

THE IRANIAN NUCLEAR THREAT: ISRAEL'S OPTIONS UNDER INTERNATIONAL LAW

*Benjamin M. Greenblum**

I. INTRODUCTION.....	57
II. IRAN'S PURSUIT OF NUCLEAR WEAPONS	58
A. <i>A Primer on Nuclear Technology and the Nuclear Non-Proliferation Treaty</i>	59
B. <i>Iran's Covert Nuclear Efforts</i>	61
C. <i>Negotiations with the International Community</i>	63
1. <i>Iranian Negotiating Tactics</i>	67
2. <i>Relying on Russia and China</i>	68
D. <i>Is an Iranian Bomb Inevitable?</i>	69
III. IRAN'S ANTI-ISRAEL AGGRESSION	71
A. <i>Mahmoud Ahmadinejad: Escalating or Perpetuating the Status Quo?</i>	73
B. <i>The Convergence of Iran's Nuclear and Anti-Israel Agendas</i>	76
C. <i>The Threats Posed to Israel by a Nuclear-Armed Iran</i>	78
1. <i>The Threat of a Nuclear Strike</i>	78
2. <i>Terrorism with Impunity</i>	80
IV. POTENTIAL RESPONSES TO THE IRANIAN THREAT	82
A. <i>International Negotiations Aimed at Keeping Iran</i>	

* Law Clerk to Chief Judge Dennis Jacobs, United States Court of Appeals for the Second Circuit. Columbia Law School, J.D., University of Pennsylvania, B.A. & B.S. I wish to thank Professor Michael Doyle for his invaluable guidance. I also thank my wife Heather for her enduring support. Last, I dedicate this work to my daughter Dalia, whom I hope will grow up in a world courageous enough to defend itself.

56	<i>HOUSTON JOURNAL OF INTERNATIONAL LAW</i>	[Vol. 29:1
	<i>Within the NPT</i>	83
	<i>B. Sanctions</i>	86
	<i>C. Regime Change</i>	90
	<i>D. Deterrence</i>	93
	<i>E. Military Force</i>	95
	1. <i>The Last Resort: Withering International Criticism or Military Force?</i>	96
	2. <i>The Necessity and Feasibility of an Israeli Strike</i>	97
	V. THE LEGALITY OF ISRAELI PREVENTATIVE ACTION AGAINST IRAN	99
	A. <i>The Charter and Traditional International Law</i>	100
	B. <i>John Yoo's Probability/Magnitude Model</i>	103
	C. <i>Polebaum's Reasonable Nation Standard</i>	106
	VI. CONCLUSION	110

Abstract

Few question the conventional wisdom that Iran is well on its way to building a nuclear weapon. Yet even fewer acknowledge that once Iran masters the nuclear fuel cycle, the so-called "point of no return," this path will be irreversible. Among the consequences that would follow, this Article focuses on the two particular threats that a nuclear-armed Iran would pose to Israel: the existential threat of a nuclear strike and the threat of an undeterrable and relentless escalation in anti-Israel terrorism. International efforts to stop Iran have nevertheless ignored the point of no return, relying instead on strategies that offer, at best, the possibility for results in the long term, such as negotiations, sanctions and regime change.

As the country most threatened by a nuclear Iran, Israel may have no choice but to pursue a preventative strike that could forestall nuclear progress in the short term. Traditional international law would nevertheless prohibit such action, and this Article therefore uses Israel's predicament as a means of evaluating alternative legal models for an era in which anticipatory self-defense principles must adapt to terrorist and

rogue state warfare. Using the Iranian-Israeli conflict as an example, the Author concludes that for international law to maintain relevance, it must offer states a credible and realistic way to defend themselves preventatively.

I. INTRODUCTION

The subtle but palpable shift towards normalized Arab-Israeli relations, fueled by the Gaza withdrawal and the U.S.-led war on terrorism, has isolated Iran as the key remaining opponent to Israel's existence.¹ Amidst this isolation, Iran's president has called for Israel to be "wiped off the map,"² and so it is with alarm that Iran has been accused of developing nuclear weapons with the potential to destroy Israel in a single stroke. Iran maintains that it seeks nuclear power only for civilian energy, but a record of concealment and duplicitous diplomacy has laid this claim open to distrust. Israel is widely acknowledged to be the country most directly threatened by a nuclear-armed Iran, which would be capable of annihilating Israel by missile strike or intensifying its terrorist attacks on Israel with impunity.

Military force lies at one end of a long spectrum of options open to Israel and others threatened by the prospect of a nuclear Iran. Yet beyond an international consensus that *something* must be done, diplomats have yet to settle on a common course. Since the long-awaited referral of the matter from the United Nations' atomic energy watchdog to the Security Council in February 2006, sanctions, regime change, and military force have been proposed but not acted upon. This Article catalogues the arguments for and against these options, and concludes that while none are palatable, the military option may be necessary

1. See Nazila Fathi, *Iran's New President Says Israel 'Must Be Wiped Off the Map,'* N.Y. TIMES, Oct. 27, 2005, at A8 [hereinafter Fathi, *Iran's New President*]. Syria is the other vocal opponent of Israel but is distinguishable as openly willing to trade peace for Israel's relinquishment of the Golan Heights. *Coalitions of the Unwilling*, ECONOMIST, Oct. 21, 2006, at 28.

2. Fathi, *Iran's New President*, *supra* note 1.

as a short-term measure to prevent an Iranian nuclear weapon from becoming inevitable.

Perhaps sharing this conclusion—or perhaps out of rhetorical bravado—Israeli officials have responded to Iran's genocidal threats, sponsorship of anti-Israel terrorism, conduct of open war on the Lebanese border through a terrorist vassal, and concomitant efforts to build a nuclear bomb by threatening preventative destruction of Iran's nuclear capacity. Therefore, this Article addresses whether Israel would be justified, under international law, in acting in preventative self-defense.

Part I documents Iran's pursuit of nuclear weapons and its success in forestalling international intervention. Part II traces Iranian-Israeli relations and describes the multifaceted threat that a nuclear-armed Iran would pose to Israel. Part III examines potential international responses to the Iranian threat, concluding that in Israel's case, force may be the only viable option. Accordingly, Part IV uses three prevalent legal standards to evaluate the legality of an Israeli preventative strike. The Article ultimately seeks to determine whether, should Israel choose to act in self-defense, it should be forced to do so under a veil of illegitimacy.

II. IRAN'S PURSUIT OF NUCLEAR WEAPONS

The war of words over the legitimacy of Iran's nuclear research is more than diplomatic banter. Underlying the conflict are threshold issues such as the science behind nuclear weapons, the sordid history of Iran's nuclear program, and the nature of its negotiations with the international community to maintain that program. Though evidence that Iran's program is directed at a bomb is not conclusive, in all likelihood the only open question is *when* Iran will be armed with nuclear weapons.³

3. William J. Broad & David E. Sanger, *Relying on Computer, U.S. Seeks To Prove Iran's Nuclear Aims*, N.Y. TIMES, Nov. 13, 2005, at A1, A22 [hereinafter Broad & Sanger, *Relying on Computer*].

A. *A Primer on Nuclear Technology and the Nuclear Non-Proliferation Treaty*

Although the science behind nuclear weapons is beyond the scope of this Article, a brief detour into the phases of nuclear power development is warranted.⁴ First, uranium ore is mined, crushed, and reconstituted in solid form as “yellow cake.” This intermediate substance is then enriched in centrifuges in order to increase the proportion of more powerful atoms within the uranium particles. The nuclear fuel cycle thus takes years to master because of both the requisite experimentation and the need to build up a store of enriched uranium. The enriched uranium can then be fed into a nuclear reactor to create electricity for civilian usage. Finally, spent fuel from the reactor is reprocessed to divide potentially valuable uranium, as well as plutonium (a different kind of nuclear fuel), from nuclear waste.⁵

Mastering this process does not, however, surmount all the obstacles to a nuclear weapons program: building up a store of nuclear material (uranium and plutonium), making bombs with that material, and constructing missiles to deliver those bombs to a target are difficult hurdles to the state in search of a nuclear weapon.⁶ Even states that have invested years in mastering the nuclear fuel cycle and building up stockpiles of weapons-grade uranium and plutonium are likely to need even more years to create a controlled nuclear explosion.⁷ Further, missile capability is critical—while radioactive material can simply be combined with explosives to create a “dirty bomb,”

4. This summary draws from a BBC website on the development of nuclear energy. *The Nuclear Fuel Cycle*, http://news.bbc.co.uk/2/shared/spl/hi/sci_nat/05/nuclear_fuel/html/mining.stm (last visited Oct. 14, 2006).

5. *The Nuclear Fuel Cycle: Reprocessing*, http://news.bbc.co.uk/1/shared/spl/hi/sci_nat/05/nuclear_fuel/html/reprocessing.stm (last visited Oct. 14, 2006).

6. See generally Owen R. Coté, Jr. *A Primer on Fissile Materials and Nuclear Weapon Design*, in GRAHAM T. ALLISON, OWEN R. COTÉ, JR., RICHARD A. FALKENRATH & STEVEN E. MILLER, *AVOIDING NUCLEAR ANARCHY: CONTAINING THE THREAT OF LOOSE RUSSIAN NUCLEAR WEAPONS AND FISSILE MATERIAL* app. B at 203–28 (1996) (discussing the various stages for producing nuclear weapons and the difficulties each stage presents).

7. Paul Kerr, *Steps to Developing a Nuclear Weapon: The Uranium Route*, *ARMS CONTROL TODAY*, Sept. 2004, available at <http://www.iranwatch.org/privateviews/ACT/perspex-act-deveopweapon-0904.htm>. But see Coté, *supra* note 6, at 225.

these are far less destructive than a conventional nuclear weapon.⁸

The enrichment and reprocessing phases pose the highest risk that nuclear material will be diverted from civilian to military use.⁹ During enrichment, uranium can be enriched to a higher degree to form the basic ingredients of a uranium bomb.¹⁰ During reprocessing, leftover uranium and plutonium can be diverted to bomb-making instead of back into the production of civilian energy.¹¹ Therefore, nuclear technology is generally considered “dual use,” and much of the concern over nuclear proliferation stems from the ability to run a covert nuclear weapons program within a broader civilian nuclear energy program.¹²

The Nuclear Non-Proliferation Treaty (NPT) was designed precisely to reduce diversion. The NPT distinguishes between nuclear weapon states and nonnuclear weapon states, committing the former not to transfer their technology and the latter to undertake research only for peaceful purposes and to accept safeguards.¹³ Thus, while nonnuclear weapon signatories are granted the “inalienable right . . . to develop research, production and use of nuclear energy for peaceful purposes,” they are required to submit to an inspections and compliance regime set out in an individualized agreement negotiated with the International Atomic Energy Agency (IAEA) subsequent to

8. See James Jay Carafano & Jack Spencer, *Dealing with Dirty Bombs: Plain Facts, Practical Solutions*, BACKGROUNDER NO. 1723 (The Heritage Found., Washington, D.C.), Jan. 27, 2004, at 2, available at http://www.heritage.org/Research/HomelandDefense/upload/55037_1.pdf.

9. See International Network of Engineers and Scientists Against Proliferation, *Beyond the NPT: A Nuclear-Weapon-Free World*, Apr. 1995, <http://www.inesap.org/beyondNPT.htm> (describing the dual-use character of nuclear technologies as a “central defect” of the Non-Proliferation Treaty).

10. *The Nuclear Fuel Cycle: Enrichment*, http://news.bbc.co.uk/1/shared/spl/hi/sci_nat/05/nuclear_fuel/html/enrichment.stm (last visited Oct. 14, 2006).

11. *The Nuclear Fuel Cycle: Reprocessing*, *supra* note 5.

12. See *id.*

13. Treaty on the Non-Proliferation of Nuclear Weapons arts. II, III, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161. Russia, China, the United States, Britain, and France were the only nuclear weapons states as of 1967. Pakistan, India, and Israel have since joined the club, and North Korea claims to be on the verge.

their ratification of the NPT.¹⁴ These “safeguards” are intended to prevent diversion, slow the spread of nuclear technology, and reduce the chances of a Chernobyl-like nuclear accident.¹⁵ However, in a gaping loophole, any signatory is permitted to withdraw from the NPT and its supplemental agreements with only ninety days notice.¹⁶

B. Iran’s Covert Nuclear Efforts

Iran ratified the NPT in 1970, during a period in which its Shah enjoyed good relations with the West, although it launched a parallel, clandestine nuclear weapon program at the same time.¹⁷ This was in stark violation of the agreement that Iran had signed with the IAEA, which requires that Iran disclose all of its nuclear research,¹⁸ permit IAEA inspections of its facilities,¹⁹ and generally ensure that its civilian research will not be diverted to military purposes.²⁰ So in August 2002, when an Iranian opposition group disclosed the existence of secret uranium enrichment facilities,²¹ Iran’s nuclear portfolio—already a concern to many for some time²²—vaulted to the top of the international community’s watchlist.

It is now clear that the Islamic fundamentalist regime ruling Iran has aggressively sought nuclear technology since

14. *Id.* arts. III, IV.

15. *See id.* pmb1.

16. *Id.* art. X.

17. ABBAS MILANI, MICHAEL McFAUL, & LARRY DIAMOND, BEYOND INCREMENTALISM: A NEW STRATEGY FOR DEALING WITH IRAN 6 (2005).

18. Agreement Concerning the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, Iran-International Atomic Energy Agency [IAEA], art. 8(a), Dec. 13, 1974, INFCIRC/214, available at <http://www.iaea.org/Publications/Documents/Infcircs/Others/infirc214.pdf>.

19. *Id.* art. 9.

20. *Id.* arts. 18–19.

21. KENNETH R. TIMMERMAN, COUNTDOWN TO CRISIS: THE COMING NUCLEAR SHOWDOWN WITH IRAN 257 (2005).

22. In fact, the IAEA knew about these facilities for some time but lacked investigational authority to determine the extent of Iran’s work. *Id.* at 258. The intersection of the opposition group’s revelations with the election of a vocally hardline government brought the Iranian nuclear portfolio to the world’s attention. Reuel Marc Gerech, *Coming Soon: Nuclear Theocrats?*, WKLY. STANDARD, Jan. 30, 2006, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/006/617pwz1q.asp>.

coming to power in 1979. The regime enlisted the aid of Dr. Abdul Qadeer Khan, a renegade Pakistani nuclear scientist who provided detailed drawings and lists of equipment to be procured from nuclear states.²³ Under Khan's guidance, the Iranians embarked on an impressive scheme to evade export controls on dual use technology.²⁴ Bartering with its vast oil reserves, the Iranians enlisted the aid of France, China, and Germany in building their nuclear facilities.²⁵ The regime was successful in luring many scientists living in exile to return and work on its nuclear enterprise.²⁶ Of course, the discrete and severable nature of these and other steps that Iran has taken toward nuclear status has given it deniability.²⁷

While there is no smoking gun evidence of Iran's true motives for nuclear research, many doubt that the world's fourth largest exporter of oil would so aggressively pursue nuclear power for energy purposes.²⁸ A 2003 IAEA investigation of Iran confirmed the existence of at least two processing plants capable of producing materials for nuclear arms.²⁹ Subsequent investigations revealed at least seven secret nuclear sites and traces of uranium concentrated at levels that belie Iranian assertions.³⁰ U.S. intelligence has uncovered Iranian drawings of a subterranean tunnel designed for an underground atomic test, as well as a laptop computer, allegedly stolen from Iranian operatives, containing plans for a secret, small-scale facility to enrich uranium and build a ballistic missile capable of accommodating a nuclear warhead.³¹ Finally, Iran's longstanding investment in a long-range missile—the "Shahab"—that is most effectively used with a nuclear,

23. TIMMERMAN, *supra* note 21, at 38–41.

24. *Id.* at 129–30.

25. *Id.* at 39, 104, 117–18.

26. *Id.* at 43–46.

27. *Id.* at 285–86, 296–97 (describing Iran's strategy of "denial, deception, and delay").

28. Nazila Fathi & Thomas Fuller, *Iran Reopens Uranium Processing Plant as U.N. Agency Meets*, N.Y. TIMES, Aug. 11, 2005, at A3.

29. Broad & Sanger, *Relying on Computer*, *supra* note 3, at A22.

30. *Id.*

31. Dafna Linzer, *Strong Leads and Dead Ends in Nuclear Case Against Iran*, WASH. POST, Feb. 8, 2006, at A1, A14.

chemical, or biological warhead, is “corroborating evidence about Tehran’s nuclear weapons intentions.”³²

Iran has clearly created a dual-track research process: its civilian energy efforts lag so far behind its nuclear weapon efforts that its claims of a single track of peaceful research are simply not credible.³³ If all Iran wanted was civilian energy, it would not refuse a longstanding Russian offer to provide a permanent supply of low-grade nuclear fuel, thereby allowing Iran to skip the second (and most diversion friendly) phase of nuclear technology.³⁴ Ultimately, Iran’s focus on super-enrichment, its history of concealment, and its virtually limitless supply of oil leave most experts convinced that it is in fact seeking a nuclear weapon.³⁵

Not only has Iran failed to live up to its obligations under its NPT-based agreement with the IAEA, it has actively obstructed IAEA investigations by using front companies to conceal relationships between its nuclear facilities and its military.³⁶ In one instance, the Iranians razed a previously undisclosed uranium enrichment facility, identified via satellite, and sanitized the surrounding soil prior to IAEA testing.³⁷ And rather than offering even token confidence-building measures, the Iranians have uncompromisingly asserted their NPT-based “inalienable right” to peaceful nuclear research, dismissing the considerable evidence arrayed against their claims that the research is for peaceful purposes.³⁸

C. *Negotiations with the International Community*

The “unsettling Iranian record of concealment, lies, and obfuscation,” set off a flurry of diplomatic activity, catching Iran

32. MILANI ET AL., *supra* note 17, at 8.

33. TIMMERMAN, *supra* note 21, at 287.

34. *When the Soft Talk Has to Stop*, ECONOMIST, Jan. 14, 2006, at 29, 31.

35. See Richard Bernstein, *Atomic Agency Delays Action on Iran*, N.Y. TIMES, Nov. 25, 2005, at A24 (quoting the British delegate to the Atomic Energy Agency who, while speaking “on behalf of the European Union and several other countries,” said that Iran’s activity “has no application other than the production of nuclear warheads”).

36. TIMMERMAN, *supra* note 21, at 258.

37. *Id.* at 286.

38. MILANI ET AL., *supra* note 17, at 8.

off-guard and red-handed by the revelation of its nuclear progress.³⁹ Wary of antagonizing a Bush Administration already at its doorstep in neighboring Iraq and Afghanistan, in December 2003 Iran agreed to suspend enrichment activities and sign the Additional Protocol to the NPT that provides for “anytime-anywhere” IAEA inspections.⁴⁰ Since then, Iran has negotiated primarily with France, Germany, and Britain (collectively, the “EU3”) for the right to continue its nuclear research.⁴¹ The United States has generally stayed on the fringes of the talks because it lacks formal diplomatic relations with Iran and rejects the negotiations’ presupposition that Iran’s research is only for peaceful purposes.⁴² Fulfilling the Americans’ prophecy, and in a tactic it would employ repeatedly, Iran announced in January 2004 that it would breach the agreement and resume the prohibited activities.⁴³

Negotiations continued, but the Iranians repeatedly maintained a blanket right to nuclear technology while leading the EU3 along with vague hints of potential compromise.⁴⁴ In May 2005, Iran once again agreed to suspend its activities, this time in exchange for incentives to be forthcoming from the EU3.⁴⁵ By August of that year, Iran had lost patience and announced that it would again breach the agreements and resume its research.⁴⁶ In September, Iran’s president went before the United Nations and brazenly rejected any

39. Michael Donovan, *Iran’s Bomb: A Crisis Deferred?*, 29 FLETCHER F. OF WORLD AFF. 27, 28–29 (2005).

40. *Id.* at 29.

41. *Id.* at 29–31 (discussing the many stages of negotiations between Iran and the EU3).

42. See Condoleezza Rice, U.S. Sec’y of State, Press Conference on Iran (May 31, 2006) (transcript available at <http://www.state.gov/secretary/rm/2006/67103.htm>) (discussing the United States’ lack of formal relations with Iran and its doubt that Iran’s purposes are peaceful).

43. Donovan, *supra* note 39, at 29.

44. *Id.* at 30–31.

45. Elaine Sciolino, *Europe Gets Iran to Extend Freeze in Nuclear Work*, N.Y. TIMES, May 25, 2005, at A1.

46. Nazila Fathi & Alan Cowell, *Iran Says It Will Resume Uranium Enrichment, Jeopardizing Nuclear Talks With Europe*, N.Y. TIMES, Aug. 1, 2005, at A8.

compromise over his nation's right to nuclear power.⁴⁷ While a subsequent IAEA resolution decried an "absence of confidence that Iran's nuclear program is exclusively for peaceful purposes," it failed to lay the groundwork for referral to the U.N. Security Council.⁴⁸

The Iranian parliament nevertheless responded with a law that would bar any inspections of the country's facilities in the event of referral.⁴⁹ Three days before the IAEA was to meet again, referral was taken off the table.⁵⁰ Nevertheless, on the eve of their inaction, IAEA member states acknowledged substantial evidence indicating Iran's ulterior motive for nuclear research.⁵¹ Negotiations continued through January 2006, but Iran refused to yield to international demands for full disclosure of its efforts and pledged to "continue until they master nuclear energy."⁵² The Iranians summoned the IAEA to remove seals from their enrichment plants—seals that had likely been nothing more than symbolic⁵³—and boldly announced the resumption of their nuclear program.⁵⁴

In February, the United States made its strongest push for referral yet and succeeded in extending its coalition beyond the EU3: Russia and China, surprised by Iran's continuing obstinacy, agreed to vote for referral, but only on the condition that no formal action be taken before March.⁵⁵ This delay was

47. Joel Brinkley, *Iranian Leader Refuses to End Nuclear Effort*, N.Y. TIMES, Sept. 18, 2005, at A1.

48. Joel Brinkley, *Half a Step Forward to Rein In Iran*, N.Y. TIMES, Sept. 27, 2005, at A6.

49. Nazila Fathi, *Iran Parliament Votes to Close Atomic Sites to U.N. Monitors*, N.Y. TIMES, Nov. 21, 2005, at A10.

50. *More Time for Iran in Nuclear Row*, BBC NEWS, Nov. 21, 2005, http://news.bbc.co.uk/2/hi/middle_east/4457772.stm.

51. Bernstein, *supra* note 35, at A24.

52. Elaine Sciolino, *World Nuclear Panel Meets Today on Iran*, N.Y. TIMES, Feb. 2, 2006, at A6 [hereinafter Sciolino, *World Nuclear Panel Meets*] (quoting Iranian President Mahmoud Ahmadinejad).

53. Editorial, *The Iranian Threat*, Jerusalem Post, Jan. 10, 2006, at 13.

54. *Id.*

55. Sciolino, *World Nuclear Panel Meets*, *supra* note 52. As a legal matter, the IAEA resolution only "reported" Iran to the Security Council, a concession the Russians and Chinese demanded. *Id.* Further, it made no mention of Iran's noncompliance with its IAEA agreement, thereby avoiding automatic referral. *Id.*

designed to give Iran time to reintroduce its moratorium on uranium enrichment and thereby comply with its IAEA obligations.⁵⁶ However, the follow-up IAEA report that laid the groundwork for the March 2006 IAEA board meeting reported that Iran still failed to reveal the “scope and nature” of its nuclear program, making it impossible to prove that its program was exclusively for civilian energy.⁵⁷ On the eve of the meeting, Iran sought a last minute reprieve from the EU3.⁵⁸ Once this ploy failed, the Iranians reversed course and proclaimed that if they were formally referred, they would escalate their activities from mere “research” to large scale enrichment.⁵⁹ The March 2006 meeting did result in referral to the Security Council, however that body has since failed to stop Iran’s march towards a nuclear weapons program.⁶⁰

Meaningful Security Council action was first forestalled by yet another European incentives package, offered on June 6, which the Iranians inexplicably refused to respond to before August 22.⁶¹ In the interim, the Iranian proxy Hizbullah launched a war against Israel, a move many believe was calculated to divert the world’s attention from Iran.⁶² The Iranians were only partially successful in this regard—on July 31, the Security Council succeeded in passing a resolution demanding the suspension of nuclear activities by August 31.⁶³ The resolution failed, however, to make noncompliance an

56. *Id.*

57. Molly Moore & Dafna Linzer, *IAEA: Iran Advancing Uranium Enrichment*, WASH. POST, Feb. 28, 2006, at A10.

58. *Iran Requests Last-Ditch EU Talks*, BBC NEWS, Feb. 3, 2006, http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/4766008.stm.

59. *IDF Forces Operating in Iran*, JERUSALEM POST, Mar. 5, 2006, <http://www.jpost.com/servlet/Satellite?pagename=JPost%2FJPArticle%2FShowFull&cid=1139395537470>.

60. Warren Hoge, *Security Council Is Stalled Over Iran’s Nuclear Program*, N.Y. TIMES, Mar. 22, 2006, at A6.

61. *Iran Promises Response to Nuclear Incentive Package on Aug. 22*, USA TODAY, July 20, 2006, http://www.usatoday.com/news/world/2006-07-20-iran_x.htm.

62. Mohammad Tabaar, *Iran’s Role in Crisis Still Murky*, BBC NEWS, July 7, 2004, http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/5210874.stm.

63. *U.N. Demands Iran Suspend Nuclear Activities*, WASH. POST, July 31, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/31/AR2006073100357.html>.

automatic trigger for diplomatic and economic sanctions, and instead did no more than open the door to nebulous “appropriate measures.”⁶⁴

1. *Iranian Negotiating Tactics*

Iranian negotiator Ali Larijani, whose predecessor took a more conciliatory approach to Western condemnation, has won praise in Tehran for proving the mantra that “if you stand up to the West, they’ll buckle.”⁶⁵ Pursuing a strategy that emanates from Iran’s Supreme Leader Ayatollah Ali Khamenei, Larijani “whittled away the suspension [of uranium enrichment] step by step, testing the EU while establishing ‘facts on the ground’ ahead of any future settlement.”⁶⁶ This negotiating strategy is an elaborate shell game: the Iranians compromise just enough to keep their counterparts interested, breach the compromise either out of impatience or simply because they perceive weakness in their counterparty, and finally, contritely promise to adhere to a new compromise if allowed to return to the negotiating table.

If those promises are insufficient, the Iranians use threats—such as barring inspections,⁶⁷ withdrawing from the NPT,⁶⁸ or even raising the price of its oil exports⁶⁹—in order to draw their counterparts back into negotiation. There is also evidence that Iran has gone as far as to order terrorist attacks and foment Muslim unrest in countries that oppose its nuclear program.⁷⁰

64. *Id.*

65. Karl Vick, *Iran Plans to Build Two More Reactors*, WASH. POST, Dec. 6, 2005, at A22 (quoting Abbas Milani, an Iran analyst at the Hoover Institution at Stanford University).

66. Gareth Smyth, *Regime Insider Faces Severe Test of His Reputation as Pragmatist*, FIN. TIMES, Jan. 11, 2006, at 6.

67. Nazila Fathi, *Bracing for Penalties, Iran Threatens to Withdraw from Nuclear Treaty*, N.Y. TIMES, Feb. 12, 2006, at A16 [hereinafter Fathi, *Bracing for Penalties*].

68. *Id.*

69. David Sanger, *Why Not a Strike on Iran?*, N.Y. TIMES, Jan. 22, 2006, at 1.

70. See Mansoor Ijaz, *Terrorists Going Nuclear*, NAT’L REV. ONLINE, Jan. 31, 2006, <http://www.nationalreview.com> (follow “Search” hyperlink; then follow “NRO Authors” hyperlink; then follow “Ijaz, Mansoor Archive” hyperlink; then follow “Terrorists Going Nuclear” hyperlink) (arguing that the London transport bombings, the New Delhi terrorist attacks, and last summer’s civil unrest in France “were all executed at a time

Thus, the Iranians “skate[] right at the edge of controlled pugnaciousness.”⁷¹

2. *Relying on Russia and China*

The Iranians have also drawn on their relationships with Russia and China to delay resolution of their nuclear portfolio. Both have sold substantial amounts of nuclear technology to Iran,⁷² have significant economic relationships with Iran (China relies on Iran for oil and Russia for billions in defense contracts),⁷³ cast important votes at the IAEA, and maintain veto power in the Security Council.⁷⁴ Although both ultimately voted in favor of reporting Iran to the Security Council in February 2006, they were behind the watering down of the resolution and have continuously blocked any meaningful Security Council action.⁷⁵

The Russians have held separate negotiations with the Iranians over a proposal to process Iran’s nuclear fuel and thereby prevent diversion;⁷⁶ fully aware that the negotiations were going nowhere, the Russians are alleged to have made them appear credible in order to delay Security Council action.⁷⁷ Iranian officials gave conflicting signals about the proposal,

soon after each country had exerted significant pressure on Tehran to give up its nuclear ambitions.”). Muslim unrest over political cartoons satirizing the prophet Mohammad have similarly been blamed on an Iran trying to divert attention from its nuclear crisis. David E. Sanger, *Bush Urges Nations to End Violence; Rice Accuses Syria and Iran*, N.Y. TIMES, Feb. 9, 2006, at A14. Finally, France and Italy have become hesitant to take on Iran in light of the fact that their troops are vulnerable to Iranian attack (via Hizbullah) in Lebanon. *Making Uranium While the Sun Shines*, ECONOMIST, Oct. 7, 2006, at 53.

71. Sanger, *Why Not a Strike on Iran?*, *supra* note 69.

72. TIMMERMAN, *supra* note 21, at 69–70, 72.

73. Robert McMahon, Deputy Editor, Council on Foreign Relations, Iran, the United Nations, and Sanctions (Apr. 4, 2006), <http://www.cfr.org/publication/10222/>; WALTER POSCH, VLADIMIR ESVEEV & PATRICK CLAWSON, *HOW MUCH DO THE EU AND RUSSIA CARE ABOUT IRAN?*, WASH. INST. FOR NEAR E. POL’Y (2006), <http://www.washingtoninstitute.org/templateC05.php?CID=2457>.

74. U.N. Charter art. 23, para. 1; *see* Colum Lynch, *No Support from China or Russia on Iran Measure*, WASH. POST, Mar. 14, 2006, at A16.

75. *See infra* Part IV.B.

76. *See infra* Part IV.A.

77. Peter Finn, *Iran’s Delay on Enrichment Deal Seen as Bid to Avoid Sanctions*, WASH. POST, Feb. 22, 2006, at A10.

fueling suspicion that they were just “stalling for time.”⁷⁸ In fact, at one point the two parties even announced a compromise on the matter, only to have Iranian officials announce hours later that the compromise did not curb their right to autonomous nuclear research.⁷⁹ Iran has “merely used talks about such talks to try to divide Russia and China from Europe and America”⁸⁰ in the hopes of delaying countermeasures long enough to “build up a civilian nuclear infrastructure under the protection of the [NPT], and then convert it to military use [after] abandon[ing] the treaty”⁸¹ by use of the 90-day withdrawal loophole described above.

As of this writing, though the August 31 deadline has long passed, Iran has forestalled any Security Council action by continuing to float compromise proposals that disappear days later and by insisting on holding talks about talks.⁸²

D. Is an Iranian Bomb Inevitable?

Despite the virtual consensus that the Iranians are pursuing a nuclear bomb, there is little, if any, consensus on how far down that path they have proceeded. That path is marked by three milestones: mastering the nuclear fuel cycle, amassing sufficient nuclear fuel for multiple bombs, and determining how to trigger a nuclear explosion within a missile capable of hitting a predetermined target.⁸³ Israel estimates that Iran will master the fuel cycle in the immediate future.⁸⁴ The United States and the EU3 do not dispute this, but instead focus on the second milestone.⁸⁵ Their predictions thus concentrate on the long term:

78. *Russia Urges Nuclear Deal on Iran*, BBC NEWS, Feb. 20, 2006, http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/4731018.stm.

79. George Nishiyama & Teruaki Ueno, *Iran's Mottaki: Won't Suspend Research*, REUTERS, Feb. 27, 2006.

80. *A Rare Diplomatic Unity*, ECONOMIST, Feb. 4, 2006, at 11.

81. Fathi, *Bracing for Penalties*, *supra* note 67.

82. *Making Uranium While the Sun Shines*, *supra* note 70.

83. *See* Kerr, *supra* note 7.

84. Elliot Jager, *Iran: All That We Don't Know*, JERUSALEM POST, Jan. 16, 2006, at 13 (predicting six months to a year).

85. Simon Tisdall & Ian Traynor, *Iran is Only Months Away from Bomb Technology*, GUARDIAN (London), Mar. 10, 2006, at 16 (reporting that British Foreign Office officials have admitted that “while it could take Iran several years to build a

the EU3 estimate nuclear weapons are five years away, while the United States believes the range is six to ten years.⁸⁶ The U.S. estimation may overcompensate for U.S. intelligence failures in Iraq.⁸⁷ Yet “most forecasters acknowledge that secret Iranian advances or black market purchases could produce a technological surprise,” not unlike the Russian, Chinese, Pakistani, and Indian nuclear breakthroughs that have surprised U.S. intelligence over the last sixty years.⁸⁸

Israel estimates that Iran could be as few as four years away from a nuclear bomb, but contends that in any case, the appropriate milestone to focus on is the first—the so-called “point of no return”—beyond which “it is simply a matter of time until Iran is nuclear-armed.”⁸⁹ Focusing on the second milestone permits Iran to string out negotiations long enough to reach the first—when Iran will have irreversibly secured the fundamental knowledge to build a bomb. If the goal is to prevent Iran from possessing nuclear weapons—a goal to which the IAEA is allegedly committed—then the first phase of nuclear research must be the metric that guides international efforts.

This conclusion is bolstered by three realities. First, the Iranians could delay an announcement of successful completion of the second phase until they have enough nuclear fuel to make a large nuclear arsenal.⁹⁰ Second, once Iran completes the second phase, it will have a substantial head-start on the third because it has already designed, tested, and marched the Shahab missile (capable of reaching Israel) through the streets of Tehran.⁹¹

serviceable nuclear weapon, it might gain the technical knowhow within months”).

86. Steven Erlanger, *Israel Wants West to Deal More Urgently with Iran*, N.Y. TIMES, Jan. 13, 2006, at A8.

87. *Id.*

88. William J. Broad & David E. Sanger, *As Crisis Brews, Iran Hits Bumps in Atomic Path*, N.Y. TIMES, Mar. 5, 2006, at A1, A11 [hereinafter Broad & Sanger, *As Crisis Brews*].

89. Erlanger, *supra* note 86.

90. Broad & Sanger, *As Crisis Brews, supra* note 88, at A11.

91. *Iran Reports Gain in Test of Missile Fuel*, N.Y. TIMES, June 1, 2005, at A9; TIMMERMAN, *supra* note 21, at 205. U.S. intelligence is thus specifically aware of “the risk of Iran acquiring nuclear arms and merging them with its existing ballistic missile systems.” George Jahn, *Iran-EU Talks End Without Nuclear Deal*, ABC NEWS, Mar. 3, 2006, <http://abcnews.go.com/International/wireStory?id=1683602>.

Third, once Iran completes the first phase and has enough enriched uranium to bring a nuclear reactor online, any preventative strike could cause massive collateral damage and have “far-reaching effects on too many innocents.”⁹²

The U.S./EU3 analysis may simply reflect resignation to the proposition that a nuclear-armed Iran is inevitable.⁹³ Israel, however, is the nation most threatened by a nuclear-armed Iran, and cannot fatalistically accept nuclear weapons in the hands of a state that has threatened to use those very weapons to destroy it. This is the subject of Part III.

III. IRAN’S ANTI-ISRAEL AGGRESSION

Iran and Israel shared a *détente* during much of the Cold War due to a common fear of Russia.⁹⁴ After its Islamic Revolution, Iran’s leading clerics were determined to position their country as a hegemon in the Middle East, and set out to prove their sincerity with anti-Israel rhetoric.⁹⁵ The Iranians have since embarked on an ambitious campaign against Israel, leading, training, and funding terrorist groups such as Islamic Jihad, Hamas, and Hizbullah.⁹⁶

Iran has thus become a *de facto* player in the Middle East peace process, using financial support for Palestinian terrorists to forestall a two-state solution recognizing Israel’s right to exist.⁹⁷ A “martyr foundation” has been established in Tehran to

92. Editorial, *They Need Us On That Wall*, INVESTOR’S BUS. DAILY, Sept. 20, 2004, at A20 [hereinafter *They Need Us On That Wall*].

93. See Steven R. Weisman, *Rice is Seeking \$85 Million to Push for Changes in Iran*, N.Y. TIMES, Feb. 16, 2006, at A14 [hereinafter Weisman, *Rice is Seeking*] (citing a resignation to a nuclear-armed Iran among key Bush Administration officials).

94. See Trita Parsi, *Whither the Persian-Jewish Alliance?*, MIDDLE E. ROUNDTABLE, Dec. 16, 2004, <http://www.bitterlemons-international.org/previous.php?opt=1&id=65#263>.

95. Abbas Milani, *For Jews, There Have Always Been Two Irans*, INT’L HERALD TRIB., Nov. 10, 2005, at 8.

96. *Iranian State Sponsorship of Terror: Threatening U.S. Security, Global Stability, and Regional Peace: Hearing Before the Comm. Of Int’l Relations*, 109th Cong. 3–5 (2005) [hereinafter *Iranian State Sponsorship*] (testimony of Matthew A. Levitt, Senior Fellow & Dir. of Terrorism Studies, Wash. Inst. for Near E. Pol’y) available at <http://www.washingtoninstitute.org/templateC07.php?CID=228>.

97. See *id.* at 2–4.

recruit suicide bombers to attack Israel.⁹⁸ Iran's efforts also extend to terrorist training at facilities in Iran and Lebanon and an annual conference convening anti-Israel terrorist groups.⁹⁹ The success of the Iranians' efforts is most visibly demonstrated by the draw to which its proxy, Hizbullah, was able to fight Israel in their most recent conflict on the Lebanese border.

All of Iran's support is contingent on an unrelenting assault against Israel designed to obstruct its progress toward normalization with the Arab world.¹⁰⁰ When donors cut off aid to the Palestinian Authority in the wake of Hamas' electoral victory, and when Lebanon needed reconstruction financing after its war with Israel, Iran filled the void,¹⁰¹ reaffirming its control over both the Palestinian Authority and Lebanon.¹⁰²

It was in this context, and with an eye to Iran's nuclear ambitions, that world leaders viewed with alarm the Iranian threat to annihilate Israel, made in October 2005 as the nuclear crisis was coming to a head.¹⁰³ The long history of Iran's anti-Israel hostilities is therefore used here as the backdrop for an analysis of the political ascension of the current regime, which concludes that the rhetoric may well be nothing more than an outward expression of an internal policy that has long been pursued. Ultimately, although neither Iran's anti-Israel aggression nor its pursuit of nuclear weapons is new to the Middle East, each has reached a crescendo and converged to make Iran a unique threat to Israel.

98. *Iranian Liberals: Our President's a Moron*, FOXNEWS.COM, Oct. 31, 2005, <http://www.foxnews.com/story/0,2933,173989,00.html>.

99. *Iranian State Sponsorship*, *supra* note 96, at 5–6, 8 (testimony of Matthew A. Levitt).

100. *See id.* at 3.

101. Orly Halpern, *Mashaal: Iran Will Have Major Role in PA*, JERUSALEM POST, Feb. 20, 2006, <http://www.jpost.com/servlet/Satellite?cid=1139395450793&pagename=JPost%2FJParticle%2FShowFull>; Michael Slackman, *Ruined Towns Look to Beirut, Mostly in Vain*, N.Y. TIMES, Oct. 1, 2006, at A1 [hereinafter Slackman, *Ruined Towns Look to Beirut*].

102. Herb Keinon, *Iran Wants to Turn Hamas into Hizbullah*, JERUSALEM POST, Feb. 26, 2006, at 1; Slackman, *Ruined Towns Look to Beirut*, *supra* note 101.

103. Mary Jordan & Karl Vick, *World Leaders Condemn Iranian's Call to Wipe Israel 'Off the Map'*, WASH. POST, Oct. 28, 2005, at A16.

A. *Mahmoud Ahmadinejad: Escalating or Perpetuating the Status Quo?*

Mahmoud Ahmadinejad was elected as President of Iran in June 2005 following an era of moderation in Iran led by reformist president Mohammed Khatami.¹⁰⁴ Ahmadinejad, a hardline religious conservative, won a surprisingly decisive victory with promises to end public corruption and share Iran's oil revenues with its poor.¹⁰⁵ He also advocated, albeit less prominently, a return to the fundamentalist principles of the Islamic Revolution.¹⁰⁶ Although there is no reason to believe that voters elected Ahmadinejad in order to escalate the Iran-Israel conflict, this is precisely what he has done.

In October 2005, Ahmadinejad called for Israel to be "wiped off of the map,"¹⁰⁷ telling an audience of terrorist groups that "very soon, this stain of disgrace . . . will be purged from the center of the Islamic world—and this is attainable."¹⁰⁸ He has stood by his threat despite worldwide condemnation.¹⁰⁹ The threat has since become the Iranian mantra, though it should be noted that the very same phrase was used as far back as 1998, when it adorned Iranian missiles in a military parade staged in Tehran.¹¹⁰ Two months later, Ahmadinejad again threatened Israel by openly proclaiming the Holocaust a Western lie perpetuated to justify the creation of a Jewish state and calling for Israeli Jews to be "moved" to Europe.¹¹¹ For many, his comments evoked images of a Nazi Germany that strove for similar goals just last century.¹¹²

104. Scott Petersen, *Iranians Wait for Change from Ahmadinejad*, CHRISTIAN SCI. MONITOR, Oct. 13, 2005, at 25.

105. *Id.*

106. *Id.*

107. Fathi, *Iran's New President*, *supra* note 1.

108. Mahmoud Ahmadinejad, Iranian President, Remarks at the Tehran Conference (Oct. 26, 2005) (transcript available at <http://memri.org/bin/articles.cgi?Page=countries&Area=iran&ID=SP101305>) (*emphasis added*).

109. See Herb Keinon, *Israel Tries to Build Improbable Coalition to Oust Iran from UN*, JERUSALEM POST, Oct. 28, 2005, at 1.

110. TIMMERMAN, *supra* note 21, at 205.

111. *Iran's President Clarifies His Stand on the Holocaust: It's a European Myth*, N.Y. TIMES, Dec. 14, 2005, at A5.

112. David Brooks, *Hating the Bomb*, N.Y. TIMES, Jan. 22, 2006, at A16.

The prevailing view is that Ahmadinejad's positions are an escalation from those of his predecessors. Experts point to the more moderate Khatami's reign as president during which Iran made intermittent attempts to establish a *détente* with the West,¹¹³ and they see Ahmadinejad as a throwback to the era of the revolution "when Iran's leaders competed to sound outrageous."¹¹⁴ Khatami himself has publicly criticized Ahmadinejad's denial of the Holocaust, calling it a "massacre of innocent people, among them many Jews."¹¹⁵ And there is no questioning the fact that Ahmadinejad's threats are the first time an Iranian president has so explicitly called for Israel's annihilation.¹¹⁶ Though his style has clearly rankled the mullahs and the old guard, Ahmadinejad's success in using anti-Semitism to stir up nationalism and in boldly challenging the West to stop the country's march to nuclear arms have won grudging praise.¹¹⁷

There is also evidence that Ahmadinejad's most visible predecessors—Ali Akbar Hashemi Rafsanjani¹¹⁸ and Khatami¹¹⁹—were no less threatening to Israel. Rafsanjani, a longtime proponent of Iran's nuclear program, reminded an audience in December 2001 that "the use of an atomic bomb against Israel would destroy Israel completely, while [the same] against the world of Islam would only cause damages. Such a scenario is not inconceivable."¹²⁰ Ahmadinejad is reputed to be "on the same page" as Rafsanjani.¹²¹ For his part, Khatami

113. Fathi, *Iran's New President*, *supra* note 1.

114. *Is the New President Truly an Exterminator?*, *ECONOMIST*, Nov. 5, 2005, at 49.

115. *Ex-Iran Head Enters Holocaust Row*, *BBC NEWS*, Mar. 1, 2006, http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/4763494.stm.

116. Ewan MacAskill & Robert Tait, *EU Issues Rebuke to Iran for President's Anti-Israel Rhetoric*, *GUARDIAN*, Oct. 28, 2005, at 17.

117. Michael Slackman, *A New Face in Iran Resurrects an Old Defiance*, *N.Y. TIMES*, Jan. 30, 2006, at A10 [hereinafter Slackman, *A New Face*].

118. *Iran Resumes Centrifuge Operation on Uranium*, *BBC NEWS*, Apr. 11, 2006, available at <http://www.kuna.net.kw/home/story.aspx?Language=en&DSNO=850238> (noting Rafsanjani's term from 1989–1997).

119. Monifa Thomas, *Iran Ex-Leader Urges Interfaith Talks*, *CHI-SUN TIMES*, Sept. 3, 2006, at A12 (noting Khatami's term from 1997–2005).

120. TIMMERMAN, *supra* note 21, at 236.

121. Gerecht, *supra* note 22.

called Israel an “illegal entity”¹²² and an “extension of fascism,”¹²³ and is said to be capable of “sound[ing] like a faithful child of [the] Ayatollah when talking about Zion [and] the Jews.”¹²⁴ From this view, Ahmadinejad’s positions are distinct only as compared to “the tendency of Iranian political elites to give speeches pleasing to Western ears one day then say something different in Farsi after coming home,”¹²⁵ known as *taqqiyah* in Arabic.¹²⁶ After all, Iranian aggression against Israel did not abate during either of Rafsanjani and Khatami’s tenures.¹²⁷ In point of fact, they may themselves be responsible for the prevailing view, having “orchestrated a campaign of character assassination against Ahmadinejad in recent months designed to paint him as a delusional figure.”¹²⁸

Whether Ahmadinejad is an escalator or perpetuator of the status quo, the reality is that Iran’s anti-Israel aggression runs deeper than any one president. It is Iran’s unelected Supreme Leader, currently Ayatollah Ali Khamenei, who “controls the armed forces and makes decisions on security, defense and major foreign policy issues.”¹²⁹ The Supreme Leader, in turn, appoints half of the so-called Guardian Council, which has veto power over all candidates for elective office and all legislation.¹³⁰ These forces have ultimate responsibility for Iran’s anti-Israel hostility—it was the first Supreme Leader, Ayatollah Ruhollah

122. Martin Phillips & Mel Hunter, *Why Do They Hate Us?*, SUN (London), Sept. 13, 2001, at 10.

123. TIMMERMAN, *supra* note 21, at 209 n.*.

124. Gerecht, *supra* note 22.

125. Daveed Gartenstein-Ross, *The Mullah Wars*, WKLY STANDARD, Jan. 25, 2006, available at <http://www.weeklystandard.com/content/public/articles/000/000/006/575kccof.asp>.

126. Gerecht, *supra* note 22.

127. See TIMMERMAN, *supra* note 21, at 191 (Rafsanjani), 209 n.* (Khatami). In fact, prosecutors in Argentina are currently seeking an arrest warrant for Rafsanjani, accusing him of having ordered a 1994 car bombing that killed 85 at a Jewish community center in Buenos Aires. Claudia Sanchez, *Iran’s ex-President Gave the Go-Ahead for the 1994 Bombing in Argentina*, MIAMI HERALD, Oct. 26, 2006, at A15.

128. Gartenstein-Ross, *supra* note 125.

129. See *Who Holds the Power?*, BBC NEWS, http://news.bbc.co.uk/2/shared/spl/hi/middle_east/03/iran_power/html/default.stm (last visited Oct. 14, 2006).

130. Christopher Shea, *Iran Contrarians: Are Iranian Elections a Fraud, a Hopeful Sign of Potential Democracy, or Both?*, BOSTON GLOBE, June 11, 2006, at E4.

Khomeini, who first called for Israel to be destroyed¹³¹—and their most recent *fatwa*, permitting the use of nuclear weapons against the nation's enemies, suggests that they have not changed their orientation on the matter since the 1979 Revolution.¹³²

B. The Convergence of Iran's Nuclear and Anti-Israel Agendas

In the words of one prominent editorial board:

[While] every new addition to the roster of nuclear weapons states significantly raises the odds that nuclear weapons will be used in war . . . those dangers are especially acute in the case of Iran [because] . . . it has called for the elimination of Israel and maintains close ties with groups that have embraced terrorism.¹³³

Others acknowledge the convergence of Iran's nuclear ambitions with its anti-Israel stance and have echoed this fear.¹³⁴ Today more than ever, the threat posed by a nuclear Iran is not abstract, but rather concretely oriented to "disrupting Arab-Israeli negotiations, undermining and demoralizing Israeli society, and threatening Israel's major population centers."¹³⁵

Although Iran has been pursuing a nuclear bomb for thirty years, it could use a weight on the geopolitical scales today more than ever. As a result of the demise of longtime Israeli nemesis Saddam Hussein,¹³⁶ Israel's withdrawal from the Gaza Strip and

131. James Phillips, John C. Hulsman & James Jay Carafano, *Countering Iran's Nuclear Challenge*, BACKGROUND NO. 1903 (The Heritage Found., Washington, D.C.), Dec. 14, 2005, at 3, available at <http://www.heritage.org/research/middleeast/iraq/bg1903.cfm>.

132. Colin Freeman & Philip Sherwell, *Iranian Fatwa Approves Use of Nuclear Weapons*, DAILY TELEGRAPH, Feb. 19, 2006, at 26.

133. Editorial, *Iran and the Bomb*, N.Y. TIMES, Jan. 13, 2006, at A20.

134. *They Need Us On That Wall*, *supra* note 92 ("Iran with the bomb is not the same as, say, Luxembourg with the bomb [because it is controlled] by a belligerent, fanatical Islamic regime that can't be trusted not to attack Israel with an atomic weapon.").

135. Michael Eisenstadt & Neri Zilber, *Hizbullah, Iran, and the Prospects for a New Israeli-Palestinian Peace Process*, WASH. INST. FOR NEAR E. POL'Y, Dec. 22, 2004, <http://www.washingtoninstitute.org/templateC05.php?CID=2223>.

136. Hussein's downfall leaves Iran as the primary opponent to Israel's existence. *Id.*

attendant diplomatic inroads,¹³⁷ and an increasing sense in the Middle East that normalization with Israel can help avoid the spotlight of the U.S.' war on terrorism,¹³⁸ Iran has been isolated and forced to escalate its war against Israel.¹³⁹ Even the Arab boycott, once the paradigmatic example of the Arab-Israeli rift, is a dying animal, pursued vigorously only by Iran, Syria, and Lebanon.¹⁴⁰

Ahmadinejad is said to envision himself as the head of a new Caliphate, a Pan-Islamic coalition arrayed against Israel and, more generally, the West,¹⁴¹ causing his Arab contemporaries to fear that a nuclear-armed Iran would stir up Shiite minorities amongst their populations and radically shift the balance of power away from Saudi Arabia, Turkey, Egypt, and Jordan, all of which are fighting radical Islam amongst their populations.¹⁴² This would likely have the collateral effect of disrupting the peaceful relationship that Israel maintains with these countries. It is also believed that a nuclear-armed Iran could set off an arms race in the Middle East,¹⁴³ one never triggered by Israel's own nuclear weapons because they have not once been brandished.¹⁴⁴ The same Arab leaders fear that an Iranian strike

137. Ben Lynfield, *Muslim World Warms to Israel*, S. CHINA MORNING POST, Oct. 26, 2005, at 16 (reporting that Pakistan, Malaysia, and Afghanistan are among many nations initiating ties with Israel as the "iron curtain" between the Arab states and Israel is lifted).

138. *Id.* (reporting that Indonesia and Tunisia have both warmed to Israel in order to improve their relations with the United States).

139. Gen. (Ret.) Mirza Aslam Beg, *The Demise of Nuclear Non-Proliferation*, NATION (Pakistan), Oct. 3, 2006, available at 2006 WLNR 17198526.

140. Orly Halpern, *Arab Boycott Largely Reduced to Lip Service*, JERUSALEM POST, Feb. 28, 2006, at 10. Syria—and by extension, Lebanon—remains allied to Iran only to the extent it wants the Golan Heights back; it does not espouse radical Islam, and is openly willing to trade land for peace. See *Coalitions of the Unwilling*, *supra* note 1, at 28.

141. Rafael D. Frankel & Oren Klass, *Dagan: Nuclear Arms Within Iran's Grasp*, JERUSALEM POST, Dec. 28, 2005, at 1.

142. Hassan M. Fattah, *Gulf States Call for Tougher Action Against Iran*, N.Y. TIMES, Jan. 31, 2006, at A10; see also Michael Slackman, *Iran the Great Unifier? The Arab World is Wary*, N.Y. TIMES, Feb. 5, 2006, at A3.

143. *Misreading Iran*, ECONOMIST, Jan. 14, 2006, at 16 (noting that Saudi Arabia, Egypt, Syria, and Turkey would be compelled to follow Iran down the nuclear path).

144. Tom Wright, *Israel Not to Blame for Iran's Nuclear Blackmail*, IRISH TIMES, Feb. 14, 2006, at 18.

on Israel could cause collateral damage to Palestinians or miss Israel entirely and hit their own populations.¹⁴⁵

While Ahmadinejad is pinned against a geopolitical wall by U.S. influence in the region, he is all too aware that now is the time to add nuclear weapons to his arsenal: “[Ahmadinejad’s] ascension came at a time when the region was in turmoil, with Iraq bogged down in a violent insurgency, Islamic groups like Hamas in Gaza and the Muslim Brotherhood in Egypt emerging as powerful political forces, . . .” and with the price of oil reaching new heights.¹⁴⁶ It cannot be forgotten that the last Arab leader to bridge the Shia-Sunni divide and stir up nationalism on the Arab street was Gamal Abdel-Nasser, who used two wars against Israel to further his objectives.¹⁴⁷

C. *The Threats Posed to Israel by a Nuclear-Armed Iran*

Israel is widely acknowledged to be “[t]he country with the most to lose from a nuclear Iran”¹⁴⁸ A nuclear-armed Iran would threaten Israel’s existence in two ways.¹⁴⁹

1. *The Threat of a Nuclear Strike*

An Iranian nuclear warhead could indeed “wipe Israel off the map,” given Israel’s size and population density.¹⁵⁰ The Iranians are fully aware of this reality.¹⁵¹ Indeed, the Iranians would not even have to fire a nuclear warhead; merely arraying them along Iran’s southwestern border—where its missiles

145. Flynt Leverett, *The Gulf Between Us*, N.Y. TIMES, Jan. 24, 2006, at A21.

146. Slackman, *A New Face*, *supra* note 117.

147. See generally *Cold War – Profiles: Gamal Abdel Nasser*, CNNINTERACTIVE, <http://www.cnn.com/SPECIALS/cold.war/kbank/profiles/nasser/> (last visited Oct. 14, 2006).

148. *Misreading Iran*, *supra* note 143; see also Ronald D. Asmus, *Contain Iran: Admit Israel to NATO*, WASH. POST, Feb. 21, 2006, at A15.

149. For a similar analysis, see Barry R. Posen, *We Can Live with a Nuclear Iran*, N.Y. TIMES, Feb. 27, 2006, at A19.

150. Ephraim Sneh, *Nuclear Dangers in the Middle East: Threats and Responses*, WASH. INST. FOR NEAR E. POL’Y, May 18, 2005, <http://www.washingtoninstitute.org/templateC05.php?CID=2314>.

151. One Iranian official has openly proclaimed that “the use of a nuclear bomb in Israel will leave nothing on the ground” Arnold Beichman, *Iran’s Eye on Nuclear Weapons*, WASH. TIMES, Jan. 7, 2002, at A15.

already sit, aimed at Israel¹⁵²—would be sufficient to blackmail Israel with its life,¹⁵³ or at least make day-to-day life impossible.¹⁵⁴

There is, however, an “unspoken European notion”¹⁵⁵ that “a nuclear-armed Iran would indeed have to be irrational to strike Israel with such weapons.”¹⁵⁶ These apologists argue that Ahmadinejad’s genocidal rhetoric is nothing more than an attempt to divert voters’ attention away from domestic problems.¹⁵⁷ They also note that Iran must be aware that any nuclear strike on Israel would have a return address, and that Israel’s allies could respond harshly.¹⁵⁸ Moreover, given that Israel is widely believed to maintain its own arsenal of nuclear weapons for defensive purposes, nuclear blackmail would not be a one-way street.¹⁵⁹

The threat of a nuclear strike cannot, however, be dismissed outright when the accompanying rhetoric threatens annihilation; there is no misreading Ahmadinejad’s statement that Israel should be “wiped off the map,” the way that Khrushchev’s “we will bury you” was misinterpreted by the United States as an existential rather than economic threat.¹⁶⁰ From this perspective, incredulity at the thought of an Iranian nuclear strike on Israel is predicated on an ignorance of Israel’s

152. See TIMMERMAN, *supra* note 21, at 292.

153. See Michael Ledeen, *Do the Right Thing*, NAT’L REVIEW, Jan. 18, 2006, <http://www.nationalreview.com/ledeen/ledeen200601180843.asp>.

154. Sneh, *supra* note 150.

155. *The Iranian Threat*, *supra* note 53.

156. *Misreading Iran*, *supra* note 143.

157. See Orly Halpern, *Ahmadinejad’s Faux Pas?*, JERUSALEM POST, Oct. 27, 2005, at 6.

158. Posen, *supra* note 149 (“[A] nuclear attack on a nuclear power is to become a nuclear target.”). Whether Israel would be able to respond depends on its second strike capability. See, e.g., Sam Ser, *Tangling with Tehran*, JERUSALEM POST, Sept. 29, 2006, at 15 (suggesting that a complete collapse of the state following a nuclear attack would render Israel second-strike capability meaningless).

159. Although its official position on the matter is implicit denial, Israel is widely thought to have a nuclear reactor and approximately 200 warheads in the Negev desert. Greg Myre, *Israel Is Lifting the Veil on Its Nuclear Program*, INT’L HERALD TRIB., July 6, 2005, at 8.

160. Fathi, *Iran’s New President*, *supra* note 1; “We Will Bury You!,” TIME, Nov. 26, 1956, available at <http://www.time.com/time/magazine/article/0,9171,867329,00.html>.

situation.¹⁶¹ The rhetoric must be viewed in the context of the war that Iran has carried out against Israel for the last twenty-five years and the decisive role that nuclear weapons could play in it.¹⁶² As an Israeli general put it, “history prevents us from ignoring people who say publicly what they want to do to us.”¹⁶³ Ultimately, while the threat of a nuclear strike should not be exaggerated, it cannot be dismissed.

2. *Terrorism with Impunity*

The second threat posed to Israel by a nuclear-armed Iran is universally recognized: Iran would be capable of “increas[ing] its support for terrorism with impunity.”¹⁶⁴ Iranian terrorism has already cost Israel thousands of casualties and limits Israel’s ability to function as a sovereign state in the Middle East.¹⁶⁵ While superficially tame relative to a nuclear warhead hitting a major population center, terrorism orchestrated by an enemy with no reason to fear you—and much to gain from your demise—is a very real threat, particularly when that enemy has already been responsible for the murder of thousands of your civilians.¹⁶⁶ The nature of this threat has been driven home by

161. See Rafael D. Frankel, *Combatting Iranian Nukes*, JERUSALEM POST, Jan. 23, 2006, at 2 (quoting Sir Michael Quinlan, “Iran using a nuclear bomb on Israel is absurd. Although[,] I can say that sitting safely in the UK.”).

162. Asmus, *supra* note 148 (“It would be a mistake to dismiss . . . Ahmadinejad’s rantings about Israel as mere posturing or a bluff. One lesson from September 11 is that we should not limit our strategic imagination or underestimate our enemies in the Middle East. When someone says he wants to wipe you off the map, he might just mean it.”).

163. Frankel, *supra* note 161, at 2 (quoting Major General Isaac Ben-Israel).

164. *The Iranian Threat*, *supra* note 53.

165. See Israel Ministry of Foreign Affairs, *Victims of Palestinian Violence and Terrorism since September 2000* (2006), <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Palestinian+terror+since+2000/Victims+of+Palestinian+Violence+and+Terrorism+sinc.htm> (stating “[b]etween September 29, 2000 and May 1, 2006, Magen David Adom treated a total of 7,844 casualties as follows: 999 killed, 642 severely injured, 940 moderately, and 5,263 lightly injured . . . “ as a result of terrorism); see also Council on Foreign Relations, *Hamas* (2006), <http://www.cfr.org/publication/8968/> (stating Hamas is believed to have killed more than 500 people).

166. See *The Iranian Threat*, *supra* note 53 (comparing the impact of a nuclear bomb in Israel to the impact of a nuclear bomb in New York, London, Paris, Sydney, or Los Angeles); Israel Ministry of Foreign Affairs, *supra* note 165.

the recent Hizbullah-Israeli conflict, in which Iranian rockets, training, and funding wrought destruction and death in northern Israel.¹⁶⁷ One need not imagine how much more destructive Hizbullah would be with nuclear technology.

The nexus between a nuclear-armed Iran and terrorism with impunity could also be established by the use of a “dirty bomb.”¹⁶⁸ In such a scenario, Iran would arm terrorists, instead of warheads, with nuclear material.¹⁶⁹ Terrorists so armed are not subject to the same rationality constraints assumed by some to rein in Tehran.¹⁷⁰ The destructive potential would be far less than a nuclear warhead, but substantially greater than the current combination of TNT and anticoagulants used in suicide bombs.¹⁷¹ And Iran would be able to maintain deniability because the attacks would not leave a precise return address.¹⁷²

The threat of terrorism with impunity renders meaningless the apologist assertion—typically used to dismiss the threat of a nuclear strike—that “Iran’s ideological opposition to Israel has been manifested in its support for Palestinian terrorists, not in the development of nuclear weapons.”¹⁷³ As Ahmadinejad has

167. Greg Myre & Steven Erlanger, *Clashes Spread to Lebanon as Hezbollah Raids Israel*, N.Y. TIMES, July 13, 2006, at A1; Mark Mazzetti & Thom Shanker, *Arming of Hezbollah Reveals U.S. and Israeli Blind Spots*, N.Y. TIMES, July 18, 2006, at A12.

168. Anne Penketh, *UN Chief Urges West and Iran to Cool Brinkmanship Over Nuclear Programme*, INDEPENDENT, Dec. 5, 2005, at 25.

169. See Gregory L. Schulte, U.S. Permanent Rep., U.N. and the Int’l Atomic Energy Agency in Vienna, *Iran’s Nuclear Program: A Challenge to the World* (Aug. 29, 2006) (transcript available at <http://vienna.usmission.gov>, then follow “Speeches and Related Documents” hyperlink; then follow “Iran” hyperlink; then follow “Iran’s Nuclear Program: A Challenge to the World” hyperlink).

170. See Penketh, *supra* note 168 (quoting IAEA head Mohammed ElBaradei: “The deterrence concept does not apply in the case of terrorists. That is the most critical danger we are facing now because there is a lot of nuclear material and nuclear facilities that need to be adequately protected.”).

171. *Compare Nuclear Terrorism is Still Urgent Risk, Says UN Atomic Watchdog Chief*, UN NEWS CENTRE, Mar. 16, 2005, <http://www.un.org/apps/news/storyAr.asp?NewsID=13676>, with Carafano & Spencer, *supra* note 8, at 1–2.

172. Theoretically, the radioactive residue of a dirty bomb could be traced to a particular reactor. Susan Ladika, *Nuclear Proliferation: Tracing the Shadowy Origins of Nuclear Contraband*, 292 SCIENCE 1634 (2001), available at <http://www.sciencemag.org/cgi/content/full/292/5522/1634?ck=nck>.

173. Ray Takeyh & Nikolas K. Gvosdev, *Pragmatism in the Midst of Iranian Turmoil*, 27 WASH. Q. 33, 42 (2004).

communicated to his Palestinian counterparts, “[t]he Palestinian-Israeli conflict . . . was the ‘focal point of the final war’ between Islam and the West, and [Hamas] could count on Iran’s full support.”¹⁷⁴ Indeed, nuclear-emboldened terrorism would threaten the tenuous *détente* that Israel has achieved with neighbors like Lebanon, and would remove any incentive for Palestinians to negotiate a two-state solution to their conflict with Israel. And in this war, a nuclear-armed Iran would be virtually immune to reprisal or invasion.¹⁷⁵

IV. POTENTIAL RESPONSES TO THE IRANIAN THREAT

Given Israel’s lack of diplomatic relations with Iran, the United States and EU3 have taken the lead in handling Iran’s nuclear ambitions. The United States has chosen a two-track course: threatening sanctions if Iran does not halt uranium enrichment and pushing regime change over the long term.¹⁷⁶ The United States has also left military force on the table, but acknowledges it is highly unlikely.¹⁷⁷ The EU3 has stuck to nonconfrontational diplomacy, preferring incentives to sanctions and ruling out military force.¹⁷⁸ Russia and China have publicly supported a halt of Iranian uranium enrichment, but have put little diplomatic weight behind the demand and are likely to veto *any* coercive measures in the Security Council.¹⁷⁹ In short, particularly in the wake of the poorly executed and much criticized preemptive invasion of Iraq, there is little support for anything but continued negotiations.

Israel, for its part, has focused on keeping the issue front and center and on dispelling the perception that Iran is exclusively its problem.¹⁸⁰ Israel believes that Iran has abused

174. Leslie Susser, *The Specter of Iran*, JERUSALEM REP., Mar. 6, 2006, at 12.

175. See Takeyh & Gvosdev, *supra* note 173, at 42 (arguing that Iran wants nuclear weapons as a means of deterring a U.S. invasion).

176. See Weisman, *Rice is Seeking*, *supra* note 93; Steven R. Weisman, *U.S. Makes Offer to Meet Iranians on Nuclear Plan*, N.Y. TIMES, June 1, 2006, at A1.

177. Peter Baker & Glenn Kessler, *U.S. Campaign is Aimed at Iran’s Leaders*, WASH. POST, Mar. 13, 2006, at A12.

178. See *infra* text accompanying note 188.

179. See Hoge, *supra* note 60.

180. Erlanger, *supra* note 86 (reporting that Israeli officials are “careful not to

negotiations to buy time for covert research, and instead advocates tough economic sanctions as the best way to prevent Iran from crossing the point of no return, after which coercive measures will be useless.¹⁸¹ Although it remains a last resort, Israel is also preparing for the possibility that military force will be the only way to stop Iran from obtaining nuclear weapons.¹⁸²

As a step towards evaluating the legitimacy of an Israeli preventative strike, what follows is a broad canvassing of the options being pursued by the international community: negotiations, sanctions, regime change, and deterrence. Finally, the feasibility and potential for success of military force is examined.

A. *International Negotiations Aimed at Keeping Iran Within the NPT*

Iranian officials repeatedly resort to their “inalienable right” to enrich uranium, but the NPT grants this right only in exchange for a broad-ranging compliance, disclosure, and monitoring regime intended to prevent diversion, proliferation abroad, and nuclear accidents.¹⁸³ Iran forfeited this right when it breached its agreement with the IAEA,¹⁸⁴ and three years after the revelation of its breach, Iran still has not fully disclosed the contents of its nuclear portfolio, choosing instead to play cat-and-mouse with IAEA inspectors.¹⁸⁵ Iran’s deception has created a situation in which its continued “operation of an enrichment plant is neither safeguardable nor economically defensible.”¹⁸⁶

react too strongly to the violently anti-Semitic comments of the Iranian president . . . [because he] is trying to turn the Iranian nuclear issue into the problem of Israel . . .”).

181. See *Russia to Iran: Stop Enrichment*, FOX NEWS, Feb. 27, 2006, <http://www.foxnews.com/story/0,2933,186148,00.html>.

182. See Frankel, *supra* note 161.

183. See *supra* Part II.A.

184. David E. Sanger, *U.S. and Europe to Give Iranians New Atom Offer*, N.Y. TIMES, Nov. 10, 2005, at A8.

185. See John O’Neil, *U.N. Atomic Agency Says Iran Still Not Fully Cooperating*, N.Y. TIMES, Feb. 27, 2006, available at <http://www.nytimes.com/2006/02/27/international/middleeast/27cnd-iran.html?1298696400&en=70fe3a5cc6215cf1&ei=5088&partner=rssnyt&emc=rss>.

186. Henry Sokolski, *After Iran: Keeping Nuclear Energy Peaceful*, EJOURNAL USA, Mar. 2005, <http://usinfo.state.gov/journals/itps/0305/ijpe/sokolski.htm>.

The EU3 has tried to bring Iran into NPT compliance by offering incentives such as trade deals, World Bank loans, and membership in the World Trade Organization.¹⁸⁷ Yet not only has the EU3 been strung along, it has been subjected to an Iranian “shakedown . . . to extort more perks from the free world in return for fewer[,] weaker and patently worthless promises regarding its nuclear plans.”¹⁸⁸ The defeat of the incentives approach is now widely acknowledged.¹⁸⁹ At this point, even though the EU3 is out of ideas,¹⁹⁰ it continues to hold out the prospect of diplomatic resolution—publicly vowing “no wish to isolate Iran”—much to the consternation of the Israelis, who see this as giving the Iranians “wiggle room.”¹⁹¹

The Russians have proposed enriching Iran’s uranium on Russian soil, thereby mitigating the risk of diversion or super-enrichment.¹⁹² Given that the Russians are substantially responsible for the continued evolution of the Iranian nuclear program, they would benefit from international confidence in its peaceful nature.¹⁹³ The United States and EU3 encouraged the proposal,¹⁹⁴ and the Israelis sent a delegation to Moscow to

187. Gerecht, *supra* note 22.

188. Editorial, *Belligerent Iran*, JERUSALEM POST, Aug. 15, 2005, at 13. Indeed, the negotiations may have just bought Iran more “time to further advance its nuclear weapons ambitions.” Editorial, *Iran’s New President*, N.Y. TIMES, June 30, 2005, at A24.

189. See, e.g., Elaine Sciolino, *Nuclear Panel Votes to Report Tehran to U.N.*, N.Y. TIMES, Feb. 5, 2006, at A1.

190. *Iran Requests Last-Ditch EU Talks*, BBC NEWS, Mar. 2, 2006, http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/4766008.stm. The EU3 may have finally realized that negotiations will never bear fruit. *Making Uranium While the Sun Shines*, *supra* note 70, at 53.

191. Herb Keinon, *Israel Concerned Iran-EU Talks Send Wrong Message*, JERUSALEM POST, Feb. 21, 2006, at 1.

192. *Id.*

193. See TIMMERMAN, *supra* note 21, at 69–70 (showing past Russian involvement in Iranian nuclear programs including weaponry). The Russians have obstinately refused to stop equipping Iran’s nuclear facilities, and in an apparent rebuke of any progress that has been made in the last year, Iran announced that it would break ground on two new reactors in 2006, one of which will be funded by Russia. Hilary L. Krieger, *Iran to Build 2 New Reactors*, JERUSALEM POST, Dec. 3, 2005, <http://www.jpost.com/servlet/Satellite?cid=1132475673325&pagename=JPost/JPArticle/S howFull>.

194. Steven L. Myers, *Russian Talks with Iran on Nuclear Program Stall*, N.Y. TIMES, Feb. 20, 2006, at A3.

support the effort.¹⁹⁵ The Iranians spoke favorably of this compromise, but contradictorily rejected its core premise by refusing to halt nuclear enrichment on their own soil.¹⁹⁶ Indeed, Iran rejected a very similar proposal, made by France, at the outset of their nuclear research in the 1970s¹⁹⁷ and have since refused other anti-diversion, confidence-building measures, such as a global initiative to downgrade Iran's reactors below weapons-grade capability.¹⁹⁸ The closest the Iranians came to accepting the Russians' proposed offer was giving up large-scale uranium enrichment while maintaining their right to perform the very experimental enrichment that is on the pathway to mastery of the fuel cycle.¹⁹⁹ In any case, there are doubts about the extent to which proposal would actually shackle Iranian research,²⁰⁰ and moreover, whether Russia can be trusted with the task.²⁰¹

Without Iranian cooperation, there is no technologically feasible way to ensure that Iran stays within the NPT and does not cross the point of no return on the military track of its nuclear program. Though the United States had been pumping money into remote sensor technology since the Cold War, there was no sense of urgency to replace other forms of intelligence-

195. Herb Keinon, *Delegation Returns with Russian Support to Pressure Iran on Nuke Issue*, JERUSALEM POST, Jan. 20, 2006, at 4.

196. Peter Finn, *Russia, Iran End Talks Without Nuclear Deal*, WASH. POST, Mar. 2, 2006, at A15.

197. See Mark Fitzpatrick, *Time is Running Out to Halt Iran's Nuclear Ambitions*, FIN. TIMES, Jan. 11, 2006, at 19.

198. See GAO, DOE NEEDS TO CONSIDER OPTIONS TO ACCELERATE THE RETURN OF WEAPONS-USABLE URANIUM FROM OTHER COUNTRIES TO THE UNITED STATES AND RUSSIA 6 (2004), <http://www.gao.gov/new.items/d0557.pdf>. The United States and Russia have undertaken a joint initiative to modify the reactors they service around the world so that those reactors are only capable of producing the lower grade uranium used for nuclear energy. Frank Von Hippel, *A Comprehensive Approach to Elimination of Highly-Enriched Uranium From All Nuclear-Reactor Fuel Cycles*, 12 SCI. & GLOBAL SECURITY 137, 137-38 (2004).

199. Herb Keinon, *Israel 'Hopeful' IAEA will Refer Iran to Security Council*, JERUSALEM POST, Mar. 6, 2006, at 3 [hereinafter Keinon, *Israel 'Hopeful'*].

200. Valerie Lincy & Gary Milhollin, *Russia's Sweetheart Deal for Iran*, N.Y. TIMES, Feb. 1, 2006, at A25 (arguing that the deal would only cover commercial scale enrichment equipment and would do nothing to prevent Iran from building smaller-scale enrichment facilities on its own).

201. See Editorial, *The Iranian Nuclear Question*, OREGONIAN, Jan. 7, 2006, at B4.

gathering until the Iraq debacle.²⁰² The technology is therefore still in the experimental phase, and there is evidence that the Iranians have already put countermeasures in place.²⁰³

Although Israel initially supported negotiations as a means to resolve the crisis, it has concluded that “too much time has been wasted, and there is now a significant gap between Iran’s development and the diplomatic efforts to stop it.”²⁰⁴

B. Sanctions

Implicit in Iran’s February 2006 referral to the Security Council was the threat of sanctions.²⁰⁵ Many believe that “[p]utting economic pressure on governments we hope to influence or change a potentially useful addition to the diplomatic tool kit.”²⁰⁶ In Iran’s case, sanctions are reported to fall into three categories.²⁰⁷ Least severe measures include cutting off IAEA technical assistance to Iran’s nuclear program, barring Iranian scientists from participating in IAEA scientific conferences, and prohibiting Iranian students from studying nuclear-related subject matter at schools abroad.²⁰⁸ However, given Iran’s proximity to mastery of the nuclear fuel cycle, there is no evidence that such sanctions would be useful.²⁰⁹

202. David E. Sanger & William J. Broad, *How to Listen for the Sound of Plutonium*, N.Y. TIMES, Jan. 31, 2006, at F1.

203. *Id.*

204. Keinon, *Israel ‘Hopeful,’ supra* note 199.

205. *Iran Referred to U.N. Security Council*, CBS NEWS, Feb. 4, 2006, <http://www.cbsnews.com/stories/2006/02/04/politics/printable1281378.shtml>.

206. David Baldwin, *Sanctions Have Gotten a Bum Rap*, L.A. TIMES, Aug. 18, 2004, at B13.

207. Herb Keinon, *Israel Sure of Russia’s Vote on Iran*, JERUSALEM POST, Feb. 14, 2006, available at LEXIS, NewsFile.

208. *Id.* Such sanctions appear to be the strongest that the United States can afford to suggest at the moment, yet the Russians have threatened to veto them and have insisted on continuing their role in building a nuclear power plant in southwest Iran. See Helene Cooper & Thom Shanker, *Draft Iran Resolution Would Restrict Students*, N.Y. TIMES, Oct. 26, 2006, at A6; Colum Lynch & Glenn Kessler, *U.S., European Allies at Odds on Terms of Iran Resolution*, WASH. POST., Oct. 27, 2006, at A20.

209. See *Iran Moves to Prevent Sanctions Over Nuclear Program*, CBC News, Apr. 29, 2006, <http://www.cbc.ca/story/world/national/2006/04/29/iran-nuclear060429.html>. That said, such sanctions would almost certainly scuttle a British university’s

More severe measures include denying visas to Iranian scientists and top government officials, closing embassies in Tehran and withdrawing diplomatic staff, and limiting Iran's diplomatic representation abroad.²¹⁰ These measures are "likely to be imposed only ad hoc" as countries with stronger diplomatic ties to Tehran will continue to engage it.²¹¹ Some argue that travel and political sanctions could still work because "[u]nlike the North Koreans, who seem not to mind their isolation, Iranians take pride in their growing contacts around the world and are keen to be accorded the status and respect they feel their ancient civilization deserves."²¹² Inasmuch as President Ahmadinejad's policies are the target, however, such sanctions might be ineffective due to his personal distaste for "being feted in European capitals."²¹³

Maximally severe measures would be economic, including trade embargos and an oil embargo.²¹⁴ Israel strongly favors these as potentially "very effective."²¹⁵ Oil sanctions are effectively off the table because "at a time of tight energy markets, no one is interested in restricting Iranian oil sales."²¹⁶ Other economic sanctions are on the table, however:

[I]f there is such a thing as a non-oil-related intimidating sanction against the Islamic Republic—and there might possibly be, depending on how much the ruling Iranian elite fears that the country's precarious economic state could be significantly hurt by European sanctions—the doom and gloom need to be convincing from the start. Dribbling out little

recently announced plan to train Iran's nuclear engineers. Gareth Walsh, *Birmingham to Train Iranian Engineers*, *Australian*, Mar. 8, 2006, at 25.

210. Keinon, *Israel Sure of Russia's Vote on Iran*, *supra* note 207.

211. Leverett, *supra* note 145.

212. *When the Soft Talk Has to Stop*, *supra* note 34, at 31.

213. Leverett, *supra* note 145.

214. Keinon, *Israel Sure of Russia's Vote on Iran*, *supra* note 207.

215. Frankel & Klass, *supra* note 141, at 1.

216. Leverett, *supra* note 145; *see also* Phillips, et al., *supra* note 131, at 6 ("An international ban on the import of Iranian oil is a non-starter.").

sanctions—the likely product of three years of U.S.-EU-3 cooperation—won't do it.²¹⁷

The threshold obstacle to a broad economic sanctions regime is that the Russians and Chinese have ruled it out²¹⁸ since they, along with the Indians and the Japanese, are “reluctant to put their oil and gas contracts and their pipeline projects at risk.”²¹⁹ Iran is aware that “if push comes to shove, Russia and China will never back words with sanctions to enforce them.”²²⁰

The United States has had sanctions in place against Iran since the 1979 Revolution,²²¹ so EU3 sanctions have been proposed as a potential escalation.²²² However, many question the extent to which the Europeans can implement such sanctions because of their “fragile welfare state economies.”²²³ Germany, for instance, relies heavily on trade with Iran, having exported \$4.4 billion worth of goods there in 2004.²²⁴ Further, Iran has already begun preparing for this contingency, calling for a cut in OPEC oil production,²²⁵ using its oil to build up domestic cash reserves,²²⁶ and moving its assets out of Europe to avoid seizure.²²⁷ In sum, Western threats are “no longer

217. Gerecht, *supra* note 22; see also *Iran and the Bomb*, *supra* note 133 (“[T]hanks to its ample oil reserves, [Iran] has the means to withstand all but the most sweeping and universally enforced sanctions.”).

218. Dariush Zahedi & Omid Memarian, *A Firebrand in a House of Cards*, N.Y. TIMES, Jan. 12, 2006, at A31 (noting that Russia recently agreed to sell Iran \$1 billion in (allegedly) defensive weapons, and that China relies “on Iran as a key producer of oil and gas not beholden to the United States . . .”).

219. *When the Soft Talk Has to Stop*, *supra* note 34, at 31.

220. *A Rare Diplomatic Unity*, *supra* note 80.

221. See U.S. DEPT OF THE TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, WHAT YOU NEED TO KNOW ABOUT U.S. ECONOMIC SANCTIONS: AN OVERVIEW OF O.F.A.C. REGULATIONS INVOLVING SANCTIONS AGAINST IRAN 3 (2003), available at <http://treas.gov/offices/enforcement/ofac/programs/iran/iran.pdf>.

222. Phillips, et al., *supra* note 131, at 4.

223. Jed Babbín, *Iran Showdown*, AM. SPECTATOR, Jan. 23, 2006, http://www.spectator.org/dsp_article.asp?art_id=9310.

224. See *Key Nations' Stances on Iran*, BBC NEWS, Mar. 30, 2006, http://news.bbc.co.uk/1/hi/world/middle_east/4662676.stm#germany.

225. Babbín, *supra* note 223.

226. See Fareed Zakaria, *Time to Face Reality on Iran*, NEWSWEEK, Jan. 30, 2006, at 31 (reporting that Iran has “tens of billions of dollars in surplus cash” to help it withstand economic sanctions).

227. Babbín, *supra* note 223.

credible,” because “[t]he Iranians know that the United States has already put all the sanctions on Iran that it can . . . [and] [t]hey seriously doubt that the Europeans will ever impose sanctions.”²²⁸

Though no sanctions appear capable of coercing Iran into abandoning its pursuit of nuclear weapons, they could still serve an important role in isolating Iran as a pariah state.²²⁹ On this theory, even the least coercive of sanctions, such as barring Iran from the 2008 Summer Olympics, for example, can have an impact if the sanction carries the support of the international community, speaking in a loud, unified voice.²³⁰ However, symbolic sanctions would still require the support of Russia and China, without whom Iran would be able to continue to cast the issue as one of East versus West.²³¹ And there is not even a consensus for such sanctions amongst Western nations: both Britain and France have committed themselves to a “step-by-step approach,” allowing Iran to respond “at every stage.”²³² If it takes *years* to build a solid international coalition against something that could be a foregone conclusion in *months*, the effort will have been for naught.

228. Thomas L. Friedman, *The Axis of Order?*, N.Y. TIMES, Jan. 13, 2006, at A21.

229. See DAVID A. BALDWIN, ECONOMIC STATECRAFT 63 (1985) (“Economic sanctions may have diplomatic, psychological, political, military, or other effects even when their economic effect is nil.”).

230. See W. Michael Reisman, *When are Economic Sanctions Effective? Selected Theorems and Corollaries*, 2 ILSA J. INT’L & COMP. L. 587, 589 (1996) (“[S]ymbolic or cosmetic economic sanction programs may have important functions and may be deemed to have been effective in terms of those functions, despite the fact that they did not secure adjustments in the policies of the target State.”).

231. Paul Koring, *U.S., Iran Make Symbolic Gestures: Release of Prisoners, Issuance of a Visa Not Seen as Material in Face of Nuclear Standoff*, GLOBE & MAIL (Toronto), Aug. 31, 2006, at A12; see *Security Council Should Not Be Exploited by Privileged Countries - Iran Minister*, BBC MONITORING, Mar. 6, 2006, available at LEXIS, NewsFile (quoting the Iranian foreign minister, “We believe the [Security Council] should not be used as a tool in the hands of privileged countries to impose pressure on independent states to achieve political goals.”).

232. See *French Premier Calls for Step-by-Step Approach to Iran Nuclear Issue*, BBC MONITORING, Feb. 5, 2006, available at LEXISNEXIS; Sarah Baxter & Uzi Mahnaimi, *NATO May Help U.S. Airstrikes on Iran*, SUNDAY TIMES (London), Mar. 5, 2006, at 27.

Moreover, the Iranian leadership does not appear vulnerable to symbolic sanctions. In fact, it might thrive on them:

[Ahmadinejad] has used Western opposition to Iran's nuclear program to generate national unity and purpose. Those dynamics have compelled even people who oppose him to give him room to maneuver. Stop Iranians on any street in any neighborhood and they are likely to demand that Iran be allowed to pursue a nuclear energy program, a sentiment that has served as a launching platform for Mr. Ahmadinejad's firebrand politics.²³³

Therefore, comparisons to the effective isolation of South Africa that ended Apartheid are considered inapposite: "[T]he ruling whites in South Africa were Western and among themselves democratic, and thus much more subject to the ethical and spiritual pressure from being ostracized by the rest of Western civilization. The ruling elite in Iran suffers no similar angst."²³⁴ Instead, sanctions could boomerang and bolster Ahmadinejad's support among Iranians,²³⁵ given that he has already used the issue to "rally round the flag,"²³⁶ calling on his countrymen to prepare for a long, hard slog to the nuclear finish line.²³⁷ He has succeeded in making nuclear power a sovereign right in the eyes of many Iranians—even a religious right²³⁸—and sanctions of any kind may only embolden this view.

C. Regime Change

Iranian resistance groups have struggled against the regime since it came to power in 1979.²³⁹ The conventional wisdom on the Iranian people's yearning for democracy was most famously

233. Slackman, *A New Face*, *supra* note 117.

234. Gerecht, *supra* note 22.

235. *The President Gets Stronger at Home*, *ECONOMIST*, Feb. 11, 2006, at 45; Editorial, *Iran's Best Friend*, *N.Y. TIMES*, Mar. 5, 2006, at A13.

236. BALDWIN, *ECONOMIC STATECRAFT*, *supra* note 229, at 137; *see also* Editorial, *There is Just a Chance to Avoid Iran Conflict*, *FIN. TIMES*, Feb. 6, 2006, at 16 ("[T]he nuclear controversy [has become] a God-given issue around which to rally the nation.").

237. Fathi, *Bracing for Penalties*, *supra* note 67.

238. Michael Slackman, *Invoking Islam's Heritage, Iranians Chafe at 'Oppression' by the West*, *N.Y. TIMES*, Feb. 6, 2006, at A10.

239. TIMMERMAN, *supra* note 21, at 9.

espoused by U.S. President Bill Clinton:

[Iran is the only country,] including the United States, including Israel, including you name it, where the liberals, or the progressives, have won two-thirds to 70 percent of the vote in six elections In every single election, the guys I identify with got two-thirds to 70 percent of the vote. There is no other country in the world I can say that about, certainly not my own.²⁴⁰

Nevertheless, Ahmadinejad currently appears immune to efforts of both the clerics and the reformists to restrain him. His brand of populism has ensnared even those who disfavor radical Islam, and there is no sign that criticism from abroad is helping his opposition. There is evidence that Iranians across the political spectrum—even those who despise the mullahcracy—support their country’s right to nuclear technology.²⁴¹ Those not swayed by the potential of nuclear technology may be swayed instead by the handouts that Ahmadinejad has promised them.²⁴²

Some resistance groups point to a recent bus drivers’ strike in Tehran and protests by textile workers in a northern province as signs that the regime’s grip is weakening.²⁴³ There is also the inevitability of the point at which Ahmadinejad will be unable to deliver on his promises to put oil “onto people’s tables.”²⁴⁴ Indeed, some believe that Iran’s “well[-]defined . . . territory, culture, and history,” as well as its undisputed national borders (it was not, as some of its neighbors were, created out of whole

240. *Id.* at 236.

241. Ilan Berman, *Pre-empting Iran’s Ambitions*, WASH. TIMES, Mar. 3, 2006, at A23 (“Iran’s atomic drive is by all indications a wildly popular domestic issue, supported both by ordinary Iranians and by regime hardliners (albeit for very different reasons). This sentiment, moreover, appears to cut across both ethnic and cultural lines.”).

242. *The President Gets Stronger at Home*, *supra* note 235 (“Nationalism is easier on a full stomach and Mr [sic] Ahmadinejad is the rare and fortunate president who expects to receive, over the coming Iranian year, some \$36 billion in oil export revenues to help buy loyalty.”); Slackman, *A New Face*, *supra* note 117, at A1, A10 (Ahmadinejad “has so far visited five provinces and one city with his cabinet, walking the streets, shaking hands, kissing local people and promising a bevy of development projects.”).

243. Sarah Baxter, *Cheney Daughter Leads ‘Cold War’ on Mullahs*, SUNDAY TIMES (London), Mar. 5, 2006, at 27.

244. Petersen, *supra* note 104.

cloth), make it ripe for democratization.²⁴⁵

Even if the regime was vulnerable, there are reasons to believe that it will not fall victim to a speedy and bloodless coup such as those that have recently befallen Eastern Bloc dictators. Iran lacks a democratic constitution upon which to build a revolution; to the contrary, its political development has been stunted by the Supreme Leader and Guardian Council.²⁴⁶ Its democratic movement is demoralized, having failed to capitalize on the reign of the moderate Khatami to achieve reform.²⁴⁷ Most of “Iran’s resistance leaders are practically never heard of,”²⁴⁸ and Iran’s “history of authoritarian regimes” may make it impossible for such a figure to survive long enough to mount a challenge.²⁴⁹ Finally, paramilitary forces and fundamentalist terrorist groups have pledged their support to the regime and would ruthlessly stifle any domestic opposition.²⁵⁰

Having forecasted the failure of negotiations and the inability to reach an international consensus on sanctions, the United States has made regime change the first priority of its two-pronged strategy on Iran, investing in nongovernmental organizations, opposition groups in exile, and Farsi-language broadcasting.²⁵¹ The goal is to draw lines “between people and government, rather than within the regime between ‘reformists’ and hardliners,”²⁵² yet even this limited effort has been criticized as altogether ineffectual,²⁵³ or worse, likely to backfire and embolden the regime.²⁵⁴ Further, one wonders whether the United States has any credibility amongst Iranians given its

245. MILANI ET AL., *supra* note 17, at 18–19.

246. *Id.* at 23.

247. *Id.* at 24.

248. Claude Salhani, *Politics & Policies: What to do with Iran*, UNITED PRESS INT’L, Mar. 2, 2006, para. 4.

249. Editorial, *Toppling Tehran Isn’t a Tea Party*, CHRISTIAN SCI. MONITOR, Feb. 17, 2006, at 8.

250. *See* MILANI ET AL., *supra* note 17, at 23.

251. *Toppling Tehran Isn’t a Tea Party*, *supra* note 249, at 8.

252. Gartenstein-Ross, *supra* note 125.

253. *See* Baker & Kessler, *supra* note 177, at A12 (quoting the president of the Council on Foreign Relations calling U.S. regime change policy “more like a hope than a strategy . . .”).

254. MILANI ET AL., *supra* note 17, at 22.

involvement in the coup removing Mohammed Mossadegh from power there in 1953 and in the more recent, but just as disastrous, invasion of Iraq.²⁵⁵

A more forceful approach would involve stirring up resistance among Iran's subjugated minorities: the two million Arabs in the oil-rich province of Khuzestan, the Kurds, the Baluchis, and the Azeris dispersed around the country.²⁵⁶ Iran's paranoia-fueled claim that U.S. and British forces in Iraq were behind October 2005 explosions in southern Iran, allegedly part of a CIA/MI6 plot to arm Iranian dissidents, suggests that the regime feels particularly vulnerable to this type of domestic unrest.²⁵⁷ Yet the threat that Iran made in response—to attack Israel or coalition forces in Iraq—requires the United States to tread carefully in its efforts, particularly given the ethnic and sectarian strife already gripping Iraq.²⁵⁸ For his part, “Mr. Ahmadinejad very likely believes that the best way to guard against regime change from without is to . . . swiftly advanc[e] Iran's nuclear capacity.”²⁵⁹

Ultimately, regime change can only be a long-term strategy, working in parallel with short-term measures, such as targeted strikes on Iran's nuclear facilities or some other forced suspension of its domestic uranium enrichment, to forestall Iran's nuclear progress.²⁶⁰ However, given the advanced stage of Iran's nuclear program, “[Israel] no longer has the luxury of waiting for a more pro-U.S. government to come to power in Iran.”²⁶¹

D. Deterrence

A deterrence strategy presumes that Iran will possess nuclear weapons and instead focuses on preventing their use.²⁶²

255. *See id.* at 22, 25.

256. Zahedi & Memarian, *supra* note 218.

257. *See* Jason Burke, *Iran Warns of a Missile Strike*, OBSERVER (England), Jan. 29, 2006, at 30.

258. *See id.*

259. Zahedi & Memarian, *supra* note 218.

260. *See* MILANI ET AL., *supra* note 17, at 4. *See generally* Ijaz, *supra* note 70.

261. Takeyh & Gvosdev, *supra* note 173, at 33.

262. *See* Asmus, *supra* note 148.

Owing perhaps to the thousands of miles that separate its shores from Iran,²⁶³ the United States appears to be relying on deterrence as a fallback to the aforementioned options.²⁶⁴ Indeed, both the United States and the EU3 can rely on this strategy insofar as the NATO alliance counts multiple nuclear states among its membership.²⁶⁵ Only a minority believes that the West cannot rely on Cold War-style deterrence against Iran.²⁶⁶

Deterrence is a less enticing proposition for Israel, however. While Israel's own nuclear weapons arsenal should outmatch Iran's for the foreseeable future,²⁶⁷ Israel lacks second-strike capability given its size and concentrated military resources.²⁶⁸ Further, deterrence would require that Israelis bet everything on Iran's instinct for self-preservation,²⁶⁹ a risky bet given that "Ahmadinejad's genocidal rhetoric has demonstrated the futility of hopes for a stable deterrence relationship"²⁷⁰ Although President Bush has publicly guaranteed Israel's security against Iran despite the lack of formal military alliance between Israel and the United States,²⁷¹ some have urged that Israel seek security guarantees, or perhaps even membership, from NATO.²⁷² As there are no indications of such a pact in the near

263. See MILANI ET AL., *supra* note 17, at 9 ("A direct nuclear attack on American soil is not a serious threat.")

264. See Asmus, *supra* note 148.

265. *Id.*

266. See, e.g., Wright, *supra* note 144.

267. See Myre, *supra* note 159, at 8 and accompanying text (noting Israel's ability to respond to any Iranian attempt at nuclear blackmail).

268. Sneh, *supra* note 150, at A4. Indeed, Iran has already threatened to preventatively attack Israel in order to forestall a preventative attack on itself. See Nazila Fathi, *Iran Says It May Pre-empt Attack Against Its Nuclear Facilities*, N.Y. TIMES, Aug. 19, 2005, at A4.

269. Wright, *supra* note 144, at 18.

270. Gerald M. Steinberg, *Analysis on Iran: Little Time Left for Sanctions*, JERUSALEM POST, Dec. 2, 2005, at 3. See also *Iran's Nuclear Goals Must Be Frustrated*, ALBUQUERQUE J., Nov. 2, 2005, at A12 ("[N]uclear capability added to the Iranian mix of religious zealotry and ethnic hatred is a more volatile mixture. The threat of Israeli retaliation might not be enough to deter Iran.")

271. Glenn Kessler, *Bush Says U.S. Would Defend Israel Militarily*, WASH. POST, Feb. 2, 2006, at A18.

272. Asmus, *supra* note 148, at A15.

future, Israel is preparing to defend itself alone,²⁷³ with a missile defense system (never tested in battle) that is theoretically capable of shooting down a nuclear warhead.²⁷⁴

It is not clear whether Israel can deter the second threat posed by a nuclear-armed Iran: terrorism with impunity. Israel's nuclear weapons arsenal has done nothing to deter the Iranians from the war they have waged against Israel since the 1979 Revolution, and there is no reason to believe that the predicted escalation in Iranian terrorism—or even Iranian sponsorship of Hizbullah's war against Israel—would legitimize an Israeli nuclear strike in reprisal.²⁷⁵ To the contrary, as discussed above, Iran seeks nuclear weapons precisely to deter any meaningful Israeli response to its attacks.

E. Military Force

The United States has publicly threatened military force as a last resort²⁷⁶ and is reported to be drawing up contingency plans for a strike,²⁷⁷ but the Bush Administration is simply not in a position to open up another front in the Middle East.²⁷⁸ Israel, the state most threatened by a nuclear-armed Iran,²⁷⁹ does not suffer from these constraints. Nevertheless, Israel has expended a great deal of diplomatic capital to push for the most aggressive forms of the aforementioned courses of action, urging

273. See Kessler, *supra* note 271, at A18.

274. Yaakov Katz, *Arrow Can Now Intercept 'Any Iranian Missile,' Top IDF Officer to 'Post': Improved System Can Destroy the Shihab-3*, JERUSALEM POST, Mar. 3, 2006, at 1.

275. See Fathi, *Iran's New President*, *supra* note 1 (stating that Israel and Iran have been bitter enemies since 1979). See generally Keinon, *Iran Wants to Turn Hamas Into Hizbullah*, *supra* note 102 (Hizbullah "is nothing less than a 'delivery system' for Iranian weapons."); John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 736–41 (2004) (discussing international law governing the use of force); TIMOTHY MCCORMACK, SELF-DEFENSE IN INTERNATIONAL LAW: THE ISRAELI RAID ON THE IRAQI NUCLEAR REACTOR 30–34 (1996) (reviewing the legality of Israel's actions).

276. See David J. Rothkopf, *Look Who's Running the World Now*, WASH. POST, Mar. 12, 2006, at B1.

277. Ksenia Svetlova & Yaakov Katz, *U.S. Sounding Out Georgia for Aid in Strike Against Iran; Washington Seeks Possible Use of Military Bases and Airfields*, JERUSALEM POST, Feb. 20, 2006, at 1.

278. Sanger, *Why Not a Strike on Iran?*, *supra* note 69, at 1.

279. *Id.*

uncompromising negotiations, strong economic sanctions, and aggressive efforts at regime change.²⁸⁰ However, given the apparent unlikelihood that any of the prevailing forms of these options will slow Iran's nuclear progress in the short term, military force remains a necessary option for Israel and may be more feasible than the pundits indicate.

1. *The Last Resort: Withering International Criticism or Military Force?*

Should Iran master the nuclear fuel cycle within the immediate future, it is sure to obtain nuclear weapons at some point thereafter.²⁸¹ No one is under the illusion that negotiations or sanctions will have a meaningful impact within that time frame; these measures will be escalated slowly and, even when fully in place, could take years to coerce Iran.²⁸² Moreover, there is no reason to believe that regime change will happen any time soon either.²⁸³ Some other short-term solution is necessary. Indeed, Iran's delay tactics at the negotiating table are predicated on this reality.

A number of pundits have reached the same conclusion and offer some variant on withering international criticism.²⁸⁴ The notion is that if Iran refuses to operate within the NPT framework, if sanctions are insufficiently coercive, and if regime change is too speculative, "plain talk and a united stand" are all that is left.²⁸⁵ In reality, the proposal's defenders are more than likely resigned to the prospect of a nuclear-armed Iran because it could only work in the long term and will in any case fail for the same reason that negotiations and sanctions already have: the international coalition against Iran is weak.²⁸⁶ In contrast,

280. See ZE'EV SCHIFF, *Israel Urges U.S. Diplomacy on Iran*, CARNEGIE ENDOWMENT FOR INT'L PEACE, May 30, 2006, <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=18387>.

281. See Jager, *supra* note 84, at 13.

282. See *supra* Part IV.A-B.

283. See *supra* Part IV.C.

284. Saul Singer, *An Old-Fashioned Solution*, JERUSALEM POST, Jan. 20, 2006, at 12.

285. *Iran and the Bomb*, *supra* note 133, at A20.

286. See Jonathan Landay, *Iran Threatens U.S. with 'Harm and Pain.'* KNIGHT

military force could forestall Iran's mastery of the nuclear fuel cycle long enough to allow other, longer-term solutions to work.

2. *The Necessity and Feasibility of an Israeli Strike*

Israel does not have the means for a full-scale land invasion of Iran, so a surgical strike using missiles launched from the air and sea is the oft-mentioned approach.²⁸⁷ Israel's air force has been considered one of the best since its strike on Iraq's nuclear reactors in 1981.²⁸⁸ Of course, Iran has since dispersed and fortified its facilities (some are even underground), which are separated from Israel by hundreds of miles of third party airspace.²⁸⁹ However, Israel has taken the risk of traversing such airspace before,²⁹⁰ and has recently purchased aircraft capable of reaching Iran on one tank of gas and bombs capable of penetrating heavy fortifications.²⁹¹ Moreover, Israel is reported to have taken advantage of the U.S. occupation of Iraq to establish a forward base of sorts on the Iran border from which to narrow down potential targets.²⁹² Israeli submarines deployed in the region are being armed with missiles capable of striking Iranian territory.²⁹³ Covert operations and sabotage are also being considered.²⁹⁴

The conventional wisdom is that while Israel's preventative strike on Iraq's nuclear reactors in 1981 may have delayed Saddam Hussein's acquisition of nuclear weapons, in the long

RIDDER NEWSPAPERS, Mar. 8, 2006 (Russia and China); Burke, *supra* note 257 (Britain).

287. Rowan Scarborough, *Israel Capable of Air Strike on Iran*, WASH. TIMES, July 18, 2006, <http://www.washtimes.com/national/20060717-105737-9603r.htm>.

288. *Id.*

289. Babbitt, *supra* note 223.

290. Mahan Abedin, *Why Israel Probably Won't Attack Iran*, DAILY STAR (Lebanon), Aug. 7, 2004, at 10. Israeli pilots crossed through Jordanian and Saudi Arabian airspace to reach Iraq in 1981. See RODGER W. CLAIRE, RAID ON THE SUN 172–82 (2004).

291. Ehsaneh I. Sadr, *The Impact of Iran's Nuclearization on Israel*, MIDDLE E. POLY, Summer 2005, at 58, 61.

292. See *IDF Forces Operating in Iran*, *supra* note 59.

293. Frankel & Klass, *supra* note 141, at 1 (“... Israel had modified American-made Harpoon cruise missiles in order to launch them from submarines . . .”).

294. Yaakov Katz & Arie O'Sullivan, *Israeli Experts Urge Covert Ops Against Iran Nukes*, JERUSALEM POST, Jan. 17, 2006, at 6.

run, it only accelerated Iraqi efforts.²⁹⁵ Accordingly, while no show of force short of a complete occupation could definitively and permanently quell Iran's nuclear weapons ambitions,²⁹⁶ "the goal is not to stop the plan, since that is almost impossible [Israel] need[s] to delay it by five years and hope that within that period the current Iranian government will be overturned" or coerced into a suspension of its program.²⁹⁷ As a result, Israel's contingency plans for a strike are aimed at the "bottlenecks" in Iran's nuclear program in order to *undermine* it in the short term.²⁹⁸

Of course, any Israeli action carries serious risks. First, there is the potential for the outbreak of full-scale war: Iran has already threatened unrelenting retaliation for a preventative strike.²⁹⁹ Yet Iran already seeks Israel's destruction, so the choice is not between a state of calm and threatened escalation of Iranian terrorism, but between Iranian terrorism and Iranian terrorism with impunity.³⁰⁰ Second, there is a substantial risk of collateral damage, given that Iran intentionally built many of its nuclear research facilities in heavily populated areas or adjacent to structures of cultural or historical significance.³⁰¹ This risk is lessened substantially—if not eliminated entirely—when the targeted reactors are not live and loaded with enriched uranium, which is of course another reason Iran is so eager to cross the point of no return.³⁰² Third, a strike could induce Iran to

295. Michael A. McFaul & Abbas Milani, *How the U.S. Should Take on Iran*, SAN JOSE MERCURY NEWS, Nov. 28, 2004, http://cddrl.stanford.edu/news/how_us_should_take_on_iran_20041203/.

296. Sanger, *Why Not a Strike on Iran?*, *supra* note 69.

297. Katz & O'Sullivan, *supra* note 294, at 6.

298. Kevin Peraino & John Barry, *Will Israel Strike Iran?*, NEWSWEEK, Feb. 13, 2006, at 32.

299. *See* Frankel, *supra* note 161, at 2.

300. *Id.*

301. *See* Thom Shanker, Eric Schmitt & David E. Sanger, *U.S. Wants to Block Iran's Nuclear Ambition, But Diplomacy Seems to Be the Only Path*, N.Y. TIMES, Dec. 12, 2004, at A8; MILANI ET AL., *supra* note 17, at 10–11 (predicting that a strike could "kill hundreds if not thousands of innocent Iranians and destroy ancient buildings of historical and religious importance to the Persian people").

302. *See supra* text accompanying note 92.

redouble its nuclear research.³⁰³ However, scientific evidence, as well as the character of Iranian negotiation, suggests that Iran is already driving as hard toward nuclear weapons as it possibly can.³⁰⁴ Finally, a strike could further entrench the ruling regime by inflaming nationalist sentiment and lending credence to the notion of nuclear power as a right that the West seeks to deny Iran.³⁰⁵ It is not at all clear, however, that this would put Israel in a worse position than it is in currently, with Iran marching towards a nuclear bomb without significant internal or external obstacles in its path. Rather, if the alternative short-term strategies offer no hope of stopping Iran from crossing the point of no return, further entrenchment of the regime is a risk that may have to be reckoned with in the long run. However, this risk pales in comparison to the immediate threats that a nuclear-armed Iran would pose to Israel.

V. THE LEGALITY OF ISRAELI PREVENTATIVE ACTION AGAINST IRAN

Long before the more recent events recounted in this Article, one scholar conclusively posited that an Israeli preventative strike on Iran's nuclear facilities "would meet the expectations of anticipatory self-defense under international law."³⁰⁶ This Part evaluates this claim by resort to the principles of international law, using the U.N. Charter (the "Charter") as a baseline, Professor Yoo's balancing of probability of attack and magnitude of potential harm, and Polebaum's reasonable nation standard—which objectively evaluates the legitimacy of a purportedly preventative strike. Even if Israel ultimately chooses to act without regard for international law, these analyses can help determine whether other nations in its position should be forced to do so.

303. McFaul & Milani, *supra* note 295.

304. *See supra* Part II.

305. Sanger, *Why Not a Strike on Iran?*, *supra* note 69, at 1 (predicting that a military strike would "probably make firm enemies out of many Iranians who have come to dislike their theocratic government").

306. Louis Rene Beres, *Israel, Iran and Nuclear War: A Jurisprudential Assessment*, 1 *UCLA J. INT'L L. & FOREIGN AFF.* 65, 90 (1996) [hereinafter Beres, *Israel, Iran and Nuclear War*].

A. *The Charter and Traditional International Law*

Article 2(4) of the Charter bars member states from “the threat or use of force against the territorial integrity or political independence of any state”³⁰⁷ Article 39 nevertheless permits the Security Council to authorize the use of force where it finds a “threat to the peace, breach of the peace, or act of aggression”³⁰⁸ Three of the five veto-wielding permanent members of the Security Council have publicly forsworn force as an option in Iran, so U.N.-sponsored force is out of the question.³⁰⁹ Alternatively, Article 51 separately preserves the right of national self-defense in the event that a member state is subjected to an “armed attack.”³¹⁰ However, the Charter was designed to reduce the overall amount of armed conflict; therefore Article 51 leaves very little room for *preventative* action.³¹¹ Traditionally, the Charter’s definition of an “armed attack” needed to trigger the right of self-defense has been understood to require temporal imminence, necessity, and proportionality.³¹²

Temporal imminence is the primary obstacle that Israel would face in striking Iran preventatively under this standard: until Iran actually possesses nuclear weapons, neither a nuclear attack nor terrorism with impunity can be considered imminent.³¹³ The Charter does not account for the fact once Iran masters the nuclear fuel cycle, a nuclear weapon will be inevitable; inevitability simply is not imminence.³¹⁴ Nor is it necessity, which is strictly construed with respect to the need to prevent an attack rather than to prevent an enemy from

307. U.N. Charter art. 2, para. 4.

308. *Id.* art. 39.

309. Landay, *supra* note 286 (Russia and China); Burke, *supra* note 257 (Britain).

310. U.N. Charter art. 51. The extent to which Article 51 was intended to merely restate an inherent right of national self-defense, as opposed to circumscribing that right, is beyond the scope of this Article.

311. *See* Yoo, *supra* note 275.

312. R. Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT’L L. 82, 89 (1938) (quoting 30 BRIT. & FOREIGN ST. PAPERS 193 (1843)).

313. Dan O’Brien, *Applying Just War Principles*, IRISH TIMES, Mar. 13, 2006, at 16.

314. *See* Jager, *supra* note 84 and accompanying text.

equipping itself with the *means* to attack.³¹⁵

Iran's proximity to the point of no return, past which an attack would cause massive civilian casualties and be futile, might establish proportionality—insofar as any strike beyond it would be disproportionate³¹⁶—but if read to satisfy the Charter's necessity and imminence requirements would leave those criteria hollow.³¹⁷ In short, although the Charter might be stretched to permit action before a nuclear warhead is actually sitting on a launcher,³¹⁸ given the alternative threat of terrorism with impunity, the Charter does not take analytical notice of the threat posed by nuclear weapons possession *per se*.

In reconciling recent preventative attacks with traditional international law, Professor Walzer argues that the strict requirement of a predicate attack should be slackened to permit action where “failure to do so would *seriously risk* [a country's] territorial integrity or political independence.”³¹⁹ While there is no doubt the escalation in terrorism that could result from a nuclear-armed Iran would certainly compromise Israel's geopolitical position, Walzer's proposal may not aid the Israelis in their current predicament. First, Walzer admits this constitutes a “major revision” of traditional international law,³²⁰ one unlikely to be accepted at a time when the doctrine of preemption has been “discredited” by the failure to find weapons of mass destruction in Iraq.³²¹ Second, Walzer bases his standard

315. Yoo, *supra* note 275, at 736.

316. *See id.* at 757. An attack past these thresholds would cause disproportionate harm in that it would be useless in erasing Iran's nuclear know-how. “If a nation can use force to prevent an attack that is further from fruition, it may well be able to use force more precisely or less destructively.” *Id.*

317. *Cf. id.* at 751 (“[T]he current approach to self-defense under international law leaves nations ill-equipped to handle . . . new types of threats [posed by rogue nations and terrorism].”).

318. *Cf. MCCORMACK, supra* note 275, at 106–07 (“Israel had no definite guarantee of its security in the face of this threat, and so decided to take unilateral action.”).

319. MICHAEL WALZER, *JUST AND UNJUST WARS* 85 (Basic Books 2000) (1977) (*emphasis added*).

320. *Id.*

321. David B. Rivkin, Jr., Lee A. Casey & Mark Wendell DeLaquil, *War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century: Preemption and Law in the Twenty-First Century*, 5 *CHI. J. INT'L L.* 467, 496 (2005).

largely on Israel's preemptive strike in the Six-Day War.³²² While in the long term Israel might be as vulnerable to Iran as it was to the Egyptian-led armies amassed at its borders in 1967, Egypt was undoubtedly poised to strike, and Israel's action was therefore preemptive, not preventative.³²³ In the days preceding the 1967 strike, Israel was paralyzed by the threat surrounding it, a state of affairs that Israel arguably will not reach vis-à-vis Iran until the latter brandishes its first nuclear warhead, notwithstanding the impending point of no return.³²⁴

Two arguments remain, outside the context of anticipatory self-defense. First, Ahmadinejad's recent call for Israel's annihilation is arguably a threat of force—a violation of Article 2(4).³²⁵ However, the view that one state's violation of Article 2(4) can alone be the predicate for another's preventative strike is held only by a minority of scholars.³²⁶ The predominant view is that Article 51's "armed attack" is required as well; where an aggressor is physically incapable of fulfilling his threat of "armed attack," one cannot say that an "armed attack" has occurred without rendering the phrase meaningless.³²⁷

Alternatively, it could be argued that Iran's anti-Israel terrorism has created a de facto state of war between the two countries such that Israel would be constrained not by the rules of anticipatory self-defense but by the rules of war.³²⁸ That Iran's nuclear ambitions are directed in part at ratcheting up this very war lends further credibility to this view. Moreover, the force of

322. See WALZER, *supra* note 319, at 82–85 (covering details of the Six-Day War beyond the scope of this Article).

323. Thomas M. Franck, *The Use of Force in International Law*, 11 TUL. J. INT'L & COMP. L. 7, 12 (2003).

324. See WALZER, *supra* note 319, at 84 (discussing the atmosphere in Israel in the weeks leading up to war with Egypt).

325. Cf. Alon Ben-Meir, *Outside View: Ominously Misguided*, UNITED PRESS INT'L, Oct. 31, 2005 (calling Ahmadinejad's statement "tantamount to a declaration of war").

326. See Winston P. Nagan & Craig Hammer, *The New Bush National Security Doctrine and the Rule of Law*, 22 BERKELEY J. INT'L L. 375, 380 n.16 (2004) (explicating the view that Article 2(4) of the U.N. Charter permits certain uses of force).

327. Cf. MCCORMACK, *supra* note 275, at 238 (discussing the view that Article 51 only permits force as self-defense to an "armed attack").

328. This would hinge on the distinction between *jus in bello* and *jus ad bellum*. For further explanation of this argument, see Beres, *Israel, Iran and Nuclear War*, *supra* note 306, at 90.

Iran's aggression—on display just this past summer in Lebanon—may be distinct enough to avoid creating troublesome precedent for situations in which the aggressor state's terrorism is ambiguous or is less clearly directed at the defending state.³²⁹ As a legal matter, however, the extent to which state-sponsored terrorism can establish a predicate for a state of war is seriously disputed.³³⁰ There is also the political reality that if Israel relies on a *de facto* state of war rather than on forestalling Iran's nuclear progress, a missile strike on Iran could be viewed as a radical, indefensible escalation over its traditional reprisal against Iran's proxies themselves.³³¹

In sum, the convergence of Iran's pursuit of nuclear weapons with its anti-Israel aggression is insufficient to meet the bright line test for temporal imminence required by the Charter. The Charter's singular focus on Iranian nuclear weapons capability at this exact cross-section of time—neglecting the impending point of no return and Iran's anti-Israel aggression—fails to establish an immediate threat that is legitimately preventable. Contextualizing the threat within a longstanding state of war circumvents the obstacles posed by the law of anticipatory self-defense, but would cast an Israeli preventative strike as a radical escalation of that war.

B. *John Yoo's Probability/Magnitude Model*

Professor Yoo took direct aim at the temporal imminence requirement for anticipatory self-defense when he formulated a balancing test that hinges on the probability of an attack, the degree to which such probability is increasing, and the magnitude of harm threatened.³³² Yoo argues that this

329. Cf. MCCORMACK, *supra* note 275, at 291 (noting that some scholars have argued that "it was not possible under Article 2(4) . . . to justify forceful measures on the basis of a continuing 'state of war' in the absence of a credible threat to the state's sovereignty").

330. Roy S. Schondorf, *Extra-State Armed Conflicts: Is there a Need for a New Legal Regime?*, 37 N.Y.U. J. INT'L L. & POL. 1, 22–26 (2004).

331. See generally TAL BECKER, *TERRORISM AND THE STATE: RETHINKING THE RULES OF STATE RESPONSIBILITY* 112–16 (2006) (discussing in detail the legality behind various state responses). After all, Israel never bombed Tehran even though it effectively directed this summer's war on the Lebanese-Israeli border.

332. Yoo, *supra* note 275, at 751.

reconceptualization of anticipatory self-defense will account for the realities of modern warfare, where rogue states can arm faster than ever before and single strikes can decimate a population.³³³ Particularly in light of the multipronged threat posed to Israel by a nuclear-armed Iran, Yoo's model is perhaps the most permissive of an Israeli preventative strike.

Applying Yoo's standard to the facts at hand, the probability of an Iranian nuclear attack on Israel is the hardest factor to measure. Of course, short of intervention to forestall Iran's mastery of the nuclear fuel cycle, its possession of nuclear weapons is only a matter of time, and imminence is in any case not required in Yoo's calculation.³³⁴ Yet the probability that Iran would launch nuclear warheads at Israel is not as high, no matter how genocidal Ahmadinejad's rhetoric and no matter how much aggression Iran has shown Israel in the past.³³⁵ Assuming that Iran would be deterred at least to some extent by Israel's nuclear weapons and those of its allies, the probability of a nuclear strike on Israel might best be judged as moderate to low.

By contrast, the probability that a nuclear-armed Iran would substantially ratchet up its anti-Israeli terrorism is exceedingly high. " Hamas needs Iran to pursue its goal of destroying Israel, while Iran needs Hamas to extend its sphere of influence," a particularly dangerous alliance given Hamas' recent ascension to control over the Palestinian Authority.³³⁶ The same concern arises out of Iran's relationship with Hizbullah. Israel has not been able to deter Iranian-sponsored terrorism in the past, and its deterrent capabilities will only diminish once a nuclear-armed Iran is immune to invasion or even reprisal.³³⁷ There is also the possibility that Iran would arm its terrorist vassals with "dirty bombs," though its probability is in dispute.³³⁸

333. *Id.*

334. *See id.* at 753.

335. *See* Steinberg, *supra* note 270, at A12.

336. Susser, *supra* note 174, at 12.

337. *See id.*

338. *Compare* Posen, *supra* note 149 (noting the improbability of an arms race in Iran), with Graham Allison, *Nuclear Dangers in the Middle East: Threats and Responses*,

The analysis of the magnitude of harm thus becomes dual-pronged. The threat of a moderate to low probability nuclear attack poses the possibility of mass destruction even higher than the typical nuclear attack because of Israel's size and concentration.³³⁹ The higher probability threat of terrorism with impunity is less existential in nature, but would impose more of the very real harm that Iranian terrorism has already imposed on Israel over the years. Moreover, the likelihood of either threat materializing is increasing, given the international community's inability to reach a consensus on short-term measures to stop Iran from crossing the point of no return.

The Yoo model's higher tolerance for preventative action is based on the notion of regional stability as a public good.³⁴⁰ While the Charter is unconcerned with intangible geopolitical considerations, Yoo accounts for the possibility that a nuclear Iran could destabilize the Middle East, without firing a shot, by stirring up Shia minorities, starting an arms race and emboldening terrorist groups in the region.³⁴¹ This consideration cannot stand alone because permitting every state challenged by the geopolitical ascendancy of its enemies a right of preventative action could cause more armed conflict than it would prevent.³⁴² This is at best a third threat posed by a nuclear-armed Iran, one controversial in legal analysis, but nonetheless relevant.

In abandoning the Charter's temporal imminence rule, Professor Yoo acknowledges that its decision costs (to accurately identify threats) are low, but argues that its error costs (caused by failures to strike) are unacceptably high.³⁴³ He admits that his model increases decision costs by bringing probability and magnitude of harm into the analysis, but argues that it reduces error costs by preventing threats from materializing or by

WASH. INST. FOR NEAR E. POL'Y, May 18, 2005, *available at* http://www.ciaonet.org/pbei/winep/policy_2005/2005_995/ (agreeing with the possibility of a nuclear attack by Iran).

339. Sneh, *supra* note 150.

340. Yoo, *supra* note 275, at 785–86.

341. *See id.* at 788.

342. *See id.* at 785–87. Yoo states that his model “promote[s] conduct that encourages stability-enhancing uses of force, rather than seeking to reach a zero level of violence.” *Id.* at 786.

343. *Id.* at 759–61.

avoiding errant preventative strikes.³⁴⁴ The relevance of this methodology to Israel's assessment of Iran's nuclear progress is striking. Further, Yoo acknowledges the danger of giving individual nations the discretion to evaluate the threats they face, but hopes that nations will realize that sharing such discretion with others will result in a more legitimate and more accurate decision-making process.³⁴⁵ This is undoubtedly the weak link in his model because it provides no objective measure for exhaustion of non-force, consensus-based alternatives. Israel, for its part, has emphasized that it prefers a consensus among the EU3 and the United States on the nature of the Iranian threat to a unilateral assertion of Iran's ulterior motives.³⁴⁶ Moreover, Israeli officials have been clear that a unilateral strike is their last preference,³⁴⁷ though this may have more to do with feasibility and avoiding back-end political fallout than with avoiding exploitation of the loophole in Yoo's model.

C. Polebaum's Reasonable Nation Standard

Starting from the premise that nations need a realistic standard of anticipatory self-defense, Polebaum argues that "[a] nation that reasonably determines that nuclear weapons are about to be used against it should be entitled to act upon that perception and defend itself."³⁴⁸ She proposes a series of objective criteria to measure the reasonableness of a nation's ex ante belief in the necessity of defensive action, criteria which constrain the discretion of the defending nation.³⁴⁹

First, Polebaum requires a clear threat, of which the defending nation must be aware.³⁵⁰ Israel is acutely aware of the threat posed by Iran's aggression against it, of the threats posed

344. *Id.* at 760.

345. *Id.*

346. See Steinberg, *supra* note 270, at 3; Hilary Leila Krieger, *Sharon: Israel 'Can't Accept' a Nuclear Iran*, JERUSALEM POST, Dec. 2, 2005, at 1 [hereinafter Krieger, *Sharon*].

347. See Krieger, *Sharon*, *supra* note 346, at 1.

348. Beth M. Polebaum, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U. L. REV. 187, 208 (1984).

349. *Id.* at 209.

350. *Id.* at 210.

by a nuclear Iran, and of the impending convergence between the two.³⁵¹ Polebaum's focus was on the threat of an actual nuclear strike, and not on nuclear-emboldened terrorism, yet she argues that the criteria are "general principles . . . applicable to a host of situations involving the threat of force."³⁵² Her language implies that the proportionality requirement, which she borrows from the Charter's rule, is capable of bridging the conceptual gap between the threat of terrorism with impunity and the more conventional threat of an actual strike.³⁵³

On this view, preventative strikes on nuclear facilities are justified as long as they are proportional to the specific threat posed by their completion.³⁵⁴ The preventative strike proposed here would not differ as between the two threats posed by a nuclear-armed Iran, insofar as a proportional Israeli strike, as planned, would do no more than forestall the point of no return past which both threats will inevitably materialize. Moreover, Israel is well aware of the hostility that any preventative strike would provoke and is unlikely to cause any more damage than necessary.³⁵⁵ Indeed, Israel took great care in its strike on Iraq's nuclear reactors to abide by the proportionality requirement.³⁵⁶

Second, Polebaum requires an ongoing evaluation of the technological credibility of the threat.³⁵⁷ Though the United

351. See Steinberg, *supra* note 270, at A12 ("The recent shrill statements by . . . Ahmadinejad threatening to 'wipe Israel off the map' and the cross-border attacks by Hizbullah, Iran's Lebanon-based ally, have heightened awareness of the dangers [of Iran's nuclear program]."). Polebaum notes that "past acts may indicate whether the threatening nation has shown a sufficient disregard for the threatened nation's integrity and civilian life to persuade it to take the nuclear threats seriously." Polebaum, *supra* note 348, at 210.

352. Polebaum, *supra* note 348, at 199.

353. *Id.* at 212 ("Proportionality must be measured not by the degree of force threatened, since the force proportionate to nuclear force is always excessive, but by the force needed to eliminate the danger.").

354. See *id.* at 226.

355. See Abedin, *supra* note 290 ("[A] military strike is unlikely because the Israelis know it would elicit a ferocious response from the Iranians.").

356. Cf. MCCORMACK, *supra* note 275, at 106 (discussing Israel's strategic timing of a raid on Iraq to minimize resultant damage); CLAIRE, *supra* note 290, at 198–99 (noting only one French fatality in the raid that was carried out on a Sunday to avoid more casualties).

357. See Polebaum, *supra* note 348, at 210–11.

States and Israel were once alone in distrusting Iran's intentions for nuclear power, the world has increasingly come around to the belief that Iran is indeed seeking nuclear weapons.³⁵⁸ Furthermore, Israel's intelligence agencies are sufficiently attuned to the Iranian threat that it would be able to wait out diplomatic alternatives without allowing Iran to cross the nuclear threshold.³⁵⁹ Finally, the Israeli personnel reportedly stationed at an American base on the Iraq/Iran border may be in a position to gauge which facilities of those spread across Iran pose the greatest technological threat.³⁶⁰

Third, Polebaum evaluates whether the defending nation waited until the last possible moment to act preventatively.³⁶¹ The recent election of a hardline president who has threatened to annihilate Israel and the end of the diplomatic road without any international consensus on Iran are both perceptible changes in the status quo that suggest that the time to act may be now.³⁶² While this criterion is necessarily backward-looking, in this context it appears to be satisfied by Israel's assurances that it would not act until it believed Iran was about to cross the point of no return.³⁶³ Moreover, Israel has publicized the nature of the Iranian threat in order to stimulate action by the international community that would forestall the need for a preventative strike³⁶⁴ and is working closely with the United States to keep the issue on the diplomatic agenda.³⁶⁵

The fourth objective criterion Polebaum offers is whether the defending nation exhausted alternative means of resolving the

358. Cf. *IDF Forces Operating in Iran*, *supra* note 59 (outlining worldwide response to Iran's claims of nuclear program development).

359. Cf. Polebaum, *supra* note 348, at 210–11.

360. See *Report: IDF Forces Operating in Iran*, *supra* note 59.

361. Polebaum, *supra* note 348, at 211.

362. Steinberg, *supra* note 270.

363. *Id.* (“[A] unilateral operation would only be launched as a last resort, when every other avenue has failed.”).

364. Polebaum, *supra* note 348, at 210. Polebaum requires such publicization “so that the threatening nation's intent can be debated in international fora and pressure exerted to defuse a nuclear crisis.” *Id.*

365. Press Release, U.S. Dep't of State, U.S.-Israel Strategic Dialogue (Nov. 29, 2005), available at <http://www.state.gov/r/pa/prs/ps/2005/57435.htm>.

conflict.³⁶⁶ Though Israel cannot negotiate directly with Iran, it has made credible efforts to urge action by the United States, the EU3, and the Security Council.³⁶⁷ Israel has also negotiated directly with Iran's nuclear patron, Russia.³⁶⁸ While these non-force alternatives have only given Iran more time to become a self-sufficient nuclear power, Israel has steadfastly maintained that it will wait them out as long as is possible.³⁶⁹

Like Professor Yoo, Polebaum's standard distinguishes itself from the Charter by taking account of threats to regional stability, a relevant consideration given that, as noted above, Iran could use nuclear weapons to its regional advantage without ever arming a warhead.³⁷⁰ Moreover, although Israel's fear of a nuclear Iran cannot be divorced from its historical (but fading) role as a pariah in the Middle East, it appears that Israel can satisfy Polebaum's objective criteria without resort to "factors such as national ideology, psychological motives, or unique historical experience . . ." ³⁷¹ Rather, the threat that Iran poses to Israel is "objectively verifiable" by the international community³⁷²—perhaps accounting for the particularly broad condemnation of Ahmadinejad's verbal threat—and the only difference remaining between Israel and the EU3 is over the

366. Polebaum, *supra* note 348, at 212.

367. See, e.g., David E. Sanger, *Sharon Asks U.S. to Pressure Iran on Nuclear Arms*, N.Y. TIMES, Apr. 13, 2005, at A1 [hereinafter Sanger, *Sharon Asks U.S.*] (reporting that Israeli Prime Minister Ariel Sharon urged President Bush "to step up pressure on Iran.").

368. Herb Keion, *Russia: Iran Not a Nuclear Threat*, JERUSALEM POST, Oct. 27, 2005, at 2 ("While Israel and the US [sic] are interested in seeing the Iranian question taken to the U.N. Security Council for possible sanctions as soon as possible, [Foreign Minister Sergei] Lavrov made it clear that Moscow was in no great hurry."). Polebaum sets a very high bar here, criticizing Israel for not delaying its 1981 preventative strike on Iraq in order to consult the new President of France to detect an impending policy change with respect to his country's support of Iraq's nuclear efforts. Polebaum, *supra* note 348, at 225–26. However, despite Israel's efforts in this regard vis-à-vis Iran, Russia has insisted on moving ahead with its sponsorship of the Iranian program. See Zahedi & Memarian, *supra* note 218, at A31.

369. See Krieger, *Sharon*, *supra* note 346 (Prime Minister Ariel Sharon stated, "[B]efore exercising [military force,] every attempt should be made to pressure Iran into stopping its activity.").

370. Polebaum, *supra* note 348, at 214.

371. *Id.* at 212.

372. *Id.*

viability of options besides force.

Given its specific focus on nuclear threats, Polebaum's standard encompasses many of the circumstances of this conflict, grafting an objective reasonableness inquiry onto the narrow imminence/alternative means/proportionality inquiry of traditional international law while relaxing these criteria far less than Professor Yoo. And although second-strike capability may be of no help to Israel, its inclusion as a factor in the Polebaum analysis gives the analysis more backing against those who see Israel as the nuclear aggressor in the Middle East. Moreover, rather than simply hoping that threatened nations will share their discretion to preventatively strike with a broader coalition (as Professor Yoo does), Polebaum puts internal, objective limitations on that discretion, and so it is perhaps reassuring that her standard would endorse an Israeli preventative strike.

VI. CONCLUSION

The facts behind Iran's nuclear program demonstrate that Iran is on the path to nuclear weapons. Once Iran masters the nuclear fuel cycle, the so-called "point of no return," this path will be irreversible. A nuclear-armed Iran would change the landscape of anti-Israel aggression in the Middle East by posing two concrete threats: the existential threat of a nuclear strike and the threat of an undeterrable and relentless escalation in anti-Israel terrorism. As the country most threatened by Iran's ascension to the nuclear club, Israel has steadfastly supported negotiations, sanctions, and regime change as solutions to the crisis, but may soon have to consider the use of force in order to protect itself.

International efforts to stop Iran have ignored the point of no return, relying instead on strategies that offer, at best, the possibility for results in the long term. A preventative strike, by contrast, could forestall nuclear progress in the short term, with little or no guarantees in the long term. Force may simply be the only way to give other avenues the time to work without making a nuclear-armed Iran a foregone conclusion.

Rather than prescribe a new standard for anticipatory self-defense, this Article has evaluated the legality of a hypothetical

Israeli strike using existing standards, affording the opportunity for a useful, if limited, commentary on them. The Charter seems ill-equipped to deal with the nuclear paradigm, in which rogue states can convert rhetoric into concrete threats overnight. Therefore, some believe that for nations like Israel to adhere to traditional international law in this context would be suicidal.³⁷³ Professor Yoo's balancing test perhaps overcompensates, however, putting no external, objective constraints on a nation's discretion to preventatively defend itself. The Polebaum reasonable nation standard constrains that discretion but may be so objective as to strip individual nations of their ability to evaluate threats from their own perspective, isolated from the international politics attendant to threat evaluation. Perhaps the right balance is to leave more room for a subjective perspective while punishing those nations whose perspectives are deemed objectively unreasonable after the fact.³⁷⁴ Under such a standard, Israel could act based on its perception of the Iranian threat, but would be held accountable if an ex post, objective analysis of its perception found the threat insufficient to legitimize the extreme precaution of a preventative strike.

Perhaps relying on a similar analysis, the Bush Administration has noted that Israel may be required to act in its own defense against Iran—to the benefit of all states that oppose nuclear weapons for Iran—despite the “diplomatic mess” that would have to be cleaned up afterwards.³⁷⁵ Were Israel to act preventatively, should it be forced to do so under a veil of illegitimacy? In spite of—or perhaps because of—the inclination of some that Israel should protect itself without regard to the law,³⁷⁶ international law will lose currency if it fails to comport with commonly-held expectations of a state's right to defend

373. See Yoo, *supra* note 275, at 756, n.84 (making this argument and citing other authors in support).

374. See generally Allen Buchanan & Robert O. Keohane, *The Preventive Use of Force: A Cosmopolitan Institutional Proposal*, 18 ETHICS & INT'L AFF. 1, 1 (2004) (proposing a procedural mechanism enforcing a similar standard).

375. Sanger, *Sharon Asks U.S.*, *supra* note 367.

376. Louis Rene Beres, *Israel, Iran and Preemption: Choosing the Least Unattractive Option Under International Law*, 14 DICK. J. INT'L L. 187, 198 (1996) (“Let Israel heed no ‘expert opinion’ that such preemptive attacks would be in violation of international law.”).

itself.³⁷⁷ Any reevaluation of anticipatory self-defense principles in the wake of an Israeli strike on Iran should therefore strive to reduce armed conflict while offering states a credible and realistic way to defend themselves preventatively.

377. Yoo *supra* note 275, at 730–31 (scholarly machinations notwithstanding). Professor Yoo criticizes scholars who “attempt to fold armed conflicts into an evolving system of law” *Id.* Polebaum argues that “[i]nternational law should seek to establish rules to guide future crises; it should not merely evolve in their wake.” Polebaum, *supra* note 348, at 208.