of the UN Charter and the United Nations Security Council, designed to enforce the prohibition.13 States have from time-to-time challenged the Charter regime restricting the use of force. Yet, the international community has repeatedly re-confirmed its support. It did so by an overwhelming vote of confidence in the Charter as written during the 2005 World Summit in New York.14

At the heart of the Charter regime is Article 2(4), a general prohibition on the right of states to use armed force.15 The Charter provides two exceptions to this prohibition. Article 51 permits individual and collective self-defense,16 and Articles 39 and 42 provide for the Security Council’s right to authorize force in the face of a “threat to the peace, breach of the peace, or act of aggression.”17 Numerous decisions of the International

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15. U.N. Charter art. 2(4): “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”
16. U.N. Charter art. 51:
Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.
Court of Justice ("ICJ"), resolutions of the Security Council and General Assembly, and official government statements have acknowledged that states are bound by these rules, interpreted in plain terms. Of particular importance in the Iran context are the 1981 Security Council condemnation of Israel's bombing of an Iraqi nuclear power plant, and the ICJ's advisory opinion, *Legality of the Threat or Use of Nuclear Weapons.*

It is understandable that states have supported these rules for over sixty years. Article 2(4)'s general prohibition on the use of force aims at fulfilling the major purpose of the UN, namely the UN Charter's aim "to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest..." The Charter has succeeded in creating a strong norm against the use of force. Article 2(4)'s general prohibition is modified only by a limited right to use force in self-defense articulated in Article 51, and by the Security Council's right in Article 39 to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and authority to "maintain or restore international peace." The Council's right to authorize force is thus broader than a state's right to use force in self-defense. States have only "the inherent right of individual or collective self-defence if an armed attack occurs." Dinstein emphasizes that "UN Member States are barred by the Charter from exercising self-defence in response to a mere threat of force."

It is noteworthy that, even if Iran is in possession of nuclear technology in violation of the Non-Proliferation Treaty ("NPT"), mere possession of nuclear weapons does not constitute an unlawful threat to use force, let alone an armed attack in the terms of Article 51. The ICJ addressed this issue in the 1996 advisory opinion *Legality of the Threat or Use of Nuclear Weapons* and concluded that mere possession of nuclear weapons did not necessarily violate the Charter or general principles of international law. Whether nuclear weapons pose a "threat" contrary to

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21. *Id.*
22. *Id.* art. 39.
23. *Id.* art. 51.
26. *Id.* at 266.
[the UN Charter], depends upon whether the . . . force envisaged would be directed against the territorial integrity or political independence of a State, or against the Purposes of the United Nations or whether . . . it would necessarily violate the principles of necessity and proportionality."27

Indeed, "[i]n making its decision, the ICJ emphasized the tension between the emerging custom—prohibiting the manufacture, possession, and use of nuclear weapons and represented by current non-proliferation treaties on one hand—and the continuing practice of nuclear deterrence on the other."28

For some scholars, the Court’s decision in the Nuclear Weapons Case is hardly relevant, because, despite the plain words of Article 51, they believe that force may be used in the absence of any evidence of an armed attack occurring.29 They believe that a right to pre-emptive force existed in customary international law prior to the adoption of the Charter in 1945 and continues to be open to states in the Article’s reference to “inherent” right of self-defense. This interpretation requires reading out express terms of Article 51 in particular “if an attack armed occurs.” Such a contorted reading is not necessary if one accepts that the “inherent” right of self-defense persists, but since 1945 has been limited to responding to an armed attack. The negotiating history of the Charter makes clear that this is the meaning the drafters intended.30

What we find in general international law, beyond the Charter, with respect to the right to use force in self-defense, are the principles of necessity and proportionality. In the 1840s, the United States and Great Britain corresponded about a use of force on the Canadian-U.S. border that involved the sinking of the ship Caroline. U.S. Secretary of State Daniel Webster described a legitimate use of force as one that is not “unreasonable or excessive,” but rather “limited by . . . necessity,” the necessity being “instant, overwhelming, [and] leaving no choice of means, and no moment of deliberation.”31 This requirement of necessity and its companion proportionality continue in force today. In addition to a lawful basis in the Charter, states using force must show that force is necessary and can be carried out while respecting the principle of proportionality. States must be

27. Id. at 246-47.
able to show that force can achieve a legitimate objective as set out in the Charter. If they can make the necessity showing they must also show that the method of force used will not result in disproportionate loss of life and destruction compared to the value of the objective. Necessity and proportionality are not expressly mentioned in the Charter, but Judith Gardam provides impressive authority for their existence as rules of customary international law or general principles of law. As the ICJ said in the Nuclear Weapons Case: "there is a 'specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.' This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed."

In sum, today, unless a state has received previous authorization from the UN Security Council to use force, it must: (a) be the victim of a significant armed attack; (b) "the armed attack must either be underway or the victim of an attack must have at least clear and convincing evidence that more attacks are planned;" (c) the state being targeted should "be responsible for the significant armed attack in progress or planned;" (d) the force used must be necessary and proportional in the context of defense. Even with Security Council authorization, a preemptive strike on nuclear facilities would not be a "legitimate target[] for an armed action in self-defence."

State practice since the adoption of the Charter further supports this restatement of the rules. When Israel used military force in response to threats not amounting to armed attack in both the Suez Crisis and the attack on Iran's Osirak nuclear reactor, its actions were condemned. The United States used force pre-emptively during both the Cuban Missile Crisis in

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34. Mary Ellen O'Connell, Lawful Self-Defense to Terrorism, 63 U. Pitt. L. Rev. 889, 889-90 (2002); see also Dinsein, supra note 24, at 187. Professor Dinsein argues that "the right to self-defence... can be invoked in response to an armed attack as soon as it becomes evident to the victim State that the attack is in the process of being mounted." Id.

35. O'Connell, Lawful Self-Defense to Terrorism, supra note 34, at 890.

36. Id.


1962 and against Iraq in 2003. In both cases, it asserted that it had authorization from organizations, the Organization of American States and the United Nations Security Council, respectively. The United States has not, to date, acted under the right asserted in the 2002 and 2006 National Security Strategies to use force to pre-empt an attack. Its actions, therefore, could have little impact on modifying the rules discussed above. Rather, United States practice has more consistently supported an application of the plain meaning of Article 51. In 1956, Israel attacked Egypt in an action coordinated with the United Kingdom and France, following Egypt’s nationalization of the Suez Canal. Israel argued that it had the right to use force in anticipatory self-defense, but it was widely condemned, including by the Eisenhower Administration.\textsuperscript{39}

The United States itself debated taking pre-emptive military action, in the absence of an imminent attack, in 1962, when U.S. intelligence agencies discovered that the Soviet Union would soon have the ability to launch missiles from the island nation of Cuba. Some officials urged bombing missile sites in Cuba and the ships delivering rockets.\textsuperscript{40} Bombing, however, would violate international law. During a subsequent Security Council debate the delegate from Ghana provided the classical legal analysis:

Are there grounds for the argument that such action is justified in exercise of the inherent right of self-defense? Can it be contended that there was, in the words of a former American Secretary of State whose reputation as a jurist in this field is widely accepted, “a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation”? . . . My delegation does not think so, for as I have said earlier, inconvertible proof is not yet available as to the offensive character of the military developments in Cuba. Nor can it be argued that the threat was of such a nature as to warrant action on the scale that has so far been taken, prior to a reference to this Council.\textsuperscript{41}

Indeed, as these comments indicate, the Cuban threat fell short of any definition of armed attack. The United States decided against an air attack.

\textsuperscript{39} Louis Henkin et al., Right v. Might: International Law and the Use of Force 45 (1989).

\textsuperscript{40} See Abram Chayes, The Cuban Missile Crisis: International Crises and the Role of Law 64-66 (1974) (The Kennedy administration was hesitant to call the installation of rockets an “armed attack” to trigger the right to act in self-defense under Article 51 because it would have signaled “that the United States did not take the legal issues involved very seriously, that in its view the situation was to be governed by national discretion not international law.”)

\textsuperscript{41} Anthony Clark Arend, International Law and the Use of Force, 26 Wash. Q. 89, 94 (2003) (quoting Mr. Quaison-Sackey, UN Doc S/ PV.1024:51 (1962)).
because it would be a “Pearl Harbor in reverse,” and because, “a first strike was inconsistent with American values.” The Soviet Ambassador to the United States, Anatoly Dobrynin, would later write that “those days revealed the mortal danger of a direct armed confrontation between two great powers, a confrontation headed off on the brink of war thanks to both sides’ timely and agonizing realization of the disastrous consequences.”

Instead of an air attack, a naval blockade was used. It was called a “quarantine” since the term “blockade” had been used for centuries to refer to an act considered a casus belli. The Administration knew, however, regardless of what it was named, interdicting Soviet ships would still be considered an unlawful use of force under the Charter, so the Administration sought authorization. Knowing the Soviet Union would veto such a request to the Security Council, the U.S. went to the Organization of American States (OAS) instead. The OAS, however, had no authority to authorize a use of force in the absence of an armed attack. Still, U.S. officials felt this was a more acceptable violation than an outright unilateral use of force. They even thought it preferable to go to the OAS than to argue that the placement of weapons in Cuba constituted an armed attack for purposes of Article 51. Apparently, there was real concern about establishing an expansive interpretation of the phrase “if an armed attack occurs.”

In 1981, however, Israel argued for just such an expansive interpretation. On June 7, 1981, it bombed a nuclear power reactor under construction at Osirak, Iraq. Prime Minister Menachem Begin justified the attack by citing Israeli intelligence reports indicating the reactor could go into operation as early as July 1, 1981. Iraq was a state party to the NPT
and its nuclear installations had been inspected on a regular basis by the IAEA.\textsuperscript{51} The IAEA reported to the Security Council after the bombing that it had found no evidence of diversion of material to a weapons program,\textsuperscript{52} and that it planned once the reactor became operational, to place full-time inspectors in Iraq, "which would have made any plutonium production impossible."\textsuperscript{53} Despite this report, Israel argued that it had the right to strike Iranian nuclear facilities and thereby halt a potentially "fatal process before it reaches completion."\textsuperscript{54} The Council disagreed, voting unanimously in Resolution 487 that the pre-emptive attack on the reactor constituted action "in clear violation of... the norms of international conduct" and "a serious threat to the entire safeguards regime of the [IAEA and of the NPT]."\textsuperscript{55} The U.S. Permanent Representative to the UN, Jeane Kirkpatrick, observed that "the means Israel chose to quiet its fears about the purposes of Iraq's nuclear program have hurt, and not helped, the peace and security of the area... Israeli action has damaged the regional confidence that is essential for the peace process to go forward."\textsuperscript{56} Kirkpatrick stated that the bombing did not meet the test of necessity and joined the resolution condemning it. In fact, bombing the Osirak reactor may have exacerbated tensions in the region and apparently encouraged Saddam Hussein to accelerate the Iraqi nuclear program given that, after the incident, he called "upon any nation not wanting Arab nations subjugated to foreign forces to develop nuclear weapons."\textsuperscript{57} Thus, military

\textsuperscript{52} Id. at 14.
\textsuperscript{53} Richard Wilson, Incorrect, Incomplete, or Unreliable Information Can Lead to Tragically Incorrect Decisions, http://physics.harvard.edu/~wilson/publications/OSIRAK(2) (last visited Jan. 25, 2007) (emphasis in original). The Osirak "was a light water cooled reactor explicitly designed to be unsuited for making plutonium." \textit{Id}.
\textsuperscript{56} U.N. SCOR, 36th Sess., 2288th mtg. at 16.
\textsuperscript{57} See Nuclear Threat Initiative, Iraq Biological Chronology: 1980-1989, http://www.nti.org/e_research/profiles/Iraq/Biological/3889_3892.html (last visited Jan. 25, 2007). After the bombing of the Osirak reactor, Sadaam Hussein addressed his cabinet saying the attack on the "Osirak... nuclear reactor was not because it was allegedly developing nuclear weapons but because Iraq is a front-line Arab nation showing progress
force may well have been counter-productive to achieving greater security for Israel.

Twenty-two years later, when the United States, the United Kingdom, and Australia invaded Iraq on March 19, 2003, they did not justify their use of force on any expansive interpretation of self-defense. There is one vague reference to "self-defense" in the U.S. letter to the Security Council, but that letter and those of the U.K. and Australia generally emphasize that the invasion was justified to enforce the Security Council resolutions passed in 1990-1991, in the wake of Iraq's invasion of Kuwait. It was subsequently revealed that British legal officials had serious reservations about this argument and had advised seeking new Security Council authorization. The United States, the United Kingdom, and Australia could not secure that fresh authority, even after Colin Powell made his now-infamous February 2003 presentation of evidence to the Security Council that Iraq had developed weapons of mass destruction.

For purposes of understanding what the current law is on the use of force, it is significant that the states invading Iraq did not try to argue they had a right to use force pre-emptively, but rather that they had Security Council authorization. As the ICJ said in the Nicaragua Case,

If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to

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58. Richard Norton-Taylor, Revealed: The Government's Secret Legal Advice on the Iraq War, GUARDIAN (London), Apr. 28, 2005, at 1. "The attorney general [Lord Goldsmith] warned Mr. Blair that Britain might be able to argue it could go to war on the basis of past UN resolutions, but only if there were 'strong factual grounds' that Iraq was still in breach of its disarmament obligations." Id; see also Global Policy Forum, British Attorney General's Advice to Blair on Legality of Iraq War, (Mar. 7, 2003), http://www.globalpolicy.org/security/issues/iraq/document/2003/0307advice.htm. From the full text of the Attorney General's memorandum to Blair: "In other words, we would need to be able to demonstrate hard evidence of non-compliance and non-cooperation [to justify use of force against Iraq]." Id. at para. 29. See also for analysis of resort to war in Iraq and conclusion that it was unlawful, Sean Murphy, Assessing the Legality of Invading Iraq, 92 GEO. L. REV. 173 (2005); Richard Falk, What Future for the UN Charter System of War Prevention?, 97 AJIL 607 (2003); Mary Ellen O'Connell, Addendum to Armed Force in Iraq: Issues of Legality, INSIGHTS, April 2003, available at, http://www.asil.org/insights/insigh99a1.htm.

confirm rather than to weaken the rule.\textsuperscript{60}

Even the 2006 United States National Security Strategy explains that the U.S. invaded Iraq because "Saddam Hussein's continued defiance of 16 UNSC resolutions over 12 years, combined with his record of invading neighboring countries, supporting terrorists, tyrannizing his own people, and using chemical weapons, presented a threat we could no longer ignore."\textsuperscript{61} With the reference to Security Council resolutions, the 2006 document cannot be cited as state practice with \textit{opinio juris} supporting the creation of a new rule of customary international law contrary to the Charter or general principles. Indeed, even if it could be so cited, Article 2(4) is a principle of \textit{jus cogens} not subject to change in the same manner as other rules of international law.

Rather than finding the terms of the Charter modified in any way in late 2006, we find renewed support for them. At the fall 2005 UN World Summit, the following statement was agreed:

\begin{quote}
We reaffirm that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security. We stress the importance of acting in accordance with the purposes and principles of the Charter.\textsuperscript{62}
\end{quote}

In addition, in fall 2006, it was widely acknowledged that measures against North Korea for developing a nuclear weapon required Security Council authorization. These measures have been far short of armed force. Nevertheless, economic measures, stopping and searching ships, and the like, have required Council authorization.\textsuperscript{63} Plainly the use of military force would as well.

The rules of the UN Charter, designed to keep the peace in the post-World War II era, remain the law. No state may use force against another unless it is acting in individual or collective self-defense to an actual armed attack or with Security Council authorization. In addition, all uses of force must be necessary and proportional.

\begin{itemize}
\item \textsuperscript{60} Nicaragua, 1986 I.C.J. at 98.
\item \textsuperscript{61} \textsc{National Security Council, National Security Strategy} 23 (2006).
\item \textsuperscript{62} 2005 World Summit Outcome, G.A. Res. 60/1 at para. 79.
\item \textsuperscript{63} Mary Ellen O'Connell, \textit{Ad Hoc War}, in \textsc{Krisensicherung und Humanitärer Schutz—Crisis Management and Humanitarian Protection} 405, 418-21 (2004).
\end{itemize}

Ambassador Bolton apparently changed his position from 2002 to 2003 when he argued that post-9/11 the United States and its allies could stop and search shipping on the high seas without consent under his "Proliferation Security Initiative." \textit{See id.}
III. INTERNATIONAL LAW’S RULES APPLIED TO IRAN

Iran may have aspirations to acquire nuclear weapons in violation of its obligations under the NPT—though this remains unproven at the time of this writing.64 Acquiring weapons is unlawful and open to countermeasures, but cannot give rise to a right of self-defense, meaning attacking the territory of a state with significant force. Thus, there is simply no right to bomb or invade Iran for attempting to acquire nuclear weapons. Nor could the United States or other states justify bombing Iranian nuclear research sites in response to Iranian support to militant groups, incursions into Iraq, or similar conduct. If any of this conduct actually gave rise to the right of self-defense, the response would have to aim at ending the conduct triggering the right, not some other unlawful conduct. A fortiori any use of force by the United States on the basis of collective self-defense would be completely unlawful under the facts here. In late 2006, the United States remained bound by the rule it primarily created—the restriction on force except in the face of an armed attack.

The Security Council is also restricted by the principles of necessity and proportionality in what it can authorize with respect to military force against Iran. Experts doubt bombing can achieve the military objective of halting the nuclear research program. Even if it could, to use force against Iran with the aim of removing its nuclear program would require bombing heavily populated areas all over the country. The inevitable death and destruction could not be justified under the proportionality rule.

With respect to individual and collective self-defense, Professor Maggs argues in another article in this volume that Iran is engaged in many unlawful uses of force and that these give rise to the right of the United States to attack it in collective self-defense with Israel or Iraq.65 Under the test of the Nicaragua Case, however, states are restricted from using force in collective self-defense unless there is a significant armed attack (not a mere border incident), the attacked state is legally responsible for the armed attack (not just a financier and/or trainer), the victim of the attack formally requests assistance in collective self-defense, and the states involved report to the Security Council that they are acting in self-defense.66

One example Professor Maggs supplies as a basis for collective self-
defense concerns Iranian incursions into Iraq. Evidence indicates such incursions have apparently occurred. For example, Iraq has “confirmed remarks by a local Kurdish official that one breach of the border had taken place on April 21[, 2006] in response to rebels attacking Iranian positions,” but Iran and Iraq quickly expressed the intention to jointly address the issue of securing their borders in May 2006. There have also been reports from the American ambassador to Iraq that “Iran is pressing Shiite militias to step up attacks against American-led forces in retaliation for the Israeli assault on Lebanon.” The ambassador, however, also acknowledged that “there was no proof that Iran was directing any particular operations by militias” in Iraq. Such incidents do not give rise to a claim of collective self-defense. The I.C.J. distinguished in the Nicaragua Case mere frontier incidents from armed attacks, finding that frontier incidents are not sufficiently grave to constitute an armed attack giving rise to the right of self defense. The Court said that “the concept of ‘armed attack’ includes . . . acts by armed bands where such acts occur on a significant scale.” The concern of the International Court of Justice in Nicaragua was “with collective self-defence, [and specifically,] it wanted to limit third state involvement” in armed conflict. Given the relatively insignificant and limited nature of reported Iranian activity on the Iraqi border, Iraq could not legally invite the United States to exercise collective self-defense against Iran. Iraq may respond to such incidents with counter-measures, but as of late 2006 it had not even closed the border with Iran.

Further, even if the incursions were sufficient to meet the test of significance and control, it is for Iraq to request assistance in defending itself from Iran. The U.S. cannot simply take measures sua sponte. The United States is not the victim of these wrongs. The U.S. is in Iraq at the

68. See generally John F. Burns, Iran and Iraq to Join to Seal Borders Against Insurgents, N.Y. TIMES, May 28, 2006, at 14. Burns reports that Iran and Iraq plan to form a joint commission to control their borders and to thwart the efforts of groups threatening the security of the two nations.
70. Id.
73. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 133 (2000).
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invitation of the Iraqi leadership. Attacks in Iraq, even on Americans, are still attacks against Iraq. Therefore, Iraq is the state with the legal authority to respond to such wrongs. The Iraqi leadership’s close ties to Iran make it unlikely that Iraq will invite the U.S. to attack Iran.

Professor Maggs also suggests the U.S. could aid Israel owing to attacks on it by Hezbollah. U.S. allegations that Iran may be linked to Hezbollah were aired publicly in the summer of 2006. These alleged links, however, appear to be insufficient to give rise to a right of collective self-defense. For example, some reports have speculated that “Iran may have passed on the technology [for lethal shaped-charge explosives to Iraqi militias] via Hezbollah” and former UN Secretary General Kofi Annan also named Iran as a supporter of Hezbollah: “Hezbollah maintains close ties, with frequent contacts and regular communication, with the Syrian Arab Republic and the Islamic Republic of Iran.” These reports do not indicate either that Hezbollah has carried out attacks of a sufficiently significant nature or that Iran exercises the requisite control over Hezbollah to be responsible for its actions. Under Nicaragua, confirmed in 2007 by I.C.J. in the Bosnia v. Serbia case, responsibility requires control:

The first issue raised by this argument is whether it is possible in principle to attribute to a State conduct of persons – or groups of persons – who, while they do not have the legal status of State organs, in fact act under such strict control by the State that they must be treated as its organs for purposes of the necessary attribution leading to the State’s responsibility for an internationally wrongful act. The Court has in fact already addressed this question, and given an answer to it in principle, in its Judgment of 27 June 1986 in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)(Merits, Judgment, I.C.J. Reports 1986, pp. 62-64). In paragraph 109 of that Judgment the Court stated that it had to “determine...whether or not the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government” (p. 62).

76. Maggs, supra note 65.
77. See Wong, supra note 69. Wong reports that “[u]ntil now [August 2006], American officials have not publicly drawn a direct connection between Shiite militant groups here and Hezbollah in Lebanon.” Id.
78. Id.
80. Application of the Convention on the Prevention and Punishment of the Crime of
Unless the United States and its allies produce clear and convincing evidence that Iran is legally responsible for Hezbollah attacks, the case for collective self-defense fails. Further, as with Iraq, Israel would have to formally request U.S. assistance and report to the Security Council. 

Again, even if a case for collective self-defense could be made, and was reported, the United States may only join in efforts to end the activity giving rise to the right of self-defense. It could not use force for some entirely different purpose in Iran. The United States could not bomb nuclear research sites to end either incursions into Iraq or the financing and training of armed militant groups attacking Israel. It is true that a state may have reasons other than self-defense for joining in a use of force, but the force used must have a necessary link to the lawful basis. For example, when Saddam Hussein invaded Kuwait, the United States had the right to join it in collective self-defense. The United States likely had other reasons apart from the liberation of Kuwait when it did so. It could have been motivated to assist Kuwait to ensure steady oil supplies. But the United States was restricted to actions aimed at liberating Kuwait, regardless of its motivations, because the liberation of Kuwait provided the lawful basis of its actions. The United States could not take over Iraq’s oil fields or overthrow the regime of Saddam Hussein. Those measures were not necessary to the liberation and could not have been justified under the necessity and proportionality aspects of the law on resort to force. States may have mixed motives for a resort to force. However, they may notbootstrap a legal basis for using force in one situation to an unrelated one.

In distinction to the right of states to act in individual and collective self-defense, the Security Council has a broader right to use force than states acting without Council authorization. Nevertheless, on the facts of the Iran situation, the Council would be hard-pressed to find it necessary to use military force to force Iran’s compliance with the NPT. Iran’s nuclear research sites are scattered throughout the country and are typically buried deep underground. How force could be useful is unclear. More importantly, several of the dispersed sites are located near heavily-populated areas. The death and injury of innocent civilians and damage to metropolitan centers would, in all likelihood, be heavily disproportionate to the value of the objective, especially when diplomatic means and measures

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short of force have not been exhausted. 83

Too many discussions of the use of force fail to consider the principles of necessity and proportionality 84 and how they restrain the right to resort to force. These principles are especially important in a case like that of Iran and are the focus of the remainder of this article. With respect to the principle of necessity:

While military necessity does grant military planners a certain degree of freedom of judgment about the appropriate tactics for carrying out a military operation, “it can never justify a degree of violence which exceeds the level which is strictly necessary to ensure the success of a particular operation in a particular case.” 85

Given all that is not known, ensuring success in such an operation is impossible. Allegations of an Iranian program to develop nuclear weapons remain largely unsubstantiated. By late 2006, Iran had not complied with the UN Security Council’s “deadline to freeze all nuclear fuel enrichment” and “the United Nations nuclear agency is having increasing difficulty monitoring Iran’s activities,” 86 still, as stated above, 87 there is no conclusive evidence of “diversion of nuclear material to nuclear weapons or other nuclear explosive devices.” 88 In fact some evidence being put forward of such a program is misleading: “The International Atomic Energy Agency has complained about a staff report from the U.S. House of Representatives Intelligence Committee, saying that it ‘contains erroneous, misleading and unsubstantiated information’ about Iran’s nuclear program.” 89 The IAEA’s letter charges that a caption under a picture of

83. As late as May 30, 2006, IAEA Director General El Baradei noted that “[t]here is no imminent threat [posed by Iran]... there is no clear and present danger... we still have lots of time to investigate that, we still have lots of time to negotiate with Iran and with the international community.” See Sammy Salama & Elizabeth Salch, Iran’s Nuclear Impasse: Give Negotiations a Chance (June 10, 2006), http://cns.miis.edu/pubs/week/060602.htm (quoting Nuclear Proliferation Challenges and Nonproliferation Opportunities—A Conversation with Dr. Mohammed El Baradei, (May 30, 2006), http://cns.miis.edu/cns/media/pr060531_transcript.htm); see also Jean de Preez & Insook Kim, Mohamed El Baradei Calls for a New Global Security Landscape, http://cns.miis.edu/cns/media/pr060531.htm (last visited Feb. 16, 2007).
84. GARDAM, supra note 32, at 21.
86. See Sciolino et al., supra note 1.
87. See supra note 1.
88. IAEA Director General Report, supra note 8, at 11.
89. David E. Sanger, Nuclear Agency For U.N. Faults Report on Iran By U.S. House,
Iran’s main nuclear site at Natanz falsely states that Tehran is “enriching uranium to weapons grade” with a small collection of centrifuges, the high-speed machines that are used to turn uranium into a fuel usable in nuclear power plants—or bombs. The letter says the uranium was enriched only to 3.6 percent—a level suitable for producing power, but far short of the 90 percent or so commonly associated with fuel for weapons.\footnote{90}

According to David Albright and Corey Hinderstein of the Institute for Science and International Security, “[r]ecent comments by U.S. officials about Iran’s timeline to develop nuclear weapons differ from official, community-wide U.S. intelligence assessments.”\footnote{91} In his February 2006, testimony before the U.S. Senate Intelligence Committee, John Negroponte, Director of National Intelligence, stated that “Iran is judged as probably having neither a nuclear weapon nor the necessary fissile material for a weapon.”\footnote{92} According to the “worst-case” scenarios outlined by Albright and Hinderstein, moreover, “Iran appears to need at least three years before it could have enough [highly enriched uranium] to make a nuclear weapon. Given the technical difficulty of the task, it could take Iran much longer.”\footnote{93}

A June 2006 Center for Nonproliferation Studies report, corroborating the technical difficulties that Iran may encounter developing nuclear technology, concludes that “impediments facing Iran’s mastery of the nuclear fuel cycle demonstrate that the threat of Iranian acquisition of nuclear weapons capability remains long-term and at this point does not warrant excessive alarm or military action.”\footnote{94} Authors Salama and Salch maintain “that Tehran may still face[] substantial hurdles to the construction of a nuclear explosive device” because of limited uranium mining, ineffective “conver[sion of] yellowcake (concentrated uranium oxide) to uranium hexafluoride gas (UF6)” to feed centrifuges, and a budding nuclear program not yet technically equipped to accurately and efficiently produce large quantities of enriched uranium required to create WMDs.\footnote{95} According to Seymour Hersh:

The Administration’s planning for a military attack on Iran was made far more complicated earlier this fall [2006] by a highly classified draft

\footnote{90}{Id.}
\footnote{92}{Id.}
\footnote{93}{Id. at 2.}
\footnote{94}{Salama & Salch, supra note 83, at 10.}
\footnote{95}{Id. at 8-9.}
assessment by the C.I.A. challenging the White House’s assumptions about how close Iran might be to building a nuclear bomb. The C.I.A. found no conclusive evidence, as yet, of a secret Iranian nuclear-weapons program running parallel to the civilian operations that Iran has declared to the International Atomic Energy Agency. \(^{96}\)

“The report ‘Would Air Strikes Work?’ written by a leading British weapons scientist, says air strikes would probably be unable to hit enough targets to cause serious damage to Iran’s nuclear facilities.” \(^{97}\) The evidence simply does not exist that Iran will pose a threat to the international community such that the Security Council could authorize the use of force in line with the principle of necessity. Indeed, even if the research program did pose such a threat, “Iran’s uranium enrichment program is spread out; it is believed some facilities are underground at unknown locations. There would be no guarantee of ending the program.” \(^{98}\) Former Pentagon analysts have agreed that “there are no effective military ways to wipe out a nuclear program that has been well hidden and broadly dispersed across the country, including in crowded cities.” \(^{99}\) Air strikes would not be an effective response. Strikes would have little impact on the research program.

The principle of proportionality then requires assessment of the means to accomplish the legitimate objective. Will the cost of achieving that objective in terms of civilian lives lost and destruction of civilian property and the natural environment exceed the value of the objective? \(^{100}\) As discussed above, bombing will have little value slowing the nuclear research program. Thus, any attack would disproportionately injure the nation’s civilian population. \(^{101}\)

Iran’s nuclear research centers around seven geographic locations: Tehran, Lashkar Ab’ad, Natanz, Arak, Isfahan, Saghand in the Yazd

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\(^{96}\) Hersh, The Next Act, supra note 1, at 101.


\(^{98}\) Trudy Rubin, Iran Sounds Like a Bad Rerun Administration’s Hints Show It’s Learned Nothing From Iraq War, NEWSDAY, Apr. 12, 2006, at A39.

\(^{99}\) Thom Shanker et al., U.S. Wants to Block Iran’s Nuclear Ambition, but Diplomacy Seems to Be the Only Path, N.Y. TIMES, Dec. 12, 2004, at 18.

\(^{100}\) O’CONNELL, supra note 30, at 278-82.

\(^{101}\) In the case of the Osirak bombing, at least the Israelis knew that destroying the reactor would slow down Iraq’s program. The bombing of Osirak, located outside of Baghdad, was “apparently done by American-made F-4 Phantoms escorted by F-15’s” and initial news reports indicated few casualties and limited environmental damage beyond the nuclear site’s infrastructure. David K. Shipler, Israeli Jets Destroy Iraqi Atomic Reactor; Attack Condemned by U.S. and Arab Nations, N.Y. TIMES, June 9, 1981, at A1.
Province, and Bushehr. Several of these locations are situated in densely populated areas. The "heart" of a potential nuclear arms program apparently involves several sites. Arak, a site "believed to be for the production of heavy water" located about "150 miles southwest of Tehran," Bushehr, a complex on the Persian Gulf Coast whose first reactor is "nearing completion," and Natanz, "located 100 miles southeast of Tehran," which "will utilize hundreds of gas centrifuges to enrich uranium." Tehran, the capital city, is home to 8,601,473 of the country's 68,688,433 residents. Given the proximity of two of these key sites to this major city, it is difficult to see how even a conventional air attack would not result in significant casualties.

There is also no guarantee that a potential attack would rely on "conventional" weapons, as in the case of the Osirak. Rather, because Iran is building facilities underground, the use of more powerful weapons could wreak greater devastation on the civilian population. For example, if nuclear arms were used, John Burroughs of the Lawyer's Committee on Nuclear Policy references a

Physicians for Social Responsibility [model of] an attack on the underground Isfahan nuclear material storage facility in Iran with a 1.2 megaton (1200 kilotons) B83 bomb modified for earth penetration... [that] found that over three million people would die within 48 hours... While the yield of the bomb used in the PSR study is far bigger than that of a bomb likely to be actually used, it still illustrates that casualties could be very large, as when an attack is in or near an urban center. A nuclear strike now would likely use the existing penetrator bomb, the B-61-11, a modification deployed by the Clinton administration in 1997 with little public debate. It is believed to have a dial-a-yield capability from 300 tons to 300 kilotons. The Hiroshima bomb was around 12 kilotons.

To use military force where there is little or no chance of achieving

107. Hersh, The Iran Plans, supra note 2.
the military objective but where death and destruction would inevitably results violates the fundamental international law principles of necessity and proportionality.

At this point in the discussion, it should not be forgotten that the international community has other, non-lethal means to encourage compliance with the NPT. Ukraine and South Africa gave up nuclear weapons and joined the NPT. Libya suspended its research program. No military force was needed in any of these cases. Non-military means are being used in the case of North Korea.

CONCLUSION

Bombing Iranian nuclear research facilities is not supported by either the international law of self-defense under Articles 2(4) and 51 of the UN Charter or the principles of necessity and proportionality. Under the current facts, a pre-emptive strike would not have the proper defensive purpose and, without overt Iranian action, the calculus of necessity and proportionality would be reckless, undermining the restraint on defensive force under current international principles. Absent a significant armed attack, “nonviolent options such as negotiation and verification that a state does not possess weapons that violate disarmament and nonproliferation norms should be pursued in all cases of suspected acquisition of weapons of mass destruction contrary to international law.” 109 The global community can best defend itself by reaffirming its obligation to resolve disputes by peaceful means as called for in UN Charter Article 2(3) and by encouraging compliance with the NPT. Indeed, greater compliance by the United States with international law and greater commitment to the NPT might go a long way toward re-invigorating the regime of non-proliferation and norms against possession of nuclear weapons and the unlawful use of force.
