

Iran, Uranium and the United Nations

The International Legal Implications of Iran's Nuclear Programme

Marisa Macpherson

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INTRODUCTION

Nuclear proliferation represents a persistent and growing cause for concern in the modern international context.¹ As scientific advancement and increasing political instability threaten the spread of nuclear weapons into volatile and dangerous hands, the challenge of nuclear proliferation has expanded beyond initial considerations.² Against this background, the nuclear programme of the Islamic Republic of Iran³ has caused considerable controversy. Iran's persistent commitment to nuclear advancement, set against a history of nuclear secrecy, has led many international organisations and individual states to question its motives.⁴ The controversy escalated earlier this year with the direct involvement of the United Nations Security Council.

This dissertation will examine the international legal framework behind Iran's nuclear programme, with a particular emphasis on the 1968 Treaty on the Non-proliferation of Nuclear Weapons ('NPT')⁵ and the International Atomic Energy Agency ('IAEA') safeguards regime which that Treaty established. Chapter One will outline the general international law of nuclear non-proliferation, against which the current dispute is set, and Chapter Two will critically analyse the right to nuclear energy embodied in the NPT and relied upon by Iran. Chapter Three will begin with an examination of the possible international responses to Iran's conduct, and will go on to examine the broader international legal implications of any such response.

A. The Science

An understanding of the legal framework behind nuclear non-proliferation requires a rudimentary grasp of the basic scientific principles. Nuclear technology is extremely useful and very valuable. It poses benefits in areas as broad as medicine, industry, agriculture and the humanities.⁶ Above all, nuclear energy has the potential to remove all current concerns relating to the world's finite sources

¹ David Bodansky, *Nuclear Energy: Principles, Practices, and Prospects* (2nd ed, 2005) 481.

² Ibid 517-24.

³ The Islamic Republic of Iran, hereinafter referred to simply as Iran, operates under an Islamic theocracy.

⁴ Frederic L Kirgis, *ASIL Insight: Iran's Resumption of Its Nuclear Program* (2005) American Society of International Law <<http://www.asil.org/insights/2005/08/insights050822.html>> at 3 March 2006.

⁵ *Treaty on the Non-proliferation of Nuclear Weapons*, opened for signature 1 July 1968, 729 UNTS 169 (entered into force 5 March 1970).

⁶ See the chapters on each of these areas in Glenn T Seaborg, *Peaceful Uses of Nuclear Energy: A Collection of Speeches by Glenn T Seaborg, Chairman, United States Atomic Energy Commission* (Reprint, 2005).

of fossil fuels.⁷ The growing world population, coupled with society's technological and industrial advances, will require increasing supplies of energy in the next century. At some point fossil fuels will fail to meet the world's requirements. For these reasons, nuclear energy is particularly valuable, even to a country like Iran with huge fossil fuel resources. Accordingly, Iran has consistently claimed its nuclear programme is for purely peaceful purposes, as part of a plan to provide for its young and growing population.⁸ The need for new energy sources, the economic value of exporting oil and gas, and the desire to diversify and modernise, are all relevant and legitimate justifications for Iran's enrichment programme.

Most of the contention in Iran's situation centres on a process known as uranium enrichment and its relationship to nuclear fission. Nuclear fission is the process by which atoms are split in an explosive chain reaction, resulting in the release of huge amounts of energy. Uranium is a 'fissile material', meaning that when it is enriched,⁹ it can be used for nuclear fission. Plutonium, another fissile material, is produced as a by-product of uranium-fuelled nuclear reactors.¹⁰ Thus, the enrichment of uranium is a vital step both in the production of a particular kind of nuclear weapon¹¹ and in the production of nuclear energy.¹²

Importantly, the concern in Iran's case is not with the generation of nuclear power itself, but with the domestic production of the fuel used to generate that power – enriched uranium.¹³ Most countries import sufficient enriched uranium to meet their energy production needs, but Iran is committed to the indigenous production of enriched uranium.¹⁴ The concern is that any country with nuclear power capabilities is in a significantly advantageous position in relation to the production of nuclear weapons. Whether or not nuclear weapons are a current element of that

⁷ See Bodansky, above n 1, 7-14: while there is much dispute over when the fossil fuel supply will run out, there is at least agreement that it will run out at some stage. Fossil fuels are fuels such as oil (or petroleum), natural gas, and coal – energy sources created by deposits of ancient organic remains.

⁸ For a discussion of the Iranian argument, see Kambiz Sheikh-Hassani, 'Meeting Iran's Energy Demands: Kambiz Sheikh-Hassani Puts the Case for His Country's Nuclear Programme' (2005) 30 *New Zealand International Review* 10.

⁹ The process of enrichment involves the use of centrifuges, which separate uranium atoms by mass to create a higher concentration of uranium.

¹⁰ Peter A Clausen, *Nonproliferation and the National Interest: America's Response to the Spread of Nuclear Weapons* (1993) 205.

¹¹ Uranium and plutonium are the two most common nuclear fuels used to create 'fission bombs'. A fission bomb was used in the United States attack on Hiroshima in 1945.

¹² Bodansky, above n 1, 482.

¹³ Amir Azaran, 'NPT, where art thou? The Nonproliferation Treaty and Bargaining: Iran as a case study' (2005) 6 *Chicago Journal of International Law* 415, 415.

¹⁴ *Ibid.*

country's nuclear programme, the ability to produce nuclear power eases the burden of weapons production.¹⁵

Commercial nuclear power plants use uranium enriched to between 2% and 5%; nuclear weapons normally require 90% enrichment.¹⁶ While it is possible for a bomb to be produced with uranium enriched to a level well below 90%, for example 60%, if the enrichment level is lower then a greater mass of uranium will be required.¹⁷ In these circumstances, sourcing sufficient uranium will be a substantial barrier to weapons production. Iran announced a 3.6% enrichment level in April this year, a statistic which has been confirmed by IAEA inspections.¹⁸ Clearly, Iran has a long way to go before it could hope to produce nuclear weapons at either level of enrichment.

B. Iran's Nuclear History

Iran has sought and desired a nuclear energy programme for many years.¹⁹ The current dispute between Iran and certain members of the international community has its roots in the nuclear programme established under the Shah of Iran in the 1950s. Under the Shah, Iran took steps towards a limited nuclear programme, with the cooperation of western countries. In 1959, for example, the United States sold Iran a research nuclear reactor.²⁰ While there was some suspicion of a clandestine nuclear weapons programme during this period, all evidence suggests that Iran's focus was firmly on nuclear energy. Iran took no visible steps towards the indigenous production of enriched uranium, or towards the development of reprocessing technology.²¹

From the 1950s until the 1970s, Iran enjoyed a period of nuclear cooperation with the United States. However, this cooperation ended with the 1979 Revolution in Iran, when the Shah was overthrown and a populist Islamic theocracy was established with Ayatollah Khomeini as its Supreme Leader. The Revolution, coupled with the 1979 seizure of United States diplomatic personnel by a group of Iranian students, led to a swift deterioration of diplomatic ties between Iran and the United States. A

¹⁵ Bodansky, above n 1, 606.

¹⁶ Ibid 482. The bomb at Hiroshima used uranium enriched to 89%.

¹⁷ Ibid 491.

¹⁸ That confirmation was made public in Mohamed El-Baradei, *Report by the Director General of the IAEA to the Board of Governors: Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, GOV/2006/27 (28 April 2006).

¹⁹ Bodansky, above n 1, 537.

²⁰ Ibid.

²¹ Sharon Squassoni, *Congressional Research Service Report for Congress – Iran's Nuclear Program: Recent Developments* (2006) Congressional Research Service <<http://www.opencrs.com/getfile.php?rid=47148>> at 30 April 2006, 1.

series of domestic developments then led to the cessation of the Iranian nuclear programme.²² Iran retained, however, a certain degree of nuclear materials and expertise.

C. Recent Developments²³

In September 2002 an Iranian dissident group revealed the existence of two previously undisclosed nuclear facilities in Iran.²⁴ This discovery led to heightened IAEA concern with the lack of transparency in its dealings with Iran and with the gaps in its knowledge of Iran's programme. The IAEA undertook intensive investigations, and it subsequently became apparent that Iran had operated a secret nuclear programme for several decades.²⁵ Negotiations began between Iran and both the IAEA and the "European Union 3" (France, Germany and the United Kingdom) to resolve the concerns related to this development.

The dispute intensified in August 2005 when Iran resumed its uranium enrichment process, after a temporary suspension agreed upon through negotiations between Iran and the European Union ('EU').²⁶ Since the resumption of the enrichment programme, there has been a series of increasingly serious interactions between Iran and both IAEA and EU negotiators. In March 2006, the IAEA referred the matter to the United Nations Security Council, citing "serious concern" at the lack of clarity in its dealings with Iran.²⁷ That referral resulted in a Security Council Presidential Statement, underlining the importance of Iran re-establishing its suspension of enrichment processes and requesting a report from the IAEA on Iranian compliance within thirty days.²⁸

²² See Bodansky, above n 1, 538: those developments included domestic opposition, foreign unhappiness with Iran, and bomb damage during the Iraq-Iran war.

²³ Due to time constraints, this dissertation does not consider developments after 30 September 2006.

²⁴ See Andrew J Grotto, *ASIL Insight: Iran, the IAEA and the UN* (2004) American Society of International Law <<http://www.asil.org/insights/2004/10/insight041105.htm>> at 3 March 2006: the group was the National Council of Resistance of Iran, and the facilities were an enrichment plant at Natanz and a heavy water production plant at Arak.

²⁵ Squassoni, above n 21, 2.

²⁶ The agreement to temporarily cease enrichment processes is commonly known as the "Paris Agreement." See *Iran in new nuclear arms pledge* (2005) BBC News Online <http://news.bbc.co.uk/2/hi/middle_east/4577877.stm> at 26 April 2006.

²⁷ *International Atomic Energy Agency Resolution: Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, GOV/2006/14 (4 February 2006).

²⁸ César Mayoral, *United Nations Security Council Presidential Statement*, UN Doc S/PRST/2006/15 (29 March 2006).

Thirty days later, the IAEA Director General reported to the Security Council, noting that Iran had failed to meet the necessary requirements of full transparency and active cooperation.²⁹ While the Agency acknowledged that Iran had continued to facilitate operation of the IAEA Safeguards Agreement, it also noted that Iran had decided to cease implementation of the IAEA Additional Protocol.³⁰ Thus, the report fell short of declaring Iran non-compliant with the IAEA Safeguards Agreement. It did, however, express serious concerns with the lack of transparency in Iran's nuclear programme, and emphasised the need for confidence-building measures on the part of Iran.

As the Security Council members negotiated an appropriate response to the IAEA Report and Iran's failure to meet the full Agency requirements, the EU took steps to resolve the dispute. On 6 June 2006, Javier Solana, EU Foreign Policy Chief, presented Iranian leaders with a package of incentives aimed at convincing Iran to cease uranium enrichment.³¹ The package offered economic and political rewards for Iran, but made cessation of enrichment processes a pre-condition for formal negotiations. When Iran refused to give a prompt reply, the countries offering the package decided to refer Iran back to the Security Council.³²

On 31 July 2006 the United Nations Security Council passed a resolution demanding suspension of "all enrichment-related and reprocessing activities, including research and development, to be verified by the IAEA."³³ As part of the resolution, the Security Council requested a report on Iranian compliance from the Director General of the IAEA by 31 August 2006. The resolution carried an implied threat of sanctions or other "appropriate" measures under Article 41 of the United Nations Charter, in order to ensure Iranian compliance, but noted that such measures would require further formal resolutions.

²⁹ Mohamed El-Baradei, *Report by the Director General of the IAEA to the Board of Governors: Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, GOV/2006/27 (28 April 2006). The report was submitted to the Board, and in parallel to the United Nations Security Council.

³⁰ These two documents are explained in detail in Chapter One.

³¹ *Iran 'positive' on nuclear offer* (2006) BBC News Online <http://news.bbc.co.uk/2/hi/middle_east/5048956.stm> at 7 June 2006.

³² *Iran referred to Security Council* (2006) BBC News Online <http://news.bbc.co.uk/2/hi/middle_east/5173872.stm> at 13 July 2006. The offering countries were the five permanent Security Council members plus Germany.

³³ *United Nations Security Council Resolution 1696*, UN Doc S/RES/1696 (31 July 2006).

One month later, the Director General of the IAEA submitted a report to the IAEA Board of Governors and the United Nations Security Council.³⁴ The report noted that Iran had not suspended its enrichment programme, and in fact there remained “outstanding issues” with Iran’s dealings with the IAEA.³⁵ In September 2006, talks between the EU and Iran resumed. While there is still hope of a peaceful resolution to the conflict, the failure of these extensive negotiations highlights the fact that there is no clear answer.³⁶

³⁴ Mohamed El-Baradei, *Report by the Director General of the IAEA to the Board of Governors: Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, GOV/2006/53 (31 August 2006). Again, this report was submitted to the Board and in parallel to the United Nations Security Council.

³⁵ Ibid.

³⁶ See *No nuclear deal at EU-Iran talks* (2006) BBC News Online <<http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/5385858.htm>> at 28 September 2006: on 27 September 2006 EU Foreign Policy Chief Javier Solana made a statement claiming that although several days of talks had ended without agreement, he had hope that new talks would be more successful.

CHAPTER ONE: THE INTERNATIONAL LAW OF NUCLEAR NON-PROLIFERATION

The Iranian dispute is set against a background of nuclear non-proliferation and a widespread desire amongst modern nations to avoid the proliferation of nuclear weapons. This Chapter discusses the general international law of nuclear non-proliferation. It outlines the legal structure established by the NPT, and the safeguards system operated by the IAEA, and assesses Iranian compliance with that regime.

A. The History of Nuclear Non-proliferation

The belief that nuclear proliferation poses a fundamental threat to international peace and security has its origins in the earliest known nuclear explosions – the United States bombings of Hiroshima and Nagasaki, which brought an abrupt end to the Second World War.³⁷ Those explosions, and the devastation they wrought, led to a concerted non-proliferation effort which eventually culminated in the NPT.

The first proposed international agreement controlling the use of nuclear technology was the Baruch Plan of 1946. Developed soon after the end of the Second World War, the Baruch Plan was an American attempt to establish an international authority which would control all nuclear materials worldwide, including the United States' nuclear arsenal.³⁸ This initiative failed due to a lack of support from the Soviet Union, and debate over the appropriate international measures to prevent nuclear proliferation continued amidst a renewed nuclear arms race.³⁹

The next important step in the history of nuclear non-proliferation was a result of President Dwight D Eisenhower's "Atoms for Peace" speech before the United Nations General Assembly in 1953.⁴⁰ The President's speech emphasised the peaceful benefits of nuclear technology, and proposed a

³⁷ Helen M Cousineau, 'The Nuclear Non-proliferation Treaty and Global Non-proliferation Regime: A US Policy Agenda' (1994) 12 *Boston University International Law Journal* 407, 408.

³⁸ Edwin Brown Firmage, 'The Treaty on the Nonproliferation of Nuclear Weapons' (1969) 63 *American Journal of International Law* 711, 713. That agency was to be called the International Atomic Development Agency.

³⁹ *Ibid* 714.

⁴⁰ *Ibid*.

programme of cooperation between nuclear states to develop those peaceful benefits.⁴¹ That programme also involved the creation of an international agency to control nuclear advancements and promote the development of their peaceful uses. As a result, 1957 saw the creation of the IAEA.⁴² The purpose of the IAEA, according to its Statute, is “to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity.”⁴³ To meet this mandate, the IAEA established a system of safeguards, which the NPT later built on.

By the 1960s, a number of international treaties dealing with non-proliferation had been signed, and the United Nations General Assembly had adopted various resolutions dealing with the nuclear threat.⁴⁴ Two non-nuclear states, Ireland and Sweden, were actively encouraging United Nations action to prevent proliferation. In 1961, the General Assembly unanimously adopted an Irish resolution “calling on” all states to conclude a non-proliferation agreement.⁴⁵ The Irish-sponsored resolution 1665 emphasised the “necessity of an international agreement, subject to inspection and control, whereby the states producing nuclear weapons would refrain from relinquishing control of such weapons to any nation not possessing them and whereby states not possessing such weapons would refrain from manufacturing them.”⁴⁶ The resolution also urged all states to cooperate in achieving such an agreement.

The Irish resolution formed the basis of a United States plan submitted to the Eighteen-Nation Disarmament Committee (‘ENDC’) in 1964 by President Lyndon B Johnson.⁴⁷ This plan proposed an international treaty which later became the NPT.

1. The Treaty on the Non-proliferation of Nuclear Weapons 1968

The NPT is the backbone of the international non-proliferation regime.⁴⁸ It established a legal framework for containing the risks of nuclear proliferation in the Cold War era.⁴⁹ In doing so, the

⁴¹ Cousineau, above n 37, 411.

⁴² Firmage, above n 38, 714.

⁴³ *Statute of the International Atomic Energy Agency*, opened for signature 26 October 1956, 276 UNTS 3, art II (entered into force 29 July 1957) (‘IAEA Statute’).

⁴⁴ Cousineau, above n 37, 412.

⁴⁵ United States Arms Control and Disarmament Agency, *International Negotiations on the Nonproliferation of Nuclear Weapons* (1969) ix.

⁴⁶ *Prevention of the Wider Dissemination of Nuclear Weapons*, GA Res 1665 (XVI) (4 December 1961).

⁴⁷ United States Arms Control and Disarmament Agency, *Arms Control and Disarmament Agreements: Texts and History of Negotiations* (1975) 80.

⁴⁸ David S Jonas, ‘Variations on Non-Nuclear: May the “Final Four” Join the Nuclear Nonproliferation Treaty as Non-Nuclear Weapon States While Retaining Their Nuclear Weapons?’ (2005) *Michigan State Law Review* 417, 418.

NPT struck a compromise between the risks and the benefits posed by nuclear technology.⁵⁰ The NPT was composed by the ENDC, using a series of drafts submitted by the United States and the Soviet Union from early 1965.⁵¹ The finalised draft of the NPT opened for signature on 1 July 1968, and entered into force on 5 March 1970. 188 states are parties to the NPT, including Iran. It constitutes a “virtual international consensus”⁵² on general proliferation principles and the role of nuclear technology in modern societies. It was, essentially, the first effective response to the emerging threat of proliferation.⁵³ The NPT is based on three fundamental principles, of which non-proliferation is paramount.⁵⁴

It was widely acknowledged at the time the NPT was drafted that the five states which possessed nuclear weapons were unlikely to surrender them. Thus, the NPT takes a realistic approach to the threat of nuclear weapons, by drawing a distinction between nuclear-weapons states (‘NWSs’) and non-nuclear weapons states (‘non-NWSs’). In furtherance of the principle of non-proliferation, the five NWSs – the United States, the United Kingdom, France, China and the Soviet Union⁵⁵ – agreed under article I of the NPT not to transfer nuclear weapons to non-NWSs and not to assist non-NWSs in acquiring nuclear weapons.⁵⁶ In return, non-NWSs agreed under article II not to seek or develop nuclear weapons.⁵⁷ This obligation on non-NWSs is supported by article III, which establishes a system of safeguards to be implemented by the IAEA.

The principle of disarmament operates as a further limitation on the conduct of NWSs under the NPT. Article VI of the NPT provides that “[e]ach Party to the Treaty must pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to

⁴⁹ Norman A Wulf, ‘NPT Review Conference: A Measure of Success’ (1986) 5 *Wisconsin International Law Journal* 57, 58.

⁵⁰ United States Arms Control and Disarmament Agency, *International Negotiations*, above n 45, iii.

⁵¹ *Ibid* 81.

⁵² Wulf, above n 49, 62.

⁵³ Cousineau, above n 37, 415.

⁵⁴ The other principles are disarmament and the right to peaceful uses of nuclear energy.

⁵⁵ Russia took control of the nuclear arsenal of the Soviet Union after its dissolution.

⁵⁶ Article I of the NPT reads: “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.”

⁵⁷ Article II of the NPT reads: “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.”

nuclear disarmament...” Thus, while the NPT took a realistic approach to the contemporary nuclear situation, it also foresaw a future international agreement which would bring about eventual nuclear disarmament. The fact that more states possess nuclear weapons capabilities now than in 1968 could be seen as a failure of the principles of non-proliferation and disarmament.

The NPT strikes a further, and very important, balance in relation to nuclear technology: article IV guarantees the “inalienable right of all... Parties... to develop research, production and use of nuclear energy for peaceful purposes.” This article is a crucial variable in the Iranian dispute, and will be discussed in detail in Chapter Two.

The NPT is often criticised for its inherently discriminatory nature. In reality, the burden of the NPT falls heavily on non-NWSs. NWSs only had to agree not to help non-NWSs gain weapons and to negotiate in good faith towards disarmament; these obligations are not particularly demanding. In contrast, non-NWSs had to forego the potential security advantages of nuclear weapons and submit to rigorous safeguards under article III of the NPT.⁵⁸ This apparent discrimination is a point of contention for many non-NWSs, including Iran.

A number of states stand as notable exceptions to the NPT regime, and they are known as the “final four” – India, Pakistan, Israel and North Korea.⁵⁹ While India and Pakistan are confirmed nuclear-weapons states, they have not ratified the NPT and thus operate outside the framework of the NPT and its obligations. Israel is a possible nuclear power, which has also failed to ratify the NPT.⁶⁰ The final exception is North Korea, a self-proclaimed nuclear power which withdrew from the NPT in 2003 following United States accusations that it had commenced an enriched uranium weapons programme.⁶¹ These exceptions serve as further fuel for Iranian claims that the international community is unfairly discriminating against Iran by protesting its pursuit of uranium enrichment facilities. States which do not “pay a significant price” for their nuclear status outside the NPT

⁵⁸ Marianne van Leeuwen, ‘Introduction’ in Marianne van Leeuwen (ed), *The Future of The International Nuclear Non-proliferation Regime* (1995) 1, 2.

⁵⁹ Jonas, above n 48, 418.

⁶⁰ Israel has never confirmed the existence of a nuclear weapons programme, but many international experts have little doubt that such a programme exists. See *Israel’s Nuclear Programme* (2003) BBC News Online <http://news.bbc.co.uk/2/hi/middle_east/3340639.stm> at 15 September 2006.

⁶¹ See Raven Winters, ‘Preventing Repeat Offenders: North Korea’s Withdrawal and the Need for Revisions to the Nuclear Non-proliferation Treaty’ (2005) 38 *Vanderbilt Journal of Transnational Law* 1499.

merely encourage non-NWS parties to the NPT to pursue nuclear weapons themselves.⁶² It is understandable that Iran may consider itself unfairly persecuted in this context.

B. Article III of the NPT and the IAEA Safeguards Scheme

The IAEA is an autonomous inter-governmental organisation responsible for operating the system of safeguards prescribed by the NPT. Article III of the NPT requires that all non-NWSs conclude an agreement with the IAEA which creates and implements safeguards on their peaceful nuclear programmes. These safeguards agreements are the main source of concrete obligations under the NPT. Essentially, NPT ‘compliance’ is compliance with a safeguards agreement.⁶³ In general terms, the safeguards agreements aim to ensure that nuclear material is not diverted from peaceful uses to nuclear weapons or nuclear explosive devices. The safeguards system is meant to operate as a deterrent by providing for the possibility of early detection of weapons initiatives.⁶⁴ It also functions as an early warning mechanism for such initiatives, and as a confidence-building measure in international relationships.⁶⁵

Although the IAEA did operate a system of safeguards prior to the NPT, it was limited to specific nuclear plants and operated as a highly unobtrusive limitation. After the NPT was signed, the IAEA was able to move away from a plant-oriented approach to a more extensive, nation-wide approach.⁶⁶ The NPT system thus allowed for a “truly comprehensive” safeguards agreement.⁶⁷

The three main pillars of the IAEA system of safeguards are material accountancy, containment and surveillance.⁶⁸ To meet these pillars, states must submit periodic reports to the IAEA, and IAEA inspectors undertake visits to those states to verify their reports and test the reported levels of nuclear materials.⁶⁹ The IAEA also installs a surveillance system which monitors conduct in declared nuclear facilities and again attempts to ensure that no nuclear material is diverted into non-peaceful

⁶² Jonas, above n 48, 420.

⁶³ Squassoni, above n 21, 5.

⁶⁴ Stockholm International Peace Research Institute, *The NPT: The Main Political Barrier to Nuclear Weapon Proliferation* (1980) 17.

⁶⁵ *Factsheets and FAQs: IAEA Safeguards Overview* (2003) International Atomic Energy Agency <http://www.iaea.org/Publications/Factsheets/English/sg_overview.html> at 12 May 2006.

⁶⁶ Stockholm International Peace Research Institute, above n 64, 17.

⁶⁷ Boutros Boutros-Ghali, *The United Nations and Nuclear Non-Proliferation* (1995) 15.

⁶⁸ Stockholm International Peace Research Institute, above n 64, 20.

⁶⁹ Ibid.

uses. Until 1997, the IAEA confined its verification processes to declared nuclear facilities. It was not responsible for detecting undeclared nuclear facilities, as it lacked the facilities and framework to function as what would essentially be an “international espionage organisation.”⁷⁰

The IAEA operates as an autonomous international body, but retains important structural links to its parent body, the United Nations.⁷¹ The IAEA reports annually to the United Nations General Assembly and has a duty to report non-compliance with its safeguards to the United Nations Security Council.⁷² This relationship is quite important in terms of the implications of a state’s lack of compliance, which will be discussed in more detail in Chapter Three.

1. The IAEA Additional Protocol

There is a further variable in the IAEA’s interactions with Iran – the Additional Protocol to the Safeguards Agreement. In 1993 the IAEA began to work on a safeguards improvement plan known as “Program 93+2”. This programme was a response to the failure of the existing safeguards regime in North Korea and Iraq during the early 1990s. In 1991, after the Gulf War, the IAEA discovered that Iraq had developed a nuclear weapons programme despite technical compliance with its IAEA Safeguards Agreement.⁷³ Iraq exploited what has been called the ‘undeclared facilities’ loophole in the IAEA system – the fact that the Agency confined inspections under its safeguards agreements to *declared* nuclear facilities.⁷⁴ The IAEA was concerned that its structural operations were not able to detect Iraq’s actions until after the Gulf War left Iraq’s infrastructure deficient. This concern was exacerbated by the 1993 threat of withdrawal from North Korea, which was refusing to allow an IAEA special inspection seeking to verify discrepancies in North Korean reports to the IAEA.⁷⁵ North Korea later withdrew from the NPT as a self-proclaimed nuclear-weapons power. As a result of the IAEA’s perceived failures in both North Korea and Iraq, the need for a more effective safeguards regime was strikingly apparent.

⁷⁰ Herbert Scoville, Jr., ‘Technical Capabilities of Safeguards’ in Bennet Boskey and Mason Willrich (eds), *Nuclear Proliferation: Prospects for Control* (1970) 53, 54.

⁷¹ Boutros-Ghali, above n 67, 14.

⁷² *IAEA Statute*, art XII(C).

⁷³ Chen Zak, *Iran’s Nuclear Policy and the IAEA: An Evaluation of Program 93+2* (2002) Washington Institute <<http://www.washingtoninstitute.org/templateC04.php?CID=55>> at 11 August 2006.

⁷⁴ Daryl Kimball and Paul Kerr, *The 1997 IAEA Additional Protocol at a Glance* (2005) Arms Control Association <<http://www.armscontrol.org/factsheets/IAEAPProtocol.asp?print>> at 11 August 2006.

⁷⁵ Zak, above n 73.

The main aims of the strengthened system were to prevent the diversion of peaceful nuclear materials into non-peaceful uses, and to detect undeclared and clandestine nuclear facilities. Program 93+2 sought to strengthen the IAEA safeguards system in two ways. The first part of the programme involved the expansion of existing safeguards. The IAEA Board of Governors began to recognise and enforce its right, under its safeguards agreements with states, to undertake no-notice inspections and environmental sampling for nuclear materials.⁷⁶ Thus, new monitoring measures were applied on declared nuclear facilities.⁷⁷ The second part of Program 93+2 required an expansion of the IAEA's legal mandate through an Additional Protocol to the Safeguards Agreements. The IAEA adopted a model Additional Protocol in May 1997.⁷⁸ The Additional Protocol is voluntary, but if a state signs and ratifies it, it allows for the monitoring of all nuclear-related activities, including imports and exports of related materials. It essentially provides expanded rights of access, including to areas not declared as nuclear, and authority to use the most advanced technologies during the verification process.⁷⁹ There is a streamlined visa process for inspectors, allowing for a greater ability to conduct short-notice inspections.⁸⁰ Furthermore, states are required to submit an expanded declaration to the Agency.⁸¹ In general, the Additional Protocol allows for more extensive and comprehensive inspections and monitoring of both declared and undeclared nuclear sites.

While the Additional Protocol is only voluntary, and only a limited number of NPT parties have signed and ratified the Protocol, it is a highly significant development in the IAEA's ability to prevent proliferation of nuclear weapons. The provisions of the safeguards agreements have "proven increasingly inadequate," according to the United Nations High Level Panel on Threats, Challenges and Change.⁸² Accordingly, the Additional Protocol must stand as the current standard for safeguarded countries to meet.⁸³

⁷⁶ Theodore Hirsch, 'The IAEA Additional Protocol: What It Is and Why It Matters' (2004) *The Nonproliferation Review* 140, 143.

⁷⁷ Kimball and Kerr, above n 74.

⁷⁸ *Model Protocol Additional to the Agreement(s) between State(s) and the International Atomic Energy Agency for the Application of Safeguards*, INFCIRC/540 (15 May 1997).

⁷⁹ *Factsheets and FAQs: IAEA Safeguards Overview* (2003) International Atomic Energy Agency <http://www.iaea.org/Publications/Factsheets/English/sg_overview.html> at 12 May 2006.

⁸⁰ Kimball and Kerr, above n 74.

⁸¹ Zak, above n 73.

⁸² United Nations High Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (2004) 44.

⁸³ *Ibid.*

2. Iran's Compliance

Iran signed a Safeguards Agreement in 1974,⁸⁴ and remains confident that it has satisfied all requirements under that agreement. It is difficult for an outsider to determine whether Iran is in full compliance with that agreement. Compliance is largely a matter of fact and evidence, to which we are not privy. However, guidance can be drawn from periodic reports by the Director General of the IAEA to its Board of Governors, and by resolutions adopted by the Board of Governors. There have certainly been points when the IAEA Board of Governors has considered Iran in non-compliance with its Safeguards Agreement.⁸⁵ The IAEA has documented many technical violations on Iran's part.⁸⁶ While those violations have been remedied to some extent by confidence-building measures over the intervening years, a resolution adopted by the IAEA Board of Governors in September 2005 found Iran in non-compliance with its Safeguards Agreement.⁸⁷ Furthermore, the IAEA was sufficiently concerned with the situation to refer the issue to the United Nations Security Council in March 2006, citing "serious doubts about the nature and direction of Iran's nuclear programme."⁸⁸ In April 2006, the IAEA Director-General, Mohammed El-Baradei, reported to the United Nations Security Council that Iran had failed to meet the IAEA's requirements of full transparency after three years of attempts to seek clarity. Thus, while there was no evidence of a weapons programme in Iran, the IAEA could not be completely satisfied that no such programme existed.⁸⁹ Using these reports and resolutions as guidance, it is clear that the IAEA considers Iran in non-compliance with its Safeguards Agreement. The IAEA is in the best position to determine Iranian compliance, and therefore it is a safe conclusion that Iran is in breach of its Safeguards Agreement with the IAEA.

The IAEA's concerns with Iran's lack of transparency are heightened by the fact that Iran has not yet ratified an Additional Protocol. Iran signed an Additional Protocol in December 2003 but has yet

⁸⁴ *Agreement between Iran and the International Atomic Energy Agency for the Application of Safeguards in Connection with the Treaty on the Non-proliferation of Nuclear Weapons*, INFCIRC/214 (13 December 1974).

⁸⁵ Particularly since the revelation, in 2002, that Iran had developed a secret nuclear programme. See, for example, *International Atomic Energy Agency Resolution: Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, GOV/2003/69 (12 September 2003). That resolution noted "failures by the Islamic Republic of Iran to report material, facilities and activities as it was obliged to do pursuant to its safeguards agreement."

⁸⁶ Squassoni, above n 21, 5.

⁸⁷ *International Atomic Energy Agency Resolution: Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, GOV/2005/77 (24 September 2005).

⁸⁸ *International Atomic Energy Agency Resolution: Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, GOV/2006/14 (4 February 2006).

⁸⁹ Mohamed El-Baradei, *Report by the Director General of the IAEA to the Board of Governors: Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, GOV/2006/27 (28 April 2006).

to ratify it. This fact is a significant point of contention. In addition, although Iran had taken steps to implement the Additional Protocol before technically ratifying it, it recently ceased implementation of the Protocol.⁹⁰ This is potentially contrary to a customary norm of international law, which dictates that once a state signs a treaty, although it may not be bound by the rules of the treaty itself, it is bound to act in good faith and not against the treaty until it makes clear its intention not to become a party to the treaty.⁹¹ Arguably, Iran is not acting in good faith by refusing to implement the Additional Protocol and refusing to meet IAEA requirements for transparency.

In diplomatic terms, the main issue is Iran's refusal to cease uranium enrichment. Uranium enrichment itself is not prohibited by the NPT or the IAEA Safeguards Agreement, though in the context of Iran's history of non-compliance and clandestine activity the enrichment process has fostered suspicion. The EU considers cessation a crucial "confidence building issue", and the United States, which cut diplomatic ties with Iran after the 1979 siege of its embassy in Tehran, has indicated it will join direct talks if Iran ceases enrichment.⁹² While other countries have enrichment facilities,⁹³ the key difference is that those countries voluntarily declared their facilities to the IAEA, whereas Iran only did so when it was forced to.⁹⁴

Clearly, issues remain in relation to Iran's compliance with IAEA requirements. While an enrichment programme would not itself breach any element of the NPT or the IAEA Safeguards Agreement, Iran has failed to comply with the administrative and technical requirements of its Safeguards Agreement. The legal relevance of this non-compliance will be discussed in Chapter Two, but in practical terms, Iran's conduct has created an atmosphere of suspicion and a concern that it may be undertaking enrichment with non-peaceful uses in mind.

⁹⁰ Ibid.

⁹¹ This is a principle of customary law affirmed by *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 311, art 18 (entered into force 27 January 1980) ("*Vienna Convention*").

⁹² *US Offers Direct Talks With Iran* (2006) BBC News Online <http://news.bbc.co.uk/2/hi/middle_east/5034228.stm> at 2 June 2006.

⁹³ Rebecca Johnson, *The 2005 NPT Conference in Crisis: Risks and Opportunities* (2005) Disarmament Diplomacy <<http://www.acronym.org.uk/dd/dd79/79npt.htm>> at 10 May 2006: Britain, France, Brazil, and Japan (among others) have enrichment facilities.

⁹⁴ Ibid.

CHAPTER TWO:

THE RIGHT TO NUCLEAR ENERGY

Iran has consistently claimed that its uranium enrichment programme is purely for peaceful purposes and thus in compliance with the NPT. This Chapter critically examines that claim, assessing the meaning and scope of article IV of the NPT and the concept of “peaceful purposes,” in the broader sense, at international law. The Chapter ends with a consideration of the potential consequences of an international failure to recognise Iran’s rights: Iran’s withdrawal from the NPT.

A. Article IV of the NPT

Article IV of the NPT deals with what is called the “inalienable right” of all states to the peaceful benefits of nuclear technology. Essentially, it aimed to address the concern of many non-nuclear weapons states that the NPT would place them at a disadvantage in industrial advancement by preventing the pursuit of peaceful nuclear technology. Article IV(1) of the NPT provides:

“Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with articles I and II of this Treaty.”

Article IV(2) took the issue a step further, by placing an obligation on nuclear states to assist non-nuclear states in their pursuit of nuclear technology. That obligation fell short of a formal duty, but it did reinforce the right to peaceful benefits:

“All the Parties to the Treaty undertake to facilitate, and have the right to participate in, the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy. Parties to the Treaty in a position to do so shall also cooperate in contributing ... to the further development of the applications of nuclear energy for peaceful purposes, especially in the territories of non-nuclear-weapon States Party to the Treaty, with due consideration for the needs of the developing areas of the world.”

The non-nuclear weapons states had expressed serious concern that the NPT's non-proliferation provisions would prevent them from acquiring civilian nuclear technology.⁹⁵ The question of peaceful nuclear uses became an important issue during the negotiations for the NPT.⁹⁶ Article IV was drafted into the NPT as a guarantee and recognition of the right of modern states to seek modern technologies. However, that guarantee is still subject to the non-proliferation principles in articles I and II of the NPT.

B. “Peaceful Purposes”

The most important part of article IV in Iran's case is article IV(1) and its guarantee of the right to nuclear energy for “peaceful purposes.” It is necessary to consider the meaning of that phrase before the “inalienable right” can be applied to Iran's situation.

1. The Vienna Convention Principles of Interpretation

The interpretation of treaties is itself governed by a treaty: the 1969 Vienna Convention on the Law of Treaties. The basic principles of treaty interpretation are set out in articles 31-33 of the Convention. Article 31 provides the general rules of interpretation: namely, that a treaty shall be interpreted in good faith, in accordance with the ordinary meaning of its terms in their context, and in light of its object and purpose.⁹⁷

a. The Wider Context of Article IV

According to article 31(2)(b) of the Vienna Convention, the context of a treaty includes “any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.” Article 31(3)(a) of the Vienna Convention also provides that “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” may be taken into account. These provisions widen the context of the NPT and incorporate agreements outside the NPT itself – namely, the IAEA safeguards agreements. Because the safeguards agreements refer directly to the

⁹⁵ Jozef Goldblat, ‘Discussion and Recommendations’ in Jozef Goldblat (ed), *Non-proliferation: The Why and the Wherefore* (1985) 3, 26.

⁹⁶ United States Arms Control and Disarmament Agency, *International Negotiations*, above n 45, 63.

⁹⁷ *Vienna Convention*, art 31(1).

NPT,⁹⁸ they are clearly relevant to the interpretation of the NPT itself as a “subsequent agreement” and as an “instrument related to the treaty.” Thus, the safeguards agreements are relevant to the interpretation of article IV and may serve to qualify the right to peaceful uses of nuclear energy.

This fact is affirmed by the words in article IV(1) which guarantee a right to the use of nuclear energy for peaceful purposes “in conformity with articles I and II of this Treaty.” Articles I and II of the NPT establish the non-proliferation obligations on NWSs and non-NWSs. Those non-proliferation obligations are enforced by the monitoring and safeguards provisions in article III of the NPT, which are in turn implemented by IAEA safeguards agreements. Therefore, the reference to conformity in article IV(1) of the NPT impliedly incorporates IAEA safeguards agreements and provides that the right to nuclear energy for peaceful purposes is subject to compliance with the IAEA safeguards agreement accepted by any individual state.

Article IV is declaratory and imperative, and it is phrased in ostensibly clear terms: the right to nuclear energy for peaceful purposes is an “inalienable” right of all states party to the NPT. But article IV(1) does not provide an unqualified right. When that right is considered in context, it is undoubtedly contingent on good faith compliance with a safeguards agreement.

b. The Drafting Process

Article 32 of the Vienna Convention provides that the preparatory work of a treaty and the circumstances of its conclusion are supplementary means of interpretation which may be considered in order to confirm a meaning resulting from the application of the primary rules of interpretation in article 31, or to determine a meaning left ambiguous or obscure by the application of the primary rules.⁹⁹ The NPT underwent an extensive drafting process, with several stages of negotiations and comprehensive debate before the twentieth session of the United Nations General Assembly.¹⁰⁰ Throughout this process, article IV remained a constant element of the NPT drafts. However, the numerous drafts of the NPT also consistently included a reference to the principles of non-proliferation contained in articles I and II. Accordingly, a consideration of the NPT’s drafting

⁹⁸ See, for example, *Agreement between Iran and the International Atomic Energy Agency for the Application of Safeguards in Connection with the Treaty on the Non-proliferation of Nuclear Weapons*, INFCIRC/214 (13 December 1974), art I, which provides “The Government of Iran undertakes, pursuant to paragraph 1 of Article III of the Treaty, to accept safeguards...”. There are other, similar references throughout the Safeguards Agreement.

⁹⁹ *Vienna Convention*, art 32(a).

¹⁰⁰ See Firmage, above n 38.

process confirms that the right to nuclear energy for peaceful purposes is subject to compliance with an IAEA safeguards agreement.

2. Other Uses of the Phrase

The phrase “peaceful purposes” is by no means unique to the NPT. It has been employed in a significant number of arms control and disarmament treaties. The use of the phrase in these other contexts sheds light on its meaning in the NPT. In some quarters “peaceful purposes” is defined as “non-military purposes” while in others – notably the United States – it is defined as “non-aggressive purposes.”¹⁰¹ In general terms, a consensus has developed within the United Nations in support of the latter definition.¹⁰² Nonetheless, the phrase is “notoriously imprecise.”¹⁰³

The phrase was first used in the 1961 Antarctic Treaty,¹⁰⁴ article I of which provides:

“Antarctica shall be used for peaceful purposes only. There shall be prohibited, *inter alia*, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military manoeuvres, as well as the testing of any type of weapons.”

It has been said that there is “considerable room for differences of opinion” on the meaning of article I of the Antarctic Treaty,¹⁰⁵ largely because it is difficult to draw a clear distinction between “military” and “peaceful.”¹⁰⁶ However, the phrase should be naturally construed.¹⁰⁷

The phrase “peaceful purposes” was borrowed from the Antarctic Treaty and inserted into the Outer Space Treaty¹⁰⁸ in 1967.¹⁰⁹ According to article IV of the Outer Space Treaty, “the moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful

¹⁰¹ Major Christopher M Petras, “Space Force Alpha”: Military Use of the International Space Station and the Concept of “Peaceful Purposes” (2002) 53 *Air Force Law Review* 135, 139.

¹⁰² *Ibid* 171.

¹⁰³ *Ibid* 180.

¹⁰⁴ *Antarctic Treaty*, opened for signature 1 December 1959, 402 UNTS 71 (entered into force 23 January 1961).

¹⁰⁵ F M Auburn, *Antarctic Law and Politics* (1982) 96.

¹⁰⁶ *Ibid* 97.

¹⁰⁷ *Ibid*.

¹⁰⁸ *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, opened for signature 27 January 1967, 610 UNTS 205 (entered into force 10 October 1967).

¹⁰⁹ Petras, above n 101, 168.

purposes.” Article IV also expressly prohibits the establishment of military bases, installations and fortifications, the testing of any weapons, and the conduct of military manoeuvres.

“Peaceful purposes” has also been used in a number of nuclear-free-zone treaties, including the Treaty of Tlatelcolco,¹¹⁰ the Treaty of Bangkok,¹¹¹ the Treaty of Rarotonga,¹¹² and the Treaty of Pelindaba.¹¹³ In these treaties, the use of the phrase is more similar to its use in the NPT – the right of the parties to nuclear technology for peaceful purposes is *affirmed*.¹¹⁴

The phrase “peaceful purposes” has been employed in a range of international agreements. These other uses of the phrase are significant because of what they do not say. Unlike the NPT, these other treaties do not provide a regulatory regime for interpreting and applying their provisions; there is no elaborate supplementary regime of the same status as the IAEA safeguards system. Thus, the other uses of the phrase are quite distinct from its use in the NPT. The fact that these supposedly similar provisions operate in a very different context underlines the importance of that context, and suggests that the right in article IV(1) is subject to that context.

3. Iran’s Interpretation

An analysis of the above rules of interpretation casts light on the meaning of article IV(1) of the NPT. The interpretation of that article, against a context of non-compliance with an IAEA safeguards agreement,¹¹⁵ is crucial to the determination of the Iranian dispute.

Iran has taken what could be called a ‘textual’ approach, viewing the NPT as a stand-alone document which is unaffected by non-compliance with an IAEA safeguards agreement. On that approach, the guarantee in article IV(1) is “inalienable” and Iran has every right to continue its uranium enrichment programme, regardless of any decision of the IAEA. Applying the ordinary

¹¹⁰ *Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean*, opened for signature 14 February 1967, 634 UNTS 326 (entered into force 22 April 1968) (“Treaty of Tlatelolco”).

¹¹¹ *Southeast Asian Nuclear-Weapon-Free Zone Treaty*, opened for signature 15 December 1995, 35 ILM 635 (entered into force 28 March 1997).

¹¹² *South Pacific Nuclear Free Zone Treaty*, opened for signature 8 August 1985, 24 ILM 1442 (entered into force 11 December 1986).

¹¹³ *African Nuclear Weapons Free Zone Treaty*, opened for signature 11 April 1996, 35 ILM 698 (has not entered into force).

¹¹⁴ For example, art 17 of the *Treaty of Tlatelolco* reads: “Nothing in the provisions of this Treaty shall prejudice the rights of the Contracting Parties, in conformity with this Treaty, to use nuclear energy for peaceful purposes, in particular for their economic development and social progress.”

¹¹⁵ See Chapter One, Part B(2) above for a discussion of Iranian non-compliance.

meaning of article IV(1),¹¹⁶ and without proof of diversion to a weapons programme, Iran's uranium enrichment is entirely lawful. Iran remains committed to the indigenous production of enriched uranium, but argues that it merely wants to fulfil its rights under the NPT. Iran has "played the trump card of Iranian nationalism" and portrayed its uncompromising commitment to enrichment as a legitimate response to discrimination propagated by the United States.¹¹⁷ Ostensibly, Iran is dedicated to the "fundamental instrument" that is the NPT.¹¹⁸ The Iranian administration claims that acquiring nuclear weapons is "inhuman, immoral, illegal and against its very basic principles."¹¹⁹ In support of this, Iran maintains that its commitment to uranium enrichment is merely an attempt to provide for a population which has more than doubled since 1979.¹²⁰ Before the 1979 Revolution, Iran had a recognised need for nuclear energy. That need had been acknowledged by the United States, which had taken steps to assist Iran's civilian nuclear goals. Accordingly, Iran argues that the United States' current objection is the result of a political agenda.¹²¹ Under the ordinary meaning of article IV(1), this argument renders Iran's attempts to establish indigenous uranium enrichment entirely legal.

However, when the rules of treaty interpretation are applied to the situation, it is clear that a 'contextual' rather than 'textual' approach is the correct legal means of interpreting article IV(1). The interpretation of article IV(1) thus goes beyond its ordinary meaning to its context. As previously mentioned, the context of a treaty is relevant as a primary rule of interpretation under the Vienna Convention on the Law of Treaties.¹²² The contextual approach requires that the ordinary meaning of article IV(1) must be interpreted in light of the object and purpose of the NPT. The object and purpose of the NPT is relatively clear in its provisions, and is confirmed by its preamble: the proliferation of nuclear weapons is a threat to international security and must be avoided. As discussed in Chapter One, the NPT is a clear and virtually unanimous international declaration against the proliferation of nuclear weapons. In this context, given Iran's history of secrecy, the suspicion surrounding Iran's enrichment programme is understandable. Iran's conduct does not

¹¹⁶ As required by the *Vienna Convention*, art 31.

¹¹⁷ Shahram Chubin and Robert S Litwak, 'Debating Iran's Nuclear Aspirations' (2003) 26 *The Washington Quarterly* 99, 99.

¹¹⁸ Islamic Republic of Iran, *Report Submitted to the 2005 Review Conference of the Parties to the Treaty on the Non-proliferation of Nuclear Weapons: Implementation of Article VI*, Un Doc NPT/CONF.2005/4 (18 April 2005).

¹¹⁹ *Ibid.*

¹²⁰ Sheikh-Hassani, above n 8.

¹²¹ *Ibid.*

¹²² *Vienna Convention*, art 31.

seem to conform to the object and purpose of the NPT. Furthermore, the context of the NPT includes the Safeguards Agreement Iran signed with the IAEA in 1970.¹²³ As discussed above, a contextual interpretation of the NPT provides that the right to nuclear energy for peaceful purposes is subject to compliance with the IAEA safeguards agreement accepted by the state in question. Iran has been deemed non-compliant with their Safeguards Agreement.¹²⁴ Applying the contextual approach, this non-compliance negates the allegedly “inalienable” right in article IV(1) of the NPT.

The Iranian approach to the interpretation of article IV(1) of the NPT is incorrect. When the correct contextual interpretation is applied, and Iran’s non-compliance with its IAEA Safeguards Agreement is considered, article IV(1) alone cannot justify Iran’s nuclear programme. The right to nuclear energy for peaceful purposes is qualified by the principle of non-proliferation in general, and by that principle’s verification procedure – the IAEA safeguards. Iran’s lack of compliance with IAEA requirements undercuts its reliance on article IV(1) of the NPT.

C. The Right to Withdraw

In the face of continuing international disapproval, Iran’s withdrawal from the NPT is a clear possibility. Iran has threatened withdrawal if the international community continues to be unreceptive to Iran’s ‘rights.’ If Iran withdrew from the NPT, article 26 of its IAEA Safeguards Agreement provides that the Agreement would no longer remain in force. Iran would therefore be placed firmly outside the obligations and regime of the NPT.

Article X(1) of the NPT guarantees the right to withdraw from the NPT:

“Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.”

¹²³ See Part B(1) above: the IAEA safeguards agreements are relevant to the interpretation of article IV, and qualify the right to peaceful uses of nuclear energy.

¹²⁴ See the discussion of Iranian non-compliance in Chapter One, Part B(2) above.

Thus, article X(1) is drafted subjectively, requiring only that the party decide that “extraordinary events” relating to the subject matter of the NPT have “jeopardised the supreme interests of its country.” The right of withdrawal is explicitly recognised as an incident of the exercise of a party’s “national sovereignty.” The judgement is left entirely to the discretion of the withdrawing state. This subjective withdrawal clause has the potential to compromise the purpose of the NPT and weaken its basic framework.¹²⁵

While the subjective terms of the article seem to suggest the right to withdraw is largely unconditional, that inference has been disputed by some commentators. It has been argued that, when considered in the context of the NPT and the United Nations Charter, the right to withdraw is subject to important limitations.¹²⁶ The subjectivity of the test for withdrawal is limited by the strong language which the NPT utilises. The “extraordinary events” must have affected the state’s “supreme interests.” Article X(1) therefore sets rather a high threshold before a state can legitimately and genuinely withdraw.

Article X(1) of the NPT was based on the withdrawal clause in article IV of the Partial Test Ban Treaty 1963,¹²⁷ and the distinctions between the two articles illuminate the existence and framing of the NPT withdrawal clause. Two elements of article X(1) of the NPT are not replicated in article IV of the Partial Test Ban Treaty: the requirement that notice of withdrawal be communicated to the United Nations Security Council, and the final sentence which requires a statement of the “extraordinary events” as part of the notice. These elements operate as constraints on the right of withdrawal and change the meaning and intent of the withdrawal clause.¹²⁸ One commentator has described these added phrases as providing “an additional brake on hasty withdrawal action without limiting the basic right of withdrawal.”¹²⁹

¹²⁵ Winters, above n 61.

¹²⁶ George Bunn and John Rhinelander, *The Right to Withdraw from the NPT: Article X is not Unconditional* (2005) Disarmament Diplomacy <<http://www.acronym.org.uk/dd/dd79/79gbjr.htm>> at 10 May 2006.

¹²⁷ *Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water*, opened for signature 5 August 1963, 480 UNTS 43 (entered into force 10 October 1963).

¹²⁸ Bunn and Rhinelander, above n 126.

¹²⁹ Jenny Nielsen and John Simpson, *The NPT Withdrawal Clause and Its Negotiating History* (2004) Mountbatten Centre for International Studies <http://www.mcis.soton.ac.uk/Site_Files/pdf/withdrawal_clause_NPT_nielsen&simpson_2004.pdf> at 11 August 2006.

The reference to the United Nations Security Council is important. It incorporates United Nations Charter considerations of international peace and security. The United Nations Charter arguably authorises the Security Council to take action against NPT withdrawals that could lead to threats to international peace and security.¹³⁰ A withdrawal from the NPT is likely to indicate an acquisition of nuclear weapons, which has been recognised as a threat to international peace and security,¹³¹ and therefore the Security Council might be forced to take action. The notice requirements also suggest that there might be a burden of proof on the state to provide a ‘credible case,’ because the issue and the reasons given will be reviewed by the Security Council. The three month suspension period was, after all, designed to allow the Security Council to assess the situation and negotiate as required. Arguably, this makes illegitimate withdrawal less feasible.¹³²

During negotiations for the NPT, Russia opposed the inclusion of article X(1), arguing that a withdrawal clause was not necessary because international law should recognise a sovereign right to withdraw from a treaty. Russian delegates were concerned that this customary right would be limited by the inclusion of article X(1).¹³³ The final wording of the article seems to be a compromise between this view and the view of the United States. While there is a specific withdrawal clause, which imposes conditions on the right to withdraw, the article begins with an affirmation of the sovereign rights of states.¹³⁴

During the negotiations, little thought was given to the situation where a non-compliant party seeks to withdraw from the NPT.¹³⁵ This would be a clear demonstration of bad faith, and therefore it is possible that the good faith requirement of the Vienna Convention on the Law of Treaties might require that a state establish full compliance before they can withdraw legitimately.¹³⁶ The United Nations High Level Panel on Threats, Challenges and Change recently stated that any withdrawal from the NPT “should prompt immediate verification of its compliance with the Treaty, if necessary

¹³⁰ Bunn and Rhinelander, above n 126.

¹³¹ Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law* (2005) 34; and *United Nations Security Council Resolution 1540*, UN Doc S/RES/1540 (28 April 2004).

¹³² Nielsen and Simpson, above n 129. ‘Illegitimate’ withdrawal in this context would be withdrawal for the purpose of developing nuclear weapons.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ Bunn and Rhinelander, above n 126.

mandated by the Security Council.”¹³⁷ If a state failed to verify its compliance, the international community might consider sanctions or some other form of international remedy for wrongful conduct. Iran is currently non-compliant with its IAEA Safeguards Agreement, and consequently the NPT. It is possible that Iran would face strict retaliation from the international community if it withdrew without sufficiently remedying the current IAEA concerns.

If Iran could not legitimately meet the requirements of article X(1), there are other alternatives at international law. Iran could either claim a breach by another party to the NPT, or it could invoke the principles of impossibility or a fundamental change of circumstances. The latter is the most obviously relevant means of termination in Iran’s situation. Article 62 of the Vienna Convention on the Law of Treaties provides a “fundamental change of circumstances” justification for withdrawal from a treaty. The principle of *pacta sunt servanda*, that treaties must be respected and performed, is modified by the principle of *rebus sic stantibus*: that treaties must only be performed if conditions remain the same.¹³⁸ Iran would need to establish that there was a fundamental change in the circumstances which prompted it to sign the NPT. In such a situation, article 62 requires a state to show that:

- “(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
- (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.”

Arguably, Iran’s emerging need to provide for a young and growing population might constitute a fundamental change of circumstances and thus provide justification for withdrawal from the NPT. However, the International Court of Justice (‘ICJ’) has demonstrated a general tendency to favour the principle of *pacta sunt servanda* over the principle of *rebus sic stantibus*.¹³⁹ Thus, the ICJ has taken a very cautious approach to the grounds for termination contained in the Vienna Convention, and would be unlikely to stretch those grounds to cover the current case.¹⁴⁰ The exception provided by

¹³⁷ United Nations High Level Panel, above n 82, 43.

¹³⁸ Donald K Anton, Penelope Mathew and Wayne Morgan, *International Law: Cases and Materials* (2005) 372.

¹³⁹ *Ibid* 376.

¹⁴⁰ See *Fisheries Jurisdiction (United Kingdom v Iceland, Federal Republic of Germany v Iceland)* [1973] ICJ Rep 3, 49. There are also procedural requirements relating to withdrawal which would serve as a significant limitation on Iranian conduct: see Part V, Section 4 of the *Vienna Convention* and its accompanying annex.

article 62 of the Vienna Convention must “be applied only in exceptional cases.”¹⁴¹ The changing circumstances must “radically transform the extent of the obligations still to be performed.”¹⁴² The changing circumstances in Iran’s case relate to changing opinions and perspectives on energy production in Iran, rather than any physical or practical change in circumstances. They have changed the incentives for Iran’s signature of the NPT rather than the obligations contained in the treaty and, as such, the “circumstances” would be unlikely to support a notice of withdrawal in the eyes of international institutions such as the ICJ.

1. The Precedent of North Korea

North Korea entered into a Safeguards Agreement with the IAEA in 1992, but in January 1993 North Korea refused to allow IAEA inspections of its nuclear sites. This caused much debate in the international community, and in March 1993 North Korea advised the United Nations Security Council of its intent to withdraw from the NPT under article X(1). This declaration resulted in diplomatic talks between North Korea and the United States, and a temporary resolution led to North Korea “suspending” its withdrawal. However, in January 2003 North Korea announced its official withdrawal from the NPT, citing the United States’ hostile policy as the “extraordinary event” which justified withdrawal.¹⁴³ North Korea was clearly non-compliant with IAEA safeguards when it invoked article X(1), and it had a history of nuclear weapons development.¹⁴⁴ The international community did not impose any sanctions on North Korea as a result of this withdrawal. Thus, Iran could use the North Korean example as a precedent for its own withdrawal from the NPT.

To satisfy the requirements of article X(1), Iran would need to make a declaration to all other parties to the NPT, and to the United Nations Security Council, outlining its grounds for withdrawal. Once this notice was made, the withdrawal would take effect after three months. The notice would need to identify the “extraordinary events” which were jeopardising Iran’s “supreme interests.” In the light of recent developments, and given the North Korean precedent, the “extraordinary events” which would justify such an action would likely be related to the international hostility towards Iran’s indigenous uranium enrichment programme.

¹⁴¹ See *Case Concerning the Gabčíkovo-Nagymaros Project* [1997] ICJ Rep 7, [104].

¹⁴² *Ibid.*

¹⁴³ Winters, above n 61.

¹⁴⁴ Johnson, above n 93.

2. The Possible Implications of Withdrawal

Withdrawal would clearly have massive political implications in signalling Iran's intention to acquire nuclear weapons. It might also have important legal implications.

Once a notice of withdrawal had been given, the NPT (and consequently the IAEA Safeguards Agreement) would no longer apply. There is a possibility that the international community could rely on a customary principle of non-proliferation to fill the void. Once established by "general acceptance,"¹⁴⁵ custom binds all states, irrespective of whether they accept it or not. However any claim on the basis of a customary principle of non-proliferation would be bound to founder – either on the material element of custom, state practice, or on the subjective element of *opinio juris sive necessitatis*.¹⁴⁶ Furthermore, even if there was enough evidence to suggest the existence of a customary principle of non-proliferation, that principle would be so vague and unqualified that it would be practically useless. Thus, without the NPT or the IAEA limiting Iran's conduct, the international community would be virtually powerless in terms of enforcing a substantive obligation on Iran.

However, withdrawal from the NPT would not necessarily leave Iran free of nuclear restraints. There is some evidence to suggest that a withdrawing state may not be legally able to use materials or knowledge obtained through NPT networks and provided on the assumption that they would be used for peaceful purposes and monitored by the operation of IAEA safeguards.¹⁴⁷ In addition, it is probable that a withdrawing state would still be accountable for any breaches of the NPT committed while it was a party to that treaty.¹⁴⁸ Those breaches would not be extinguished by the mere fact of withdrawal. Under article 70(1)(b) of the Vienna Convention, the termination of a treaty "does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination." A state's past actions may, therefore, constitute a breach of treaty obligations and might even provide sufficient evidence that its withdrawal constitutes a threat to international peace and security.

¹⁴⁵ *Statute of the International Court of Justice*, art 38(1)(b).

¹⁴⁶ *Opinio juris sive necessitatis*, often shortened to *opinio juris*, is a state's belief that its behaviour was governed by a legal obligation.

¹⁴⁷ Bunn and Rhineland, above n 126.

¹⁴⁸ *Ibid.*

In the case of North Korea's withdrawal, the United Nations Security Council could not agree on the appropriate action to take. The Security Council would have to act decisively and firmly in deviating from this precedent. Iran might face political or economic sanctions, or even a more drastic penalty, if the Security Council was not convinced that Iran's withdrawal was legitimate. There is, therefore, the possibility of collective or unilateral action to remedy the threat caused by a withdrawal from the NPT. That possibility will be discussed in detail in Chapter Three.

CHAPTER THREE:

THE INTERNATIONAL RESPONSE

This Chapter addresses the international response to Iran’s conduct – a response which has until now operated against a background of diplomacy. The Chapter will begin by examining the international law on the use of force and will consider the possibility of the use of force against Iran on a collective and unilateral basis. The Iranian situation and its possible consequences will be assessed in terms of implications for the future of international law. The diplomatic attempts at a negotiated solution will also be considered in the context of sovereignty and the principle of non-intervention. Finally, a number of alternative solutions will be canvassed.

A. The Prohibition on the Use of Force at International Law

The Iranian situation raises complex issues relating to the international law on the use of force. The continued development of an Iranian nuclear programme may, in the foreseeable future, lead to the use of force by the international community. The United Nations High Level Panel on Threats, Challenges and Change recently declared that the United Nations Security Council should be prepared to act in all cases of serious concern over non-compliance with non-proliferation and safeguards standards.¹⁴⁹ If the United Nations Security Council were sufficiently concerned with Iran’s nuclear programme to take action, and if agreement could be reached among all permanent members of the Security Council that force was the appropriate action to take, Iran could face the collective use of military force against its nuclear facilities.

Alternatively, given recent history, the United States might take military action against Iranian facilities – either alone or in concert with a coalition of states. Iran has been identified by President George W Bush as a member of the “axis of evil” alongside Iraq and North Korea.¹⁵⁰ According to the Bush administration, the possibility that Iran is developing a clandestine nuclear weapons

¹⁴⁹ United Nations High Level Panel, above n 82, 44. The Report was a response to concerns that the United Nations Charter system was being contravened by certain members of the international community – namely the United States, by its intervention in Iraq in 2003.

¹⁵⁰ Christine Gray, *International Law and the Use of Force* (2nd ed, 2004) 1.

capability is a threat which the United States cannot tolerate.¹⁵¹ Set against a background of the American ‘war against terrorism,’ Iran’s conduct could very well elicit a coercive response from the United States. American non-proliferation efforts are principally focused on terrorists and ‘rogue’ states.¹⁵² In this context, there is a significant possibility of military action against Iranian nuclear interests.

Both of these courses of action would face significant barriers. At international law there is a general prohibition against the use of force to resolve disputes.¹⁵³ This prohibition has its origins in the League of Nations Covenant of 1919 and the General Treaty for the Renunciation of War of 1928, better known as the Kellogg-Briand Pact.¹⁵⁴ Those international instruments formed the legal background to the regime established by the United Nations Charter in 1945. The legal regime embodied in the Charter incorporates principles of non-intervention and state sovereignty – both integral elements of customary international law.¹⁵⁵ The general prohibition on the use of force is to be found in article 2 of the United Nations Charter alongside the general obligation to resolve disputes peacefully:

- “3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”

While article 2(4) seems to provide a complete prohibition on the use of force, the United Nations Charter recognises two key exceptions to the prohibition.¹⁵⁶ The first exception is provided by article 42 of the Charter, which states that the Security Council may take “such action by air, sea or land

¹⁵¹ This comment was made in the President’s State of the Union address on 29 January 2002: *President Delivers State of the Union Address* (2002) White House Website <<http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>> at 16 July 2006.

¹⁵² Jonas, above n 48, 422. North Korea is called a “rogue” state in United States official documents.

¹⁵³ This prohibition is embodied in the United Nations Charter, and was confirmed as a peremptory norm of customary international law in *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14 (‘the Nicaragua case’).

¹⁵⁴ *General Treaty for the Renunciation of War*, opened for signature 27 August 1928, 94 LNTS 57 (entered into force 24 July 1929). See Ian Brownlie, *Principles of Public International Law* (6th ed, 2003) 697-8.

¹⁵⁵ This was affirmed in the *Nicaragua* case, above n 153.

¹⁵⁶ A third exception is provided by article 53 of the Charter, which allows for Security Council authorisation of regional enforcement arrangements.

forces as may be necessary to maintain or restore international peace and security.” Thus, article 42 allows the Security Council to authorise the use of force in certain circumstances.¹⁵⁷

The second exception to the prohibition on the use of force is to be found in article 51 of the Charter which provides that nothing in the Charter “shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations.” This exception to the prohibition on the use of force is not dependent on Security Council approval, although the Security Council does have a subsequent role to play. Any measures taken under article 51 must be reported to the Security Council, which retains the right to take whatever action it deems necessary.¹⁵⁸ The right to the use of force in self-defence is also a recognised principle of customary international law.¹⁵⁹

B. Formal Action by the United Nations Security Council

The powers of the Security Council are primarily governed by Chapter VII of the United Nations Charter, which prescribes the actions the Security Council can take with respect to threats to the peace, breaches of the peace, and acts of aggression. Chapter VII provides for both the use of armed force and the use of measures not involving armed force.

The threshold requirement for Security Council action under Chapter VII is to be found in article 39 of the United Nations Charter, which provides:

“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

¹⁵⁷ These circumstances will be discussed below in relation to the Iranian situation.

¹⁵⁸ Article 51 reads, in full: “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. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

¹⁵⁹ The *Nicaragua* case, above n 153.

To invoke the provisions of Chapter VII, the Security Council must first make a finding under article 39 of the Charter that there has been a threat to the peace, a breach of the peace, or an act of aggression. When invoking Chapter VII in the past, the Security Council has tended towards use of the more general phrase “threat to the peace.”¹⁶⁰ Furthermore the Security Council tends to exercise a very wide interpretation of its discretion to define a threat to the peace.¹⁶¹ While both possession of nuclear weapons¹⁶² and withdrawal from the NPT¹⁶³ would likely constitute a threat to the peace, neither of those factors is present in the Iranian situation as it currently stands. In Iran’s case, the “threat” would have to be found in Iran’s non-compliance with its IAEA Safeguards Agreement and its general lack of transparency with the IAEA. However, it has been argued that the Security Council could resort to its enforcement measures in order to prevent a state from developing a nuclear weapons programme which would, on completion, constitute a threat to the peace.¹⁶⁴ In the context of an ignored Security Council request to cease enrichment,¹⁶⁵ and given the volatile nature of the region, it is quite possible that the Security Council would exercise its discretion and find Iran’s conduct a threat to the peace under article 39 of the United Nations Charter. The Security Council could then take various actions under Chapter VII of the Charter.

1. The Use of Armed Force

The primary exception to the prohibition on the use of force embodied in the United Nations Charter is that of Security Council authorisation. To invoke article 42 of the United Nations Charter and take “such action by air, sea or land forces as may be necessary,” the Security Council need only make the article 39 declaration described above. Once such a declaration has been made, the Security Council can take whatever forcible action it considers appropriate. Because the United

¹⁶⁰ Gazzini, above n 131, 10.

¹⁶¹ Ibid. The width of the Security Council’s discretion is reinforced by the fact that there is no consensus on the ICJ’s ability to review decisions of the Security Council. See the diversion of opinion in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamabiriya v. United Kingdom)* [1998] ICJ Rep 9 and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamabiriya v. United States)* [1998] ICJ Rep 115.

¹⁶² Gazzini, above n 131, 34. See also *United Nations Security Council Resolution 1540*, UN Doc S/RES/1540 (28 April 2004) and the dissenting opinion of Judge Weeramantry in *Legality of the Threat or Use of Nuclear Weapons Case (Advisory Opinion)* [1996] ICJ Rep 226. Judge Weeramantry argued that mere possession of nuclear weapons might be seen as a threat to international peace and security.

¹⁶³ See Erik Raines, ‘North Korea: Analyzing the “New” Nuclear Threat’ (2004) 12 *Cardozo Journal of International and Comparative Law* 349 for a discussion of withdrawal as a threat to the peace. Also see United Nations High Level Panel, above n 82, 44.

¹⁶⁴ Gazzini, above n 131, 34.

¹⁶⁵ *United Nations Security Council Resolution 1696*, UN Doc S/RES/1696 (31 July 2006).

Nations is not itself adequately equipped to take enforcement action, this action would necessarily involve the authorisation of force by one member nation or a group of member nations.

In the past, the Council's article 42 powers have been invoked in several different situations.¹⁶⁶ Although it is true that the Security Council has been freer with the use and authorisation of force in recent years,¹⁶⁷ the Security Council does not employ its powers under article 42 often or lightly. Furthermore, in most cases the use of force has taken place with the consent of the host nation.¹⁶⁸ In Iran's case, however, the force would be exercised against a non-consenting state. Thus the Security Council would probably not take such drastic action without, at the very least, positive evidence of a nuclear weapons programme.

2. Other Measures Not Involving the Use of Armed Force

As an alternative to the use of force in Iran, the Security Council could impose economic enforcement measures under article 41 of Chapter VII. Article 41 provides:

“The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.”

Under article 41 the Security Council could impose wide-ranging sanctions on Iran provided, again, that the threshold requirement was met. The most recent statement by the Security Council on the Iranian situation was made in a resolution on 31 July 2006. While that resolution did not make a declaration under article 39 of the Charter, it did demand the suspension of all “enrichment-related and reprocessing activities,” and carried an implied threat of sanctions or other “appropriate” measures under article 41 of the United Nations Charter should the demand not be met.¹⁶⁹ Iran's

¹⁶⁶ For example the 1950 Korean War, the 1990 Iraqi conflict, and the 1992 Somalia humanitarian relief mission. See Brendan M Howe and Jasper S Kim, 'Legality, Legitimacy and Justifications for Military Action Against North Korea' (2005) 11 *University of California Davis Journal of International Law and Policy* 229, 240.

¹⁶⁷ Gray, above n 150, 195.

¹⁶⁸ *Ibid* 253.

¹⁶⁹ *United Nations Security Council Resolution 1696*, UN Doc S/RES/1696 (31 July 2006).

failure to cease enrichment might well constitute sufficient justification for those “appropriate” measures. As matters stand, this course of action is far more likely than the authorisation of force.

3. The Security Council Veto

For the Security Council to authorise the use of force or the use of measures not involving force under Chapter VII of the United Nations Charter, nine members of the Security Council must cast an affirmative vote.¹⁷⁰ Furthermore, those nine members must include all five permanent members of the Security Council.¹⁷¹ If any of those five permanent members voted against the imposition of measures under Chapter VII, that state would effectively exercise a ‘veto’ and prevent even an otherwise unanimous resolution from passing.¹⁷² In the Security Council’s dealings over the Iranian nuclear programme, both Russia and China have shown a disinclination towards coercive action.¹⁷³ Without positive evidence of a nuclear weapons programme, it is unlikely that Russia and China would be convinced to support a coercive resolution by the other permanent members of the Security Council. Consequently, there seems little prospect that the United Nations Security Council would take any action against Iran, other than limited non-military sanctions, in the foreseeable future.

There is, however, one other possible avenue for United Nations action against Iran. That avenue is provided by the *Uniting for Peace* resolution of the General Assembly, which has its origins in the Korea crisis of 1950.¹⁷⁴ Under that resolution the General Assembly created a fall-back position for situations where one member of the Security Council exercised its veto and sought to bar formal action by the United Nations. In such a case, where there appears to be a threat to the peace or an act of aggression, the General Assembly may employ its “general powers” to consider the matter. This consideration can be triggered by a vote of nine of the fifteen Security Council members, or by a two-thirds majority of the General Assembly. These “general powers” have been upheld by the

¹⁷⁰ The Security Council is made up of 15 member states. Five of those are permanent members, and ten are elected by the General Assembly on a non-permanent basis.

¹⁷¹ Britain, France, the United States, Russia and China.

¹⁷² United Nations Charter, art 27(3): “Decisions of the Security Council on [non-procedural matters] shall be made by an affirmative vote of nine members including the concurring votes of the permanent members.”

¹⁷³ *Key Nations’ Stances on Iran* (2006) BBC News Online <http://news.bbc.co.uk/2/hi/middle_east/4662676.stm> at 28 September 2006.

¹⁷⁴ *United Nations General Assembly Resolution 377*, UN Doc A/RES/377(V) (3 November 1950).

ICJ,¹⁷⁵ and employed on about fifteen different occasions.¹⁷⁶ However, this course of action would again be limited by the extent of agreement in the Security Council and the General Assembly.

C. Unilateral or Allied Use of Force Against Iran

As it is highly unlikely the Security Council would take action against Iran without substantial proof of nuclear proliferation, either the United States or a coalition of states led by it might resort to using force against Iran without a Chapter VII authorisation. Assuming such action, a land-based initiative is inconceivable given the United States' current level of over-commitment to ground troops in Iraq. Instead, an air strike against identified nuclear facilities is more plausible. This would end Iran's burgeoning uranium enrichment programme and prevent – or at least significantly delay – the development of nuclear weapons in Iran.

The United States has a number of strategic reasons for preventing the development of nuclear weapons in Iran. The state of Iran has significant links to terrorist networks,¹⁷⁷ and the United States is currently engaged on a 'war against terrorism.' In the context of President Bush's pre-emptive doctrine of self-defence, Iran's terrorist connections clearly provide a justification for military action against Iranian nuclear facilities.¹⁷⁸ In addition, the development of Iranian nuclear weapons would constitute a significant security threat to Israel, the United States' long-time ally. Iranian President Mahmoud Ahamedinejad has made no secret of his rivalry with Israel.¹⁷⁹ For these reasons, as well as the international insecurity created by nuclear proliferation, the United States may well be motivated to remove the threat of an Iranian nuclear weapons programme.

1. Self-defence

To justify the use of military force against Iran without United Nations authorisation, the United States would presumably rely on the self-defence exception to the general prohibition against the use

¹⁷⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, [29-34].

¹⁷⁶ *Ibid.*

¹⁷⁷ Seymour M Hersh, 'The Iran Plans', *The New Yorker* (New York), 17 April 2006, 30, 31.

¹⁷⁸ See *The National Security Strategy of the United States of America* (2002) White House Website <<http://www.whitehouse.gov/nsc/nss.html>> at 6 June 2006.

¹⁷⁹ Ahmadinejad has called for Israel to be "wiped off the map": *Iran leader defends Israel remark* (2005) BBC News Online <http://news.bbc.co.uk/2/hi/middle_east/4384264.stm> at 2 July 2006.

of force. Accordingly, the United States would take action either in the defence of its ally Israel,¹⁸⁰ or in the defence of its own interests.

The self-defence exception to the prohibition on the use of force requires some interpretive analysis. Article 51 of the United Nations Charter begins by stating:

“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...”

The article goes on to emphasise the temporary nature of the right to self-defence, by including the proviso that the right of defence exists “until the Security Council has taken measures necessary to maintain international peace and security.” In addition, it requires that any action taken in the exercise of the right to self-defence must be reported to the Security Council.

The main issue of interpretation arises in relation to the words “armed attack.”¹⁸¹ On a strict reading of these words, nothing less than an armed attack will justify a resort to force in self-defence. This is supported by a contextual reading which takes account of article 33 of the Charter – the obligation to seek “peaceful means” of resolving disputes.¹⁸² However, many commentators argue for a more liberal interpretation of the right to self-defence, based on the terms of article 51 and pre-existing customary law. According to such an interpretation, the inclusion of the word “inherent” (or “natural” in the French text) as descriptive of the right to self-defence affirms the existence of a pre-Charter right, which is broader than the merely responsive right explicitly recognised by article 51. In the *Nicaragua* case,¹⁸³ the ICJ affirmed that article 51 refers to a pre-existing customary right of self-defence. In support of this finding, reference was made to the use of the word “inherent” and its implication that some right existed outside and before the operation of the United Nations Charter.¹⁸⁴ Thus it is widely acknowledged that a customary right of self-defence exists outside the Charter, though there is much disagreement over the definition of that right.

¹⁸⁰ See the *Nicaragua* case, above n 153: the United States would need Israel to request assistance.

¹⁸¹ Brownlie, above n 154, 700.

¹⁸² Beth M Polebaum, ‘National Self-defense in International Law: An Emerging Standard for a Nuclear Age’ (1984) 59 *New York University Law Review* 187, 201.

¹⁸³ The *Nicaragua* case, above n 153, [176].

¹⁸⁴ *Ibid.*

It is useful to define the various forms of self-defence which would be justified under article 51 or its companion customary right. Clearly, a ‘responsive’ act of self-defence is justified under both the United Nations Charter and the customary law of self-defence – any state would be justified in acting in response to an actual armed attack by another state. It is also well-established that an ‘interceptive’ act of self-defence is similarly justified. Any state would be justified in taking forceful action to prevent an armed attack reaching completion.¹⁸⁵ The classic example is a state taking military action to disable a missile which was travelling towards it.

The difficulty arises when the “armed attack” is only a planned attack or just a foreseeable attack. ‘Anticipatory’ self-defence describes the use of force to remove an imminent threat of armed attack, especially when an armed attack has already taken place and there are reasonable fears of another.¹⁸⁶ In contemporary usage, notably that of the United States, ‘pre-emptive’ self-defence is a wider doctrine describing the use of force to prevent a foreseeable attack by another state, even when no such attack has been specifically planned or is perceived as imminent.¹⁸⁷ Clearly, the United States could not rely on either ‘responsive’ or ‘interceptive’ self-defence to justify an attack on Iran’s nuclear facilities. Accordingly, the doctrines of anticipatory and pre-emptive self-defence are the only relevant justifications for a military strike against Iran.

A liberal view of customary self-defence recognises the right of anticipatory self-defence. The argument is that in some circumstances, if a state waits for an armed attack to occur, it will lose its opportunity to defend itself. This form of self-defence was first established in a chain of correspondence between the United States Government and the British Government between 1838 and 1842.¹⁸⁸ In 1837, British armed forces had seized a vessel, the *Caroline*, in an American port, because it was being used by rebels to support an armed rebellion in Canada.¹⁸⁹ The United States Secretary of State Daniel Webster wrote to the British Government in complaint and in doing so outlined a formula for the customary principle of self-defence at international law.¹⁹⁰ According to

¹⁸⁵ Natalia Ochoa-Ruiz and Esther Salamanca-Aguado, ‘Exploring the Limits of International Law relating to the Use of Force in Self-defence’ (2005) 16 *European Journal of International Law* 499, 500.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.* For the purposes of analysis, this dissertation will treat anticipatory and pre-emptive self-defence as separate doctrines. Some authors do not.

¹⁸⁸ Brownlie, above n 154, 701.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

advocates of a right to anticipatory self-defence, the right which was first documented in the *Caroline* correspondence was thereafter confirmed by the United Nations Charter and state practice.

However, the *Caroline* correspondence provided a number of important limits on the right to self-defence, whether anticipatory, interceptive or responsive. According to Webster's formulation of the right, which has been subsequently legitimised by state practice, the right to self-defence is limited by principles of immediacy, proportionality, and necessity.¹⁹¹ In Webster's words, there must exist "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."¹⁹² The action taken "justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it."¹⁹³

Applying these limits to the concept of anticipatory self-defence, the current Iranian situation could not provide a legal justification for the use of force. Nothing in the present situation suggests the necessary degree of imminence. The threat from the possible creation of Iranian nuclear weapons is, at the most, very remote. It relies on a chain of contingencies which could not logically match the legal requirement of an instant and overwhelming need for action. Furthermore, it could not realistically be said that all peaceful means of resolving the issue have been exhausted,¹⁹⁴ at least until Iran has responded to the most recent package of incentives.

a. Pre-emptive Self-defence

It is, however, possible to envisage a broader doctrine of self-defence which might provide a more realistic justification for a military strike against Iran's nuclear facilities – the somewhat vague concept of pre-emptive self-defence. Pre-emptive or preventive self-defence is intended to protect against a threat even further removed from an anticipated "armed attack". It involves a consideration of foreseeability, based upon the *potential* for an attack. The doctrine of pre-emptive self-defence occupies a controversial position in international law. It relies on an 'extensive'

¹⁹¹ Brownlie, above n 154, 701. Other terms have been used to describe the legal requirements for self-defence. Some commentators identify the exhaustion of peaceful procedures as one criterion – see W Thomas Mallison and Sally V Mallison, "The Israeli Attack of June 7, 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self-Defense?" (1982) 16 *Vanderbilt Journal of Transnational Law* 417, 419. Essentially, however, this criterion is covered by the principles of necessity and immediacy.

¹⁹² Quoted in Malcolm N Shaw, *International Law* (5th ed, 2003), 1025.

¹⁹³ *Ibid.*

¹⁹⁴ Mallison and Mallison, above n 191, 419.

interpretation of the customary principle of self-defence.¹⁹⁵ Thus, supporters of a pre-emptive right insist that a strict interpretation of the requirement of ‘imminence’ is no longer appropriate in a world where nuclear weapons predominate, because modern weapons are so immediately destructive.¹⁹⁶ To adequately protect itself against a nuclear strike a state must be able to pre-empt a foreseeable threat. Hence the customary rule against the use of force must be interpreted flexibly¹⁹⁷ and its limits should no longer be governed by diplomatic correspondence over 150 years ago.

Such an expansive interpretation of self-defence necessitates a particular approach to the development of customary law. On this approach, state practice, and particularly the practice of powerful states, is the essence of custom.¹⁹⁸ So custom can develop rapidly or even instantly to adapt international law to the necessities of international life.¹⁹⁹ To remedy a “disjuncture between law and reality”²⁰⁰ the law must respond to the views of the international community. If a pre-emptive strike is justified and acceptable²⁰¹ in the eyes of the international community, then custom must develop to recognise that fact; and according to advocates of the expansive view, a pre-emptive strike will be justified when it is a logically necessary response to a diffuse and severe threat.²⁰²

The United States certainly subscribes to this expanded theory of self-defence. Since mid 2002, President Bush has consistently referred to what is commonly called the “Bush doctrine” – a doctrine of pre-emptive self-defence in which force may be used, even when there has been no actual attack, purely in order to pre-empt future attacks.²⁰³ This doctrine was first unveiled in an address by President Bush to the graduating class at West Point Military Academy in June 2002,²⁰⁴ and was then formalised in the *National Security Strategy* of the United States in September 2002.²⁰⁵

¹⁹⁵ Oliver Corten, ‘The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate’ (2005) 16 *European Journal of International Law* 803, 803. ‘Extensive’ is Corten’s term, contrasted against ‘restrictive’ in a methodological study.

¹⁹⁶ Polebaum, above n 182, 187.

¹⁹⁷ Corten, above n 195, 803.

¹⁹⁸ Ibid 804.

¹⁹⁹ Ibid 805.

²⁰⁰ Anton, Mathew and Morgan, above n 138, 487.

²⁰¹ Whether the acceptance is willingly given or not: see Corten, above n 195, 810.

²⁰² Ibid 806-7.

²⁰³ Gray, above n 150, 175.

²⁰⁴ *President Bush Delivers Graduation Speech at West Point* (2002) White House Website <<http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>> at 6 June 2006.

²⁰⁵ *The National Security Strategy of the United States of America*, above n 178.

Two passages in the *National Security Strategy* are typically identified as articulating the doctrine of pre-emptive self-defence:

“While the United States will constantly strive to enlist the support of the international community, *we will not hesitate to act alone if necessary, to exercise our right of self-defence by acting pre-emptively* against such terrorists, to prevent them from doing harm against our people and our country.”²⁰⁶

“We cannot let our enemies strike first... We must be prepared to stop rogue states and their terrorist clients before they are able to threaten to use weapons of mass destruction against the United States... *We must adapt the concept of imminent threat* to the capabilities and objectives of today’s adversaries. [emphasis added]”²⁰⁷

In contrast to the expanded, pre-emptive view of self-defence adopted by the United States and several other states,²⁰⁸ positivist international lawyers adopt a more restrictive approach. The restrictive approach favours a literal interpretation of the prohibition against the use of force – one which makes it much less likely that new exceptions are acceptable.²⁰⁹ This approach also views the nature of customary law differently, arguing that *opinio juris sive necessitatis* – the subjective element of custom – is the dominant element.²¹⁰ State practice is only relevant “if and to the extent that we can deduce a conviction, on the part of states, that a legal rule exists.”²¹¹ Hence, custom necessarily evolves gradually and on the basis of equality between states.²¹² The expansionist argument that unilateral pre-emptive action is an objectively logical response to a modern threat is disingenuous because it portrays an inherently subjective principle as objective.²¹³

Whether it is dominant or not, on both views of self-defence state practice is an important consideration. Looking at the historical record, a number of previous uses of force can be identified

²⁰⁶ Ibid 6.

²⁰⁷ Ibid 15.

²⁰⁸ Australia has supported the Bush doctrine. Australia asserted a right of pre-emptive self-defence against terrorists in neighbouring states when it responded to a terrorist attack on a Bali nightclub in December 2002: see Gray, above n 150, 177.

²⁰⁹ Corten, above n 195, 803.

²¹⁰ Ibid.

²¹¹ Ibid 816.

²¹² Ibid 804.

²¹³ Ibid 814.

as pre-emptive acts of self-defence. The most commonly quoted instance took place on 7 June 1981, when a fleet of American-made aircraft flown by Israeli pilots attacked Iraq's Osirak nuclear reactor.²¹⁴ In a statement released afterwards, the Israeli government claimed self-defence as the justification for the attack, maintaining that the nearly completed reactor would be used to build nuclear weapons which would then be deployed against the Israeli state.²¹⁵ In support of this claim, Israel quoted from an Iraqi press statement, in which Saddam Hussein had responded to Iranian concerns about the reactor by saying "the Iranian people should not fear the Iraqi nuclear reactor, which is not intended to be used against Iran, but against the Zionist enemy."²¹⁶

At the time, the Israeli attack was roundly denounced by the international community. The United Nations Security Council and General Assembly both passed resolutions condemning the attack as a "clear violation" of international law.²¹⁷ The United States also appeared to condemn the attack, taking action to delay a shipment of arms it had contracted to sell to Israel.²¹⁸ Certainly, on the conventional view of anticipatory self-defence, there was a distinct lack of an imminent threat. There had been a long period of planning by Israel,²¹⁹ and Iraq was at least a year or two away from completing a nuclear weapon.²²⁰ However, some commentators argue that although the attack cannot be justified on the basis of the contemporary international law of self-defence, it can be used as evidence of the genesis of a broader right of pre-emptive self-defence.²²¹ In support of this claim, it is noted that the Security Council failed to impose sanctions on Israel and that in certain situations, political considerations may mean the international community condemns what it secretly approves.²²² With this in mind, the failure to impose sanctions on Israel could qualify as "state acquiescence" in Israel's actions.²²³ In addition, it might be that international the condemnation of the strike was merely the result of a finding that the requirements of pre-emptive self-defence were not met in that case. On this view, the Israeli attack suggests that pre-emptive self-defence may be legal under some circumstances.

²¹⁴ Polebaum, above n 182, 217.

²¹⁵ Ibid.

²¹⁶ Ibid 218.

²¹⁷ *United Nations Security Council Resolution 487*, UN Doc S/Res/487 (19 June 1981); *United Nations General Assembly Resolution 27*, UN Doc A/Res/36/27 (13 November 1981).

²¹⁸ Polebaum, above n 182, 217.

²¹⁹ Mallison and Mallison, above n 191, 430.

²²⁰ Ibid.

²²¹ Charles Pierson, 'Preemptive Self-Defense in An Age of Weapons of Mass Destruction: Operation Iraqi Freedom' (2004) 33 *Denver Journal of International Law and Policy* 150, 167.

²²² Ibid.

²²³ Ibid.

There are other examples of state acquiescence in alleged acts of pre-emptive self-defence. The 1962 United States blockade of Cuba has been classed by some as an act of self-defence. In that case, because the justification on the basis of regional peacekeeping has been rejected, leading scholars justify the action on the basis of self-defence.²²⁴ Similarly, the Israeli air strike against Egypt in 1967 – which began the Six Day War – was a pre-emptive act against an Arab assault which was not condemned by the United Nations and which most scholars deemed justified.²²⁵ It should be noted, however, that the attack took place against a background of troops being amassed on the Israeli-Egyptian border, and as such it might be better classified as an act of anticipatory self-defence.

The argument, based on these historical precedents, would be that recent developments in the nature of international security have led to a change in the customary law of self-defence. Thus the “Bush doctrine” is declaratory of a developing customary right which would allow for pre-emptive action against foreseeable but not necessarily imminent threats. However, this argument has not received positive support at the international level. The United Nations High Level Panel on Threats, Challenge and Change seems recently to have denied the existence of a right of pre-emptive self-defence in its statement that “if there are good arguments for pre-emptive military action, with good evidence to support them, they should be put to the Security Council, which can authorise such action if it chooses to.”²²⁶

Even those jurists who agree that there should be a right of pre-emptive self-defence impose limitations on that right, requiring that the state waited until the last possible moment to take action and that all reasonable efforts had been made to find alternative means of resolving the conflict.²²⁷ Thus, even if the doctrine of pre-emptive self-defence could be established as a legal reality, its application would not be certain in the Iranian situation. When the Osirak precedent is considered against the context of the Iranian situation, the argument just described fails to have resonance. If the United States were to destroy Iranian nuclear facilities in the near future, the circumstances would be almost uncannily similar to the circumstances in the Iraqi situation. In both cases, the construction of nuclear weapons would be or have been a future possibility and not a current reality,

²²⁴ Pierson, above n 221, 164.

²²⁵ Polebaum, above n 182, 191.

²²⁶ United Nations High Level Panel, above n 82, 55.

²²⁷ Polebaum, above n 182, 209.

and in both cases the use of any completed nuclear weapons against the state claiming a right to self-defence would be or was based entirely on a chain of contingencies. The threat which the United States would seek to remove relies on the potential risk that Iran is not enriching uranium for peaceful purposes, as it claims, but rather for the development of nuclear weapons. It also relies on the further potential risk of Iran deploying any weapons it did manufacture against the United States or its ally Israel. Without positive evidence that Iran is undertaking a nuclear weapons programme, it would be virtually impossible to establish the requirements for pre-emptive resort to self-defensive force.

b. The Precedent of Iraq

The United States-led coalition intervention in Iraq in 2003 raises important issues that are equally relevant to the Iranian situation. Prior to the intervention, self-defence was used, successfully, as justification for ‘Operation Enduring Freedom’ – the United States intervention in Afghanistan in 2001 to remove the Taliban and the al-Qaeda terrorist network. The United Nations Security Council was notified of the action, and its basis in self-defence, on 7 October 2001.²²⁸ The intervention was defined as an act of responsive self-defence on several grounds. Firstly, it was accepted that the terrorist attacks on United States territory which took place on 11 September 2001 were an “armed attack” for the purposes of article 51 of the United Nations Charter.²²⁹ Secondly, it was accepted that those attacks were the latest in a “more protracted campaign” undertaken by al-Qaeda, which included the 1993 attack on the World Trade Center, the 1998 embassy bombings in Nairobi and Dar es Salaam, and the 2001 attack on the USS *Cole* in Yemen.²³⁰ There was also convincing evidence to suggest that al-Qaeda was planning more attacks on the United States. Finally, the intervention did not subvert the operation of the Security Council and its role as overseer of international peace and security.²³¹

The United States-led intervention in Iraq in March 2003 is much more controversial. The ‘coalition’ of the United States, the United Kingdom and Australia advanced two main legal claims for the

²²⁸ Shaw, above n 192, 1028. The self-defence justification was accepted by the Security Council in *United Nations Security Council Resolution 1373*, UN Doc S/RES/1373 (28 September 2001).

²²⁹ Alex J Bellamy, ‘International Law and the War with Iraq’ (2003) 4 *Melbourne Journal of International Law* 497, 513.

²³⁰ *Ibid.*

²³¹ *Ibid.*

intervention, neither of which has been well accepted by international legal scholars.²³² Those two claims are based on the two exceptions to the prohibition on the use of force outlined in the United Nations Charter – Security Council authorisation and self-defence.

The main argument advanced in official statements of the coalition governments was Security Council authorisation, based on the combined operation of a series of Security Council resolutions. Firstly, the coalition relied on resolution 678,²³³ which authorised the use of force to eject Iraqi forces from Kuwait after the First Gulf War. That resolution also referred to the need “to restore international peace and security in the area.” Secondly, the coalition relied on resolution 687,²³⁴ which outlined the terms for the cease-fire after the War. Those terms were deemed to be criteria for judging whether or not regional peace and security had been restored, and it was claimed that a material breach of those criteria revived the authority for the use of force in resolution 678.²³⁵ In short, the intervening states claimed express Security Council authorisation arising from resolution 678, adopted over twelve years earlier.

Because the United States and United Kingdom were aware of the weaknesses involved in an argument based on these two resolutions, until the eleventh hour they attempted to secure a new resolution explicitly authorising the use of force.²³⁶ That attempt was unsuccessful. The Security Council eventually passed resolution 1441,²³⁷ which found Iraq in material breach of resolution 687 and warned of “serious consequences” if Iraq did not comply with it. The coalition then claimed that because resolution 1441 did not expressly state that another resolution was required to sanction force against Iraq, the resolution in fact accepted the use of force if Iraq was in material breach of its pre-existing obligations.²³⁸ This argument is somewhat duplicitous, however, as Security Council records make it clear that resolution 1441 was not intended impliedly and automatically to authorise the use of force.²³⁹

²³² See Bellamy, above n 229, for a survey of Australian international lawyers who condemned the action.

²³³ *United Nations Security Council Resolution 678*, UN Doc S/Res/678 (29 November 1990).

²³⁴ *United Nations Security Council Resolution 687*, UN Doc S/Res/687 (8 April 1991).

²³⁵ Bellamy, above n 229, 502.

²³⁶ *Ibid* 507.

²³⁷ *United Nations Security Council Resolution 1441*, UN Doc S/Res/1441 (8 November 2002).

²³⁸ Bellamy, above n 229, 503.

²³⁹ *Ibid* 510.

The ICJ has indicated that the correct approach to interpreting United Nations resolutions involves a close examination of the wording, context and intent of the resolutions.²⁴⁰ On this approach, it is clear that the Security Council never intended to authorise the use of force in Iraq as it occurred in March 2003.²⁴¹ While resolution 678 did expressly authorise the use of force, that authorisation was suspended by the entry into force of the permanent cease-fire contained in resolution 687. Iraq's continuing breaches of resolution 687 did not, of themselves, invoke the authorisation in resolution 678. Any other conclusion would misrepresent the clear wording and intent of those resolutions.²⁴²

A subsidiary justification for the intervention, based on the self-defence exception, can also be implied from statements made by President Bush.²⁴³ The political imperatives behind the intervention were a continuation of the war against terror and a desire to prevent the development of weapons of mass destruction in Iraq.²⁴⁴ In a February 2003 report to the United Nations Security Council, Hans Blix, head of the United Nations Monitoring, Verification and Inspection Commission, had listed a large number of "unanswered questions" in relation to inspections in Iraq. Resolution 1441 had, in fact, confirmed that Iraq's failure to provide complete disclosure on its weapons of mass destruction constituted a material breach of its obligations in resolution 687. Thus, the coalition intervention in Iraq was based in part on seemingly sound evidence that Iraq possessed weapons of mass destruction which would cause a threat to the security of other nations. Subsequent reports revealed no evidence of such weapons, but at the time their existence was considered almost certain.

Clearly then, there are significant parallels between the Iraqi and Iranian situations. Just as Hans Blix had scores of "unanswered questions" in relation to the Iraqi weapons programme, IAEA inspectors continue to express concerns about Iran's failure to provide full disclosure and remedy certain issues.²⁴⁵ While international criticism – indeed condemnation – of its intervention in Iraq may

²⁴⁰ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (Advisory Opinion)* [1971] ICJ Rep 16 ("The Namibia case").

²⁴¹ Bellamy, above n 229, 519.

²⁴² See Jane E Stromseth, 'Law and Force After Iraq: A Transitional Moment' (2003) 97 *American Journal of International Law* 628; Thomas M Franck, 'What Happens Now? The United Nations after Iraq' (2003) 97 *American Journal of International Law* 607; and Bellamy, above n 229, for criticisms of Security Council authorisation as justification for the 2003 intervention in Iraq.

²⁴³ Bellamy, above n 229, 503.

²⁴⁴ *Ibid.*

²⁴⁵ See, for example, Mohamed El-Baradei, *Report by the Director General of the IAEA to the Board of Governors: Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, GOV/2006/53 (31 August 2006).

inhibit the United States from taking forcible action without compelling evidence, if not conclusive proof, of an Iranian nuclear weapons programme, it is just as possible that the Iraqi intervention may encourage similar action in Iran.²⁴⁶ Either way it is fairly well established that without Security Council authorisation, such an intervention would be in contravention of existing international law. The principle of self-defence could not be applied without, at the very least, cogent evidence of a weapons programme.

D. Implications for the Future of International Law

It seems apparent from the preceding discussion that the only possible legal justification for the use of force against Iran – pre-emptive self-defence – could not be met on current standards of customary international law. The question that then arises is whether the existing international legal limitations on the use of force are too restrictive to meet the realities of the modern world. This issue has both prescriptive and descriptive dimensions: the law may be changing as a matter of reality, and in fact that change may be desirable.

Existing international legal institutions proved unable to adequately deal with the dispute in Iraq. The same could prove true in Iran's situation. For some, depriving the United States of a recognised legal basis for its use of force “threatens Charter interests and values rather than supporting and advancing them.”²⁴⁷ Consequently, the law should develop along with state practice and allow for the use of force in more broad circumstances. International law is often portrayed as “the sphere of equality, in which reason and justice prevail, whereas power asymmetries are relegated to the sphere of politics where the law of the jungle seems to reign.”²⁴⁸ In truth, international law consistently falls prey to the political “law of the jungle.” An idealised perspective of international law fails to recognise the need for realistic and responsible systems of law. It is possible that the Iranian situation could highlight that need and allow the international community to respond accordingly.

1. The Changing Security Context: A New Solution for a New Threat?

The ‘Bush doctrine’ of self-defence is premised on a need for pre-emptive, forcible action against terrorist threats. According to the doctrine, the changing nature of global security makes pre-

²⁴⁶ The intervention was successful, in the eyes of the Bush administration, because it saw the end of Saddam Hussein.

²⁴⁷ Corten above n 195, 812.

²⁴⁸ Nico Krisch, ‘International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order’ (2005) 16 *European Journal of International Law* 369, 370.

emptive self-defence a necessary element of international law. The modern political context, it is argued, should allow for the use of force “to occlude or remove sources of terrorism.”²⁴⁹ Thus, although the 2003 Iraqi intervention was illegal at the time, a similar intervention might not be illegal in the future.²⁵⁰ This relies on an adaptation of the concept of ‘imminence’ in the face of nuclear threats from terrorist networks.²⁵¹ A temporal standard of imminence, based on nineteenth century technology and tactics, may no longer be an appropriate means of meeting the challenges which modern states face.²⁵² Indeed, some believe that a new custom is emerging which would allow for anticipatory or pre-emptive counter-terrorism strikes. While this custom “has not yet crystallised,”²⁵³ it may do so in the near future. Necessity could lead to a change in the fundamental concepts of the use of force.

According to one international lawyer, “in an age of terrorism and [weapons of mass destruction], to expect a state to wait until there is a [conventional ‘necessity’] before it resorts to the use of force in self-defence is to expect a state to be complicit in its own demise.”²⁵⁴ President Bush himself has restated this reality in more emotive language, declaring that “facing clear evidence of peril, we cannot wait for the final proof, the smoking gun that could come in the form of a mushroom cloud.”²⁵⁵ From that perspective, the Bush doctrine of pre-emptive self-defence is a “genuine attempt to adapt the legal doctrine to contemporary demands.”²⁵⁶ Indeed, the United Nations Charter may itself provide support for a new theory of self-defence. The Charter was based on post-war concepts of collective security under the auspices of the Security Council. Arguably, these concepts no longer serve their original purpose in an environment where terrorists operate outside traditional models of state sovereignty.²⁵⁷ The current era of transnational threats is undoubtedly very different to the security situation in the post-war era.

²⁴⁹ Brownlie, above n 154, 713.

²⁵⁰ Ronli Sifris, ‘Operation Iraqi Freedom: United States v Iraq – The Legality of the War’ (2003) 4 *Melbourne Journal of International Law* 521, 521.

²⁵¹ Mark L Rockefeller, ‘The ‘Imminent Threat’ Requirement for the use of Preemptive Military Force: Is It Time for a Non-Temporal Standard?’ (2004) 33 *Denver Journal of International Law and Policy* 131, 147.

²⁵² Ibid.

²⁵³ Sifris, above n 250, 521.

²⁵⁴ Ibid.

²⁵⁵ Pierson, above n 221, 150.

²⁵⁶ Eyal Benvenisti, ‘The US and the Use of Force: Double-edged Hegemony and the Management of Global Emergencies’ (2004) 15 *European Journal of International Law* 677, 699.

²⁵⁷ Ibid 684.

Applying this nascent customary principle to the facts of the Iranian situation is somewhat difficult, given the hypothetical nature of the argument. It would rely on two variables: first, that Iran had nuclear weapons capabilities and second, that there was an established terrorist network with sufficient ties to the state of Iran to pose a threat of nuclear proliferation. Accordingly, the main threat from an Iranian nuclear weapons programme is the threat from the state itself; the possibility that an insecure weapons programme in Iran would lead to the proliferation of nuclear weapons to a terrorist network is a secondary and highly speculative threat.

2. International Law and the Hegemonic World Order

Since the fall of the Berlin Wall, the United States has been the sole global superpower. Effectively, the United States leads a hegemonic world order. As a result, some would say the United States has assumed the role of an international policing agent to rival the United Nations.²⁵⁸ Hegemony has presented the United States with a “double-edged sword”: it has achieved unprecedented levels of international power, but also unprecedented levels of international responsibility.²⁵⁹

The hegemonic nature of the world order raises concerns about unilateral decision-making.²⁶⁰ According to United Nations Secretary-General Kofi Annan, the United Nations has come “to a fork in the road,” given some states’ tendency to challenge the operation of the Charter system of collective security.²⁶¹ The very essence of the multilateral system has been challenged and we are thus faced with a stark choice – between multilateralism and unilateralism.²⁶²

The United States has purportedly been stretching the limits of international law in the interests of the world as a whole.²⁶³ Global stability is a “pure public good”²⁶⁴ and while the United States arguably recognises the benefits of cooperation, it also maintains a right to take action alone, if necessary, to protect that public good.²⁶⁵ Pre-emptive self-defence, rather than being an unlawful

²⁵⁸ Ibid 678.

²⁵⁹ Ibid.

²⁶⁰ Ibid.

²⁶¹ Ved P Nanda, ‘Preemptive and Preventive Use of Force, Collective Security, and Human Security’ (2004) 33 *Denver Journal of International Law and Policy* 7, 7-8.

²⁶² Mark Udall, ‘Keynote Address: Collective Security and the United Nations. University of Denver College of law, February 28, 2004’ (2004) 33 *Denver Journal of International Law and Policy* 1, 1.

²⁶³ Benvenisti, above n 256, 678.

²⁶⁴ Ibid 681. A “pure public good” is defined by Benvenisti as something which does not exclude or rival other interests.

²⁶⁵ Ibid 683.

doctrine which contravenes basic international principles, may be a “law-enforcing” technique.²⁶⁶ While this idea is perverse to a legal positivist, for others the United States has merely adopted an approach which is both legitimate and necessary. The ‘extensive’ interpretation of self-defence described above adopts a similar perspective on the role of powerful states, justifying their privileged status on the basis of their democratic principles and their power to ensure other states respect the rule of law.²⁶⁷ Because international law is not an abstract theory but an applicable reality, it is “both desirable... and inevitable... that we recognise that ‘major states’ have a specific status in the elaboration of customary law.”²⁶⁸

A policy-oriented approach to international law, with its focus on the policy of major international players, would also recognise the value in American hegemony bringing about the evolution of customary law. In this context, a policy-oriented approach “tends to justify a very broad range of grounds for the use of force, resting, it is accepted, upon political considerations.”²⁶⁹ According to the policy-oriented approach, an overly legal interpretation cannot solve the realities of certain international disputes and does not account for the moral necessity of certain acts in certain circumstances.²⁷⁰ Value judgements are a necessary element of all legal interpretation, and a policy-oriented approach recognises this fact.²⁷¹ Policy and law cannot and should not be separated. The United States’ policy thus deserves formal recognition as a viable alternative to a strict reading of international law.

If the United States took action against Iranian nuclear facilities outside the structure of existing international law, these theoretical considerations would be drawn into the mainstream of international politics. It would pit those who support inviolable legal prohibitions against those who support a realist approach to our changing circumstances. While there is some value in a perspective which properly accounts for the new threats which modern nations face, it must be acknowledged that a doctrine which would allow an intervention in Iran would also make the use of force virtually limitless. If such interventions were considered legal, the decision on the legality of the actions would in every case fall to the policy of the individual state. While the United Nations system is

²⁶⁶ Pierson, above n 221, 171.

²⁶⁷ Corten, above n 195, 811.

²⁶⁸ Ibid.

²⁶⁹ Ibid 809.

²⁷⁰ Ibid.

²⁷¹ Ibid.

clearly flawed, the system itself should not be destroyed by the actions of a sole, albeit powerful, state. The United Nations lends legitimacy to members' actions. Without that legitimacy, the whole system would be based on antagonism.²⁷² In reality, it would only be marginally easier for the United States to operate unilaterally,²⁷³ as the support of at least several other states would always be necessary. Furthermore, a unilateral system would virtually remove the opportunity for multilateral action.²⁷⁴

On 22 June 2006, a Presidential Statement from the United Nations Security Council reaffirmed the Council's conviction "that international law plays a crucial role in fostering stability and order in international relations."²⁷⁵ Any change to the legal principles on the use of force must take place within the existing institutional arrangements. Transnational problems require transnational solutions.²⁷⁶ The new security environment is not so new that it requires a complete reworking of the most basic international legal principles. As the leading international lawyer Ian Brownlie comments in the preface to the most recent edition of his international law text, "the problem of the efficacy of the law has long been with us. The system of international law will survive, as it has done before, both terrorism and breaches of international law by powerful states."²⁷⁷ The United Nations remains the paramount institution of international law. It operates with almost universal membership, and it is constantly evolving to meet the necessities of the modern era. Thus, the United Nations is still the most appropriate institution for "accommodat[ing] and protect[ing] the diversity of cultures and claims."²⁷⁸

E. The Negotiated Solution

The current solution to the Iranian problem does not yet involve any of the drastic measures just discussed. Rather, the approach to resolving the conflict with Iran has been premised on principles of diplomacy and negotiation. The EU in particular has taken significant steps towards resolving the conflict peacefully. A package of incentives aimed at convincing Iran to cease uranium enrichment

²⁷² Ian Johnstone, 'US-UN Relations after Iraq: the End of the World (Order) As We Know It?' (2004) 15 *European Journal of International Law* 813, 836.

²⁷³ *Ibid.*

²⁷⁴ *Ibid.* 837.

²⁷⁵ Ellen Margrethe Loj, *United Nations Security Council Presidential Statement*, UN Doc S/PRST/2006/28 (22 June 2006).

²⁷⁶ Udall, above n 262, 4.

²⁷⁷ Brownlie, above n 154, preface.

²⁷⁸ Corten, above n 195, 816.

was offered by EU Foreign Policy Chief, Javier Solana, on 6 June 2006.²⁷⁹ Iran has not yet officially responded to the package, which offered economic and political rewards for Iran but made cessation of enrichment processes a pre-condition for formal negotiations. Discussions continue, but without any substantial resolution.

The EU offer, and the Security Council attempts to encourage cessation of enrichment processes,²⁸⁰ raise issues of what is often dubbed ‘non-armed force.’ Article 2(4) of the United Nations Charter prohibits the use of force in international disputes, and there is some debate over whether this prohibition includes economic force, such as the imposition of boycotts and embargoes. This issue has not been satisfactorily resolved in any forum.²⁸¹ Consequently, it is possible that an expanded definition of ‘force’ might encompass the actions recently taken by the EU and the United Nations in response to Iran’s conduct.

When studied in context, some jurists believe that the word ‘force’ in article 2(4) of the United Nations Charter must correspond to armed – or military – force.²⁸² Accordingly, article 2(4) could only cover economic or psychological pressure if it was coupled with the use or at least the threat of armed force. The preamble to the United Nations Charter does refer to the phrase “armed force,” but that fact is not conclusive.²⁸³ Furthermore, certain international agreements have reaffirmed a prohibition against non-armed force, whether it exists within the Charter regime or outside it. In 1965, the United Nations General Assembly affirmed that:

“[n]o state has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements, are condemned.”²⁸⁴

²⁷⁹ *Iran 'positive' on nuclear offer* (2006) BBC News Online <http://news.bbc.co.uk/2/hi/middle_east/5048956.stm> at 7 June 2006.

²⁸⁰ *United Nations Security Council Resolution 1696*, UN Doc S/RES/1696 (31 July 2006).

²⁸¹ Anton, Mathew and Morgan, above n 138, 488.

²⁸² Yoram Dinstein, *War, Aggression and Self-defence* (3rd ed, 2001) 81.

²⁸³ Shaw, above n 192, 1019.

²⁸⁴ *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States*, GA Res 2131 (XX), UN Doc A/Res/36/103 (21 December 1965).

In addition, the Charter of the Economic Rights and Duties of States – passed by the General Assembly in 1974 – prohibits the use of “economic, political or any other type of measures to coerce another state.”²⁸⁵ The 1970s saw a comprehensive debate about the nature of non-armed force, in response to coercive action taken by the Organisation of Petroleum Exporting Countries (“OPEC”). The “Arab oil weapon” was deployed between 1973 and 1974 against states allied to Israel.²⁸⁶ At the time, it was believed that the coercive action of the Arab states was probably in breach of the United Nations Charter, but not in breach of the prohibition in article 2(4).²⁸⁷

The concept of non-armed force is intricately linked to the principle of non-intervention. In the *Nicaragua* case,²⁸⁸ the ICJ stated that many forms of pressure exerted by one state against another – such as economic coercion and political pressure – are not a breach of the prohibition in article 2(4) of the United Nations Charter.²⁸⁹ However, it was determined that such conduct may constitute an unlawful interference in another state’s domestic affairs through another means. In the *Nicaragua* case, it was held that United States’ activities in support of Nicaraguan counterrevolutionaries did violate the prohibition on non-interference.

If Iran were to argue an unlawful interference on the basis of the principle of non-intervention, both the EU and the United Nations would have solid defences at international law. The United Nations’ interest is governed by article 2(7) of the United Nations Charter:

“Nothing in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”

Thus, where the United Nations is justified in acting to prevent a breach of the peace, threat to the peace, or act of aggression, any action taken would be justified regardless of whether it technically intervened in Iran’s domestic affairs. Furthermore, the EU interest is legitimised by article 2(3) of

²⁸⁵ *Charter of the Economic Rights and Duties of States*, GA Res 39/163, UN Doc A/RES/39/163 (17 December 1984).

²⁸⁶ Shaw, above n 192, 1019.

²⁸⁷ *Ibid* 1020. The action might breach articles 2(3) and 33(1) of the United Nations Charter, which create an obligation to settle disputes by peaceful means.

²⁸⁸ The *Nicaragua* case, above n 153.

²⁸⁹ Anton, Mathew and Morgan, above n 138, 502.

the United Nations Charter, which provides that all Members shall settle their international disputes by peaceful means, and also by article 33 of the Charter, which provides that the parties to a dispute shall, first of all, settle their dispute by any peaceful means available, including the resort to regional agencies or arrangements. Given the desire for a peaceful resolution, and the prominence which the pacific settlement of disputes occupies in the Charter system, the use of non-armed force is a far more attractive alternative to the resort to force. It is unlikely that any Iranian argument based on non-armed force would receive support in the international community.

F. Other Alternatives

There are other, less drastic, alternatives for a resolution of the Iranian dispute. In general terms, it is possible that the states involved might seek an opinion from the ICJ on the legal issues involved in the dispute. Article 93(1) of the United Nations Charter provides that “all Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.” Under article 36(1) of the Statute of the International Court of Justice, the Court has jurisdiction over all cases which parties refer to it. While Iran would have to agree to the referral,²⁹⁰ if that agreement was given the Court could rule finally on the legal relationship between articles III and IV of the NPT. Alternatively, the case could go before the ICJ following a General Assembly request for an Advisory Opinion under article 96 of the United Nations Charter. Such a request was made in the case of the legality of the threat or use of nuclear weapons.²⁹¹ However, in either case, a final decision by the ICJ would not resolve the issues of trust and secrecy relating to Iran’s nuclear programme.

Other alternatives might include a dispute resolution mechanism of some kind, which would continue the diplomatic and negotiation attempts made thus far. With a firm structure for negotiations, Iran may be encouraged to agree to cessation of enrichment processes. It is unlikely the Western states would be satisfied with any lesser outcome.

It should also be noted that there is some potential for the IAEA to take a more comprehensive and intrusive role in the Iranian dispute. There is an argument that the IAEA should take a more

²⁹⁰ Raines, above n 163, 369. Iran would have to agree to the compulsory jurisdiction of the ICJ, either in general or in relation to or for the purpose of the current dispute.

²⁹¹ *Legality of the Threat or Use of Nuclear Weapons Case (Advisory Opinion)* [1996] ICJ Rep 226. An Advisory Opinion is not binding on the requesting party; its purpose is to provide authoritative guidance on points of law.

developed role in, for example, the provision of nuclear fuel. This was recommended by the United Nations High Level Panel on Threats, Challenge and Change.²⁹² If the IAEA agreed to provide the fuel required for Iran's peaceful nuclear energy production, and Iran agreed to forego the right to domestic production of that fuel, the dispute might be resolved. However, it seems doubtful – given the extensive dialogue which has already taken place – that Iran would forego this right.

²⁹² United Nations High Level Panel, above n 82, 44.

CONCLUSION

Iran's nuclear programme has caused a great deal of political and legal controversy. An examination of the international legal framework behind Iran's programme, and an assessment of Iran's compliance with the NPT and its IAEA Safeguards Agreement, leads to a stark conclusion: Iran is in breach of its international legal obligations.

The right to nuclear energy embodied in article VI(1) of the NPT can only be correctly understood with a contextual approach, taking into account the context of the NPT's object and purpose, and the context of Iran's lack of compliance with its IAEA Safeguards Agreement. Against this background, it is apparent that Iran cannot base its case on the right to nuclear energy for peaceful purposes. Iran cannot rely on the NPT to justify its rigid commitment to a uranium enrichment programme.

The fact that Iran has failed to comply with its IAEA safeguards – and cannot rely on the right to peaceful purposes granted by the NPT – leads to a consideration of the appropriate international response to the situation. After canvassing the possible alternatives, it is clear that a diplomatic, negotiated solution is the only legitimate and legally justified solution to the Iranian dispute. Without substantive proof of a nuclear weapons programme, the United Nations would not take any action beyond limited sanctions. Furthermore, there is no legitimate legal justification for the use of force by the United States.

The Iranian dispute raises interesting issues about the future of international law, and the ability of our existing international regime to cope with modern security threats. While many would argue that the United States should be able to take unilateral action against perceived threats to the peace, in reality such action should only be taken through the multilateral system established by the United Nations Charter. As conventionally understood, the law on the use of force allows for legitimate checks and balances on global power. Multilateralism is the best response to threats to international peace and security; without it, the rule of law would be eroded and the world less secure.

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