

**Targeting Tehran:  
Assessing the Lawfulness of Preemptive Strikes Against Nuclear Facilities**

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**Abstract:** In 1981, Israel launched a preemptive attack on the Iraqi Osiraq nuclear reactor. Now a similar strike is being considered against Iranian nuclear facilities. This article assesses the lawfulness of preemptive strikes generally and a preemptive strike against Iran specifically, focusing on the new threat posed by terrorists' potential acquisition of nuclear material for a "dirty bomb." The article begins by evaluating preemptive strikes on nuclear facilities against the criteria for self-defense—necessity, immediacy, and proportionality—and then turns to broader criteria for "lawfulness," such as environmental damage and harm to the legal rules governing the use of force. After developing criteria to evaluate the lawfulness of a preemptive strike, the article concludes that a preemptive strike against Iran at this point would not satisfy the outlined criteria and thus would be unlawful.

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## **Targeting Tehran: Assessing the Lawfulness of Preemptive Strikes Against Nuclear Facilities**

Iran's recent resumption of its nuclear development program has caused great concern among the reigning nuclear powers as well as states in the region. The concern with Iranian possession of enriched nuclear materials is two-fold. First, some fear that Iran will develop nuclear weapons and will use or threaten to use such weapons against Israel, other Middle Eastern states, U.S. military bases in the region, or even southern Europe.<sup>1</sup> Second, since the 1979 Islamic revolution, Iran has been a state-sponsor of terrorist organizations, notably Hezbollah,<sup>2</sup> and it is possible that Iran could deliver nuclear material to terrorists for use in a nuclear weapon or a "dirty bomb," which would not require the technology necessary for a full-fledged nuclear weapon.<sup>3</sup> Iranian President Mahmoud Ahmadinejad has compounded perceptions of Iran as a threat through various statements, especially his assertion that Israel "must be wiped off the map."<sup>4</sup> Given the perceived threats from Iran itself and from terrorist organizations supported by Iran, both Israel and certain U.S. leaders have issued militaristic statements in the last several months suggesting the possibility of a preemptive strike against Iranian nuclear facilities.<sup>5</sup>

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<sup>1</sup>John D. Negroponte, Director of National Intelligence, Annual Threat Assessment of the Director of National Intelligence for the Senate Select Committee on Intelligence 11 (Feb. 2, 2006), *available at* <http://www.dni.gov/WWT%20Oral%20Statement%20UNCLASSIFIED%201%20February%20FINAL%20VERSION.pdf>.

<sup>2</sup> See, e.g., Faiza Saleh Ambah, *Arab Leaders, Unlike Much of the Public, Uneasy About Hezbollah*, Wash. Post, July 24, 2006, at A12; Robert Fisk, *Hizbollah Leaves the Twilight Zone; Reborn and Transformed, the Organization Which Once Fought for an Islamic State in Lebanon Is Seeking a New Role in the Post-Hostage World*, INDEPENDENT (London), Oct. 9, 1991, at 12. Iran is also suspected of orchestrating the 1996 bombing of a U.S. military compound in Saudi Arabia. Bryan Bender, *Iran is Prepared to Retaliate, Experts Warn*, BOSTON GLOBE, Feb. 12, 2006, at A1.

<sup>3</sup> Seymour M. Hersh, *The Iran Plans: Would President Bush Go to War To Stop Tehran from Getting the Bomb?*, NEW YORKER, Apr. 17, 2006 (quoting a Pentagon advisor).

<sup>4</sup> See, e.g., Tim Butcher, *Wipe Israel Off Map, Says Iran's President*, DAILY TELEGRAPH (London), Oct. 27, 2005, at 16.

<sup>5</sup> U.S. Senator Joseph Lieberman has stated, "We have to try to take [the Iranian nuclear situation] to the United Nations. I am pessimistic that Russia and China will let us do what we want to do. And then I think we form a 'coalition of the willing' - first to impose economic sanctions on Iran. Secondly, we can never

Such a preemptive strike would not be unprecedented. On June 7, 1981, Israel conducted a preemptive attack on the Iraqi Osiraq nuclear reactor with fourteen planes dropping more than ten 2,000-pound bombs on the facility.<sup>6</sup> Many of the same reasons that were used to claim that the Osiraq attack was legal and/or lawful are currently being recycled in the Iranian case. However, this article argues that a preemptive strike on Iranian nuclear facilities would be unlawful.

Building on the two-part threat framework outlined above and using the case study of Iran, this essay analyzes whether either threat would be sufficient to allow for a lawful preemptive strike on the nuclear facilities of a state suspected of developing nuclear weapons. In the Iraqi situation in the early 1980s, the primary threat was perceived as use of full-fledged nuclear weapons by Iraq itself. In contrast, current analysis of nuclear development is complicated by the potential terrorist connection, namely the possibility of nuclear material being passed to terrorists for use in a “dirty bomb.” This essay evaluates the state-based threat, similar to that from Osiraq, and asks whether the potential terrorist threat changes the conclusions about lawfulness. By developing criteria for evaluating the lawfulness of a preemptive strike on nuclear facilities, the essay moves beyond a narrow analysis of textual legality to include analysis of justifications that could convert an illegal strike into a lawful one and analysis of broad

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take the military option off the table.” Michael Bowman, *US Senators Discuss Options to End Iran’s Nuclear Threat*, VOICE OF AMERICA NEWS, Jan. 22, 2006. U.S. Senator John McCain stated, “We cannot take the military option off the table,” and he continued, “But we have to make it very clear [that] it is the last option. There is only one thing worse than the United States exercising a military option, and that is Iran having nuclear weapons.” *Id.* Israeli Defense Minister Shaul Mofaz stated, “Israel will not be able to accept an Iranian nuclear capability and it must have the capability to defend itself, with all that implies.” *Id.* In December 2005, Israeli Military Chief of Staff Dan Halutz responded that he would go 2,000 kilometres—the approximate distance between Israel and Iranian nuclear sites—to prevent Iran from acquiring a nuclear weapon. Matthew Gutman, *Israeli Pilot Recalls Smashing a Rival’s Nuclear Ambitions, But a Repeat, This Time Against Iran, May Not Be an Option*, USA TODAY, Mar. 8, 2006.

<sup>6</sup> TIMOTHY L.H. MCCORMACK, SELF-DEFENSE IN INTERNATIONAL LAW: THE ISRAELI RAID ON THE IRAQI NUCLEAR REACTOR 15 (1996).

consequences of a preemptive strike that could make a legal strike unlawful. Section I outlines the textual criteria determining legality under the framework of self-defense and its requirements of necessity, immediacy, and proportionality. Section II assesses the viability of justifications for preemptive strikes outside the self-defense framework, while Section III turns to the possibility and limits of U.N. Security Council authorization of a preemptive action against nuclear facilities. Rejecting these alternative explanations and possibilities, Section IV develops non-textual criteria for evaluating the lawfulness of preemptive action, grouping the criteria under the five headings of (1) balance of power, (2) feasibility of removing the threat, (3) diplomatic power and hearts and minds, (4) environmental effects and harm to civilians, and (5) precedent and the effect on legal rules. Applying the lawfulness analysis to the current Iranian situation, this essay concludes that a preemptive strike on Iranian nuclear facilities would be both illegal and unlawful absent U.N. Security Council authorization, which is unlikely to be forthcoming.

## **I. The Legality of Self-Defense**

According to Art. 51 of the U.N. Charter, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence 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.”<sup>7</sup> Since the Charter’s passage over fifty years ago debate has raged over the meaning of Art. 51. Two basic schools of thought have emerged. The first argues for a narrow reading of the Charter, focusing on the words “if an armed attack occurs,” and denies the validity of any anticipatory or

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<sup>7</sup> U.N. Charter art. 51.

preemptive self-defense claim.<sup>8</sup> The second offers a broader reading of Art. 51, focusing on the statement that the Charter does not impair states' "inherent" right of self-defense, which proponents of this view argue encompassed a right of anticipatory self-defense.<sup>9</sup> State practice since the Charter's adoption suggests that many states do recognize a customary right of anticipatory self-defense. A prominent example of an anticipatory action that was not condemned by the U.N. Security Council or most states was the Israeli attack on the Egyptian air force at the commencement of the 1967 war.<sup>10</sup>

An additional dimension of Art. 51 that has been debated and arguably revised since 9/11 is the permissible targets for actions in self-defense, specifically whether actions of non-state-sponsored terrorist groups may give rise to a right of self-defense. The International Court of Justice (ICJ) advisory opinion on the *Palestinian Wall* exemplifies the traditional reading of Art. 51 as applicable only against states.<sup>11</sup> Israel had claimed that the wall was a means of self-defense against terrorist attacks, but the Court rejected its arguments, holding that the attacks were not state-sponsored and because Israel "exercised control in the Occupied Palestinian Territories," the threat "originates within, and not outside, that territory."<sup>12</sup> Despite the ICJ's intransigence, separate opinions in the *Palestinian Wall* case and state practice since 9/11 suggest a shift in *opinio juris* toward permitting self-defense against terrorists. For example, Judge Higgins argues, "There is . . . nothing in the text of Article 51 that *thus* stipulates that

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<sup>8</sup> See IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* (1963).

<sup>9</sup> See D.W. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* (1958)

<sup>10</sup> For a description of the international reaction to the Israeli strike, see Rosalyn Higgins, *The Attitude of Western States Towards the Legal Aspects of the Use of Force*, in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 435, 442-43 (A. Cassese ed., 1986) (contrasting the reactions to the 1967 attack on Egypt and the 1981 attack on Osiraq).

<sup>11</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. x, 139 (July 9) [hereinafter "Palestinian Wall"]

<sup>12</sup> *Palestinian Wall* at par. 139.

self-defence is available only when an armed attack is made by a State. *That* qualification is rather a result of the Court so determining in [*Nicaragua*].”<sup>13</sup> Judge Buergenthal also argues that the U.N. Charter, “in affirming the inherent right of self-defence, does not make its exercise dependent upon an armed attack by another State.”<sup>14</sup> Acceptance of self-defense against terrorists was also evidenced by the response of international organizations to the 9/11 attacks. The U.N. Security Council adopted Resolution 1368, which specifically condemned the 9/11 attacks and called them a “threat to international peace and security,” while reaffirming the “inherent right” of self-defense in accordance with the U.N. Charter.<sup>15</sup> Two weeks later, the Council, acting under its Chapter VII powers, restated its view of the 9/11 attacks in Resolution 1373: “*Reaffirming* the inherent right of individual or collective self-defense as recognized by the Charter of the United Nations as reiterated in Resolution 1368 (2001).”<sup>16</sup> Similarly, both NATO and the Organization of American States responded to 9/11 by invoking their founding documents as required in an instance of armed attack against a member state.<sup>17</sup>

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<sup>13</sup> Palestinian Wall (separate opinion of Judge Higgins at par. 33).

<sup>14</sup> Palestinian Wall (declaration of Judge Buergenthal at par. 6). Additionally, Judge Kooijmans notes that, “Resolutions 1368 and 1373 recognize the inherent right of individual or collective self-defence *without making any reference to an armed attack by a State*,” which, he concludes, “is not excluded by the terms of Article 51” since Art. 51 does not specify that an “armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years.” Palestinian Wall (separate opinion of Judge Kooijmans at par. 35).

<sup>15</sup> United Nations S/Res/1368, 12 Sept. 2001, <http://daccessdds.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement>. Accessed 7 Apr. 2005.

<sup>16</sup> United Nations S/Res/1373, 28 Sept. 2001, <http://daccessdds.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>. Accessed 7 Apr. 2005.

<sup>17</sup> NATO invoked Art. V of its Charter, which states, “The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked . . .” North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243. The OAS invoked the 1947 Inter-American Treaty of Reciprocal Assistance and declared, “these terrorist attacks against the United States of America are attacks against all American States.” Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*. 4 SAN DIEGO INT’L L.J. 7, 18 (2003).

The foregoing debates over the meaning of Art. 51, and especially the “inherent” right to self-defense, have occurred within the parameters of the classic statement of the right to self-defense contained in the “Caroline Doctrine”—significantly declared with regard to an incident involving non-state-sponsored rebels. During an 1837 rebellion against British occupation in Canada, rebels operating from a Canadian island in the Niagara River garnered sympathy from the U.S. population. Consequently, the steamer *Caroline* was used to transport men and supplies between the United States and the rebel-controlled island. After a British protest failed to stop the supply, British forces entered the United States, boarded the *Caroline*, set it alight, and sent it over Niagara Falls. During the incident, several U.S. citizens were killed or injured, and the United States lodged a complaint with the British government, which claimed self-defense.<sup>18</sup> In response, U.S. Secretary of State Daniel Webster wrote that for the self-defense claim to be valid, the British had to “show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”<sup>19</sup> In addition, the action taken must involve “nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.”<sup>20</sup>

The Caroline Doctrine yielded three general principles against which all uses of force must be measured: (1) necessity, (2) immediacy, and (3) proportionality. The remainder of this section analyzes the legality of a preemptive strike against nuclear facilities with regard to these three requirements.

### Necessity

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<sup>18</sup> YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENSE 218-19 (3d ed. 2001).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

The necessity requirement of self-defense has two prongs: 1) certainty that the state will produce nuclear weapons or certainty that it will pass nuclear material to terrorists, and 2) necessity of using force because of a lack of other, non-forceful options.

### *Certainty*

According to 17th century jurist Hugo Grotius: “[I]n order that a self-defence may be lawful, it must be necessary; and it is not necessary unless we are certain, not only regarding the power of our neighbour, but also regarding his intention.”<sup>21</sup> Christopher Greenwood writes, “[T]he right of self-defense will justify action only where there is sufficient evidence that the threat of attack exists. That will require evidence not only of the possession of weapons but also of an intention to use them.”<sup>22</sup> The clearest demonstration of intent to use a weapon is, of course, its actual use in an armed attack, which is the threshold specified in Art. 51 of the U.N. Charter for justification of self-defense. The certainty prong of necessity analysis is one of the greatest targets for those opposed to a right of anticipatory self-defense because they argue that until a state actually attacks, it is not certain that it will do so. The state could change its mind.<sup>23</sup> Though anticipatory action in the face of an imminent threat has become accepted, primarily because the existence of an imminent threat is almost as objectively identifiable as the occurrence of an armed attack, lack of certainty regarding a state’s intentions becomes increasingly problematic the further one moves away from the commencement

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<sup>21</sup> Quoted in STANIMIR A. ALEXANDROV, *SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW* 7 (1996).

<sup>22</sup> Greenwood, *supra* note 18, at 16.

<sup>23</sup> Ian Brownlie opposes action in self-defense prior to an armed attack because it “involves a determination of the certainty of attack which is extremely difficult to make and necessitates an attempt to ascertain the intention of a government.” BROWNLIE, *supra* note 9, at 259.

of an armed attack. Put another way, “The further a decision to use force moves away from the requirement of imminence, the more likely the possibility of a mistake.”<sup>24</sup>

How then can a state’s leaders be certain that a state that is merely at the stage of developing nuclear materials is going to use such materials as weapons against another state or deliver the materials to a terrorist group for use in attacks? While absolute certainty regarding future events will be virtually impossible to achieve, especially in situations where the relevant determination is largely based on intelligence information, a standard of certainty analogous to the “beyond a reasonable doubt” standard from criminal law may be possible to attain and would satisfy the certainty prong of the necessity requirement for self-defense. Five factors could, in combination, lead to an acceptable level of *near* certainty. First, and most obviously, a nuclear developing state may announce that it is developing nuclear material or weapons as a means of deterring attacks against it or increasing its prestige. Second, a state may have credible intelligence from human sources in the nuclear developing state that the state is pursuing weapons, intends to use the weapons or pass nuclear material to terrorists, or plans to offer the nuclear material for sale to terrorists.<sup>25</sup> Third, a state that is already involved in hostilities with another state would be more likely to engage in nuclear weapons development for both deterrent and offensive purposes and would likely be more inclined to deploy newly developed weapons, especially if it was losing the conflict or was locked in a virtual stalemate. Fourth, a state that is generally alienated from the international system, for example lacking economic, cultural, or other connections with a variety of states, could

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<sup>24</sup> Miriam Sapiro, *Preempting Prevention: Lessons Learned*. 37 N.Y.U. J. INT’L L. & POL. 357, 367 (2005).

<sup>25</sup> In contrast, before the U.S. invasion in 2003, scientists in Iraq who were contacted by family members from the United States at the CIA’s request told the CIA that the Iraqi nuclear program had been suspended since the early 1990s. JAMES RISEN, *STATE OF WAR: THE SECRET HISTORY OF THE CIA AND THE BUSH ADMINISTRATION* 85-107 (2006).

be more likely to develop nuclear weapons or pass nuclear material to terrorists because it would have little to lose from sanctions by or ostracism from the international community. Fifth, the state's form of government may provide restraint or impetus for weapons development. Leaders of a totalitarian state, especially one that is already ostracized from the international community, may be more likely to develop or distribute weapons because their control over the population eliminates internal debate about the wisdom of such a policy and prevents dissenting factions from opposing the weapons development.<sup>26</sup> On the other hand, a democratic state may be restrained by the existence of public debate and legislative control over war powers,<sup>27</sup> but democratic leaders may also be driven to engage in more belligerent behavior in order to solidify their domestic base of support in the face of potential challengers.<sup>28</sup>

Analysis of the five factors just enumerated reveals that the certainty prong of necessity is problematic in the Iranian case for several reasons. First, Iran continues to deny that it intends to produce, much less use, nuclear weapons. Instead, it claims that its nuclear program is solely for research and development of nuclear energy production.<sup>29</sup> However, despite Iranian denials, there is evidence that Iran has more malevolent intentions. For example, its nuclear programs were hidden from International Atomic Energy Agency (IAEA) inspectors for eighteen years until their existence was disclosed

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<sup>26</sup> For an example regarding increased belligerency in general, see Lori Fisler Damrosch, *Use of Force and Constitutionalism*, 36 COLUM. J. TRANSNAT'L L. 449, 466 (1997).

<sup>27</sup> For an overview of research and schools of thought regarding government structure's effect on the propensity of a state to engage in war, see, for example, Damrosch, *supra* note 27 at 454-64.

<sup>28</sup> For an analysis of diversionary belligerent behavior in general and as applied specifically to ethnic politics, see V.P. Gagnon, Jr., *Ethnic Nationalism and International Conflict: The Case of Serbia*, 19 INT'L SECURITY 130, 130-40 (1995).

<sup>29</sup> See, e.g., Int'l Atomic Energy Agency [IAEA], *Implementation of the NPT Safeguards Agreements in the Islamic Republic of Iran*, at 1, IAEA Doc. GOV/2006/15 (Feb. 27, 2006), available at <http://www.iaea.org/NewsCenter/Focus/IaeaIran/index.shtml> (quoting Iran's announcement of its decision to resume "R&D activities on the peaceful nuclear energy programme") [hereinafter "IAEA Feb. 27, 2006"]; *When the Soft Talk Has to Stop: Iran's Nuclear Programme*, ECONOMIST, Jan. 14, 2006.

by a dissident group in 2002.<sup>30</sup> IAEA reports since 2003 relate that Iran has carried on secret uranium enrichment and plutonium separation that the state did not declare to the IAEA as required by the Non-Proliferation Treaty (NPT).<sup>31</sup> The IAEA has also reported that Iran received information on nuclear centrifuges from a clandestine nuclear proliferation network, run by Pakistani scientist A.Q. Khan.<sup>32</sup> All of these developments are especially suspicious in light of the fact that Russia has agreed to supply ten years worth of fuel to the one nuclear reactor that is close to completion, thereby begging the question of why Iran would need to produce its own nuclear fuel.<sup>33</sup>

Second, U.S. human intelligence in Iran has been notoriously bad since the 1979 Revolution and especially after CIA spies were outed in the late 1980s.<sup>34</sup> Because the United States has no diplomatic relations with Iran, it has been forced to run intelligence operations on Iran from abroad.<sup>35</sup> The absence of CIA operatives and lack of intelligence assets on the ground in Iran left a corresponding gap in understanding among the U.S. intelligence and policy communities about the intentions and capabilities of an already unpredictable Iranian regime. Third, Iran is not currently engaged in hostilities with any

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<sup>30</sup> ECONOMIST, *supra* note 30. For a summary of Iranian failures to report and declare nuclear materials and activities, see Int'l Atomic Energy Agency [IAEA], *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, at 19, IAEA Doc. GOV/2004/83 (Nov. 15, 2004)[hereinafter "IAEA Nov. 15, 2004"].

<sup>31</sup> Stephen Rademaker, Acting Assistant Secretary of State for International Security and Nonproliferation, Remarks to the American Enterprise Institute on Iran's Challenge to the Nuclear Nonproliferation Regime (Feb. 2, 2006); *see also* IAEA Feb. 27, 2006, *supra* note 30, at 9-10 ("Iran has made substantial efforts over the past two decades to master an independent nuclear fuel cycle, and, to that end, has conducted experiments to acquire the know-how for almost every aspect of the fuel cycle. Many aspects of Iran's nuclear fuel cycle activities and experiments, particularly in the areas of uranium enrichment, uranium conversion and plutonium research, had not been declared to the Agency in accordance with Iran's obligations under its Safeguards Agreement. Iran's policy of concealment continued until October 2003, and resulted in many breaches of its obligation to comply with that Agreement . . .").

<sup>32</sup> IAEA Nov. 15, 2004, *supra* note 31, at 6.

<sup>33</sup> ECONOMIST, *supra* note 30.

<sup>34</sup> *See, e.g.*, Stephen Engelberg with Bernard E. Trainor, *Iran Broke C.I.A. Spy Ring, U.S. Says*, N.Y. TIMES, Aug. 8, 1989, at A6.

<sup>35</sup> The United States lost CIA operatives in the bombing of the U.S. embassy in Beirut in 1983, and its Beirut station chief, William Buckley, was tortured and killed by Hezbollah at Iran's direction. *Id.*

of its neighbors, which was not true of Iraq when it was developing nuclear weapons in the 1980s during a war with Iran. Iran is arguably in a more stable position since the overthrow of its traditional enemy Saddam Hussein in 2003, however it undoubtedly feels threatened by the presence of U.S. troops in both Iraq and Afghanistan, which could encourage it to develop a nuclear weapon, especially as a deterrent. Fourth, Iran is deeply embedded in the international system, particularly in the economic realm with strong ties to countries including Russia, China, and India. If Iran were to suffer economic sanctions, it would likely lose lucrative oil and gas contracts.<sup>36</sup> Fifth, though authoritarian and far from a free and fairly contested electoral democracy,<sup>37</sup> Iran has a level of politics within the elite ruling establishment, such that there is room for individual leaders to ascend and fall from political power pursuant to the will of the Shia clerics. President Mahmoud Ahmadinejad gained office through election (with the blessing of the clerics), and he must be concerned that he would lose power if his actions in the military realm displeased or caused economic hardship for his popular constituency and especially the clerical establishment. However, militaristic statements against Israel and challenges to the United States have also gained him popularity, suggesting that there could be popular domestic forces that would push him to the brink of nuclear development or deployment, though potentially would also punish him electorally if they were to suffer hardship.

Though Iran's intentions regarding nuclear development are suspicious, they are not proven, and the necessity requirement mandates at least *near* certainty as to the state's intentions. Iran does not yet possess weapons, and though malevolent intent to

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<sup>36</sup> Russia recently entered into a one billion dollar weapons contract with Iran, and China, India, and Japan, among others, have oil and gas contracts and pipeline projects with Iran. *ECONOMIST*, *supra* note 30.

<sup>37</sup> The author uses "authoritarian" to denote a society in which the government exercises almost complete control over civil society and brooks little, if any political dissent. This is in contrast to the complete control exercised by governments in "totalitarian states," such as Nazi Germany and Stalinist Russia.

produce them can be inferred from its deceptions with regard to the IAEA, intent to *use* nuclear weapons cannot be inferred. To assume that Iranian nuclear development means that Iran would be willing to *use* nuclear weapons requires the corollary assumption that the ruling powers in Iran who control military action—ultimately the President at the direction of the supreme religious leader Ayatollah Khamenei—are also irrational. If Iran became the first state since World War II to employ nuclear weapons, the consequences for the country would be devastating, likely including a military invasion by a coalition of world powers, complete isolation from the world community, and the toppling of the government. These factors also counsel hesitation for Iran if it considers passing nuclear material to terrorists. The state is undeniably a sponsor of terrorist groups, especially Hezbollah and likely militant Shia groups in Iraq,<sup>38</sup> but if any of these groups used nuclear material in a terrorist attack, the material could easily be traced back to Iran, which would suffer severe international consequences. Barring complete irrationality on the part of Iran’s leaders, which they have not yet demonstrated, Iran’s intention to develop nuclear weapons may reasonably be deduced from its past actions, but an intent to *use* nuclear weapons or to pass nuclear materials to terrorists cannot be proven at this time.

### *Exhaustion of Non-Forceful Options*

Perhaps even more important than the certainty prong, the second prong of the necessity requirement is the unavailability or exhaustion of non-forceful means to remove the threat, assuming a threat does exist. The first line of diplomatic defense to nuclear weapons development is state membership in the NPT and the NPT’s mandatory

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<sup>38</sup> Negroponte, *supra* note 2, at 12-13.

monitoring by the IAEA. If a state is a member of the NPT and is complying with an IAEA monitoring regime, then IAEA inspectors—experts in nuclear power and development—will be on the ground in the nuclear developing state and will be well situated to detect diversion of nuclear material to a clandestine weapons program. IAEA inspectors are not infallible, but their presence gives the international community an important and informed window into the state and its nuclear facilities. Diplomacy may also be used to bribe a state away from nuclear development with the proverbial “carrot.” States may offer diplomatic concessions (e.g. increased visa grants), economic aid, or fuel supply in return for the state’s renunciation of nuclear weapons development or nuclear development more broadly.

Though Iran had in the past not complied with the IAEA NPT regime by failing to disclose its nuclear development, it had provided unusual access to IAEA inspectors during the past few years. However, Iran has recently ended IAEA surprise inspections to which it had voluntarily agreed.<sup>39</sup> IAEA inspectors are still present in the country and are monitoring Iranian nuclear sites, but their access is limited to the minimum required under international treaties.<sup>40</sup> For the past several years, Britain, France, and Germany have attempted through diplomatic means to convince Iran to refrain from nuclear development.<sup>41</sup> At the same time, Russia, in a show of diplomacy perhaps designed to avoid forceful action by the European Union and the United States, offered to supply Iran’s Bushehr reactor with nuclear fuel for ten years.<sup>42</sup> In January 2006, Iran removed

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<sup>39</sup> Steven R. Weisman, *Iran Hints at Compromise on Nuclear Inspections*, N.Y. TIMES, Feb. 18, 2006, at A3.

<sup>40</sup> William J. Broad & Elaine Sciolino, *Iran’s Secrecy Widens Gap in Nuclear Intelligence*, N.Y. Times, May 19, 2006, at A1.

<sup>41</sup> See ECONOMIST, *supra* note 30.

<sup>42</sup> *Id.*

the IAEA seals on its Natanz uranium-enrichment plant in preparation for restarting experiments, thereby ending the suspension of nuclear development that had underlined the talks with Britain, France, and Germany.<sup>43</sup> The overt resumption of nuclear development seems to signal the failure of the initial diplomatic strategy.<sup>44</sup> The March 29, 2006 U.N. Security Council statement, to which Russia and China acceded, calls on Iran to resume suspension of its nuclear enrichment activities and evidences a ratcheting up of diplomatic pressure on Iran.<sup>45</sup> However, it is unlikely that Russia and China would allow the U.N. Security Council to back up the statement with sanctions or credible threats of force for noncompliance. Without a credible threat of at least sanctions and at most a use of force, it is unlikely that the U.N. Security Council efforts will convince Iran to halt its pursuit of nuclear development. If a coalition of states attempted to use all “carrots” and no “sticks,” an agreement would likely not be reached because without a credible threat of punishment for non-compliance, Iran would attempt to extort additional benefits beyond what the offering states would provide.

However, although diplomacy seems to be failing to stop Iran from pursuing nuclear development, that does not mean that Iran could not be deterred from *using* nuclear weapons or passing nuclear materials to terrorist organizations for use in a dirty bomb. Conventional wisdom holds that terrorists, at least of the non-nationalistic, non-

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Security Council President, *Statement by the President of the Security Council*, U.N. Doc. S/PRST/2006/15 (Mar. 29, 2006) (“The Security Council calls upon Iran to 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 to resolve outstanding questions, and underlines, in this regard, the particular importance of re-establishing full and sustained suspension of all enrichment-related and reprocessing activities, including research and development, to be verified by the IAEA.”)

territorial Al Qaeda variety, are undeterrable,<sup>46</sup> but Iran is a state embedded in the international system, as discussed with regard to the certainty prong of the necessity analysis. Even though there may be a non-deterrable terrorist threat if Iran were to pass nuclear material to terrorists, Iran, as a state, could be deterred from distributing the material or from using nuclear weapons itself because it would suffer disastrous economic, military, and political consequences if it used or distributed highly enriched nuclear material. If Iran is indeed pursuing nuclear weapons, it likely wants them for deterrence, rather than actual use: deterrence is useful, but use would be costly. Possessing a nuclear weapon would be extremely useful to Iran because it would increase Iran's power regionally and deter attacks on the country by nuclear and non-nuclear powers alike.<sup>47</sup> Iran is situated in a rough neighborhood: Pakistan and Israel are both nuclear powers, Iraq remains unstable, and U.S. military forces are present in great numbers on Iran's major borders in Iraq and Afghanistan. Thus, possession of nuclear weapons would serve Iran's interests. However, actual use of a nuclear weapon by Iran would cause the state to suffer grave costs that would far exceed virtually any benefit the state could derive from the weapon's use. Realistically, if Iran were to become the first state since World War II to use nuclear weapons, it would suffer severe retaliation from a most likely united world community. As recent events have demonstrated, the Iranian

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<sup>46</sup> Non-nationalist terrorist groups embrace goals that cannot be accommodated within political processes, and they lack a domestic constituency that can demand moderation or a reduction of violence. *See, e.g.*, WALTER LAQUEUR, *THE NEW TERRORISM: FANATICISM AND THE ARMS OF MASS DESTRUCTION* 81 (1999)(describing the goals of traditional terrorism); JESSICA STERN, *THE ULTIMATE TERRORISTS* 78-79, 85 (1999);

<sup>47</sup> Hersh, *supra* note 4 (quoting a "senior Pentagon advisor" saying, "This White House believes that the only way to solve the problem is to change the power structure in Iran, and that means war." The Pentagon advisor explained that the U.S. position "reinforces the belief inside Iran that the only way to defend the country is to have a nuclear capability.").

leaders should know that not only their military but they themselves as leaders could be personally targeted.<sup>48</sup>

The Iranian leaders are not necessarily acting irrationally: they have made a calculated gamble that they can achieve nuclear development without major adverse repercussions—something both Pakistan and India accomplished. If Iran creates weapons grade nuclear material, it will likely suffer repercussions from the United States and its allies in the short term, but Iran’s large population, strategic location, importance to the energy industry, and prominence in the regional power struggle between the United States, Russia, and China suggest that the United States will eventually need to engage with it.<sup>49</sup> In the long term, Iran would gain great benefit from *possessing* a nuclear weapon. In contrast, Iran and its leaders would suffer severe costs if Iran actually *employed* a nuclear weapon. Even if Iranian development of nuclear materials cannot be deterred or prevented without the use of force (and it is unclear that it could be prevented even *with* the use of force),<sup>50</sup> Iran’s immersion in the international system of states suggests strong reasons why Iran would be deterred from use or distribution of enriched nuclear materials. Mere possession of nuclear materials, however troubling to NPT signatories, the IAEA, and the United Nations, is permitted to Iran as an NPT signatory. As such, it does not rise to the level of a threat permitting self-defense or justifying a claim that forceful action would be necessary in response.

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<sup>48</sup> Michael R. Gordon & Bernard E. Trainor, *Iraqi Leader, in Frantic Flight, Eluded U.S. Strikes*, N.Y. TIMES, Mar. 12, 2006, at 4 (detailing U.S. targeting of Saddam Hussein after the U.S. invasion of Iraq).

<sup>49</sup> For recent commentary on Iranian efforts to court Russia and China, see Edward Cody, *Iran Seeks Aid in Asia in Resisting the West; Shanghai Group Urged To ‘Block Threats,’* WASH. POST, June 16, 2006, at A14; Flynt Leverett, Op-Ed., *The Race for Iran*, N.Y. TIMES, June 20, 2006, at A17.

<sup>50</sup> See *infra* note 55 and accompanying text.

## Immediacy

In 1981, Israel bombed the Osiraq reactor one month before it was to become operational and several years before it would have produced enough nuclear fuel for a bomb.<sup>51</sup> Israel defended the timing of its action by claiming that it attacked at the last time when bombing the reactor would not have caused release of nuclear radiation that could have endangered civilians in Baghdad.<sup>52</sup> Some at the time accepted Israel's immediacy claim, if not its necessity claim, and some authors have argued that the nature of nuclear weapons, namely their enormous destructive potential, makes a nuclear attack imminent where one with conventional weapons would not be. Greenwood explains,

Where the threat is an attack by weapons of mass destruction, the risk imposed upon a State by waiting until that attack actually takes place compounded by the impossibility for that State to afford its population any effective protection once the attack has been launched, mean that such an attack can reasonably be treated as imminent in circumstances where an attack by conventional means would not be so regarded.<sup>53</sup>

There is less willingness to ask a state to absorb a nuclear attack than to absorb a conventional one.

When a nuclear developing state would pose an "immediate" threat depends on whether the threat is defined as possession of nuclear weapons or possession of enriched nuclear material that could be passed to terrorists. In the Iraqi case, the time between the Israeli attack and Iraqi production of quantities of enriched nuclear material sufficient for a dirty bomb would have been shorter than the horizon for the actual threat posed by

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<sup>51</sup> Estimates of the actual time necessary for Iraq to produce a nuclear bomb ranged from one year to several years. McCormack, *supra* note 7, at 104-05.

<sup>52</sup> *Id.*, at 105 (referencing Israeli government claims that bombing the reactor after it was operational would have released radioactive material that would have contaminated Baghdad). The veracity of the Israeli claim that bombing the reactor at a later time would have released radioactive contamination is disputed. *See id.* at 301; Matt S. Nydell, Note, *Tensions Between International Law and Strategic Security: Implications of Israel's Preemptive Raid on Iraq's Nuclear Reactor*, 24 VA. J. INT'L L. 459, 482 n.121 (1984).

<sup>53</sup> Greenwood, *supra* note 18, at 16.

Iraq—production of a nuclear bomb—because Iraq had to produce not just the nuclear material but also a nuclear-capable missile system.<sup>54</sup> In deciding whether a state poses an immediate threat of use of weapons itself, analysts should determine whether the nuclear developing state already possesses weapons systems capable of carrying a nuclear warhead or whether such systems are being developed and how long the development process will last. If the threat is viewed as distribution of nuclear material to terrorists, then the threshold for immediacy would be much earlier than that for delivery via an advanced weapons system. Factors to consider would include existing ties between the state and terrorist groups, suggesting an extant and sympathetic network that could be used to pass the materials, and concurrence of enemies between existing terrorist groups and the nuclear developing state, which would suggest a shared motivation and target for a “dirty bomb” attack.

In Iran, if the threat is possession of nuclear *weapons*, then the horizon for threat development is longer because Iran does not yet possess delivery systems for nuclear weapons, though it is likely developing them.<sup>55</sup> However, if the threat is mere possession of highly enriched nuclear materials because such materials could be delivered to terrorists for a “dirty bomb,” then the threat is more immediate. Israeli sources estimated since at least September 2005 that Iran would possess the knowledge to construct a

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<sup>54</sup> McCormack, *supra* note 7, at 105.

<sup>55</sup> Iran already possesses a style of long-range missiles, the Shahab-3, with a range of at least 800 miles. Pentagon reports state that longer-range missiles are under development in addition to X-55 cruise missiles that Iran purchased from the Ukraine in 2001. Bender, *supra* note 3, at A1. However, these missiles would need to be altered to be capable of carrying nuclear warheads. Estimates for Iranian acquisition of a nuclear weapons arsenal range from three to ten years. *See id.* (citing CIA estimates); Hersh, *supra* note 4 (quoting non-proliferation expert Robert Gallucci of Georgetown University estimating eight to ten years). Israeli sources estimate a shorter time frame of one to two years. *See* Hersh, *supra* note 4; Donald Macintyre & Rupert Cornwell, *Iran To Have Nuclear Bomb in Six Months, Says Israel*, INDEPENDENT (UK), Sept. 21, 2005.

nuclear bomb by March 2006<sup>56</sup>—an estimate proven wrong by only nine days when Iran announced on April 11 that it had enriched uranium on April 9, thus completing its knowledge of the nuclear fuel cycle.<sup>57</sup> Assuming that Iran is attempting to produce a nuclear weapon, or more credibly, highly enriched nuclear material, experts predict that Iran is years away from acquisition.<sup>58</sup> A timeframe of “years” does not qualify as an “imminent” threat. Webster’s *Caroline* doctrine requires “no moment for deliberation”—hardly the case with likely more than a year before Iran produces even highly enriched nuclear material. Even conceding Greenwood’s point that nuclear threats “can reasonably be treated as imminent in circumstances where an attack by conventional means would not be so regarded,”<sup>59</sup> a year leaves time for deliberation and continued diplomatic efforts.<sup>60</sup> The immediacy of the threat posed by Iran is intimately tied to the certainty prong of the necessity analysis: there is uncertainty as to the existence of the threat, both whether Iran is producing nuclear weapons and whether it would use or distribute them. Thus, combined with the minimum year-long delay until Iran produces highly enriched nuclear material, the immediacy requirement for self-defense cannot be satisfied.

### Proportionality

Proportionality presents a further challenge to evaluation of the legality and lawfulness of a preemptive strike against nuclear facilities. Proportionality requires that

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<sup>56</sup> Macintyre & Cornwell, *supra* note 56.

<sup>57</sup> See, e.g., Nazila Fathi & Christine Hauser, *Iran Marks Step in Nuclear Development*, N.Y. TIMES, Apr. 11, 2006.

<sup>58</sup> See, e.g., David E. Sanger & Eric Schmitt, *At the White House, Engaging Iran With Words Over Action*, N.Y. TIMES, Apr. 12, 2006, at A8; *supra* note 56.

<sup>59</sup> Greenwood, *supra* note 18, at 16.

<sup>60</sup> A similar argument was made with regard to Iraq at the time of the Israeli strike against Osiraq. See Nydell, *supra* note 53, at 483. *But see* Beth Polebaum, Note, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U. L. REV. 187, 222-23 (1984)(arguing that Israel met the imminence requirement because it acted at the last possible moment for minimizing the loss of life).

the amount of force used in self-defense be proportionate to the harm threatened.<sup>61</sup> Opponents of anticipatory and preemptive self-defense argue that self-defense exercised before an attack occurs can never be properly proportional because the state does not know the damage it would have suffered if it had been attacked.<sup>62</sup> Ian Brownlie writes, “In the great majority of cases to commit a state to an actual conflict when there is only circumstantial evidence of impending attack would be to act in a manner which disregarded the requirement of proportionality.”<sup>63</sup> When acting preemptively—even further removed from objective evidence of an armed attack than anticipatory action—a state can only estimate the magnitude of harm it would have suffered, and thus can only estimate the appropriate amount of damage to inflict.

However, by a less rigid measure, proportionality can be measured as the least amount of force required to remove the threat. For example, some have argued that Israel’s strike on Osiraq did meet the requirement of proportionality.<sup>64</sup> Assuming that an Iraqi nuclear program did pose a significant threat to Israel, then Israel met the proportionality requirement by entering Iraqi air space for the sole purpose of destroying the reactor, targeting only the reactor, striking the reactor on a Sunday afternoon when the fewest people were likely to be present, and leaving Iraqi air space immediately after the strike.<sup>65</sup> The Israeli strike on Osiraq suggests general criteria for proportionality including: 1) efforts to minimize casualties, 2) demonstrated purity of intention regarding destruction of the nuclear facilities, without the unnecessary destruction of unrelated

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<sup>61</sup> Bowett, *supra* note 10, at 269.

<sup>62</sup> See, e.g., Brownlie, *supra* note 9, at 259.

<sup>63</sup> *Id.*

<sup>64</sup> McCormack, *supra* note 7, at 292, 301-02.

<sup>65</sup> *Id.* at 109.

facilities, even if centers of state power, and 3) absence of direct efforts to destroy or destabilize the state's ruling government.

If the Iranian nuclear program poses a threat of a nuclear strike or “dirty bomb” terrorist attack to Israel or the United States, then perhaps destruction of Iranian nuclear facilities would be proportional if conducted in a discrete manner like the Osiraq attack. But an attack on Iran would not be as simple as the one on Iraq because Iran learned from Iraq's Osiraq experience. Iran has dispersed its nuclear program throughout multiple facilities, some of which are ensconced deep underground.<sup>66</sup> Therefore to have the same devastating effect as the attack on Osiraq, an attack on Iran would have to be much larger, targeting multiple sites and using more powerful bombs to destroy them.<sup>67</sup> The civilian casualties at the multiple facilities could be very high, and there would still be a good chance that the attacking state would not even have identified, much less destroyed, all the nuclear sites.<sup>68</sup> Hence an attack of a large magnitude may not even be sufficient to remove the threat of nuclear development. Additionally, if the only threat Iranian nuclear development poses is that Iran will in the end *possess* nuclear weapons, but not use them, then an attack causing any loss of life may not be proportionate.

## II. Additional Arguments for the Legality of the Osiraq Strike

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<sup>66</sup> See Peter Baker, et al., *U.S. Is Studying Military Strike Options on Iran; Any Mix of Tact, Threats Alarms Critics*, WASH. POST, Apr. 9, 2005, at A01; Hersh, *supra* note 4.

<sup>67</sup> Recent reports have noted that the U.S. administration has two contingency plans, one for a strike against key nuclear facilities such as those at Natanz and Isfahan, and one for a broader strike that would target not just nuclear facilities but also Iranian intelligence headquarters and the Revolutionary Guard. Baker, et al., *supra* note 67, at A01. Reports have also speculated that the United States is considering using tactical nuclear weapons to attack sites, particularly Natanz, that are known or suspected to be reinforced and underground. Hersh, *supra* note 4.

<sup>68</sup> Baker, et al., *supra* note 67, at A01 (citing a senior administration official).

Outside of the self-defense framework, several other arguments have been offered for the legality of the Israeli attack on Osiraq, and these arguments can be evaluated with regard to a preemptive strike generally and a strike on Iranian facilities specifically.

Anthony D'Amato has argued that the Israeli strike on Osiraq was legal because Israel was acting as a proxy for the international community, which was unable to carry out the action itself.<sup>69</sup> D'Amato provides four criteria that, in his opinion, legalize a preemptive strike:

- (1) The preemptive strike has to be against a nuclear weapons facility, and not against any other kind of weaponry;
- (2) The target state must be a rogue state in the sense that it is unstable and is likely to use its nuclear weapons for international blackmail and aggrandizement;
- (3) The preemptive strike must be limited to the nuclear facility target and must be carried out with the least possible loss of life; and
- (4) The international community must be de facto disabled from carrying out the strike itself, thus implicitly authorizing an attack state to act as proxy for the international community.<sup>70</sup>

Under this framework, D'Amato would likely approve a strike against Iranian nuclear facilities.

However, there are several problems with D'Amato's argument stemming from the fact that he ignores the requirements of self-defense. First, D'Amato fails to account for the necessity requirement. He appears to approve a preemptive strike even if there is uncertainty as to whether the state would employ its nuclear weapons in military combat; he merely says that the state must be "likely to use its nuclear weapons for international blackmail and aggrandizement," not even use them in the sense of employ them as

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<sup>69</sup> Anthony D'Amato, *Open Forum: Israel's Strike Against the Osiraq Reactor: A Retrospective*, 10 TEMP. INT'L AND COMP. L.J. 259, 262-63 (1996).

<sup>70</sup> *Id.*

weapons.<sup>71</sup> Second, D'Amato ignores the immediacy requirement. His four-part test for determining the legality of a strike does not specify that the threat from the nuclear developing state must be imminent. His first criterion does not limit an attack on a nuclear weapons facility to a facility that is even completely constructed or nearly operational. D'Amato explicitly claims that the strike would be preemptive, suggesting that he would be willing to accept a high level of uncertainty about the state's intentions. Though D'Amato does identify a salient problem with the international system, namely the frequent inefficacy of the U.N. Security Council, the remedy he proposes exceeds customary international law's boundaries for the legitimate use of force. Modification of D'Amato's criteria to include the necessity and immediacy requirements would bring his proposal more into line with traditional self-defense analyses.

Davis Brown has argued that the attack on Osiraq was legal as a remedy for an injury to Israel. Treating the NPT essentially like a contract, Brown argues, "When a State breaches an obligation, and that breach results in an injury, the injured party has the right to a remedy from the State that breached the obligation."<sup>72</sup> Brown claims, "[T]he injury to Israel was in subjecting it to the intolerable situation of an indefinitely high alert, putting Israel at a significant tactical disadvantage if it did not strike on its own terms."<sup>73</sup> Though Iraq's violations of the NPT were not a general *casus belli*, Brown argues that because Iraq had threatened to use force against Israel, Iraqi nuclear development justified Israel in attacking Iraq.<sup>74</sup> He writes, "The injury to Israel [of Iraqi nuclear

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<sup>71</sup> *Id.*

<sup>72</sup> Davis Brown, *Enforcing Arms Control Agreements by Military Force: Iraq and the 800-Pound Gorilla*, 26 HASTINGS INT'L & COMP. L. REV. 159, 167 (2003).

<sup>73</sup> *Id.* at 181.

<sup>74</sup> *Id.* ("In the absence of a threat or use of force, the appropriate and proportional remedy for development of nuclear weapons in violation of the NPT is for other States to suspend their obligations to Iraq under the NPT, e.g. by suspending any programs to supply equipment, technology, or materials to Iraq.").

development] was the real and substantial reduction of its life expectancy to a few years. Such an injury warranted the use of force as an appropriate remedy.”<sup>75</sup>

Brown’s argument has serious flaws that make it unpersuasive in the Iraqi and Iranian contexts. Perhaps most importantly, Israel is not a party to the NPT, and thus any violation by Iraq or Iran could not violate Israel’s rights as a party.<sup>76</sup> Additionally, Brown improperly conflates remedies under the NPT with the right to self-defense. Forceful remedies, or reprisals, are illegal under international law, and thus cannot be an appropriate “remedy” to a threat of force.<sup>77</sup> The only justification under the current international system for a unilateral use of force is self-defense,<sup>78</sup> the prerequisite for which is an armed attack or at least an imminent armed attack—significantly more than a mere “injury.”<sup>79</sup> Brown’s proposal would defeat the purpose of the whole Charter regime, namely controlling (and thereby reducing) uses of force, especially by eliminating forceful reprisals outside of those authorized by the U.N. Security Council. States that feel “injured” and threatened by Iranian violations of the NPT must function within the self-defense or U.N. frameworks.

Yoram Dinstein has argued that the Israeli strike on Osiraq was legal as “another round of hostilities in an on-going armed conflict.”<sup>80</sup> Dinstein contextualizes Iraqi missiles fired against Israel during the first Gulf War as part of the same on-going conflict as the Osiraq strike. He writes, “The Iraqi missile offensive against Israel must be observed in the legal context . . . of the war between Iraq and Israel which started in 1948

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<sup>75</sup> *Id.* at 184.

<sup>76</sup> For an explanation of parties and major nuclear-capable non-parties, see *Non-Proliferation Treaty Explained*, BBC, Sept. 20, 2004, <http://news.bbc.co.uk/1/hi/world/asia-pacific/2645379.stm>.

<sup>77</sup> Bowett, *supra* note 10, at 1.

<sup>78</sup> U.N. Charter art. 2, para. 4.

<sup>79</sup> *Id.* art. 51.

<sup>80</sup> Dinstein, *supra* note 19, at 45.

yet continues to this very day. That war is still in progress, unhindered by its inordinate prolongation since 1948, for hostilities flare up intermittently.”<sup>81</sup> Dinstein’s argument has been rejected on the legal merits by those who argue that even the existence of a formal state of war does not justify attacks on a state in the absence of an imminent threat.<sup>82</sup> This rejection of Dinstein’s argument may be persuasive in instances where, though a formal state of war exists, actual hostilities have been suspended for a significant period of time and concluded with some sort of ceasefire. In such an instance, Dinstein’s claim that a formal state of war justifies a preemptive attack would be unpersuasive because a state may not use the existence of a formal state of war as a pretense for attacking the opposing state, absent some provocation by the opposing state that demonstrates the state’s intent to recommence hostilities.<sup>83</sup> Dinstein’s argument would, however, be completely correct if the attacking state and the attacked state were in a more commonly recognized state of war, that is an ongoing armed conflict that includes current military hostilities. In such an instance, an attack on a nuclear development facility would be considered a lawful attack on a military target. But D’Amato’s argument does not apply to the Iranian situation where, unlike Iraq, Iran is not in a formal state of war with Israel and has not sent troops into Israel in past wars as Iraq did in 1948, 1967, and 1973. Iran is not in open hostilities with any state that would justify that state in attacking its nuclear facilities. Thus a preemptive strike against Iran by Israel or any other state could not be justified as part of an ongoing war.

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<sup>81</sup> *Id.*

<sup>82</sup> See D’Amato, *supra* note 70, at 261-62; McCormack, *supra* note 7, at 291 (citing H. Lauterpacht, *The Legal Irrelevance of the “State of War,”* 62 PROC. OF THE AM. SOC’Y OF INT’L L. 58, 62 (1968)).

<sup>83</sup> This is not to suggest that in a “hot” conflict where hostilities are ongoing, as was arguably the case between Iraq and Israel in 1981 given that Iraq had periodically participated in attacks on Israel, as in the 1973 war, a state must wait to be attacked, respond, and then wait for the next attack.

### III. An (Im)possible Legal Alternative

Authorization of forceful action by the U.N. Security Council provides a legal, but rarely effectuated, remedy for a threat to the peace not reaching the level of an armed attack. The collective security regime of the U.N. Charter provides a means to avoid the criteria of necessity and imminence, though not proportionality, in self-defense evaluations, because, “The scope for pre-emptive action under the collective security regime is . . . more extensive than under the right of self-defense.”<sup>84</sup> Greenwood explains,

[T]he historical background against which the Charter was drafted—in particular, the importance of the lack of pre-emptive action against Hitler in the 1930s in contributing to the causes of World War Two—strongly suggests that the pre-emptive power of the Security Council was intended to be much more far-reaching than the power of individual States to take action by way of self-defense against threats of armed attack.<sup>85</sup>

The Charter drafters envisioned an effective Security Council that would act with the concert of the permanent members to police threats to peace and security, ideally acting with its own forces, but if not then through authorizing forces of member states.<sup>86</sup> With the assumption of an effective Security Council—a hope stymied during the Cold War and even afterwards—the U.N. Charter continues to maintain that U.N. Security Council authorization and self-defense are the only two exceptions to Art. 2(4)’s prohibition on the use of force. As Greenwood explains and apparently endorses,

[T]he power to take action under the collective security regime can be conferred only by a decision of the Security Council. No state is entrusted under the Charter with the power to take military action to preserve or restore international peace and security without such a decision. In the

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<sup>84</sup> Greenwood, *supra* note 18, at 37.

<sup>85</sup> *Id.* at 19.

<sup>86</sup> U.N. Charter arts. 42-45.

absence of such a decision, only the more limited power to act in self-defense—individual or collective—remains.<sup>87</sup>

In fact, it has been suggested that “if the five permanent members of the Security Council adopted a common declaratory policy in support of preemptive attacks, it might deter potential proliferators from even attempting to construct plutonium production reactors, reprocessing plants, or uranium enrichment facilities.”<sup>88</sup> The enunciation by the Security Council of a policy of approving preemptive attacks on illegal nuclear production facilities might increase public order by stabilizing expectations, that is, by making the consequences of illegal nuclear development clear to non-nuclear states.<sup>89</sup>

However, the Security Council remains ineffective. Though not intractably deadlocked by Cold War ideological divisions, the Security Council members are still generally more concerned with their own self-interest than with fulfilling the goal of the organization—the maintenance of international peace and security. The Security Council immobilization before the U.S. invasion of Iraq demonstrates that the members pursue their own self-interest. However dubious and ultimately incorrect U.S. intelligence on Iraqi weapons programs was, French and Russian economic interests in Iraq—as revealed after the fact by the report of the Oil-for-Food Independent Inquiry Committee—presented another major roadblock to achieving a second Security Council resolution authorizing action against Iraq for its violations of other Security Council resolutions.<sup>90</sup>

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<sup>87</sup> Greenwood, *supra* note 18, at 20.

<sup>88</sup> David Sloss, *Is International Law Relevant to Arms Control?: Forcible Arms Control: Preemptive Attacks on Nuclear Facilities*, 4 CHI. J. INT'L L. 39, 41 (2003).

<sup>89</sup> W. Michael Reisman, Editorial Comment, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT'L L. 82, 90 (Jan. 2003) (“Not all doctrines conform with existing international law, but doctrines do contribute to minimum order by stabilizing the expectations of all actors as to the consequences of certain types of action and thus aid in avoiding adventures and mistakes.”).

<sup>90</sup> The report revealed that Russia and France were the largest beneficiaries of the Oil-for-Food program and that they benefited from special allocations by the Iraqi regime for their pro-Iraqi policies. Independent Inquiry Committee into the United Nations Oil-for-Food Programme, *Report on Programme Manipulation*,

With Iran's rejection of European offers of negotiation and financial assistance, it seems that Russia and China—both of which have large investments in Iran<sup>91</sup>—may pursue their national interests rather than the U.N. interest in maintaining international security by blocking even non-forceful decisive action on Iran, namely sanctions. The comparatively euphoric internationalism that immediately followed World War II faded from memory in the Cold War and has not been recaptured for the purposes of concerted action in the 1990s and into the current decade. If the Security Council acted to authorize Israel, the United States, or some group of states to take action against Iran, then the use of force would be legal, avoiding the problems entailed by claims of self-defense. But authorization will not be forthcoming.

#### **IV. Criteria for Lawfulness**

Moving beyond the narrow criteria for legality under international texts, a determination of the *lawfulness* of a preemptive strike on nuclear facilities must account for broader and longer-term considerations. Such an accounting is necessary because a strike may be legal based on an evaluation of the texts, but may be unlawful when factors such as the environmental harms and the long-term incitement to violence a strike could cause are also evaluated. On the other hand, a preemptive strike may be illegal under a strict reading of the international legal texts regarding self-defense, but additional considerations may render it lawful, or justified, in furtherance of world public order. For

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9, Oct. 27, 2005, available at <http://www.iic-offp.org/story27oct05.htm>. The report states, "Russian companies contracted for approximately \$19.3 billion worth of oil from Iraq under the Programme, which amounted to about 30 percent of all oil sales—by far the largest portion among all participating countries." *Id.* at 22. The Iraqi government also favored French companies because France supported lifting the sanctions on Iraq, and French companies purchased the largest amount of oil (\$4.4 billion) after Russian companies. *Id.* at 47. China was also a major purchaser of Iraqi oil. *Id.* at 10 chart A.

<sup>91</sup> See *supra* note 37.

example, though Anthony D’Amato argues that the Osiraq strike was legal, he also does self-proclaimed “Monday morning quarterbacking” to argue that the strike was lawful (justified) given Iraq’s later actions, such as invading Kuwait and lobbing missiles at Israel—both of which would have been far more destructive and nearly impossible to defend against if Iraq had had nuclear weapons.<sup>92</sup> The remainder of this section proposes five criteria—in addition to the self-defense analysis discussed in the last section—that must be analyzed *ex ante* to determine if a preemptive strike on nuclear facilities would be lawful.

### 1. Balance of Power

Preemptive action against nuclear facilities has been justified as a protection of the status quo. Thomas Graham, Jr., writes of the Osiraq attack, “[T]he Israeli response was aimed at protecting the status quo, yet there still was not a violation of a legal obligation, nor had there been an armed attack.”<sup>93</sup> He argues that the attack was *justified* because the threat to Israel was great, the response was necessary and proportionate, and no diplomatic solution was possible.<sup>94</sup> Protection of the status quo or balance of power was also a U.S. justification for preventing the installation of Soviet missiles in Cuba during the Cuban Missile Crisis. A change in the status quo—such as placement of missiles or acquisition of nuclear materials—is not equivalent to an armed attack for the

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<sup>92</sup> D’Amato, *supra* note 70, at 259. See also Thomas Graham, Jr., *Is International Law Relevant to Arms Control?: National Self-Defense, International Law, and Weapons of Mass Destruction*, 4 CHI. J. INT’L L. 1, 11 (2003); Charles Pierson, *Preemptive Self-Defense in an Age of Weapons of Mass Destruction: Operation Iraqi Freedom*, 33 DENV. J. INT’L L. & POL’Y 150, 168 (2004) (“With the benefit of hindsight the Security Council very probably would reach a different conclusion. Iraq’s post-Osiraq conduct - its instigation of the Iran-Iraq war and invasion of Kuwait, its violation of numerous Security Council resolutions, and its use of poison gas against the Iraqi Kurds - have forced a reevaluation of the 1981 raid. Could Saddam have been ousted from Kuwait if Israel had not prevented Saddam from developing nuclear weapons?”).

<sup>93</sup> Graham, Jr., *supra* note 93, at 11.

<sup>94</sup> *Id.* at 11-12.

purposes of self-defense under the U.N. Charter. But conclusions about the legality of the Cuban Missile Crisis have been mixed,<sup>95</sup> suggesting that even if a change in the status quo is not sufficient to *legalize* a use of force, it may be sufficient to *justify* a use of force.

The threat to the status quo and balance of power comes not just from the acquisition by a new, and potentially hostile, state of nuclear material or weapons, but also from the possibility of sparking a nuclear arms race. The NPT regime has been fairly successful throughout recent decades in restricting nuclear development, as evidenced by the small number of states that are currently nuclear-capable. Large regions of the world have remained free of nuclear weapons, including Central and South America, Southeast Asia, Africa, and the Middle East, with the exception of Israel, which is an undeclared nuclear power.<sup>96</sup> The possibility of a nuclear arms race in the Middle East appears particularly threatening because of continued hostility among states and against Israel and the relatively high proportion of Middle Eastern governments that are complicit with terrorist groups, or at least have large populations that are sympathetic to terrorist groups.

In the Middle Eastern milieu, Iranian acquisition of nuclear weapons would be problematic. Iranian President Mahmoud Ahmadinejad has repeatedly made belligerent remarks about Israel, suggesting that the state should be relocated to Europe and that Israel “must be wiped off the map.”<sup>97</sup> It is possible that these remarks could be regarded

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<sup>95</sup> Compare Quincy Wright, *The Cuban Quarantine*, 57 AM. J. INT’L L. 546 (1963)(arguing that the U.S. blockade of Cuba violated international law), with Leonard C. Meeker, *Defensive Quarantine and the Law*, 57 AM. J. INT’L L. 515 (1963)(arguing that the United States acted legally) and Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT’L L. 597 (1963)(arguing that the blockade was legal).

<sup>96</sup> See generally Captain Mark E. Rosen, JAGC, U.S. Navy, *Nuclear Weapons Free Zones: Time for a Fresh Look*, 8 DUKE J. COMP. & INT’L L. 29, 42 (1997); Walter Pincus, *Push for Nuclear-Free Middle East Resurfaces; Arab Nations Seek Answers About Israel*, WASH. POST, Mar. 6, 2005, at A24.

<sup>97</sup> See, e.g., Butcher, *supra* note 5.

as the functional equivalent of the Iraqi posture toward Israel in the early 1980s, but Iraq by 1981 had already provoked one war with a neighbor (Iran) and had sent troops to invade Israel three times. Iran has been bellicose in words, but so far not in military actions. The Iranian president's belligerent statements may be rhetoric designed to build his domestic support, rather than actual threats against Israel.<sup>98</sup> More generally, in addition to the possibility of Iranian hostility toward Israel, the balance of power in the Middle East would be altered if Iran were to acquire nuclear weapons. Aside from the power balance between Israel and Iran, other states would lose power relative to a nuclear capable Iran. Specifically, Afghanistan and Sunni areas of Iraq would be put in fear of Iranian nuclear attack, and Sunni states would feel an acute loss of power with respect to Shia Iran. Allowing one change in the status quo could provoke a slippery slope toward a Middle East nuclear arms race, which would in turn be a large change to the international status quo. But concern about maintaining the balance of power must be weighed against other lawfulness criteria.

## 2. Feasibility of Removing the Threat

If maintaining the balance of power by preventing another state from becoming nuclear-capable is deemed desirable, state leaders then must determine whether preventing nuclear development is possible and at what cost. In the case of Iraq, the Israeli strike on Osiraq was a comparatively easy, swift, and non-destructive operation. The Iraqi nuclear program was concentrated at one, above-ground, unreinforced site that

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<sup>98</sup> Various commentators have suggested that President Ahmadinejad is using the nuclear issue to bolster his domestic support. See, e.g., Bruce Anderson, *There Is Only One Thing To Do About Iran*, THE INDEPENDENT (London), Feb. 20, 2006, at 33; Ilan Berman, Op-Ed., *Pre-Emptying Iran's Ambitions; Limited Strike Could Prove Self-Defeating*, WASH. TIMES, Mar. 3, 2006, at A23.

was destroyed in one attack. As discussed above with regard to proportionality, in the aftermath of Osiraq, states diversified and scattered their nuclear development operations, making them more difficult to bomb, especially in a single operation.<sup>99</sup> A state contemplating preemptive action would need to assess what level of military force it was prepared to commit to the operation. If bombing did not completely destroy or disable the attacked state's nuclear program, would the attacking state be prepared to commit ground troops for an invasion of the country to totally disarm it? The attacking state would need to prepare for a potentially long-term presence in the attacked country to battle its way into the state, disarm the state, and also reconstruct the invaded state. The attacking state would need a frank *ex ante* assessment not just of its military capability but also of its finances, political and popular will, and allied support. The state or states would also have to plan for governance of the attacked state after an invasion; in the long-run, the power vacuum following an invasion and toppling of an existing government could prove more dangerous than the status quo semi-hostile, but stable, government. The dangers of a domestic insurgency have been evidenced in Iraq, where domestic Iraqi and international terrorist groups have attacked U.S. coalition troops since soon after the U.S. invasion.<sup>100</sup> An assessment of the feasibility of removing the nuclear threat could not be accurately made if only an Osiraq-like scenario was envisioned. A state contemplating a preemptive strike must ensure that the threat posed by the nuclear development is sufficient to justify the worst-case scenario—invasion, disarmament, and long-term

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<sup>99</sup> See *supra* note 68 and accompanying text.

<sup>100</sup> See, e.g., Thomas E. Ricks, *In Iraq, Military Forgot the Lessons of Vietnam; Early Missteps by U.S. Left Troops Unprepared for Guerilla Warfare*, WASH. POST, July 23, 2006, at A1; Ellen Knickmeyer, *After Zarqawi, No Clear Path in Weary Iraq; Difficult Questions Surround Legacy of Insurgent Leader*, WASH. POST, June 9, 2006, at A1.

reconstruction—and that it has sufficient resources and will to implement a long-term and more complicated disarmament plan.

Beyond the calculus of the attacked state’s ability to respond to an attack militarily, a state considering a preemptive strike must also incorporate into its utility calculus non-military retaliation that the attacked state could undertake. In an era of global economic interdependence, economic sanctions implemented by the attacked state could be extremely painful to an attacking state’s domestic well-being. Additionally, an attacked state could support low-level terrorist violence against the attacking state within the attacking state or against its citizens abroad.

An attack on Iran would not be as simple as the one on Iraq because Iran responded to Iraq’s Osiraq experience by dispersing its nuclear program throughout multiple facilities, some of which are reinforced and underground.<sup>101</sup> Therefore to have the same devastating effect as the attack on Osiraq, an attack on Iran would have to be much larger, targeting multiple sites and using more powerful bombs to destroy them.<sup>102</sup> The civilian casualties at the multiple facilities could be very high, and there would still be a high probability that the attacking state would not have identified, much less destroyed, all the nuclear sites.<sup>103</sup> An invasion of Iran would be extremely difficult as it is a large state with a well-trained military, armed with domestically developed weapons, that appears loyal to the state’s political and religious leadership. A large-scale bombing operation may not even be sufficient to remove the threat of nuclear development, and an invasion would be extremely difficult for the United States to mount, even with allied

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<sup>101</sup> See Baker, et al., *supra* note 67, at A01; Hersh, *supra* note 4.

<sup>102</sup> See *supra* note 68 and accompanying text.

<sup>103</sup> Baker, et al., *supra* note 67, at A01 (citing a senior administration official).

support.<sup>104</sup> Were the United States to contemplate an invasion, it would need to assess the detrimental effects its additional deployments of troops and reallocation of material resources would have on the security situations in Iraq and Afghanistan. The effect would undoubtedly be negative. Additionally, Iran is in a powerful position to impose economic hardship on states that might attack it because of its control over oil. Iran could cause an oil price spike by blocking access of oil into the Indian Ocean through the Strait of Hormuz.<sup>105</sup> Iran could also threaten the United States by fomenting violence in Iraq via Shia militias.<sup>106</sup> In sum, the costs to the United States of a strike on Iran would be high, and Iran could drive them higher by employing its economic clout and influence over terrorist groups throughout the Middle East.

### 3. Diplomatic Power and Hearts and Minds

A state that carries out a preemptive strike could suffer direct and indirect costs as a result of its actions. An attacking state could suffer a direct cost if it lost diplomatic and persuasive power, and it could suffer an indirect cost if the attacked state's prestige were to increase as a result of the strike. In assessing the potential direct costs, a state considering unilateral preemptive action should carefully consider why such action would be unilateral. Specifically, if the U.N. Security Council and other states are failing to address what the potential attacking state perceives to be a threatening situation, the state should assess whether its calculation of the threat posed by the nuclear development is

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<sup>104</sup> See *supra* note 68 and accompanying text.

<sup>105</sup> *ECONOMIST*, *supra* note 30; Hersh, *supra* note 4. Almost ninety percent of oil exported from the Persian Gulf transits the Strait of Hormuz via oil tanker. Energy Information Agency, Dep't. of Energy, Persian Gulf Oil and Gas Exports Fact Sheet (Sept. 2004), available at <http://www.eia.doe.gov/emeu/cabs/pgulf.html>.

<sup>106</sup> Hersh, *supra* note 4.

accurate. It may be that the U.N. Security Council is prevented from acting by the veto or threat of a veto by one of the permanent members, but action to disarm the nuclear developing state is otherwise widely supported. If Security Council action is prevented only by the veto threat of one state, then it is likely that the attacking state's threat perception is accurate. However, if the proposed preemptive action is generally unsupported, not just blocked by one veto, then a state considering unilateral preemptive action must account for the costs of the preemptive strike and its aftermath (including a potential invasion) to its own diplomatic and persuasive power worldwide.<sup>107</sup> If the preemptive action would be unpopular, then the attacking state could be undermining world order by decreasing its own ability to create alliances to address other global threats. The attacking state's decreased prestige could also create greater enmity against the state that could spur momentum and willingness of groups to carry out terrorist attacks against the attacking state at a further cost to world order.

In addition to the direct diplomatic cost to the attacking state, the attacking state could suffer an indirect cost if the attacked state is able to claim victimhood at the hands of the attacking state and thereby increase its own regional or worldwide standing. A preemptive attack might strengthen the domestic popularity of the government that is targeted by giving it an external enemy against which to mobilize support.<sup>108</sup> An attack might also strengthen the attacked government's position regionally by allowing it to claim that it is the frontline of defense against a threat to an entire region.<sup>109</sup>

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<sup>107</sup> What I have termed persuasive power is akin to "soft power" identified by Joseph Nye and Robert Keohane. ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE* 220-27 (3d ed. 2001); JOSEPH S. NYE, JR., *THE PARADOX OF AMERICAN POWER: WHY THE WORLD'S ONLY SUPERPOWER CAN'T GO IT ALONE* 8 (2002).

<sup>108</sup> See *supra* note 29.

<sup>109</sup> Within the Middle East, Gamel Abdel Nasser successfully employed a tactic of this sort in the 1960s. Nasser claimed the Egypt was the frontline of combat against Israel and used this claim to build up Egypt's

The United States has encountered huge diplomatic costs because of its invasion of Iraq and has spent the past several years trying to rebuild its diplomatic and persuasive capital around the world. At the present time, a preemptive strike against Iran would cause the United States to suffer further diplomatic and prestige losses. China and Russia have independent reasons to oppose an attack on Iran,<sup>110</sup> but European leaders, though conceding that Iranian nuclear development is a threat, do not believe that the diplomatic options for negotiation and settlement with Iran have been exhausted. Thus any preemptive action by the United States would undoubtedly cause a rift with Western Europe, in addition to further confirming perceptions throughout the Middle East of the United States as imperialistic. Similar to the situation that has developed in Iraq, any toppling of the Iranian government by a foreign force—though unlikely to succeed anyway—would be very likely to result in terrorist violence via Hezbollah and domestic Iranian groups that would develop. The Iranian government already appears to be using the issue of nuclear development as a domestic rallying cry to build support for itself,<sup>111</sup> and would undoubtedly mobilize even more support in opposition to an attack on its nuclear facilities.<sup>112</sup> The government might also be able to transform an attack on its facilities into broader regional support at least from Middle Eastern publics, if not from their governments.<sup>113</sup> Thus, an attack on Iran could be costly to the United States not only because of the damage done to its own reputation, but due to the possibility that the Iranian regime's reputation in the region could be enhanced.

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position as the leader of the Arab world. *See* IAN J. BICKERTON & CARLA L. KLAUSNER, A CONCISE HISTORY OF THE ARAB-ISRAELI CONFLICT 132, 135-36 (4th ed. 2002).

<sup>110</sup> *See supra* note 37.

<sup>111</sup> *See supra* note 99.

<sup>112</sup> Harvard security expert Ashton B. Carter has explained, "In Tehran, the threat of military action is double-edged . . . It may scare the leadership, but it could also cause people to rally around the leadership." Sanger & Schmitt, *supra* note 59.

<sup>113</sup> *See generally* Baker, et al., *supra* note 67; Sanger & Schmitt, *supra* note 59.

#### 4. Environmental Effects and Harm to Civilians

A further factor that must be weighed when considering a preemptive strike on nuclear facilities is the environmental damage such a strike would engender. Depending on the stage of development of the reactor, namely whether it is operational or not and whether nuclear material has been introduced into the site, bombing a reactor has the potential to cause nuclear fallout that would be released into the atmosphere.<sup>114</sup> In bombing Osiraq, Israel claimed that it waited until the last opportunity before the facility was operational and bombing could have caused nuclear fallout that would have harmed civilians.<sup>115</sup> Commentators debate the exact point at which bombing a reactor would cause nuclear fallout.<sup>116</sup> It is likely that the potential for human and environmental damage from fallout would depend on the specific design of the reactor and its location, namely proximity to water sources and civilian populated areas.

In addition to the fallout from bombing the reactor itself, more widespread bombing of installations, such as air defenses, that might be necessary to effect a preemptive strike on the nuclear reactor could cause further environmental damage and civilian casualties. If ancillary bombing were to stretch even further to installations such as power stations or industrial plants that supply component parts for nuclear reactors, the potential for both direct and indirect environmental damage would increase. For example, if large sectors of the population were left without electricity, water, and basic social

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<sup>114</sup> For an overview of specific times at which various types of nuclear facilities would cause the release of nuclear material if bombed, see Sloss, *supra* note 89.

<sup>115</sup> See *supra* note 53.

<sup>116</sup> See Nydell, *supra* note 53, at note 121 (overviewing various expert opinions that were promulgated soon after the Israeli raid on Osiraq).

services, then pollution of water sources could become problematic, leading to the appearance of diseases such as cholera and dysentery.<sup>117</sup>

A strike against Iranian nuclear facilities at this point would necessarily include targeting operational nuclear reactors, and therefore the potential for nuclear fallout. Additionally, leaked U.S. plans describe preparations for a possible widespread bombing campaign that would include military targets, intelligence headquarters, and government buildings.<sup>118</sup> Widespread bombing even of non-nuclear targets with non-nuclear weapons would cause environmental damage such as chemical and sewage spills and air contamination from particulate matter released from collapsed and damaged buildings. In a country as populous as Iran, the concerns described above of environmental damage and direct harm to civilians would be very problematic and could outweigh the strategic benefit of removing the potential threat of nuclear development.

##### 5. Precedent and the Effect on Legal Rules

Perhaps the most troubling consequence of a preemptive strike is the strike's potential long-term effect on the legal rules governing the use of force. It would be impossible to limit implementation of preemptive strikes to "responsible" states or to situations involving nuclear proliferation. A preemptive strike on nuclear facilities would legitimize preemption generally and inevitably lead to preemptive attacks in other, unintended and illegitimate contexts. In discussing the Bush Administration's preemption

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<sup>117</sup> For country specific information, see the website of the World Health Organization, <http://www.who.int/countries/en/>, last visited May 19, 2006.

<sup>118</sup> Baker, et al., *supra* note 67; Sanger & Schmitt, *supra* note 59.

doctrine, recently reiterated in the 2006 National Security Strategy,<sup>119</sup> Thomas Franck explains,

The new doctrine is not meant to create a world in which every nation keeps a nuclear weapon in its bedside drawer—the way 80 million Americans are said to keep pistols—with a license to shoot anyone suspected of being unfriendly. It is very unlikely that Washington is eager to have its new doctrine adopted by New Delhi and Beijing, let alone Tehran and Pyongyang. Yet, inconveniently at such moments as this, law is all about the gander's right to the goose's sauce.<sup>120</sup>

Preemption by one state—even one generally viewed as a responsible member of the world community, acting in the international community's interest—would open the door for many other states to claim that preemption is legitimate. This would in turn lead to a movement away from diplomacy and toward force as exemplified in the shift from anticipatory to preemptive to preventive self-defense.

A preemptive strike against nuclear facilities would further endanger public order by undermining the criteria by which uses of force are evaluated—necessity, immediacy, and proportionality. Action taken in advance of an armed attack is much more difficult to evaluate against the appropriate criteria than action taken in response to an armed attack or in anticipation of an armed attack. The further states move away from objectively verifiable threats—such as actuated or imminent armed attacks—as justifiable sources of self-defense rights, the more likely violence will become. Violence will increase as states feel 1) that they can escape punishment even if acting preemptively against a threat that is not fully materialized, and 2) that it may even be necessary for them to strike first

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<sup>119</sup> NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, March 2006 at 23 (“If necessary, however, under long-standing principles of self defense, we do not rule out the use of force before attacks occur, even if uncertainty remains as to the time and place of the enemy's attack. When the consequences of an attack with WMD are potentially so devastating, we cannot afford to stand idly by as grave dangers materialize. This is the principle and logic of preemption. The place of preemption in our national security strategy remains the same.”).

<sup>120</sup> Thomas M. Franck, *Preemption, Prevention and Anticipatory Self-Defense: New Law Regarding Recourse to Force?*, 27 HASTINGS INT'L & COMP. L. REV. 425, 429 (2004).

because their adversary is likely to strike preemptively as well, responding to the same incentive of inability of the international community to restrain preemptive force.<sup>121</sup>

Though a preemptive strike against nuclear facilities may appear to solve the short-term problem of a particular state becoming nuclear-capable, allowing such an instance of preemption would be extremely detrimental to world public order because it would loosen the bounds of the legal criteria employed to evaluate uses of force.

In the specific case of Iran, a preemptive attack by the United States or Israel would not even have the legitimacy granted by having the support of a majority of the international community. With the European Union favoring a diplomatic solution and offering Iran a multitude of diverse concessions to abandon its nuclear program and Russia and China strongly opposed to sanctions or military action, a state undertaking a preemptive attack against Iran could hardly be said to be acting for the world community. A preemptive strike against Iran at this point would be an aberrant action by one state or a few states acting in concert, rather than a unified action by a generally united world community, prevented from obtaining U.N. Security Council sanction only because of the veto or veto threat of a single permanent member. An unsupported preemptive strike opens the door for other states to act in similar situations, that is, when they individually claim that there is a threat requiring preemption, even if the majority of states and most of the U.N. Security Council do not agree. Already in the context of the “war on terror,” U.S. actions that have arguably legitimately pushed the boundaries of international law have been adopted by other states in more questionable circumstances. For example, Russia has used the U.S. “war on terror” rhetorical framework to characterize its military

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<sup>121</sup> See Reisman, *supra* note 90, at 89.

operations in Chechnya.<sup>122</sup> Israel also found renewed legitimacy for its “targeted killings” policy when the United States called for Osama bin Laden’s capture “dead or alive” in the aftermath of 9/11.<sup>123</sup> As much as U.S. political leaders would like to claim that the United States is entitled to special privileges in the world, other states take Franck’s “gander’s right to the goose’s sauce”<sup>124</sup> to heart and will use U.S. actions to justify their own. Emulation of U.S. or Israeli actions would be particularly dangerous in the realm of preemptive military action because the United States and Israel have offered legal rationales justifying their actions in contexts like targeted killings and the invasion of Iraq that undermine the traditional necessity, immediacy, and proportionality criteria and that are easily exportable by other states to other contexts.

## V. Alternatives to Preemptive Strikes

Absent the analysis of the many potentially unlawful aspects and consequences of preemptive strikes on nuclear facilities described above, preemptive strikes have been regarded as a fast, simple response to unwanted nuclear development. Therefore, preemptive strikes are considered as a possible response early in the process of evaluating a developing nuclear situation, as has happened recently in the Iranian case. Policymakers must exhaust non-forceful options before resorting to destructive use of the military instrument and must even re-visit non-military options before resorting to a strike that is

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<sup>122</sup> See, e.g., Michael Wines, *War on Terror Casts Chechen Conflict in a New Light*, N.Y. TIMES, Dec. 9, 2001, at 6; Howard Witt, *Terror War Has U.S. in Dubious Alliances*, CHI. TRIB., Sept. 4, 2002, at 1.

<sup>123</sup> Defense Minister Ben-Eliezer explained a targeted killing in October 2001 as part of the “war on terror without any concessions”—language pulled straight from new U.S. policy rhetoric. Arieh O’Sullivan, Herb Keinon, & Lamia Lahoud, *Israel Kills Hamas Planner of Tel Aviv Disco Bombing*, JERUSALEM POST, Oct. 15, 2001, at 1. Zalman Shoval, a foreign policy advisor to Prime Minister Sharon, said in reference to the United States, “We do the same thing they do and they do the same thing we do.” Phil Reeves, *Israel’s Targeted Killings ‘Same as War on Al’Qa’ida’*, THE INDEPENDENT (London), Oct. 17, 2001, at 2.

<sup>124</sup> Franck, *supra* note 121, at 429.

*ex ante* determined to be unlawful. Potential uses of the military instrument at levels lower than an actual strike could include force buildup in the nuclear-developing state's region to demonstrate willingness and ability to escalate to a use of force. Blockade of the nuclear-developing state presents another option. As in the Cuban Missile Crisis, a blockade could force the nuclear-developing state to back down or face military escalation. Additionally, a blockade could be tied to the economic instrument if used to prevent goods from entering and leaving the nuclear-developing state. In the purely economic realm, states or, more effectively, a group of states could impose a boycott on the nuclear-developing state's exports, institute sanctions against states and companies that do business with the nuclear-developing state, and seize the assets of the nuclear-developing state and its nationals abroad. The economic instrument encourages government to work not just with other governments, but also with the private sector to lobby companies, particularly large multinational corporations, to halt business with the nuclear-developing state and its companies. All uses of the economic instrument, like uses of the military instrument, must be targeted to influence and pressure the nuclear-developing state's decisionmakers, rather than its civilian population, to the greatest extent possible.

In addition to the U.N. Security Council forum and negotiations mentioned throughout this essay, the diplomatic instrument provides several other options for addressing a nuclear-developing state. States and groups of states can deny government leaders visas and travel rights, and diplomatic personnel can be expelled from host countries. In an extreme case, diplomatic relations may be severed, though the potential negative consequences of closing channels of communication must also be evaluated.

Many of these non-military measures are currently being implemented against Iran, though additional measures could be employed. Iranian assets in the United States were seized in response to the 1979 hostage crisis, and the United States has maintained sanctions against Iran since that time.<sup>125</sup> Recently, however, the embargo and sanctions against companies that do business with Iran have been more strictly enforced.<sup>126</sup> To increase pressure on Iranian elites, the United States can work to have similar sanctions imposed by other countries. The United States has reportedly been urging the European Union and Japan to take such steps in recent weeks.<sup>127</sup> The United States has also been pushing foreign companies to halt business with Iran voluntarily.<sup>128</sup> Similarly, though the United States and Iran have not maintained diplomatic relations since the 1970s, the United States has been pushing the European Union and other allies to expel high-ranking Iranian diplomatic staff and to limit the travel of Iranian leaders.<sup>129</sup> The most obvious retaliatory action to impose on Iran would be a boycott of its oil exports. Western Europe imports almost one-third of its Persian Gulf oil from Iran, while twelve percent of all Japanese oil imports come from Iran.<sup>130</sup> However, though the boycott would impose great costs on Iran—assuming that excess Iranian oil would not be bought by states like Russia and China—it would also impose great costs on the rest of the world in the form

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<sup>125</sup> Dafna Linzer, *U.S. Urges Financial Sanctions on Iran; White House Tries To Enlist Europe; Japan*, WASH. POST, May 29, 2006, at A1.

<sup>126</sup> David Lynch, *U.S. Using Financial Clout To Squeeze Iran; Enforcing '95 Embargo More Strictly*, USA TODAY, May 23, 2006, at 3B.

<sup>127</sup> Linzer, *supra* note 126, at A1.

<sup>128</sup> Lynch, *supra* note 127, at 3B; *see also* Elaine Shannon, with Reporting by Jim Frederick, *How To Isolate Iran*, TIME, June 19, 2006, at 20.

<sup>129</sup> European countries have purportedly been considering travel bans on Iranian officials for months. Linzer, *supra* note 126, at A1.

<sup>130</sup> Energy Information Agency, Dep't. of Energy, Persian Gulf Oil and Gas Exports Fact Sheet (Sept. 2004), *available at* <http://www.eia.doe.gov/emeu/cabs/pgulf.html>.

of higher oil prices.<sup>131</sup> Therefore, it will be difficult to convince states and their publics to bear increased costs and some level of economic hardship, though doing so could effectively pressure the Iranian leadership. Because of the increased oil prices that would result, it would also be difficult to gain support for a blockade of the Strait of Hormuz to prevent Iranian oil exports from reaching world markets. Sanctions against Iran must be more targeted than oil—Iran’s largest export. For example, sanctions could be targeted at materials utilized by the military or at communications systems used by the elites.

The same instruments that can be employed to pressure Iran can also be used to provide incentives to the state to abandon its nuclear development and reactor construction. Because the United States has long-standing sanctions against Iran, relaxing the sanctions could serve as an incentive. One proposed sanction relaxation is allowing Iran’s ailing aircraft fleet to purchase replacement parts from Boeing and U.S.-based Airbus plants.<sup>132</sup> The United States could also offer restored, though probably still limited, diplomatic relations.

A preemptive strike against Iran should not be seriously considered until non-military instruments are exhausted. Given the unlawfulness of a preemptive strike against Iranian nuclear facilities at the current time, greater effort must be expended in resolving the crisis with non-military instruments. Progress on this front has been made with the incentives package offered to Iran by the “E.U.-3”—Britain, Germany, and France—and the United States. It remains to be seen how Iran will respond.

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<sup>131</sup> Linzer, *supra* note 126, at A1.

<sup>132</sup> The United States is also offering to support Iranian membership in the World Trade Organization and to hold direct talks with Iran, which has not occurred since before the 1979 Islamic Revolution. Helene Cooper, *U.S. Is Offering Deals on Trade To Entice Iran*, N.Y. TIMES, June 6, 2006, at A1.

## **VI. Conclusion**

Nuclear proliferation is not a new challenge to the international system. However, the potential willingness of states to pass nuclear material to terrorists or for terrorist groups otherwise to obtain nuclear material from nuclear capable states is a new threat to established world order that has arisen with the formulation of terrorist groups with worldwide organizational and attack capabilities. Building on scholarship surrounding the 1981 Israeli strike on Iraq's Osiraq nuclear reactor, this essay has applied the criteria for legal self-defense—necessity, immediacy, and proportionality—to the new situation in which the perceived threat is both from nuclear developing states and from terrorist groups that might obtain nuclear material from those states.

I have suggested that the necessity prong of self-defense analysis has two components: 1) (near) certainty that the state is developing nuclear weapons and/or that it will pass nuclear material to terrorists, and 2) necessity of using force because of exhaustion of non-forceful options. The immediacy prong of self-defense is perhaps the most altered by the inclusion of passing nuclear material to terrorists as a threat. Immediacy with regard to state-based threats has been vigorously debated in academic literature for decades, with a consensus forming around the permissibility of anticipatory self-defense, with some going further to argue for preemptive self-defense. For a state-based nuclear threat, immediacy in the anticipatory self-defense context would mean something like a state possessing deployable nuclear weapons and engaged in or on the verge of hostilities with the state that would attack its nuclear facilities. In contrast, the threat of passing nuclear material to terrorists for use in a “dirty bomb” would not even require a state to possess weapons capable of carrying nuclear warheads, thus making the

threat from the state's nuclear development potentially "immediate" at a much earlier stage. The immediacy analysis is problematic with regard to terrorists obtaining nuclear material because it is even more difficult to verify preparations for such an action than for a state-based nuclear weapons capability. The proportionality prong is similarly problematic with regard to terrorist actions because the possibility of their completion and the magnitude of harm they would cause are uncertain. The proportionality and necessity prongs are intimately related because both depend on knowing or accurately predicting the future: is the state going to use its nuclear weapons, is it going to pass nuclear weapons to terrorists, and how much damage would a state-based or terrorist attack cause?

Moving beyond the textual legality analysis, this essay has developed five broad criteria for evaluating the lawfulness of a preemptive strike on nuclear facilities. First, preservation of the balance of power has been used historically in instances such as the Cuban Missile Crisis to justify the lawfulness of actions that were only questionably *legal*.<sup>133</sup> In the nuclear development context, preserving the balance of power is a reasonable argument for preventing a state in an otherwise non-nuclear region, such as South America or the Middle East, from becoming a regional hegemon by becoming the only nuclear-capable state in the region and sparking a regional arms race.

Second, the feasibility of removing the threat must include two parts. First, states must weigh the feasibility of the initial direct goal of destroying the state's nuclear capabilities, which would itself be extremely difficult. Second, states must account for the additional threats that could arise from the attacked state's retaliation in the military, economic, and diplomatic realms and from diversion of the attacking state's resources to

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<sup>133</sup>See *supra* note 96.

the nuclear-developing state from other areas that may become increasingly threatening with decreased monitoring or military presence. Harm to civilians must also be included in the feasibility calculation where it should be weighed against the threat from nuclear development: how many civilian deaths is destruction of the nuclear capability worth?

The third factor is termed “diplomatic power and hearts and minds.” This category encompasses the political, diplomatic, and persuasive power costs to the attacking state of acting unilaterally, unsanctioned by the U.N. Security Council and in such a way that it may lose support of its historic allies in other sectors where cooperation would be beneficial. The attacking state also risks inflaming sentiment against it among publics and governments sympathetic to the attacked state, which could increase the threats emanating from a particular region or make more difficult economic or other interactions with states sympathetic to the attacked state. The attacking state also runs the risk that the attacked state’s government will be bolstered by popular support in the face of attack by an outside power.

Fourth, environmental harm and attendant harm to civilians, particularly consequences for public health, must be weighed against the utility of the attack itself and specifically against any particular mode of attack or attack on ancillary facilities, such as factories, electric plants, and other infrastructure. The timing of the attack on a nuclear facility can affect whether or not bombing produces nuclear fallout. The number of other facilities that would need to be attacked in order to make a strike on the nuclear reactor feasible should be considered not just in terms of military advantage, but in terms of harm and hardship that would result among the civilian population, particularly with regard to public health crises.

Fifth, the precedential weight of a preemptive strike and its effect on legal rules governing the use of force may be the most detrimental long-term results of a preemptive strike against nuclear facilities. The criteria for lawful self-defense have already been stretched to include anticipatory action and some academics and policy-makers have argued for expanding them to include even “preventive” self-defense.<sup>134</sup> Temporally expanding justifications for self-defense to include less objectively verifiable threats will increase states’ propensity to resort to force at an earlier stage in a threat’s development and will lead to less respect for the rule of law and for alternative international instruments, such as diplomacy and economic sanctions. In addition, a preemptive attack on nuclear facilities would legitimize preemption generally, that is, for attacks other than those against new nuclear facilities and by states not acting responsibly to promote order or with the blessing of a majority of the international community.

A preemptive strike against Iran would not be surprising, but it would be illegal and likely unlawful under the criteria outlined above. Absent U.N. Security Council authorization, which appears unlikely, the most plausible claim for the legality of a preemptive strike would come from a state claiming self-defense. But the claim of any state that took preemptive action at this point would fail on the grounds of necessity and immediacy. Necessity is not satisfied because there is uncertainty as to Iran’s intent to develop nuclear weapons and its intent to use or distribute them. Also diplomatic and economic options for restraining Iran from unacceptable uses of nuclear material have not been exhausted. The fact that Iran is embedded in the international system, as evidenced by its strong economic ties to Russia and China, suggests that it has much to lose from alienation and is thus likely to be deterred from use or distribution of nuclear materials.

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<sup>134</sup> *See, e.g.*, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, Sept. 2002 at 6, 14-15.

Immediacy is not satisfied because even if the threat from Iran is mere possession of highly enriched nuclear material at least a year remains before Iran will be able to produce highly enriched nuclear elements.<sup>135</sup>

A preemptive strike against Iran would not meet the criteria of lawfulness outlined above. Though Iranian acquisition of nuclear weapons would greatly alter the status quo, making it the only nuclear-capable state in the region besides Israel, a Middle Eastern nuclear arms race seems unlikely. The United States has strong ties to Saudi Arabia, the Gulf States, and Egypt and potentially would enter into defense agreements with such states in order to deter them from pursuing nuclear weapons. Similarly, U.S. ties to the new Iraqi regime are likely to remain strong enough to deter a new Iraqi government from pursuing nuclear development, if such research would even be possible given the current situation in Iraq. As described above, a simple bombing campaign like that undertaken against Osiraq would not remove Iran's nuclear capabilities, and even a more intensive bombing campaign might require an invasion to ensure that all of the nuclear sites had been identified and destroyed. Military action of this magnitude would be extremely harmful to the civilian population, both directly in terms of deaths during the bombing and indirectly in the aftermath when civilians would be living in the rubble of bombings. Environmental consequences from widespread bombing would also be grave, especially if the United States were to employ tactical nuclear weapons as has been reported to be part of the military planning.<sup>136</sup> If the United States or Israel were to carry out a preemptive attack, they would suffer severe diplomatic and potentially economic consequences from European and other states that oppose military action

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<sup>135</sup> See *supra* notes 56, 59.

<sup>136</sup> See Hersh, *supra* note 4.

against Iran. The attacking states are also vulnerable to Iranian supported terrorist attacks. Finally, though the United States and Israel have asserted a right to preemptive and even preventive self-defense, both states must understand that they are providing examples that will be used to legitimize uses of force that they would deplore or even uses of force against themselves.

As the Iranian nuclear situation develops, the international community faces a quandary. Forceful U.N. Security Council action is unlikely, though it would provide a comparably easy solution to the problem. In the absence of U.N. Security Council backing, states should bring the strength of diplomatic and economic instruments to bear on Iran to dissuade it from developing nuclear weapons. If non-military instruments are unsuccessful, then in assessing whether to use force absent U.N. Security Council authorization, states should know that a preemptive strike would be illegal and only potentially lawful. When evaluating the probable consequences of a preemptive strike, states must not be short-sighted, but instead must understand that though an attack may appear to solve a short-term problem, it would endanger world public order by legitimizing unilateral preemption for use by many states and in many situations that its initial proponents would reject. If a state decides to attack Iranian facilities preemptively, it must be prepared to cope with the disorder that its action will create.