International Law Versus the Preemptive Use of Force: Racing to Confront the Specter of a Nuclear Iran

Roxana Vatanparast
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I. Introduction

The notion that the US is getting ready to attack Iran is simply ridiculous. Having said that, all options are on the table.

– George W. Bush (February, 2005)¹

This oft-cited quote represents not just an ambiguous statement made by President Bush, but is also analogous to the current conflict between the United States and Iran — confusing and uncertain. At the same time, it serves as a reminder that the preemptive use of force against Iran for possession of a nuclear weapon is certainly a possibility.

According to the International Atomic Energy Agency (“IAEA”) inspectors, Iran has been secretly pursuing technologies to enrich uranium from 1985 to 2003.² Enriched to a low level, uranium is used to produce nuclear fuel, which is permissible under the Nuclear Non-Proliferation Treaty (“NPT”), but further enrichment would make it suitable for building a nuclear bomb, which would

constitute a violation of the NPT.\textsuperscript{3} The United Nations ("U.N.") has already imposed two sets of sanctions on Iran to punish it for enriching uranium, and a draft U.N. resolution on new sanctions against Iran include trade curbs and a travel ban for Iran's nuclear scientists.\textsuperscript{4}

Even though Defense Secretary Robert M. Gates has stated that the United States has no intention of attacking Iran,\textsuperscript{5} the administration has said time and again that it will not allow Iran to have a nuclear weapon,\textsuperscript{6} and a Pentagon panel has been created to plan a fast strike that could implement a bombing attack on Iran within 24 hours of the President's approval.\textsuperscript{7} Furthermore, Vice-President Dick Cheney renewed a warning that the use of force could be an option if Iran continues to defy the West.\textsuperscript{8} In March 2006, the United States National Security Adviser, Stephen J. Hadley, stated, "We face no greater challenge from a single country than from Iran . . . . The doctrine of preemption remains sound . . . . We do not rule out the use of force before an attack occurs."\textsuperscript{9}

As recently as January 2008, President Bush called Iran's government "the world's leading sponsor of terrorism" and that the United States is "rallying friends around the world to confront this danger before it is too late."\textsuperscript{10} Astonishingly, this statement came after a National Intelligence Estimate report concluded that Iran


\textsuperscript{9} Id.

halted its nuclear weapons program in 2003. The United States, citing self-defense, is clear that it can and will use preemptive force against Iran if it continues its current path of enrichment, while other countries have already ruled out invading Iran under any circumstance.

Under international law, a preemptive attack on Iran at this point would be illegal. The United States administration maintains the possibility of invoking the preemptive use of force doctrine (also referred to as “anticipatory self-defense”), while Iranian officials argue that they have been in compliance with the NPT and that their nuclear program is solely for peaceful purposes. This note analyzes the preemptive use of force doctrine and whether its invocation by the United States on Iran for its nuclear program would meet the standards required under international law.

II. Sources of International Law

In order to understand the effects of a preemptive attack on Iran on international law, an introduction to the sources of international law would help provide a framework for analyzing such an attack.

Article 38 of the Statute of the International Court of Justice outlines the sources of international law in order of preference. Rules established by treaty and agreements among sovereigns take preference, then customary international law, general principles of law common to mature legal systems, and finally, subsidiary determinations of law (e.g., judicial decisions).

Treaties are “instruments binding at international law concluded between international entities....” In order for something to be considered a treaty, it must be a binding instrument, i.e., the contracting parties intended to create legal rights and duties; it must be concluded by states or international organizations with treaty-
making power; must be governed by international law; and is generally in written form.\(^5\)

Customary international law "consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way."\(^6\) Thus, customary international law requires state practice and state acceptance of that practice as a legal obligation (*opinio juris*).

### III. The Preemptive Use of Force Doctrine

The preemptive use of force doctrine, or anticipatory self-defense, presupposes that in situations in which a state believes an attack on its borders is imminent, the concerned state may respond militarily to protect itself.\(^7\) The Caroline affair first established this principle, along with its criteria, and international law scholars consider this affair as the leading source regarding the customary international law of self-defense.\(^8\)

#### A. The Caroline Affair

The concept of anticipatory self-defense was generally accepted under customary international law as early as the nineteenth century, when the Caroline affair established the principle as an acceptable use of force. The Caroline affair articulated two criteria for anticipatory self-defense: proportionality and necessity (which in turn requires imminence).

The 1837 Caroline affair involved a group of Canadian rebels seeking a democratic Canada that were forced to flee to Navy Island located on the Canadian side of the Niagara River, which became their headquarters.\(^9\) Americans started supplying men, arms, and provisions using the steamboat *SS Caroline* to the rebel headquarters, as they were planning an invasion on Upper Canada.\(^20\) In response,


\(^{18}\) *Id.* at 107.

\(^{19}\) MICHAEL BYERS, WAR LAW 53 (2006).

\(^{20}\) *Id.* See generally Louis-Philippe Rouillard, *The Caroline Case: Anticipatory
the British seized the *Caroline* overnight, set it on fire, and then cast it adrift over Niagara Falls, killing two men in the process.\textsuperscript{21}

The resulting tensions between the United States and Britain were resolved in 1842,\textsuperscript{22} and the letters exchanged in diplomacy between the British Minister, Lord Ashburton, and the U.S. Secretary of State, Daniel Webster, became the basis for the principle of anticipatory self-defense. Webster wrote that the use of force in self-defense could be justified in situations “in which the necessity of that self-defence [sic] is instant, overwhelming, leaving no choice of means, and no moment of deliberation.”\textsuperscript{23}

In order to show necessity, the state would have to show that “the use of force by the other state was imminent and that there was essentially nothing but forcible action that would forestall such attack.”\textsuperscript{24} Thus, the necessity requirement implies an additional showing of imminence for a preemptive attack. Webster also stated that nothing “unreasonable or excessive” could be done in self-defense.\textsuperscript{25} Thus, the state would have to respond to an imminent threat in a proportionate manner, such that the force used must be proportional to the danger the state seeks to avoid.\textsuperscript{26}

Other governments subsequently accepted these criteria — necessity and proportionality — as the parameters of a new customary international law right of anticipatory self-defense.

\textbf{B. The U.N. Charter}

In order to limit the use of force in international relations, the 1945 U.N. Charter ("Charter") provides restrictions on its use. Under Article 2, paragraph 4 of the Charter, Member states must "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any

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Article 2, paragraph 3 states that all states “shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”

There are only two explicit exceptions to the prohibition against the use of force in the Charter: force authorized by the U.N. Security Council and force used in self-defense. Article 51 of the Charter provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security . . . .

There are two possible interpretations of Article 51. One such interpretation is that Article 51 requires that an act of self-defense by a Member State only occur after an armed attack occurs on that State, and that this language supersedes preexisting rights of preemptive self-defense. On the other hand, some argue that since Article 51 refers to the “inherent” right of self-defense, it seems to implicitly incorporate preexisting customary international law of self-defense into the treaty provision, meaning that a Member State need not wait for an attack to occur on itself in order to act in self-defense. U.N. Secretary General Koffi Annan has said that states “retain” the inherent right of self-defense under the Charter, which could support the latter interpretation.

Since the U.N. Security Council has not approved the use of force by the U.S. against Iran, the only way that the U.S. could attack Iran without violating the U.N. Charter is if the use of force is in self-defense. Regardless of how one interprets Article 51, under the Charter paradigm, a “unilateral preemptive strike without an

28. Id. at ¶ 3.
30. Id.
32. Byers, supra note 19, at 73.
33. Id.
imminent threat is clearly unlawful." Nevertheless, it seems that the prevailing view is that “anticipatory self-defense is permissible but traditionally has required the existence of an imminent threat.”

Also, those that support the doctrine of anticipatory self-defense claim that the right is “limited by the requirements of necessity and proportionality set out in the *Caroline* case.” Thus, this paper will assume that anticipatory self-defense is acceptable under international law, as long as it meets the requirements articulated in the Caroline affair.

IV. The Bush Doctrine

The Bush Administration introduced a different standard for anticipatory self-defense in 2002. The Bush Doctrine of preemption attempts to adapt the preemptive use of force doctrine to “the capabilities and objectives of today’s adversaries” and is inconsistent with both the U.N. Charter and the Caroline affair. Following the 9/11 terrorist attacks on the U.S., the Bush Administration argued in its 2002 National Security Strategy that the requirement of an imminent threat had to be adapted in order to face the new threats of WMDs and terrorism. During a commencement speech at West Point, President Bush advocated “confront[ing] the worst threats before they emerge,” implying that even a preventive use of force is acceptable and necessary in light of the new threats of weapons of mass destruction (“WMDs”) and terrorists. Thus, the Bush Doctrine attempts to justify using force even before a threat is imminent, and for this reason, is often referred to as the “preventive” use of force doctrine.

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41. BYERS, *supra* note 19, at 75.
A. Arguments Against the Bush Doctrine

i. No Need for Relaxing the Traditional Requirements for the Preemptive Use of Force

The situation of weapons of mass destruction and terrorism do not provide reason to relax the traditional international law requirements for the preemptive use of force in this context. The consequences of such a relaxation would be uncertainty and danger for the whole world.

First, WMDs are not a new problem. The first treaty on poison gas was established in 1899.42

Second, the Bush Doctrine creates broad rights of preemptive, or preventive, use of force, which create uncertainties with respect to who would decide whether a potential threat is justification for the use of force in self-defense; whether the preemptive use of force would be merely a pretense for an “opportunistic military intervention;” and whether the same broad rights would apply to all countries, as customary international law requires.43

For example, since the United States itself is in violation of the NPT by “accelerat[ing] efforts to develop battlefield nuclear weapons designed to . . . destroy dangerous chemicals and weapons,”44 does that give other countries the right to preemptively use force against the United States, as the Bush Doctrine suggests? It would be unclear where to draw the line as to what the requirements are for the use of force. If simply possessing nuclear weapons is sufficient reason to use force against a sovereign state, then India would be able to use force against Pakistan, and vice versa; Iraq could target Israel; and many states could target the United States, Great Britain, France, China, and Russia45 for they all have WMDs. It seems unjustified why the U.S. should have a unilateral policy of preemption that only applies to itself.

Furthermore, the U.N. Secretary General’s High Level Panel on Threats, Challenges, and Change, along with a group of former prime ministers, foreign ministers, and ambassadors, disapproved of the Bush doctrine in the following response issued in December of 2004:

42. Id.
43. Id.
44. Id.
The short answer is that if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. For those impatient with a response, the answer must be that, in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action...to be accepted. Allowing one to so act is to allow all.46

Thus, the threat of terrorists and WMDs is not sufficient reason to relax the traditional requirements for the preemptive use of force, as the Bush doctrine suggests.

ii. The Bush Doctrine Is Not Based in Law

Some have called the Bush Doctrine the preventive doctrine, rather than the preemptive doctrine, since the rationale for it is that a state should strike at a time when the threat is distant because it may be difficult to eliminate the threat once it is more imminent.47 However, there is no such doctrine accepted in international law.48 Also, the doctrine does not have the widespread support needed to change customary international law.49 Since the Bush Doctrine is not based in law, it cannot be accepted as law or as a lawful doctrine under international law.

Further, Professor Joel Paul argues:

Two of the fundamental requirements of any international legal doctrine are that it must first be applicable to all parties, and second, it cannot derogate from the essential state structure of the international legal system. If the Bush Doctrine is read as a non-reciprocal rule — that the U.S. alone may prevent war by attacking other states that are developing weapons of mass destruction — then it is not a doctrine of law, it is simply a unilateral assertion of power. Conversely, if the Bush Doctrine is read as conferring on all states the authority to act to prevent war, then every state's territorial sovereignty is threatened, and no practical limit on

47. George E. Bisharat, Facing Tyranny with Justice: Alternatives to War in the Confrontation with Iraq, 7 J. GENDER RACE & JUST. 1, 46 (2003).
48. Id.
49. BYERS, supra note 19, at 80.
violence is retained: Pakistan is as justified as India in attacking its neighbor to prevent a possible future use of nuclear weapons; Iran, Iraq, Israel and Syria have license to attack each other to prevent the acquisition of weapons technologies. Such a rule would be wholly incompatible with the fundamental principle of minimizing violence. For the Bush Doctrine to be accepted as law, its proponents must articulate some limiting principle other than non-reciprocity.50

For the foregoing reasons, and for the purposes of this paper, the discussion will assume that the traditional international law requirements for the preemptive use of force, as expressed in the Caroline affair, should apply in this context instead of the Bush Doctrine.

V. The Nuclear Non-Proliferation Treaty

Iran signed the NPT as a non-nuclear state in 1968 and ratified it in 1970.51 The purpose of the NPT is to “prevent the spread of nuclear weapons technology, to promote co-operation in the peaceful uses of nuclear energy and to further the goal of achieving nuclear disarmament.”52 In 2003, Iran signed an additional protocol that allows IAEA inspectors “access to individuals, documentation relating to procurement, dual use equipment, certain military owned workshops, and research and development locations.”53 The United States is also a signatory to the NPT, along with 186 other parties.

A. Iran’s Rights and Duties Under the Nuclear Non-Proliferation Treaty

Under the NPT, “non-nuclear weapons states are allowed to acquire nuclear technology for civil purposes but commit themselves

not to build a bomb," and agree to international inspections of their facilities.\(^5\)

Article I of the NPT provides:

Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.\(^6\)

Under Article II:

Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.\(^7\)

Article IV, Paragraph 1 creates an inalienable right for “all parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes . . . in conformity with Articles I and II of this Treaty.”\(^8\) Under Article V, “[n]ations that are capable of making nuclear weapons shall forgo that possibility in exchange for the promise by the members of the nuclear club to reduce and eventually abolish their nuclear arsenals.”\(^9\)

Iran has not violated the NPT by building plants secretly, since the original NPT had a loophole that allowed construction of a pilot


\(^{56}\) *Treaty on the Non-Proliferation of Nuclear Weapons*, supra note 52.

\(^{57}\) Id.

\(^{58}\) Id.

\(^{59}\) Id.
nuclear fuel enrichment plant without declaring it for IAEA inspections until 180 days before nuclear fuel was introduced into the plant.\textsuperscript{60} Thus, Iran has the right to enrich uranium to acquire a full nuclear fuel cycle for peaceful purposes under the NPT, but not to the extent of producing nuclear weapons.\textsuperscript{61}

VI. Contradictory Claims & What the Evidence Indicates

A. \textit{What the United States Claims About Iran's Nuclear Program}

On May 8, 2003, Richard Boucher, a State Department spokesperson, stated, "We believe Iran's true intent is to develop the capability to produce fissile material for nuclear weapons... there is no logical reason for Iran to pursue uranium enrichment other than to support a weapons capability..."\textsuperscript{62} On August 17, 2004, Undersecretary of State for Arms Control and International Security James Bolton told the Hudson Institute in Washington D.C. regarding Iran's uranium enrichment plant in Natanz and the heavy water processing plant in Arak:

The costly infrastructure to perform all these activities goes well beyond any conceivable peaceful nuclear program. No comparable oil-rich nation has ever engaged, or would be engaged, in this set of activities... unless it was dead set on building nuclear weapons.... Another unmistakable indicator of Iran's intentions is the pattern of repeatedly lying to and providing false reports to the IAEA.\textsuperscript{63}

In November 2004, the CIA released the 721 Report, which stipulated:

The United States remains convinced that Tehran has been pursuing a clandestine nuclear weapons program, in contradiction to its obligations as a party to the Nuclear Nonproliferation Treaty (NPT).\textsuperscript{64}


\textsuperscript{63} Id. at 38.

\textsuperscript{64} U.S. C.I.A., Unclassified Report to Congress on the Acquisition of
The U.S. claims that Iran, with its oil reserves, does not need nuclear power since it is more expensive to generate than oil-fired power. However, the British Parliament and the U.S. National Academy of Sciences have conducted studies that contradict this claim.

The most explosive development recently in the quest for answers is a U.S. National Intelligence Estimate report released in December 2007 that concluded that Iran had stopped its nuclear weapons program in 2003, and has remained frozen since. The report also stated with “moderate confidence” that Iran is now leaning towards the civilian side of the uranium enrichment program.

This report was released less than two months after President Bush warned that if Iran “stays on its present course, the international community is prepared to impose serious consequences,” and that Iran’s nuclear ambitions could unleash World War III. Even after the report was released, perhaps since his credibility was once again under scrutiny, President Bush warned that even if Iran’s nuclear program is not active in the pursuit of weapons, it could “easily resume such work unless strong international oversight is put in place.”

The U.S.’s primary concern with Iran obtaining nuclear weapons is that it believes Iran sponsors terrorism, provides weapons to the

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66. Id.

67. Mazzetti, supra note 11.


69. Mazzetti, supra note 11.

70. Id.


Iraqi insurgency, and that Iranian nuclear weapons could end up in the wrong hands.\textsuperscript{73}

\section*{B. What Iran Claims About Its Nuclear Program}

We won't accept any new obligations. Iran has a high technical capability and has to be recognized by the international community as a member of the nuclear club. This is an irreversible path.

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Iranian foreign minister Kamal Kharrazi, June 12, 2004.\textsuperscript{74}

Under Article IV of the NPT, Iran insists it has an inalienable right to develop the fuel cycle for peaceful purposes.\textsuperscript{75} Iran denies that it is secretly trying to build nuclear arms, and consistently claims that its nuclear program is solely for energy-producing purposes.\textsuperscript{76} Iran's rapid population growth and the reduction in its export revenues because of domestic oil consumption support the argument that Iran needs to diversify its energy sources.\textsuperscript{77} Iran's leaders wish to uphold the rights conferred on their country under the NPT, namely, to enrich uranium for the purpose of producing fuel.\textsuperscript{78} Iran's President, Mahmoud Ahmadinejad, stated in January 2008 that Iran would produce nuclear energy by 2009.\textsuperscript{79} Iran also announced in January 2008 that it would cooperate on its nuclear program.\textsuperscript{80}


\textsuperscript{74} KENNETH R. TIMMERMAN, \textit{COUNTDOWN TO CRISIS: THE COMING NUCLEAR SHOWDOWN WITH IRAN} 281 (2005).

\textsuperscript{75} Aldridge, \textit{supra} note 60, at 9.

\textsuperscript{76} \textit{Id.}


Iran does not understand why it is under such tough international scrutiny. Iran claims that the U.N. has imposed sanctions on a member of the NPT (referring to itself) which has never "attacked or threatened to use force against any United Nations member."\(^8\) Also, Iran "had placed all its nuclear facilities under IAEA safeguards, had fully implemented the Additional Protocol for more than two years, and had stated its readiness to resume its implementation."\(^9\) Iran had also allowed "more than 2,000 'person days of IAEA scrutiny' of all of its related — and even unrelated — facilities, resulting in reported statements by the Agency on the absence of any evidence of diversion."\(^10\) Iran feels that it is complying with its duties under the NPT, and does not pose a special danger to the world, and thus, disagrees with the need to be put under a special magnifying glass.

C. What the Evidence Suggests – The IAEA Reports

Iran has been developing a nuclear fuel cycle. Have they taken the step from that into weaponization? We have not seen that. But I am not yet excluding that possibility.

- Mohamed ElBaradei, head of the IAEA, to a U.S. Congressional Subcommittee, March 17, 2004.\(^4\)

The IAEA is an autonomous body established by the United Nations to promote the peaceful use of nuclear energy.\(^5\) The IAEA has been doing inspections on Iranian facilities since 2002.\(^6\) According to the IAEA, Iran does not possess nuclear weapons.\(^7\) The Director General of the IAEA, Mr. ElBaradei has stated that to "develop a nuclear weapon, you need a significant quantity of highly


82. Id.

83. Id.


enriched uranium or plutonium, and no one has seen that in Iran."\textsuperscript{88} Even though inspectors found documentation indicating Iran's intentions of developing nuclear weapons, Mr. ElBaradei noted, "there's a big difference between acquiring the knowledge for enrichment and developing a bomb."\textsuperscript{89}

In November 2007, Mr. ElBaradei reported that Iran was operating "3,000 uranium-enriching centrifuges capable of producing fissile material for nuclear weapons."\textsuperscript{90} However, the IAEA has said that Iran is operating its centrifuges "well below their capacity," and that "it had not discovered any evidence that Iran was enriching to the level that would produce bomb-grade fuel."\textsuperscript{91}

\textbf{D. Uncertainties}

The only thing certain about Iran's nuclear program is uncertainty.\textsuperscript{92} There is no reliable evidence that conclusively proves the existence of nuclear weapons in Iran, even though there has been a strong interest in acquiring them since the time of the shah, Mohammad Reza Pahlavi.\textsuperscript{93} According to the International Institute for Strategic Studies, Iran's nuclear activities can have civilian applications; at the same time, they can be applicable to nuclear weapons development.\textsuperscript{94}

Thus far, there is no hard evidence that Iran has violated its obligations under the NPT. In November 2006, Seymour Hersh described a classified draft assessment by the Central Intelligence Agency "challenging the White House's assumptions about how close

\begin{itemize}
  \item \textsuperscript{89} Id.
  \item \textsuperscript{92} VENTER, \textit{supra} note 84, at 85.
  \item \textsuperscript{93} ANTHONY H. CORDESMAN, \textit{IRAN'S DEVELOPING MILITARY CAPABILITIES} 1 (2005).
  \item \textsuperscript{94} THE INT'L INST. FOR STRATEGIC STUDIES, \textit{IRAN'S STRATEGIC WEAPONS PROGRAMMES: A NET ASSESSMENT}, at 63 (2005).
\end{itemize}
Iran might be to building a nuclear bomb."\(^9\) According to Hersh, based on technical intelligence, such as satellite photography, the CIA has not yet found any "conclusive evidence of a secret Iran nuclear weapons program running parallel to the civilian operations that Iran has declared to the International Atomic Energy Agency."\(^9\) The CIA declined to comment on the report, but a senior intelligence official confirmed the report.\(^9\)

The CIA report warned that the White House should not presumptively conclude that a lack of evidence of a nuclear weapons program signifies that Iran is deceiving the international community. During the Cold War the Soviets were "skilled at deception and misdirection, yet the American intelligence community was readily able to unravel the details of their long-range-missile and nuclear-weapons programs."\(^9\) There is no conclusive evidence of Iran violating its duties under the NPT, and the White House should be wary of making presumptive conclusions regarding the existence of a secret nuclear weapons program in Iran.

VII. Are the Requirements Met for Preemptive Use of Force Against Iran?

A. No Necessity

i. No Imminent Threat – Inconclusive Evidence At Best

Although Iran may not have fully complied with NPT or U.N. resolutions, it has not declared any imminent threat to the United States. The United States cannot attack Iran preemptively without violating international law since it has been unable to provide proof of an imminent threat.

It is likely that Iran is still several years away from acquiring a nuclear weapons capability.\(^9\) The U.S. National Intelligence Estimate report released in December 2007 also concluded that the

\(^9\) Id.
\(^9\) Id.
\(^9\) Id.

earliest time in which Iran could potentially have a bomb is not until at least 2013.\textsuperscript{100} Also, Mr. ElBaradei reported that there is no evidence that Iran is developing nuclear weapons, and the CIA declared that it would take Iran a decade to develop nuclear weapons, if it sought to do so.\textsuperscript{101} Thus, Iran is not a nuclear power, and is not even on the brink of becoming a nuclear power.

Furthermore, a capability in itself is not a threat. For a threat to exist, there must be a capability plus intention, and currently there is neither any evidence of Iran's capability nor an intention to attack the United States.\textsuperscript{102} Some have argued that Iran's bragging about its nuclear ambitions may indicate that it considers the bomb as a bargaining chip, or as a deterrent, rather than a weapon it intends to use.\textsuperscript{103}

\textit{ii. Alternative Means of Resolving the Conflict}

Ali Larijani, the former Iranian nuclear negotiator, said his country was willing to give reassurances that no nuclear material would be diverted to a weapons program, but he insisted that Iran has the right to enrich uranium under the NPT.\textsuperscript{104} Imposing sanctions on Iran, as the U.N. has done, could have a serious economic impact on the country, since its population is young, there are high unemployment rates, and high inflation rates.\textsuperscript{105}

Resorting to the use of force would violate international law since Iran has taken steps to negotiate over its enrichment program. Iranian leaders claim their willingness to negotiate as long as there is no pre-condition of halting its enrichment program.\textsuperscript{106} President Bush

\textsuperscript{100} Mark Mazzetti, \textit{U.S. Finds Iran Halted Its Nuclear Arms Effort in 2003}, N.Y.


\textsuperscript{103} Id.


\textsuperscript{106} \textit{Report: U.S. working on Iran attack plan}, MSNBC NEWS, Feb. 24, 2007,
has needlessly ruled out entreaties to Iran that could resolve “the international deadlock over its nuclear ambitions.” Even Mr. ElBaradei has urged the U.S. to try talking to Iran instead of isolating it.

Finally, the United States has such overwhelming military superiority as to dissuade Iran from aggressive action unless its leaders are ready to commit national suicide, which supports the idea that Iran would probably not resort to the use of force without first being attacked. Thus, the current state of the tensions between Iran and the U.S. over Iran’s nuclear program are nowhere near the standard of necessity set forth in the Caroline affair, and there are other means to try to resolve this conflict, if need be.

B. No Proportionality

According to the Caroline affair, when force is used in self-defense, it must be proportional to the threat. A state is justified only in using the amount of force that is necessary to deter an attack. In order to examine whether a preemptive attack made by the U.S. on Iran would meet the requirement of proportionality, one must balance the damage the threat causes against the damage the preemptive use of force would cause if implemented.

The 2003 U.S. invasion of Iraq offers a helpful example of the possible impact of a preemptive strike against Iran. While Iran and Iraq “are very different cases, much the same level of uncertainty exists about their nuclear programs.” The United States’ decision to use force against Iraq in 2003 has resulted in the deaths of nearly 100,000 innocent civilians, severe injury to tens of thousands of others, destruction of the infrastructure of the country, and a
collapse of law and order. One may concede the attack on Iraq was disproportionate to the threat the United States believed it faced, especially since Iraq did not have the means or intent to attack the United States in the near future.

Since the uncertainties surrounding Iran’s nuclear program are very similar to the ones that surrounded Iraq’s WMDs, the U.S. should be wary of resorting to the use of unilateral force. The consequences of the Iraq war illustrate the disproportionate impact a preemptive strike can have when it is based on an uncertain threat.

Furthermore, if the U.S. were to attempt to fight Iran or attack its facilities, the result would be an even greater number of deaths and severe injuries of civilians since Iran is a much larger country than Iraq, and its enrichment facilities are widespread. Since the threat of Iran’s nuclear program is so uncertain, under international law such a result would clearly be disproportionate to the threat.

“Iran has promised ‘harm and pain’ will result from any attack,” and that it will strike against U.S. interests if it is attacked. Iran is capable of launching a devastating retaliation with conventional weapons, it could intervene on the Shiite side in Iraq and cause an increased number of casualties, and it could increase its support to Islamist resistance forces in the Palestinian territories and to Hezbollah in Lebanon. Thus, the indirect effects of an invocation of the preemptive use of force doctrine against Iran would be so disastrous, that such an invocation would severely violate the proportionality requirement of the doctrine.

VIII. Other Grounds That Could Justify the Preemptive
Use of Force Against Iran

Even if the preemptive use of force doctrine would not be justifiable with respect to Iran today, there may be certain occasions in the future that could call for invocation of the preemptive use of force against Iran, and would be justified by international law.

A. Hypothetical: The IAEA Finds That Iran Has Violated Its Duties Under the NPT By Building a Nuclear Weapon

To justify a preemptive attack, the United States might argue that Iran violated its obligations under the NPT, and that the U.S. must use military force to enforce compliance. This alone could not constitute grounds for a preemptive attack, and this argument is weakened by the fact that the United States itself is in violation of the NPT since it has not fulfilled its obligation to disarm its nuclear weapons under Article VI of the treaty.119

B. Hypothetical: Iran Possesses a Nuclear Weapon and Expressly Threatens the U.S.

On the other hand, if there was definitive proof that Iran has a nuclear weapon, and it makes its intention clear that it plans on using the weapon to attack the United States in the next month — creating an imminent threat — and it refuses to negotiate or comply after sanctions have been imposed — creating necessity — for example, that would justify a preemptive use of force, or anticipatory self-defense, under international law, since there would be imminence and necessity. In that case, an attack on Iran’s nuclear facilities alone would probably be sufficient in order to meet the requirement of proportionality to the threat, since the U.S. would merely be seeking to destroy Iran’s nuclear capabilities. Such an attack would likely comply with international law standards. Nevertheless, this hypothetical is a far cry from the current situation.

IX. Conclusion

"...let's take the military option off the table. We've seen it

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doesn’t work.”
— German Chancellor Gerhard Schroeder.\textsuperscript{120}

\textbf{A. Problems With the Preemptive Use of Force in the Current Context}

Invoking the preemptive use of force doctrine in this context would be illegal under international law since there is no evidence of an imminent threat, no necessity for the use of force, and an attack at this time would be disproportionate to the threat being deterred. Further, such an invocation would be politically egregious since the U.S. would set a bad example for other governments and could increase the potential for military conflicts; an attack on Iran today would weaken the force of international law since there is no threat that would justify initiating war in these conditions, and since it has already been weakened by the unilateral, unprovoked war with Iraq; it would strengthen and unite the Middle East and the Arabs with Iran; and Iran could create a deep global recession by embargoing its oil if it is attacked.\textsuperscript{121}

\textbf{B. Fundamental Problems with the Doctrine as a Whole}

The preemptive use of force doctrine has some inherent problems, regardless of the situation. One such flaw of the preemptive doctrine is the fact that in many instances one cannot know for certain until after the fact whether the attack was justified. It is always difficult to substantiate threats in advance because of the uncertain nature of a preemptive attack.

A perfect illustration of the doctrine’s flaws is the war in Iraq, which is regarded throughout the world as illegal under international law.\textsuperscript{122} The two justifications for the Iraq war under the Bush administration was that the U.S. faced an imminent attack that Iraq would use weapons of mass destruction and that Iraq had links to Al Qaeda. Both beliefs have been since discredited.\textsuperscript{123} The Iraq War has

\begin{itemize}
  \item \textsuperscript{120} ROGERS, supra note 1, at 274.
  \item \textsuperscript{121} Id.
  \item \textsuperscript{122} Krieger, supra note 112.
  \item \textsuperscript{123} Id.
\end{itemize}
been a step backward for international law\textsuperscript{124} since the preemptive strike occurred despite objections from the U.N. and without international support.

Professor Philippe Sands describes a memo of a meeting between President Bush and Prime Minister Blair at the White House on January 31, 2003 — nearly two months before the invasion — revealing that Mr. Bush made it clear the U.S. intended to invade whether or not there was a second U.N. resolution and even if U.N. inspectors found no evidence of a banned Iraqi weapons programme [sic].\textsuperscript{125} The situation with Iran today is particularly suspicious since the charges made against Iran, and the lack of evidence to support them, are “ominously similar to the spurious claims the Bush administration leveled against Iraq as a cause for initiating that war.”\textsuperscript{126}

The preemptive use of force doctrine was never meant to serve as merely a pretense for attacking a foreign country. Thus, perhaps a higher standard of certainty of an imminent threat should be required when invoking the doctrine in any situation — a standard that clearly would not be met in the current context of Iran — in order to avoid grave miscalculations and misrepresentations similar to the ones that occurred just before the War in Iraq.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{124} Id.
\item \textsuperscript{126} Krieger, \textit{supra} note 101.
\end{enumerate}
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