
**POLITICS UNDER THE COVER OF LAW: CAN
INTERNATIONAL LAW HELP RESOLVE THE IRAN
NUCLEAR CRISIS?**

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I. INTRODUCTION	369
II. IRAN: TIMELINE OF A DEVELOPING CRISIS	371
III. THE SHAKY “GRAND BARGAIN”: THE CURRENT NUCLEAR NON-PROLIFERATION REGIME	382
a. <i>Basics of the NPT Regime</i>	382
b. <i>The NPT in the Real World: Practical Operation and Challenges</i>	384
IV. A PROPOSED WAY FORWARD: POLITICS IN THE SHADOW OF THE LAW	396
a. <i>Procedure</i>	397
b. <i>Substance</i>	409
V. CONCLUSION	424

I. INTRODUCTION

For more than four years, the controversy surrounding Iran’s pursuit of civilian (and potentially military) nuclear capability has gripped news headlines worldwide. This Note asks what international law can do to help break the deadlock in finding a peaceful solution to the crisis. I contend that reliance on the law, conceived of as a body of rules emanating from a sovereign who compels compliance by threatening sanctions,¹ is inadequate. However, international law can be the key to a solution as an instrument that facilitates a mutually beneficial bargain by eliminating the political costs of cooperation. Specifically, bringing together Iran, the

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¹ The famous positivistic formulation, the “command” theory of law, credited to John Austin, is that law is a command of a sovereign backed by the power and purpose to inflict harm on the disobedient. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 5-8, 11, 14 (London, John Murray ed. 1832).

United States, and other relevant parties under the initiative and auspices of the Nuclear Non-Proliferation Treaty (NPT) and the International Atomic Energy Agency (IAEA) can eliminate the political barriers currently obstructing a compromise that would benefit both Iran and those alarmed by its nuclear progress.

The rest of this Note is organized as follows. Part II reviews the history of the Iran nuclear crisis. Part III describes and appraises the NPT regime, the international legal mechanism currently in place to deal with nuclear proliferation. It considers some nuclear-weapon states'² criticism that the NPT permits a non-nuclear weapon state to advance to the brink of nuclear weapons capability and then withdraw from the NPT using its emergency exit provision, thereby becoming a nuclear-weapon state without having encountered legal rebuke in the process. I will also consider some non-nuclear weapon states' objection that nuclear-weapon states have made little meaningful progress towards nuclear disarmament, turning the NPT into a regime of one-way obligations. The enumeration of non-nuclear weapon states' grievances against the NPT regime serves the purpose of dispelling the notion that the conflict over Iran's nuclear development is a battle between peace-lovers and rogue proliferators. It will show that this notion, and its corollary that finding a resolution to the crisis is essentially a search for a strategy to foil the evil designs of proliferators, must be rejected in favor of a solution that recognizes the legitimate security concerns of both sides and attempts to forge common ground by compromise.

Part IV fleshes out a practical compromise. It relies on the public history of the crisis and on interviews with two members of the Iranian political elite for a diagnosis of the roots of conflict and possible solutions. I argue that because much of the disagreement between Iran and the United States stems from problems of pride and prestige, the intervention of a neutral third-party under the color of law can prove effective in creating a forum for meaningful negotiation. No entity is better suited than the IAEA to supply this legal cover. The first, procedural, part of my proposal thus relies on international legal institutions to create a climate

² It is important not to equate the controversy over Iran's nuclear program with a general conflict between nuclear-weapon states and non-nuclear weapon states or the developed world and the developing world. It remains true, however, that those sympathetic to Iran's arguments are mostly non-nuclear weapon states and developing countries, while those who find themselves drawn to the United States' side of the story are mostly developed or nuclear-weapon states. (This will be evident in Part II, recounting the history of the nuclear crisis.) Furthermore, it is impracticable to specify all the states that subscribe to an argument every time the argument is raised. Hence the practical need for the occasional use of "nuclear-weapon states," "nuclear haves," "the West," or "the developed world" and "non-nuclear weapon states," "the nuclear have-nots," or "the developing world" as a shorthand for referring to those sympathetic to the United States and Iran, respectively.

in which meaningful negotiation for a resolution can take place. In the second, substantive, part of the proposal, I suggest steps to be taken by Iran and the United States to increase the likelihood of success in negotiations. The United States should make a formal, high-level, unconditional disavowal of regime change in Iran as a goal of American foreign policy. It should also refrain from rhetoric about democratizing the Middle East and spreading freedom. Iran should suspend uranium enrichment, a measure to be accompanied by some sort of international arrangement to provide it with nuclear fuel. Iran should also refrain from inflammatory rhetoric of the sort that has characterized many of President Ahmadinejad's major foreign policy announcements. Finally, Iran must put an end to the incoherent chorus of contradictory pronouncements by various political actors and instead speak with one voice. I will describe how each measure would improve the prospects of negotiated resolution and how the absence of each has contributed to the current entanglement. Part V concludes by putting the crisis in perspective and appraising the potential practical effects of my proposal.

II. IRAN: TIMELINE OF A DEVELOPING CRISIS³

In August 2002, the National Council of Resistance of Iran⁴ announced that the Islamic Republic of Iran was building a uranium enrichment

³ In the interest of accuracy, the following history relies exclusively on contemporary news reports and official positions taken by the IAEA, United Nations (UN), Iran, and other involved entities. Other sources such as books are cited for further information on relevant but tangential aspects of the story, for example the Abdul Qadeer Khan network. In the interest of space, I will not consider the scientific and technical aspects of building nuclear weapons. For a layperson-friendly interactive introduction to nuclear energy generation see *The Nuclear Fuel Cycle*, BBC NEWS, http://news.bbc.co.uk/2/shared/spl/hi/sci_nat/05/nuclear_fuel/html/mining.stm (last visited Mar. 2, 2008). For those interested in the more technical aspects of Iran's nuclear program, the IAEA reports and resolutions cited throughout this Part provide some food for thought.

⁴ The National Council of Resistance of Iran (NCRI) describes itself as a broad-based umbrella organization of diverse Iranian opposition groups in exile. See the NCRI's official website, <http://www.ncr-iran.org/content/view/27/38/> (last visited Mar. 2, 2008). In fact the group probably operates as a front for the Organization of People's Mojahedin of Iran. This is the official view of the U.S. government, which since 1999 has determined the NCRI to be an alias for Mojahedin and designated it a foreign terrorist organization. See 1999 Designation of Foreign Terrorist Organizations, 64 Fed. Reg. 55,112 (Oct. 8, 1999); 2001 Redesignation of Foreign Terrorist Organization, 66 Fed. Reg. 51,088, 51,089 (Oct. 5, 2001); 2003 Redesignation of Foreign Terrorist Organizations, 68 Fed. Reg. 56,860, 56,861 (Oct. 2, 2003); 2006 Alphabetical Listing of Blocked Persons, Specially Designated Nationals, Specially Designated Terrorists, Specially Designated Global Terrorists, Foreign Terrorist Organizations, and Specially Designated Narcotics Traffickers 71 Fed. Reg. 39,709, 39,946 (July 13, 2006); see also *Nat'l Council of Resistance of Iran v. Dep't of State*,

plant at Natanz and a heavy water plant at Arak without informing the United Nations.⁵ Evidence suggests that Western intelligence agencies already knew of Iran's secretive nuclear operations by the time of the August 2002 announcement,⁶ but the announcement marked the first public airing of such information.⁷ Following U.S. accusations that Iran was pursuing nuclear weapons and Iranian denials of the same,⁸ Iran

373 F.3d 152 (D.C. Cir. 2004). It is the view of the European Union (EU) that the NCRI is part of the Mojahedin. See Council Common Position No. 2004/500/CFSP of 17 May 2004, 2004 O.J. (L 196) 12, 15 (listing as a terrorist group "Mujahedin-e Khalq Organisation (MEK or MKO) [*minus the 'National Council of Resistance of Iran' (NCRI)*]" (brackets in original) (emphasis added). The Mojahedin, a Marxist-Islamist militant group, were part of the diverse coalition that united in opposition to the Shah's rule in the 1979 Iranian revolution. The coalition broke down after the revolution, and the Mojahedin briefly threatened the primacy of the Islamic government with a string of bombings and assassinations in the early 1980s. But the group was soon uprooted by the government and most its members were killed, imprisoned, or exiled. It has operated in exile ever since. The Mojahedin probably lost whatever measure of popular support they had in Iran by siding with Iraq during the Iraq-Iran war of 1980-1988. On the Mojahedin, see ERVAND ABRAHAMIAN, *THE IRANIAN MOJAHEDIN* (1992).

⁵ See Sharon Otterman, *Iran Accused of Secret Nuclear Plants*, UNITED PRESS INT'L, Aug. 14, 2002; *Rebels: Iran Building Sites for Nuclear Arms*, HOUSTON CHRON., Aug. 15, 2002, at A18; *Iran Building Nuclear Sites, Rebels Say*, SAN DIEGO UNION-TRIB., Aug. 15, 2002, at A17.

⁶ Apparently Western intelligence agencies had seen signs of an Iranian nuclear procurement network as early as 1991. GORDON CORERA, *SHOPPING FOR BOMBS: NUCLEAR PROLIFERATION, GLOBAL INSECURITY, AND THE RISE AND FALL OF THE A.Q. KHAN NETWORK* [hereinafter *SHOPPING FOR BOMBS*] 68, 79 (2006). Though they became less suspicious during the mid-1990s, by 2000 intelligence awareness of nuclear developments in Iran had reached such heights that U.S. and Israeli intelligence tried to pass on flawed information, machinery, and equipment to Iran in order to obstruct its nuclear development program. *Id.* at 79-80. Since 2000, American and British intelligence had been watching the Natanz facility being built, and were already aware of the existence of every sight revealed in 2002 by the Iranian opposition. *Id.* at 80-81.

⁷ The Iranian nuclear story actually begins much earlier. It was an ambition fertilized under Mohammad Reza Shah, abandoned in the early post-revolution years, and renewed after the eight-year war with Iraq, during which Iran saw the effectiveness and international impunity with which Iraq used chemical weapons and learned (perhaps for the first time) of Iraqi nuclear weapons plans. Iranian efforts were reenergized after 2003 when Iran saw what happened to Iraq and what did not happen to North Korea. For an eminently amusing account of Iran's covert nuclear developments see *id.* at 57-81.

⁸ See Glenn Kessler, *Nuclear Sites In Iran Worry U.S. Officials; White House Cites 'Pursuit of Weapons'*, WASH. POST, Dec. 14, 2002, at A18.

agreed to inspections by the IAEA in December 2002.⁹ In February 2003, IAEA Director General Mohammed ElBaradei visited Iran with a team of inspectors.¹⁰ His report, issued in June, expressed concerns that “Iran has failed to meet its obligations under its Safeguards Agreement with respect to the reporting of nuclear material, the subsequent processing and use of that material and the declaration of facilities where the material was stored and processed.”¹¹ It also noted, however, that the quantity of nuclear material involved was not large and far from being usable in a nuclear explosive device, and that Iran had taken and was taking corrective actions.¹² The IAEA called on Iran to conclude an Additional Protocol¹³ in order to expand the IAEA’s inspection rights.¹⁴

International pressure on Iran increased after further inspections in August and September revealed traces of highly enriched weapons-grade uranium at the Natanz plant.¹⁵ On October 21, 2003, responding to growing international pressure and ten days short of an IAEA deadline to improve its cooperation or face potential punitive measures under Chapter VII of the UN Charter, Iran agreed to suspend uranium enrichment and allow surprise IAEA inspections.¹⁶ The IAEA’s subsequent report was favorable to Iran. It concluded that “there is no evidence that the previously undeclared nuclear material and activities . . . were related to a nuclear weapons programme.”¹⁷ The United States found this assess-

⁹ Ravil Musin, *Iranian FM Invites IAEA Inspectors to Visit Nuclear Centres*, ITAR-TASS NEWS AGENCY, Dec. 14, 2002; Tehran Brushes Off Nuclear Plant Concerns, L.A. TIMES, Dec. 14, 2002, § 1, at 12.

¹⁰ Michael R. Gordon, *Threats and Responses: Nuclear Programs; Inspectors View Nuclear Work At Iranian Site*, N.Y. TIMES, Feb. 23, 2003, at A1.

¹¹ IAEA Dir. Gen., *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, Report by the Director General*, at 7, delivered to the IAEA Board of Governors, IAEA Doc. GOV/2003/40 (June 6, 2003), available at <http://www.iaea.org/Publications/Documents/Board/2003/gov2003-40.pdf>.

¹² *Id.*

¹³ *Id.* at 8.

¹⁴ *UN Suspects Iran of Nuclear Breaches*, BBC NEWS, June 6, 2003, http://news.bbc.co.uk/2/hi/middle_east/2969644.stm.

¹⁵ See *EU Envoy Warns Iran*, BBC NEWS, Aug. 30, 2003, http://news.bbc.co.uk/2/hi/middle_east/3190319.stm; *US Gives Iran “Last Chance,”* BBC NEWS, Sep. 9, 2003, http://news.bbc.co.uk/2/hi/middle_east/3093490.stm.

¹⁶ Bryan Bender, *Pressed, Iran Offers Nuclear Concessions*, BOSTON GLOBE, Oct. 22, 2003, at A1; Angus McDowall, *Iran Bows to Europe over Nuclear Crisis*, INDEPENDENT, Oct. 22, 2003, at 14.

¹⁷ IAEA Dir. Gen., *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, Report by the Director General*, at 7, delivered to the IAEA Board of Governors, IAEA Doc. GOV/2003/75 (Nov. 10, 2003), available at <http://www.iaea.org/Publications/Documents/Board/2003/gov2003-75.pdf>. See also IAEA Bd. of Governors, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, Resolution Adopted by the Board on 26 November 2003*, GOV/2003/81, available at <http://www.iaea.org/Publications/Documents/Board/2003/gov2003-81>.

ment “impossible to believe.”¹⁸ Iran agreed to abide by the much-urged NPT Additional Protocol on December 18, 2003, raising hopes for a resolution to the nuclear crisis.¹⁹

Despite these reassuring steps, Iran’s subsequent actions to deliver on its promise to stop uranium enrichment did not satisfy the IAEA. Following reports of Iranian involvement with the Pakistani “father of the bomb” and nuclear merchant Abdul Qadeer (A.Q.) Khan,²⁰ Iran’s resumption of building centrifuges for uranium enrichment,²¹ and months of haggling between Iranian officials and ElBaradei, the IAEA responded. In a September 2004 resolution it criticized Iran for doing too little to suspend uranium enrichment and reprocessing activities. It called on Iran to “immediately suspend *all* enrichment-related activities” and to reconsider its decision to start building a heavy water reactor.²² It also urged Iran to increase its cooperation with the IAEA by providing better access and information.²³ These calls came amid heightened pressure from the United States to refer Iran to the UN Security Council to impose sanctions “not involving the use of armed force” under Article 41 of the U.N. Charter.²⁴

pdf; *Iran “Meeting” UN Nuclear Demands*, BBC NEWS, Oct. 31, 2003, http://news.bbc.co.uk/2/hi/middle_east/3229255.stm.

¹⁸ *US Attacks Nuclear Report on Iran*, BBC NEWS, Nov. 13, 2003, http://news.bbc.co.uk/2/hi/middle_east/3266015.stm.

¹⁹ *Iran Signs NPT Additional Protocol*, IRAN NEWS AGENCY (IRNA), Dec. 18, 2003; Gareth Smyth, *Iran Signs Up to Tougher Supervision of Nuclear Sites*, FIN. TIMES, Dec. 19, 2003, at 13. Contrary to some sources, Iran did not sign an additional protocol, but simply agreed to voluntarily comply with it. This became clear in February 2006, when Iran chose to no longer abide by the additional protocol. See *Iran to Halt All Nuclear Cooperation Beyond NPT as of 5 Feb 06*, BBC MONITORING MIDDLE EAST, Feb. 4, 2006.

²⁰ See John Lancaster & Kamran Khan, *Pakistanis Say Nuclear Scientists Aided Iran*, WASH. POST, Jan. 24, 2004, at A1; Peter Slevin, John Lancaster & Kamran Khan, *At Least 7 Nations Tied To Pakistani Nuclear Ring*, WASH. POST, Feb. 8, 2004, at A1. On A.Q. Khan see generally CORERA, *SHOPPING FOR BOMBS*, *supra* note 6; see also David Rohde & David Sanger, *Key Pakistani Is Said to Admit Atom Transfers*, N.Y. TIMES, Feb. 2, 2004, at A1; William J. Broad, David E. Sanger & Raymond Bonner, *A Tale of Nuclear Proliferation: How Pakistani Built His Network*, N.Y. TIMES, Feb. 12, 2004, at A1; Bill Powell & Tim McGirk, *The Man Who Sold the Bomb*, TIME, Feb. 14, 2005, at 22.

²¹ *Iran Resumes Centrifuge Building*, BBC NEWS, July 31, 2004, http://news.bbc.co.uk/2/hi/middle_east/3942435.stm.

²² IAEA Bd. of Governors, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, Resolution Adopted by the Board on 18 September 2004*, GOV/2004/79, at 2 (Sept. 18, 2004) (emphasis in original), available at <http://www.iaea.org/Publications/Documents/Board/2004/gov2004-79.pdf>.

²³ *Id.*

²⁴ See *US Seeks UN Action Against Iran*, BBC NEWS, Sep. 2, 2004, http://news.bbc.co.uk/2/hi/middle_east/3620222.stm.

Iran had pushed its hand as far as it could and tested the limits of the Western stance, and would now cave in to avoid an impending clash. On November 14, 2004, just days before the upcoming November 25 meeting of the IAEA Board of Governors, Iran agreed to a freeze on all uranium enrichment- and reprocessing-related activities for the duration of talks with the EU-3 (Britain, France, and Germany).²⁵ Other positive developments ensued. Iran-EU talks continued. In January 2005 the IAEA visited the Parchin military complex, a site near Tehran that the United States suspected of being linked to a weapons program.²⁶ However, wary of espionage,²⁷ Iran rejected a repeat visit to Parchin, claiming that the IAEA lacked any justification for returning.²⁸ This was followed in April and May by Iranian announcements of plans to resume uranium conversion, though Iran made it clear that it would await the conclusion of Iran-EU talks.²⁹ In August 2005, as Mahmoud Ahmadinejad was being sworn in as the new Iranian president, Iran rejected EU proposals for a nuclear deal.³⁰ A few days later Iran lifted UN seals off the uranium conversion facility near Esfahan, making it operational again.³¹

A report issued in the same month by an independent panel of scientists from the United States, France, Japan, Britain, and Russia concluded that there was no evidence that Iran had been trying to produce nuclear weapons.³² The report concluded that the traces of weapons-grade enriched uranium found at Natanz came from contaminated Pakistani

²⁵ See Maggie Farley & Sonya Yee, *Iran Agrees to Nuclear Deal Sought by EU*, L.A. TIMES, Nov. 15, 2004, at A3; Elaine Sciolino, *Iran Agrees to Nuclear Limitations*, INT'L HERALD TRIB., Nov. 17, 2004, at 1.

²⁶ See *UN Nuclear Monitors at Iran Site*, BBC NEWS, Jan. 13, 2005, http://news.bbc.co.uk/2/hi/middle_east/4170235.stm.

²⁷ See *id.*

²⁸ *Iran Rejects Repeat Visit to Base*, BBC NEWS, Mar. 1, 2005, http://news.bbc.co.uk/2/hi/middle_east/4309777.stm.

²⁹ See Nazila Fathi, *Iran Hints Talks on Ending Its Nuclear Program Are Near Collapse*, N.Y. TIMES, Apr. 29, 2005, at A4; Paul Leavitt, *Iran Plans to Resume Uranium Enrichment*, USA TODAY, Apr. 25, 2005, at 8A; Ewen MacAskill & Robert Tait, *Defiant Iran Plans Nuclear Revival*, GUARDIAN, May 11, 2005, at 1.

³⁰ Nazila Fathi, *Iran Rejects EU Proposal on Nuclear Program*, INT'L HERALD TRIB., Aug. 8, 2005, at 4.

³¹ Nazila Fathi & Thomas Fuller, *Iran Reopens Uranium Processing Plant as U.N. Agency Meets*, N.Y. TIMES, Aug. 11, 2005, at A3; *Iran Removes UN's Nuclear Seals*, BBC NEWS, Aug. 10, 2005, http://news.bbc.co.uk/2/hi/middle_east/4136662.stm.

³² Dafna Linzer, *No Proof Found of Iran Arms Program; Uranium Traced to Pakistani Equipment*, WASH. POST, Aug. 23, 2005, at A1; *US Dismisses Iran Nuclear Report*, BBC NEWS, Aug. 24, 2005, http://news.bbc.co.uk/2/hi/middle_east/4178804.stm.

equipment, a position Iran had taken all along.³³ The United States dismissed the report.³⁴

Negotiations with the EU-3 and IAEA following Iran's resumption of uranium enrichment repeatedly faltered on the issue of enrichment. Iran insisted that it was under no legal obligation to suspend uranium enrichment, as the NPT (Article 4(1)) acknowledges its inalienable right to peaceful nuclear energy.³⁵ Iran accused the West of hypocrisy in turning a blind eye to Israel's well-known possession of nuclear weapons while vigilantly persecuting Iran for its peaceful nuclear program.³⁶ The EU and the IAEA argued that given Iran's 18-year concealment of its nuclear program and previous failures to accurately reveal the extent and details of the program, suspending enrichment would provide an indispensable assurance of peaceful intentions.³⁷ The gap between the two positions could not be breached.

In September 2005 the IAEA passed a resolution finding Iran in non-compliance with the IAEA Statute.³⁸ It concluded that Iran's secrecy engendered doubt about the peacefulness of its nuclear program and placed the issue within the competence of the U.N. Security Council.³⁹ Some rapprochement followed, including a November 2005 IAEA revisit of the Parchin site⁴⁰ and ElBaredei's qualified but positive assessment in the same month.⁴¹ But no real breakthrough occurred. In February 2006, following the IAEA's decision to refer Iran's case to the UN Security Council, Iran announced the end of all cooperation with the IAEA beyond the normal requirements of the NPT.⁴² This meant withdrawal from the Additional Protocol (though of course not from the NPT itself).

³³ See Linzer, *supra* note 32. Cite to author, not source. See Rule 4.2.

³⁴ Linzer, *supra* note 32.

³⁵ See, e.g., *supra* notes 28-32; *infra* note 60; see also *Treaty on the Non-Proliferation of Nuclear Weapons*, art. IV, ¶ 1, Mar. 5, 1970, 21 U.S.T. 483, 1970 U.N.T.S. 169 [hereinafter NPT].

³⁶ See, e.g., Gootman, *infra* note 59; Rosen, *infra* note 59; UNSC Resolution 1737 *Based on Imagination*, *infra* note 60.

³⁷ See, e.g., *supra* notes 28-29; see also the various IAEA reports and resolutions cited throughout, and the three UN Security Council resolutions cited below.

³⁸ IAEA Bd. of Governors, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, Resolution adopted on 24 September 2005, GOV/2005/77, ¶ 1 (Sept. 24, 2005).

³⁹ *Id.* ¶ 2.

⁴⁰ *UN Inspectors Visit Iran Complex*, BBC NEWS, Nov. 3, 2005, http://news.bbc.co.uk/2/hi/middle_east/4401844.stm.

⁴¹ IAEA Dir. Gen., *Introductory Statement to the Board of Governors*, IAEA Doc. DG 24112005 (Nov. 24, 2005), <http://www.iaea.org/NewsCenter/Statements/2005/ebsp2005n018.html>.

⁴² Alissa J. Rubin, *Rejecting Cooperation, Iran Asks IAEA to Remove Seals, Cameras*, L.A. TIMES, Feb. 7, 2006, at A4; *Iran to Halt All Nuclear Cooperation Beyond NPT as of 5 Feb 06*, *supra* note 19.

An unexpected American offer of direct negotiations with Iran in May 2006 was similarly unsuccessful. U.S. Secretary of State Condoleezza Rice announced that “as soon as Iran fully and verifiably suspends its enrichment and reprocessing activities, the United States will come to the table.”⁴³ Iran responded that it was ready to negotiate, but could not accept waiving its right to enrichment as a precondition.⁴⁴

Following the failure of the Rice initiative and successive negative IAEA reports and resolutions,⁴⁵ on July 31, 2006 the UN Security Council, acting under Chapter VII, Article 40 of the UN Charter, passed Resolution 1696. The Resolution called on Iran to take the confidence-building steps required by the IAEA⁴⁶ and demanded that Iran “suspend all enrichment-related and reprocessing activities, including research and development.”⁴⁷ Reflecting Russian and Chinese opposition to harsh wording,⁴⁸ Resolution 1696 stopped short of imposing or even mentioning sanctions. But the Resolution did indicate that “appropriate measures under Article 41” may follow if Iran did not comply with demands for confidence-building and enrichment suspension by August 31, 2006.⁴⁹

International opinion was divided over Resolution 1696. Indicatively, while Pakistan’s Nawa-i Waqt warned that “any activity against Iran would be considered as aggression against the entire Muslim world,” Israel’s Jerusalem Post found it unlikely that “the Great Satan in Iran” would comply with the resolution.⁵⁰

On August 22, in its response to a June 2006 deal endorsed by the United States, EU, Russia, and China, Iran offered “serious talks” but

⁴³ *Iran Cautious Over US Talks Offer*, BBC NEWS, June 1, 2006, http://news.bbc.co.uk/2/hi/middle_east/5036082.stm.

⁴⁴ *Id.*

⁴⁵ See IAEA Bd. of Governors, *Implementation of the NPT Safeguards Agreement in the Islamic Republic in Iran, Resolution Adopted on 4 February 2006*, IAEA Doc. GOV/2006/14 (Feb. 4, 2006); IAEA Dir. Gen., *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, delivered to the IAEA Board of Governors*, IAEA Doc. GOV/2006/15 (Feb. 27, 2006); IAEA Dir. Gen., *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, delivered to the IAEA Board of Governors*, IAEA Doc. GOV/2006/27 (April 28, 2006); IAEA Dir. Gen., *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, delivered to the IAEA Board of Governors*, IAEA Doc. GOV/2006/38 (June 8, 2006).

⁴⁶ S.C. Res. 1696, ¶ 1, U.N. Doc. S/RES/1696 (July 31, 2006).

⁴⁷ *Id.*, ¶ 2.

⁴⁸ See *UN Issues Iran Nuclear Deadline*, BBC NEWS, July 31, 2006, http://news.bbc.co.uk/2/hi/middle_east/5232288.stm.

⁴⁹ S.C. Res. 1696, *supra* note 44, ¶¶ 7-8.

⁵⁰ These statements were quoted in BBC NEWS, *Press Gauges New Iran Deadline*, BBC NEWS, Aug. 2, 2006, http://news.bbc.co.uk/2/hi/middle_east/5238590.stm. The BBC article contains an interesting sample of contemporary newspaper articles from around the world.

did not agree to enrichment suspension.⁵¹ In the wake of this response, and having received negative feedback from the IAEA,⁵² on December 23, 2006 the UN Security Council issued its second Resolution on the Iran nuclear issue. Issued under Article 41 of the UN Charter, Resolution 1737 demanded that Iran suspend “all enrichment-related and reprocessing activities” and “work on all heavy water-related projects.”⁵³ It imposed a ban on the transfer to Iran by any state of all materials, technology and know-how that could contribute to the development of Iran’s nuclear development or nuclear weapons delivery systems.⁵⁴ It provided for extensive state monitoring of the travels of certain individuals involved in Iran’s nuclear and ballistic missile programs⁵⁵ and for freezing all economic assets of those individuals and some companies.⁵⁶ The Resolution requested IAEA reports on Iranian compliance within 60 days⁵⁷ and stated that further Article 41 measures would be forthcoming in the event of non-compliance.⁵⁸ However, Resolution 1737 stopped short of imposing or mentioning economic sanctions not related to Iran’s nuclear program (and *a fortiori* did not mention use of force under Article 42 of the UN Charter). It did not adopt the more stringent travel bans favored by the United States and United Kingdom, and did not ban the continuance of Russian assistance in the building of a nuclear power plant in Bushehr, in southern Iran.⁵⁹

⁵¹ Michael Slackman, *Iran Won’t Give Promise to End Uranium Effort*, N.Y. TIMES, Aug. 23, 2006, at A1; see also Dafna Linzer, *Iran Rejects Offer For Nuclear Talks; Demand for Immediate Freeze Cited*, WASH. POST, Aug. 22, 2006, at A11. For the proposed deal see *Letter Dated 13 July 2006 from the Permanent Representative of France to the United Nations Addressed to the President of the Security Council*, U.N. Doc. S/2006/521 (Jul. 13, 2006); for Iran’s response see *Communication Dated 6 November 2006 Received from the Permanent Mission of the Islamic Republic of Iran to the Agency*, U.N. Doc. INFCIRC/685 (Nov. 8, 2006).

⁵² See IAEA Dir. Gen. GOV/2006/14, *supra* note 43; IAEA Dir. Gen. GOV/2006/38, *supra* note 43; IAEA Dir. Gen., *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, delivered to the IAEA Board of Governors*, IAEA Doc. GOV/2006/53 (August 31, 2006); IAEA Dir. Gen., *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, delivered to the IAEA Board of Governors*, IAEA Doc. GOV/2006/64 (Nov. 14, 2006).

⁵³ S.C. Res. 1737, ¶ 2, U.N. Doc. S/RES/1737 (Dec. 23, 2006).

⁵⁴ *Id.* ¶ 3. The definition of relevant weapons and equipment is specified in paragraph 3 with reference to other UN documents. See also ¶ 6 for the prohibition of relevant training, financial assistance and so forth, and ¶ 9 for exceptions.

⁵⁵ *Id.* ¶ 10.

⁵⁶ *Id.* ¶ 12. See also *id.*, Annex; *id.* ¶ 13 (listing exceptions to the application of the Resolution).

⁵⁷ *Id.* ¶ 23.

⁵⁸ *Id.* ¶ 24(c).

⁵⁹ Some in the American media nevertheless saw the resolution as a firm measure against Iran. See Elissa Gootman, *Security Council Approves Sanctions Against Iran Over Nuclear Program*, N.Y. TIMES, Dec. 24, 2006, at A8; James Rosen, *Sanctions Put*

Displeased, Iran called the Resolution illegitimate and vowed that it would not be strong-armed.⁶⁰ The Iranian parliament (Majles) passed an act urging the government to accelerate the pace of peaceful nuclear development and reconsider its cooperation with the IAEA.⁶¹ The IAEA issued another report on Iran on February 22, 2007. The report noted with approval Iran's provision of access to declared nuclear material and facilities⁶² and affirmed that the "Agency is able to verify the non-diversion of declared nuclear material in Iran."⁶³ However, the report went on to express dismay over what it saw as Iran's lack of cooperation and transparency about its undeclared nuclear material and the history of its nuclear program.⁶⁴ Without knowledge of these issues, concluded the report, the IAEA could not rest assured of the peaceful nature of Iran's current program.⁶⁵

On March 24, 2007, the Security Council issued another Resolution concerning Iran's nuclear activities. Resolution 1747 repeated the demand that Iran suspend enrichment-related activities⁶⁶ and affirmed the travel restrictions on individuals associated with Iran's nuclear program.⁶⁷ It added more entities to the list of those whose assets should be frozen.⁶⁸ Resolution 1747 imposed a ban on all sales and transfers of arms by Iran⁶⁹ and on sales and transfers of certain arms and knowledge of their use to Iran.⁷⁰ It banned all "grants, financial assistance, and concessional loans" to Iran except for "humanitarian and developmental purposes."⁷¹ The Resolution stated that its measures would be suspended if

New Pressure on Iran, SEATTLE TIMES, Dec. 24, 2006, at A1. *But see* Editorial, "Nyet" on Iran; Russia Has Turned a U.N. Sanctions Resolution on Tehran's Nuclear Program into a Demonstration of Western Weakness, WASH. POST, Dec. 24, 2006, at B6.

⁶⁰ See, e.g., UNSC Resolution 1737 Based on Imagination: Elham, ISLAMIC REPUBLIC NEWS AGENCY (IRNA), Dec. 25, 2006; Anti-Iranian UNSC Resolution Result of US Plot Against Iran, IRNA, Dec. 27, 2006.

⁶¹ See *Iran to Revise IAEA Co-operation*, BBC NEWS, Dec. 27, 2006, http://news.bbc.co.uk/2/hi/middle_east/6211561.stm; Nazila Fathi, *Iran to 'Revise' Any Relations with Monitors in Nuclear Area*, N.Y. TIMES, Dec. 28, 2006, at A3.

⁶² IAEA Dir. Gen., *Implementation of the NPT Safeguards Agreement and Relevant Provisions of Security Council Resolution 1737 (2006) in the Islamic Republic of Iran*, ¶ 26, delivered to the IAEA Board of Governors, IAEA Doc. GOV/2007/8 (Feb. 22, 2007).

⁶³ *Id.* ¶ 27.

⁶⁴ *Id.* ¶¶ 27-29.

⁶⁵ *Id.* ¶ 29.

⁶⁶ S.C. Res. 1747, ¶ 1, U.N. Doc. S/RES/1747 (Mar. 24, 2007); see also S.C. Res. 1737, *supra* note 53, ¶ 2.

⁶⁷ S.C. Res. 1747, *supra* note 66, ¶ 2.

⁶⁸ *Id.* ¶ 4, Annex I.

⁶⁹ *Id.* ¶ 5.

⁷⁰ *Id.* ¶ 6.

⁷¹ *Id.* ¶ 7.

Iran suspended enrichment- and reprocessing-related activities but that further measures under Article 41 of the UN Charter would be forthcoming in the event of Iran's noncompliance.⁷² Iran reiterated that "pressure" and "intimidation" would not work.⁷³

On April 9, 2007, Iran announced that it was capable of producing nuclear fuel on an industrial scale.⁷⁴ The announcement drew a sharp rebuke from the United States, which stated that Iran "continues to defy the international community and further isolate itself by expanding its nuclear programme."⁷⁵ The EU also expressed disapproval.⁷⁶ Despite these setbacks, negotiations intensified following Resolution 1747. The first round of talks occurred in late April 2007 between representatives of Iran and the EU in Ankara, Turkey.⁷⁷ Following these talks, which resulted in no breakthrough, EU foreign policy chief Xavier Solana urged

⁷² *Id.* ¶ 13.

⁷³ See Security Council 5647th Meeting (PM), *Security Council Toughens Sanctions Against Iran*, SC/8980 (Mar. 24, 2007), available at <http://www.un.org/News/Press/docs/2007/sc8980.doc.htm>.

⁷⁴ Iran "Enters New Nuclear Phase," BBC NEWS, Apr. 9, 2007, http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/6538957.stm. Contradictory reports after Iran's announcement cast some doubt over whether Iran had in fact achieved the declared capability. See "Only a Few Hundred Centrifuges Are Operational in Natanz," BBC PERSIAN, Apr. 12, 2007, http://www.bbc.co.uk/persian/iran/story/2007/04/070412_mf_nuc_baradei.shtml (quoting a Russian nuclear expert to the effect that Iran's production of nuclear fuel is not as advanced as it claims and quoting ElBaradei's statement that only a few hundred centrifuges, about ten times fewer than the number needed for industrial-scale fuel production, are operational in Natanz); Gordon Corera, *How Close Is Iran to a Nuclear Bomb?*, BBC NEWS, Feb. 10, 2007, http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/6348797.stm (explaining problems on the path of Iran's nuclear development). But see *Iran Nuclear Operations Confirmed*, BBC NEWS, Apr. 19, 2007, http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/6570167.stm (reporting a leaked IAEA report confirming the operation of over 1,300 centrifuges at Natanz).

⁷⁵ Iran Nuclear "Landmark" Angers US, BBC NEWS, Apr. 10, 2007, http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/6540083.stm (quoting an unnamed American national security official).

⁷⁶ *Id.* See also *Reactions to Iran's Obtaining Nuclear Fuel*, BBC PERSIAN, Apr. 10, 2007, http://www.bbc.co.uk/persian/iran/story/2007/04/070409_an-iran-reax.shtml.

⁷⁷ Vincent Boland, Iran and EU in "Constructive" Nuclear Talks, FIN. TIMES, Apr. 26, 2007, at 12; *Iran-EU Negotiations in Ankara*, BBC PERSIAN, Apr. 25, 2007, http://www.bbc.co.uk/persian/iran/story/2007/04/070425_an-iran.shtml. Then Iranian chief nuclear negotiator Ali Larijani later hinted at a dramatic proposal Iran had made during the Ankara talks, laconically suggesting that Iran had offered some concessions on uranium enrichment but the EU had declined. See *Larijani's Allusion to the West's Rejection of an Iranian Proposal*, BBC PERSIAN, May 31, 2007, http://www.bbc.co.uk/persian/iran/story/2007/05/070530_si-he-larijani-spain.shtml; see also Daniel Dombey, Tehran Hints at Fresh Ideas on Nuclear Dispute, FIN. TIMES, Apr. 27, 2007, at 4.

the United States to meet with Iran directly.⁷⁸ News that American and Iranian officials were to meet in Sharm el-Sheikh, Egypt during an international conference on Iraq raised hopes for a negotiated settlement.⁷⁹ But the meeting ended without substantive discussion when the Iranian foreign minister walked out of the room in protest to what he deemed the inappropriate dress of a female violinist entertaining the guests.⁸⁰

There were to be more United States-Iran talks. In two rounds of talks in late May and late July of 2006, American and Iranian officials met in Baghdad to discuss the security situation in Iraq.⁸¹ Though both sides were careful to emphasize that the negotiations concerned Iraq and not Iran's nuclear development, it was an improvement that Iran and the United States were talking directly and openly for the first time after the 1979 revolution.⁸² The meetings ended without a breakthrough on the Iran nuclear issue. Similarly, nothing groundbreaking came of Iran-EU talks.⁸³

Today Iran is by various estimates 5-10 years away from a nuclear bomb if it wishes to make one.⁸⁴ At the time of this writing a final show-

⁷⁸ *Solana Urges US to Talk to Iran*, BBC NEWS, Apr. 28, 2007, http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/6602413.stm.

⁷⁹ See Kirk Semple, *Iran to Attend Regional Talks on Iraq Violence*, N.Y. TIMES, Apr. 30, 2007, at A1; *Iran to Attend Key Iraq Meeting*, BBC NEWS, Apr. 29, 2007, http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/6604943.stm.

⁸⁰ Jonathan Beale, *Brief Encounters at Sharm el-Sheikh*, BBC NEWS, May 5, 2007, http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/6627557.stm (“So those landmark US-Iranian talks in full. Condoleezza Rice asks: ‘How are you foreign minister?’ and Manouchehr Mottaki replies: ‘Fine, thank you.’”).

⁸¹ On the first round of talks see Back to Talking: U.S., Iran Set the Stage for Greater Dialogue, PITTSBURGH POST-GAZETTE, May 30, 2007, at B6; Editorial, A Face to Face, Finally, S.F. CHRONICLE, May 30, 2007, at B8. On the second round of talks see Steve Negus, Iran to Join US on Iraq Security Body, FIN. TIMES, Jul 25, 2007, at 8; *End of Second Round of Direct Iran-US Negotiations*, BBC PERSIAN, Jul 24, 2007, http://www.bbc.co.uk/persian/iran/story/2007/07/070724_mf_iran_us_talks.shtml.

⁸² See *Solana Urges US to Talk to Iran*, *supra* note 78.

⁸³ *End of Larijani-Solana Negotiations Without a “Major Opening,”* BBC PERSIAN, May 31, 2007, http://www.bbc.co.uk/persian/iran/story/2007/05/070531_mf_nuc_larijani.shtml.

⁸⁴ See, e.g., Corera, *How Close Is Iran to a Nuclear Bomb?*, *supra* note 74 (citing various estimates); INTERNATIONAL INSTITUTE FOR STRATEGIC STUDIES, THE MILITARY BALANCE 2007 (2007) (“2–3 years away at the earliest”), excerpts available at <http://www.iiss.org/publications/the-military-balance/military-balance-2007-press-launch>; *UN Warns on Iran Nuclear Schedule*, BBC NEWS, May 24, 2007, http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/6687137.stm (quoting ElBaradei that “Even if Iran wanted to go for a nuclear weapon, it would not be before the end of this decade or sometime in the middle of the next decade,” adding that this estimate echoed the CIA view).

down and a major breakthrough in the Iran nuclear crisis both seem unlikely.⁸⁵

III. THE SHAKY “GRAND BARGAIN”: THE CURRENT NUCLEAR NON-PROLIFERATION REGIME

a. *Basics of the NPT Regime*⁸⁶

The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) opened for signature on July 1, 1968 and today claims a membership of all but four UN member states.⁸⁷ It is almost universally regarded as the

⁸⁵ This account of the history of the crisis is updated through September 13, 2007. One important development that has occurred since then is the publication, on December 4, 2007, of the November 2007 National Intelligence Estimate (NIE). (NIEs represent the authoritative assessment of the Director of National Intelligence (DNI), who is the head of the United States Intelligence Community, an umbrella group of 16 American intelligence agencies. National Intelligence Estimate, Iran: Nuclear Intentions and Capabilities (November 2007) [hereinafter NIE].) The November 2007 NIE concluded “with high confidence that in fall 2003, Tehran halted its nuclear weapons program.” *Id.* It concluded “with moderate confidence” that “Tehran had not restarted its nuclear weapons program as of mid-2007.” *Id.* It further concluded that the “assessment that Iran halted the program in 2003 primarily in response to international pressure indicates Tehran’s decisions are guided by a cost-benefit approach rather than a rush to a weapon irrespective of the political, economic, and military costs.” *Id.* The NIE was widely seen in American and international media as an effective rebuff to the increasingly bellicose rhetoric of the Bush administration on the Iran nuclear issue (President Bush had at one point even raised the specter of “World War III”), dramatically reducing the chances of a possible military strike against Iran. See, e.g., Paul Koring, *Top Spies Counter Bush’s Rhetoric on Iran*, GLOBE & MAIL, Dec. 4, 2007, at A1; Tim Harper, *Nuclear Weapons Bombshell for Bush; U.S. Spy Agencies Insist Tehran Scrapped Arms Bid in 2003, Despite White House Rhetoric*, TORONTO STAR, Dec. 4, 2007, at A1; ‘World War III’ on Hold - for the Moment, N. Z. HERALD, Dec. 6, 2007; Elizabeth Sullivan, *They Never Were the Axis of Crazy*, CLEVELAND PLAIN DEALER, Dec. 6, 2007, at B9. Days before this Note went to press, the United Nations Security Council issued a Resolution imposing new sanctions on Iran. See S.C. Res. 1803, U.N. Doc. S/RES/1803 (March 3, 2008); *UN Approves New Sanctions on Iran*, BBC NEWS, Mar. 3, 2008, http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/7274902.stm.

⁸⁶ What follows in this subsection is a non-controversial bare-bones description of the basics of the NPT regime, based on the text of the NPT. Similar descriptions can be found in Amir Azaran, *NPT Where Art Thou? The Nonproliferation Treaty and Bargaining: Iran as a Case Study*, 6 CHI. J. INT’L L. 415, 418-20 (2005-2006); Richard L. Williamson, Jr., *Law and the H-Bomb: Strengthening the Nonproliferation Regime to Impede Advanced Proliferation*, 28 CORNELL INT’L L.J. 71, 118 (1995).

⁸⁷ Non-signatories are India, Israel, North Korea (at one time a signatory), and Pakistan. See <http://disarmament.un.org/TreatyStatus.nsf> for a list of signatories. See also <http://disarmament.un.org/wmd/npt/index.html>.

linchpin of the global nuclear non-proliferation regime.⁸⁸ The NPT sees two kinds of states in the world: “nuclear-weapon states,” i.e. those which had “manufactured and exploded a nuclear weapon or other nuclear explosive device prior to January 1, 1967,” and “non-nuclear weapon states,” i.e. all other states.⁸⁹ Its operation revolves around three basic premises, commonly referred to as the “three pillars” of the NPT regime.

The first pillar attempts to prevent non-nuclear weapon states from acquiring nuclear weapons. To this end it prohibits nuclear-weapon states from transferring nuclear weapons to non-nuclear weapon states or in any way assisting or encouraging the latter in the production of nuclear weapons.⁹⁰ It also prohibits non-nuclear weapon states from receiving nuclear weapons or assistance in producing them and from manufacturing or otherwise acquiring nuclear weapons.⁹¹ The second pillar guarantees to all states parties to the treaty the “inalienable right” to “develop research, production and use of nuclear energy for peaceful purposes.”⁹² It imposes an obligation on all parties to contribute to the development of nuclear energy for peaceful purposes, especially in non-nuclear-weapon states and with due consideration to the needs of the developing

⁸⁸ See, e.g., Matin Zuberi, *The Nuclear Non-proliferation Regime*, in WEAPONS OF MASS DESTRUCTION: OPTIONS FOR INDIA 79, 79 (Raja Menon ed., 2004) [hereinafter *Nuclear Nonproliferation*] (calling the NPT the “crown jewel” of the nuclear nonproliferation regime); THOMAS GRAHAM, JR., COMMON SENSE ON WEAPONS OF MASS DESTRUCTION 50 (2004) (describing the NPT as “the cornerstone of security”); Chamundeeswari Kuppaswamy, *Is the Nuclear Non-Proliferation Treaty Shaking at Its Foundations? Stock Taking After the 2005 NPT Review Conference*, 11 J. CONFLICT & SECURITY L. 141, 141 (“NPT is the only international convention that addresses non-proliferation issues comprehensively.”); Azaran, *supra* note 86, at 415 (stating that the NPT “occupies center stage in the international nonproliferation regime”); Williamson, *supra* note 86, at 117-18 (calling the NPT the “centerpiece” of the nuclear nonproliferation regime).

⁸⁹ NPT, *supra* note 35, art. IX(3). The states possessing nuclear weapons at the time NPT opened for signature were (in order of acquiring nuclear capability) the United States, the USSR, the UK, France, and China. Since then, India, Israel, Pakistan, and North Korea have been added to the list of de facto nuclear weapon states. Other states, including South Africa and some former Soviet republics, gained nuclear weapons but later gave them up. For brief and useful data and chronology see GRAHAM, *supra* note 88, at 160-75; Robert S. Norris & Hans M. Kristensen, *Global Nuclear Stockpiles, 1945-2006*, BULL. OF THE ATOMIC SCI., July-Aug. 2006, at 64. Under a deal reached on February 13, 2007, North Korea appears to be disarming. See Barbara Slavin, *Deal Calls for Halt in N. Korea Nuclear Efforts*, USA TODAY, Feb. 13, 2007, at 8A; Anne Penketh, *North Korea Agrees to Nuclear Freeze in Return for Foreign Aid*, INDEPENDENT, Feb. 14, 2007, at 22. It remains to be seen whether the deal will hold.

⁹⁰ NPT, *supra* note 35, art. I.

⁹¹ NPT, *supra* note 35, art. II.

⁹² NPT, *supra* note 35, art. IV(1).

world.⁹³ The deal enshrined in the first two pillars of the NPT—namely the non-nuclear weapon states’ pledge not to develop nuclear weapons in exchange for the nuclear-weapon states’ pledge of assistance in realizing the non-nuclear weapon states’ right to peaceful nuclear energy—has been popularly dubbed the “grand bargain” of the NPT.⁹⁴ To regulate the interaction of the first and second pillars, the NPT requires non-nuclear weapon states to accept safeguards, set forth in separate agreements with the IAEA and supervised by the IAEA, to verify that nuclear energy is not diverted from lawful peaceful purposes to prohibited military purposes.⁹⁵

The third pillar of the NPT requires parties to negotiate in good faith on measures “relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a Treaty on general and complete disarmament.”⁹⁶ Finally, the NPT contains an exit mechanism, giving each party the right to withdraw from the treaty with three months’ advance notice if the party decides that “extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country.”⁹⁷

In accordance with the NPT,⁹⁸ conferences of states parties have been held every five years since 1970 to review the operation of the treaty and ensure its effectiveness. Originally set to expire after twenty-five years,⁹⁹ the NPT’s legal operation was indefinitely extended by the states parties at the 1995 NPT Review and Extension Conference.¹⁰⁰

b. *The NPT in the Real World: Practical Operation and Challenges*

Like most international legal instruments, the NPT does not work exactly as it is supposed to on paper. This section reviews the practical operation of the NPT regime and considers challenges to its effectiveness. The focus will be on points of significance to the Iran nuclear crisis.

From the point of view of nuclear-weapon states (the “nuclear haves”), the Achilles heel of the NPT is that it permits a non-nuclear weapon state

⁹³ NPT, *supra* note 35, art.IV(2)-V.

⁹⁴ James Traub, *The Netherworld of Nonproliferation*, N.Y. TIMES MAG., June 13, 2004, at 49.

⁹⁵ NPT, *supra* note 35, art. III.

⁹⁶ NPT, *supra* note 35, art. VI.

⁹⁷ NPT, *supra* note 35, art. X(1). So far only North Korea has invoked this provision to withdraw from the NPT. See *N Korea Withdraws from Nuclear Pact*, BBC NEWS, Jan. 10, 2003, <http://news.bbc.co.uk/2/hi/asia-pacific/2644593.stm>; *N Korea Quits Nuclear Treaty: Text*, BBC NEWS, Jan. 10, 2003, <http://news.bbc.co.uk/2/hi/asia-pacific/2644613.stm>.

⁹⁸ NPT, *supra* note 35, art. VIII(3).

⁹⁹ NPT, *supra* note 35, art. X(2).

¹⁰⁰ The Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, *Extension of the Treaty on the Non-Proliferation of Nuclear Weapons*, NPT/CONF.1995/L.6 (May 11, 1995).

to develop a technologically advanced nuclear program under Article IV, which could take that state to the brink of nuclear weapon production capability, and then withdraw from the NPT under Article X(1).¹⁰¹ Such a shift is not very difficult because much of the equipment and technology required for peaceful nuclear generation can also be used to make weapons.¹⁰² I will call this feature the problem of dual use. This potential weakness was noticed even before the NPT went into effect. As early as May 1968, a prescient U.S. State Department research paper observed that a non-nuclear weapon state could “achieve an advanced state of nuclear pregnancy, while remaining within the strictures of the NPT.”¹⁰³ The issue continues to worry nuclear weapon states. In a February 2004 speech outlining U.S. strategy on WMD non-proliferation, President George W. Bush referred to the dual use problem as a “loophole” in the NPT exploited by Iran and North Korea to try to acquire nuclear weapons.¹⁰⁴

NPT Article III provisions, calling for safeguards mandated and supervised by the IAEA, partially cure the dual use problem by enabling close international monitoring of a non-nuclear weapon state’s nuclear energy programs. The IAEA Additional Protocol, conceived after the discovery of Iraq’s hitherto well-concealed and relatively advanced nuclear weapons program in the wake of the 1991 Gulf War,¹⁰⁵ attempts to further tighten this so-called loophole. Adopted by the IAEA in 1997, the Additional Protocol is an agreement between a non-nuclear weapon state and the IAEA allowing for more intrusive IAEA inspections than those regularly allowed under the NPT.¹⁰⁶ Despite these curative measures, the dual use problem remains at the heart of nuclear-weapon states’ objections to the practical implementation of the NPT. The dual use problem explains why Iran’s assertion that it has a right to peaceful nuclear tech-

¹⁰¹ See Azaran, *supra* note 86, at 420; CORERA, *SHOPPING FOR BOMBS*, *supra* note 6, at 72; Albert Wohlstetter, *Spreading the Bomb Without Quite Breaking the Rules*, 25 FOREIGN POL’Y 88, 88 (1976-77).

¹⁰² For more details see CORERA, *SHOPPING FOR BOMBS*, *supra* note 6, at xvi, 72; Kuppuswamy, *supra* note 88, at 152; Wohlstetter, *supra* note 101, at 89-90.

¹⁰³ Quoted in Matin Zuberi, *The Nuclear Non-Proliferation Regime in Crisis, in WEAPONS OF MASS DESTRUCTION*, *supra* note 88, 129, 184 [hereinafter *Crisis*].

¹⁰⁴ George W. Bush, President Announces New Measures to Counter the Threat of WMD, Remarks by the President on Weapons of Mass Destruction Proliferation, Address Before National Defense University (Feb. 11, 2004) (transcript available at <http://www.whitehouse.gov/news/releases/2004/02/20040211-4.html>).

¹⁰⁵ Zuberi, *Nuclear Nonproliferation*, *supra* note 88, at 93-95; GRAHAM, *supra* note 88, at 79-80.

¹⁰⁶ See International Atomic Energy Agency, Model Protocol Additional to the Agreement(s) between State(s) and the International Atomic Energy Agency for the Application of Safeguards, INFCIRC/540 (Corrected) (September 1997). As noted in Part II, Iran agreed to comply with the Additional Protocol in December 2003 but withdrew from it in February 2006. See *supra* notes 19 and 42 and accompanying text.

nology under the NPT does not ameliorate worries about the possible future diversion of its nuclear program to non-peaceable ends. Because Iran can develop ostensibly peaceful nuclear technology under NPT Article IV and later turn around and “go nuclear,” goes the argument, Iran needs to take additional measures to assure all parties of its peaceful intentions.¹⁰⁷

If nuclear weapon states have this one central objection to the NPT regime, non-nuclear weapon states (the “nuclear have-nots”) have a long list of criticisms. Consider first Articles IV(2) and V of the NPT, which require assistance to non-nuclear weapon states for the development of

¹⁰⁷ There are two routes to the same conclusion. One may argue that Iran is correct to assert that it has a right to peaceful nuclear technology under Article IV(1), which reads in its entirety: “Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with articles I and II of this Treaty.” Alternatively, one may argue that Iran’s position is not legally correct because Article IV(1) allows access to peaceful nuclear technology only “in conformity with articles I and II of this Treaty,” and Iran is not in conformity therewith because of suspicions surrounding its nuclear program. One may contend that the latter interpretation is superior because it reads Article IV(1) in context rather than in isolation, takes heed of the central purpose of the NPT, and is more in accord with the principle of good faith performance. See Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [Hereinafter VCLT] (“A treaty shall be interpreted *in good faith* in accordance with the ordinary meaning to be given to the terms of the treaty *in their context* and *in the light of its object and purpose*”) (emphasis added); see also *id.*, art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith”). In response, it may be argued that the latter interpretation reduces the rights of non-nuclear weapon states under the NPT to a nullity. If a nuclear have is allowed to halt the peaceful nuclear development of a nuclear have-not by simply suggesting that it has non-peaceful intentions, the have-nots are deprived of the sole concession provided to them under the NPT, turning the treaty into a one-way pledge. The ideal approach to determining which side is legally correct would be to ask whether evidence of Iran’s actions evinces a high enough probability of non-peaceful intentions to support the conclusion that further enrichment would not be “in conformity with articles I and II.” Under this approach, one may argue that Iran has not acted “in conformity with articles I and II” because Iran’s history of concealment and deceit demonstrate that it has violated its Article II commitment “not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.” This argument is vulnerable to the counter-argument that it presumes the conclusion that Iran is seeking nuclear weapons. Concealment and deceit, Iran could argue, are best explained by the long history of post-revolutionary isolation and distrust, especially during the Iraq-Iran war, and do not inexorably lead to the conclusion that Iran is seeking to develop nuclear weapons. At any rate, answering the legal question, even if intellectually possible, would be futile. The point is that Iran’s assurances of peaceful intentions are not enough to satisfy those alarmed by its nuclear development. Whether Iran’s position is correct under the NPT is beside the point.

peaceful nuclear energy. From the start of the NPT regime, the United States kept secret¹⁰⁸ and used for commercial gain¹⁰⁹ its virtual uranium enrichment monopoly, a by-product of its massive weapons program, rather than assisting non-nuclear weapon states to cheaply obtain such technology, as required by the NPT. When Dutch and West German groups started investigating the gas centrifuge technology of enrichment, the United States made the research classified rather than promote the diffusion of scientific knowledge.¹¹⁰

In 1980, at the conclusion of the International Nuclear Fuel Cycle Evaluation meetings, a series of technical conferences on the growth of nuclear technology and its proliferation implications, the non-proliferation regime was modified to distinguish between “sensitive” non-nuclear weapon states, which were not allowed access to key civilian nuclear technology and equipment, and other non-nuclear weapon states, mostly the industrialized countries, which were allowed full access to the same.¹¹¹ Currently, non-nuclear weapon states parties to the NPT, except some developed states like Germany and Japan, are not allowed uranium enrichment and reprocessing technologies, even under IAEA safeguards.¹¹² These political differentiations hardly satisfy the “nondiscriminatory basis” standard of NPT’s Article V. To some in the developing world, they add “another layer of discrimination” to the NPT regime.¹¹³

Furthermore, states possessing advanced nuclear technology and equipment act in association through organizations like the Nuclear Suppliers Group to restrict the flow of nuclear knowledge by imposing stringent “licensing” requirements on the transfer of nuclear material capable of both peaceful and militaristic use.¹¹⁴ From the point of view of the nuclear haves, such extra-NPT measures are justifiable and necessary in view of the dual use problem. To the have-nots, however, this regime

¹⁰⁸ Pierre Lellouche, *Breaking the Rules without Quite Stopping the Bomb: European Views*, 35 INT’L ORG. 39, 40 (1981).

¹⁰⁹ Zuberi, *Nuclear Nonproliferation*, *supra* note 88, at 84; Lellouche, *supra* note 108, at 45-46.

¹¹⁰ Zuberi, *Nuclear Nonproliferation*, *supra* note 88, at 84. The American monopoly ended in the 1970s, as European countries acquired the capability for reactor manufacturing and fuel cycle servicing, surpassed the United States in reprocessing and fast breeder technologies, and freed themselves of dependence on American enriched uranium. Lellouche, *supra* note 108, at 41. *See generally* Paul L. Joskow, *The International Nuclear Industry Today*, FOREIGN AFF., July 1976.

¹¹¹ Zuberi, *Nuclear Nonproliferation*, *supra* note 88, at 93.

¹¹² *Id.* at 98.

¹¹³ *Id.* at 93.

¹¹⁴ *See, e.g.*, IAEA Information Circular, *Communication Received from Certain Member States Regarding Guidelines for the Export of Nuclear Material, Equipment or Technology*, IAEA Doc. INFCIRC/254 (Feb. 1978); *see also* <http://www.nuclearsuppliersgroup.org>.

“almost abrogates Article IV of the NPT.”¹¹⁵ The problem acquires an acute complication in Iran’s case. As will be seen, it lies at the heart of a vicious cycle of distrust: the West refuses Iran’s demands for guarantees of technological assistance for fear that the technologies will be used for nuclear weapons production; Iran in turn refuses to suspend enrichment because it cannot receive meaningful guarantees of foreign technological assistance and so must rely on its own capability to ensure the viability of a nuclear power generation program.

Another deep-seated objection of non-nuclear weapon states to the NPT is what they see as its fundamentally discriminatory structure. They claim that by dividing the world into nuclear haves and nuclear have-nots and assigning different rights and obligations to the two, the NPT is designed to preserve the monopoly of the nuclear haves on nuclear weaponry and the power and prestige that comes with it.¹¹⁶ What is it, they ask, but the simple succumbing of law to power, that can justify a policy that enjoins some countries (which happen to be the weak) from developing nuclear weapons but endorses the possession of nuclear weapons by other countries (coincidentally the powerful)? This argument was part of China’s list of reasons for rejecting the NPT for more than two decades, before it joined the regime in exchange for a host of concessions in 1992.¹¹⁷ India, still outside the NPT, maintains a similar line. Matin Zuberi, veteran Indian statesman and nuclear authority, puts it concisely: “As the NPT is basically a discriminatory treaty, India decided not to join it.”¹¹⁸

The NPT’s third pillar, codified in Article VI, offers one potential response to this objection. Article VI requires states parties to work toward total nuclear disarmament.¹¹⁹ This part of the NPT bargain, it appears, mitigates the general discriminatory structure of the treaty by providing for eventual equalization. There are two problems with this response.

First, the obligations imposed on non-nuclear weapon states are concrete and verifiable, especially given IAEA inspections and even more so since the advent of the Additional Protocol, whereas the nuclear weapon states’ duties are vague and aspirational.¹²⁰ Article VI of the NPT pro-

¹¹⁵ Zuberi, *Nuclear Nonproliferation*, *supra* note 88, at 98.

¹¹⁶ See Azaran, *supra* note 86, at 421; CORERA, *SHOPPING FOR BOMBS*, *supra* note 6, at 74-75, 247; Zuberi, *Nuclear Nonproliferation*, *supra* note 88, at 80, 84-87; JOHN SIMPSON & DARRYL HOWLETT, *THE FUTURE OF THE NON-PROLIFERATION TREATY* 4-5 (1995).

¹¹⁷ See Zuberi, *Crisis*, *supra* note 103, at 135-37.

¹¹⁸ Zuberi, *Nuclear Nonproliferation*, *supra* note 88, at 80.

¹¹⁹ See *supra* Part III(a).

¹²⁰ China and India have both made arguments to this effect. For the Chinese position see, for example, Geoffrey Hunt, *China’s Case Against the Nuclear Non-Proliferation Treaty: Rationality & Morality*, 3 J. OF APP. PHIL. 183 (1986). WEAPONS

vides for eventual nuclear disarmament, but fails to specify any concrete measures or any timetable (except for the phrase “at an early date”) that have to be observed in reaching that goal. It sets out a broad goal but leaves the manner and time of implementation unspecified. As such it imposes but a loose restraint, especially since the duty is affirmative rather than prohibitive.¹²¹

The second problem is a bit more acute: The NPT’s third pillar has been committed to oblivion. What NPT Article VI requires of nuclear weapon states may be vague, but it does require something. According to non-nuclear weapon states, nuclear-weapon states have treated Article VI as though it requires nothing.¹²² Despite numerous arms control agreements during the Cold War and some afterwards,¹²³ the non-nuclear weapon states see very little indication of the nuclear haves’ compliance with their NPT Article VI obligations. They seem to have reason. At the end of 2002, the United States and Russia maintained 10,640 and 8,600 nuclear warheads, respectively.¹²⁴ Despite the end of the Cold War, the total stockpile of NPT nuclear weapon states’ nuclear warheads has not even halved since 1970 (from 38,153 at the end of 1970 to 20,190 at the end of 2002).¹²⁵ These figures are all the less impressive when one considers that they do not account for thousands of tactical nuclear weapons which have been withdrawn from forward positions, and that the “decline” in deployed warheads masks the growth in clandestine nuclear weapons.¹²⁶ The United States has conducted well over 1,000 nuclear

OF MASS DESTRUCTION: OPTIONS FOR INDIA (Raja Menon ed., 2004), two chapters of which are cited throughout this Note, provides the viewpoint of Indian authorities.

¹²¹ Similarly, NPT Articles IV(2) and V require assistance to non-nuclear weapon states for the development of peaceful nuclear energy. But these obligations are diluted by the phrase “in a position to do so” in Article IV(2), and are not concrete enough to be verifiable and justiciable. Yet, as explored immediately below, the non-nuclear weapon states’ objections with regard to technological assistance are directed not so much at the text of Articles IV(2) and V but at the way the text has, or rather has not, been put into practice.

¹²² See Hon. Syed Hamid Albar, Minister of Foreign Affairs of Malay., Statement on Behalf of the Group of Non-Aligned States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons at the General Debate of the 2005 Review Conference of the Parties to Treaty on the Non-Proliferation of Nuclear Weapons (May 2, 2005) *passim* [hereinafter Malaysia Statement].

¹²³ See GRAHAM, *supra* note 88, at 35-48 for an overview of post-World War II international arms control agreements.

¹²⁴ Nat’l Res. Def. Council, *Table of Global Nuclear Weapons Stockpiles, 1945-2002*, <http://www.nrdc.org/nuclear/nudb/datab19.asp> (last visited Mar. 3, 2008).

¹²⁵ *Id.*

¹²⁶ Nat’l Res. Def. Council, *Faking Nuclear Restraint: The Bush Administration’s Secret Plan for Strengthening U.S. Nuclear Forces*, <http://www.nrdc.org/nuclear/restraint.asp> (last visited Mar. 3, 2008) (calling the Bush administration’s count of the United States nuclear stockpile “an accounting system worthy of Enron”); Hans M.

weapon tests, more than the combined total of the rest of the world, followed by the Soviet Union and Russia (715 tests), France (210 tests), China and Britain (45 tests each).¹²⁷

And this despite the fact that non-nuclear weapon states emphasized a ban on nuclear weapon tests as their primary quid pro quo for permanently foreswearing nuclear weapons during NPT negotiations in 1968.¹²⁸ The importance of this condition is apparent in the NPT itself¹²⁹ and in statements made by NPT negotiators in 1968.¹³⁰ Non-nuclear weapon states have reiterated their disappointment with the nuclear haves' failure to carry their end of the bargain in the area of disarmament at NPT Review Conferences.¹³¹ Their concerns have found voice in various international declarations. The statement of Principles and Objectives agreed to at the conclusion of the 1995 NPT Review and Extension Conference (the same conference that established the indefinite extension of the NPT) reiterated the "the ultimate goals of the complete elimination of nuclear weapons and a treaty on general and complete disarmament,"¹³² reaffirmed the Article VI commitments of the nuclear weapon states to pursue good faith negotiations on nuclear disarmament,¹³³ called for the completion of a Comprehensive Test Ban Treaty (CTBT) by no later than 1996,¹³⁴ and called for nuclear-weapon states' "determined pursuit" of "systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goal of eliminating those weapons."¹³⁵ In the same year, UN Security Council Resolution 984 urged all states to uphold their commitments under Article VI of the NPT to pursue good faith negotiations in order to bring about total nuclear disarmament, which the Resolution recognized as a "universal goal."¹³⁶ Similarly, the Final Document of the 2000 NPT Review Conference urged an "unequivocal under-

Kristensen, *Bomb Deal A Dud, Part One*, BULL. OF THE ATOMIC SCI., Jan.-Feb. 2002, at 25.

¹²⁷ GRAHAM, *supra* note 88, at 75.

¹²⁸ *Id.* at 74, 80.

¹²⁹ NPT, *supra* note 35, art. VI (calling for measures leading to "cessation of the nuclear arms race at an early date" and to total nuclear disarmament). Calling for such measures a fortiori contemplates a ban on nuclear explosive tests. See also *id.*, pmbl. ("Recalling the determination expressed by the Parties to the 1963 Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water in its Preamble to seek to achieve the discontinuance of all test explosions of nuclear weapons for all time and to continue negotiations to this end").

¹³⁰ *Id.*, pmbl.

¹³¹ See, e.g., Malaysia Statement, *supra* note 122.

¹³² NPT Review Extension Conference, *Principles and Objectives for Nuclear Non-Proliferation and Disarmament*, pmbl, NPT/CONF.1995/L.5 (May 9, 1995).

¹³³ *Id.* ¶ 3.

¹³⁴ *Id.* ¶ 4(a).

¹³⁵ *Id.* ¶ 4(c).

¹³⁶ S.C. Res. 984, ¶ 8, U.N. Doc. S/RES/984 (Apr. 11, 1995).

taking by the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament,¹³⁷ reaffirmed the desirability of the cessation of nuclear weapons explosions,¹³⁸ and called on states to maintain the moratorium on nuclear testing pending the entry into force of the Comprehensive Test Ban Treaty (CTBT).¹³⁹

Despite the weight of international consensus to the contrary, the nuclear haves, most prominently the United States, have increasingly moved away from upholding their part of the NPT bargain. A wave of unilateral American actions in disregard of the NPT began in 1999 with the U.S. Senate's rejection of the CTBT.¹⁴⁰ The CTBT aimed to create a comprehensive international regime to accomplish a worldwide ban on nuclear test explosions.¹⁴¹ It had been provided for at the urging of the developing world during the 1995 Extension and Review Conference and had already been ratified by Russia, Britain, and France by the time the U.S. Senate rejected it. The U.S. rejection effectively suspended the Treaty's operation in mid-air, as the backing of the world's most powerful nuclear weapon state and leading nuclear tester was widely seen as essential to its viability. After the U.S. refused to ratify the CTBT, non-nuclear weapon states became increasingly reluctant to submit to the IAEA Additional Protocol.¹⁴² For this reason, IAEA Director General Mohammed ElBaradei called the Senate rejection "a devastating blow to our efforts to gain acceptance of more intrusive inspections of nuclear facilities around the world."¹⁴³ Another senior IAEA official warned that, as a result of the U.S. rejection, "[e]ven reliable countries are dragging their feet, asking why they should accept new burdens if America is

¹³⁷ The 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Apr. 24 - May 19, 2000, *Final Document*, Article VI and eighth to twelfth preambular paragraphs, ¶ 15(6), NPT/CONF.2000/28 (Vol. I, Parts I and II) (May 22, 2000), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N00/453/64/PDF/N0045364.pdf?OpenElement> [hereinafter 2000 Review Conference].

¹³⁸ *Id.* ¶ 4.

¹³⁹ *Id.* ¶ 15(2). As will be seen, the CTBT has not yet entered into force, in violation of the 1995 statement of Principles and Objectives.

¹⁴⁰ See Deborah McGregor, *US Senate Rejects Nuclear Test Ban Treaty*, FIN. TIMES, Oct. 14, 1999, at 1. The opening of this news story effectively captures the international mood: "The US Senate rejected a nuclear test ban treaty yesterday, in a stunning foreign policy defeat for President Bill Clinton that leaves the future of global arms control in limbo."

¹⁴¹ See Comprehensive Nuclear-Test-Ban Treaty, Sept. 24, 1996, 35 I.L.M. 1439 (1996), available at http://www.ctbto.org/treaty/treaty_text.pdf; see also GRAHAM, *supra* note 88, at 39, 55, 58.

¹⁴² GRAHAM, *supra* note 88, at 76-77.

¹⁴³ William Drozdiak, *Missile Shield Eroding U.S. Arms Control Goals*, WASH. POST, June 15, 2000, at A24.

turning its back on nuclear disarmament.”¹⁴⁴ The U.S. rejection also affected the attitudes of the nuclear haves. India, which had indicated a willingness to ratify the CTBT, declared itself “off the hook” after the U.S. Senate rejected the treaty.¹⁴⁵ China and Israel await U.S. ratification.¹⁴⁶ Furthermore, evidence suggests that, in anticipation of CTBT ratification, the United States had devised schemes to maneuver around and subvert the purpose of a test ban treaty. These schemes reportedly included a \$4.5-billion project for the construction of a “virtual testing” regime to conduct nuclear explosions in laboratories to replace underground testing, the information from which would be used to improve existing weapons and design new ones.¹⁴⁷ Other nuclear weapon states had similar projects in the works.¹⁴⁸

The United States followed its 1999 rejection of the CTBT with withdrawal from the Anti-Ballistic Missile (ABM) Treaty in 2002.¹⁴⁹ Having been in force for thirty years, the ABM Treaty was considered a milestone of nuclear arms control. The U.S. withdrawal was a dramatic setback. It violated U.S. obligations under Article VI of the NPT. It also contradicted the 1995 Review and Extension Conference’s statement of Principles and Objectives, and the Final Document of the 2000 Review Conference. Another setback was the 2002 Treaty of Moscow between the United States and Russia concerning reductions in strategic nuclear weapons.¹⁵⁰ It contained such minor obligations as compared to predecessor SALT and START agreements that Thomas Graham, a leading American arms control expert who has been involved in negotiating virtually every major international arms control and non-proliferation

¹⁴⁴ *Id.* Note that despite the Senate non-ratification, because then president Clinton had signed the CTBT, one could argue that the United States is still legally bound under Article 18 of the VCLT not to conduct any nuclear explosive tests (and carry forward other obligations under the CTBT) pending the Treaty’s ratification, until it formally announces its intention not to ratify. VCLT, *supra* note 107, art. 18. There could be an argument to the contrary, on the basis that the U.S. intention not to become party is clear, *id.*, art. 18(a), or that in any event the entry into force of the CTBT has been “unduly delayed.” *Id.*, art. 18(b).

¹⁴⁵ GRAHAM, *supra* note 88, at 84.

¹⁴⁶ *Id.*

¹⁴⁷ See John Burroughs & Jacqueline Cabasso, *Nuclear Weapons Testing: Now and Forever?*, INESAP INFO. BULL. No. 6, (Int’l Network of Engineers & Scientists Against Proliferation), July 1995, at 1, 4-6.

¹⁴⁸ *Id.* at 6.

¹⁴⁹ See Frank James, *Bush Officially Withdraws U.S. from 1972 ABM Treaty*, CHI. TRIB., June 14, 2002, at N4.

¹⁵⁰ Treaty Between the United States of America and the Russian Federation On Strategic Offensive Reductions, U.S.-Russ., May 24, 2002, 41 I.L.M. 799 (2002), available at <http://www.state.gov/t/ac/trt/18016.htm#1>.

agreement of the past 30 years,¹⁵¹ has called it an “abandon[ment]” of the “strategic arms control process.”¹⁵² Yet another sign of regress can be found in the December 2001 U.S. Nuclear Posture Review (NPR).¹⁵³ The NPR discusses the advent of new nuclear weapon delivery systems two to three decades into the future, suggesting continued possession and development of new nuclear weapons in contravention of NPT Article VI obligations.¹⁵⁴ The same document also recommends continued reliance on nuclear weapons along with conventional weapons and a reinvigoration of the U.S. nuclear stockpile, including production of new nuclear weapons,¹⁵⁵ again betraying a (by now characteristic) U.S. disregard for its obligations under the NPT.

This list of failures in nuclear arms reduction is complemented by alarming developments in the area of no-first-use policy. “No-first-use” pledges or “negative security assurances” are formal assurances by states possessing nuclear weapons that they will not use nuclear weapons against non-nuclear weapon states except if attacked by the latter in association or alliance with a nuclear weapon state. They have been a central request of non-nuclear weapon states. Such assurances by the United States, USSR, and Britain at the 1978 first UN special session on disarmament worked as a major incentive for many states to join the NPT.¹⁵⁶ Repeated by the United States, Russia, Britain and France at the 1995 NPT Review and Extension Conference, they were an indispensable condition for the non-nuclear weapon states’ acquiescence to the NPT’s indefinite extension.¹⁵⁷ UN Security Council Resolution 984 (1995) recognized the legitimacy of the non-nuclear weapon states’ interest in negative security assurances,¹⁵⁸ noted with appreciation the assurances given by nuclear weapon states,¹⁵⁹ and provided for Security Council involvement in case of use or threat of use of nuclear weapons against non-nuclear weapon states.¹⁶⁰ The Final Document of the 2000 NPT Review

¹⁵¹ See biography of Thomas Graham at <http://www.americanambassadors.org/index.cfm?fuseaction=members.view&memberid=101> (last visited Mar. 3, 2008).

¹⁵² GRAHAM, *supra* note 88, at 65.

¹⁵³ This was the second (the first was in 1994) of two post-Cold War U.S. Department of Defense reviews of U.S. nuclear forces and nuclear doctrine. The NPR was classified, but portions were leaked to the press. Excerpts of the leaked portions are available at <http://www.globalsecurity.org/wmd/library/policy/dod/npr.htm> (last visited Mar. 3, 2008).

¹⁵⁴ *Id.* at 41-49; GRAHAM, *supra* note 88, at 68.

¹⁵⁵ NPR, *passim*; Zuberi, *Crisis*, *supra* note 103, at 181.

¹⁵⁶ GRAHAM, *supra* note 88, at 69.

¹⁵⁷ *Id.* at 69-70. China had maintained an absolute no first use policy as an integral part of its nuclear doctrine since its first nuclear test. *Id.*

¹⁵⁸ S.C. Res. 984, pmbl, ¶ 2, U.N. Doc. S/RES/984 (Apr. 11, 1995).

¹⁵⁹ *Id.* ¶ 1.

¹⁶⁰ *Id.* ¶¶ 3-6.

Conference likewise recognized that legally binding negative security assurances strengthen the NPT regime.¹⁶¹

The reason for the nuclear have-nots' eagerness for negative security assurances is self-evident. "After all," as Graham has written, "if a non-nuclear weapon state is going to permanently forswear nuclear weapons, the least it can expect from its nuclear weapon state treaty partners is that it will not be attacked by them using nuclear weapons."¹⁶² Such obvious considerations notwithstanding, ever since the Bush doctrine of preemptive attack has become a dominant feature of U.S. national security policy, the United States has abandoned no-first-use in favor of a policy of "calculated ambiguity." This means that the United States threatens an "overwhelming" response to the use (not necessarily first use) of chemical or biological weapons by any actor against not only the United States homeland but also against U.S. friends, allies or U.S. forces abroad.¹⁶³ The United States does not rule out the use of nuclear weapons in this "overwhelming" response ("including through resort to all our weapons").¹⁶⁴ The December 2001 NPR not only does not embrace a no-first-use doctrine but implies possible uses of nuclear weapons against North Korea, Iran, Iraq, Syria, and Libya (at the time all non-nuclear weapon states parties to the NPT), as well as China and to a lesser extent Russia.¹⁶⁵

Perhaps no single statistic demonstrates the nuclear weapon states' disregard for the third pillar of the NPT more clearly than the fact that, just during the four weeks when the 1995 NPT Extension and Review Conference proceeded in New York with intense United States-led efforts to indefinitely extend the NPT,¹⁶⁶ the United States spent about \$780 million on nuclear weapons and continued to modernize its nuclear forces;

¹⁶¹ Final Document of the 2000 Review Conference, *supra* note 137, at "Article VII and the security of non-nuclear-weapon States," ¶ 2.

¹⁶² GRAHAM, *supra* note 88, at 70-71.

¹⁶³ Press Release, The White House, National Strategy to Combat Weapons of Mass Destruction (Dec. 11, 2002), available at <http://www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf>.

¹⁶⁴ *Id.* For a positive assessment of the strategy see Jason D. Ellis, *The Best Defense: Counterproliferation and US National Security*, WASH. Q., Summer 2003, at 115. For a criticism of such policy, written before the 2002 announcement of the "calculated ambiguity" strategy, see Scott D. Sagan, *The Commitment Trap: Why the United States Should Not Use Nuclear Threats to Deter Biological and Chemical Weapons Attacks*, 24 INT'L SEC. 85 (2000). For a critique of Sagan's criticism and Sagan's response see Susan B. Martin & Scott D. Sagan, *Correspondence: Responding to Chemical and Biological Threats*, 25 INT'L SEC. 193 (2001).

¹⁶⁵ 2001 NPR, *supra* note 153, at 16-17. It must also be noted that the NPR extensively discusses the integration of nuclear missile defense systems into the new U.S. nuclear strategy, an alarming prelude to the 2002 U.S. withdrawal from the ABM Treaty.

¹⁶⁶ On the extension campaign see Zuberi, *Crisis*, *supra* note 103, at 141-44.

Britain sent its newest Trident ballistic missile submarine on patrol armed with nuclear weapons; France completed the construction of a new facility to simulate nuclear weapons development; and Russia and China continued to produce new nuclear warheads.¹⁶⁷ In short, nuclear weapon states, in particular the United States, and especially under the George W. Bush administration, have clearly violated their NPT Article VI obligations.¹⁶⁸

Indeed, criticism of nuclear weapon state non-proliferation policy is no longer solely the province of the discontent in the developing world; it is now becoming the common view among authorities in pertinent international legal institutions and some in the nuclear weapon states themselves. Mohammed ElBaradei, IAEA Director General and recipient of the 2005 Nobel Peace Prize, has written, "A clear road map for nuclear disarmament should be established . . . We must abandon the unworkable notion that it is morally reprehensible for some countries to pursue weapons of mass destruction yet morally acceptable for others to rely on them for security – and indeed to continue to refine their capacities and postulate plans for their use."¹⁶⁹ Jimmy Carter, former U.S. President and winner of the 2002 Nobel Peace Prize, complained before the opening of the 2005 NPT Review Conference that "the United States and other nuclear powers seem indifferent to [the NPT's] fate," calling the United

¹⁶⁷ Hans M. Kristensen & Joshua Handler, *Changing Nuclear Targets*, INESAP INFO. BULL., No. 6, (Int'l Network of Engineers & Scientists Against Proliferation) July 1995, 1, 3.

¹⁶⁸ One objection that for considerations of space could not be treated in the body of this Note relates to the NATO member states' compliance with Articles I and II of the NPT. Evidence from documents originating in the U.S. foreign policy establishment, some recently declassified, tends to show that the United States and its allies in the North Atlantic Treaty Organization (NATO)—unilaterally and without making known to all other parties their reservations at the time of accession to the NPT, as required by Article 23 of the Vienna Convention on the Law of Treaties—interpreted the NPT to allow nuclear proliferation within NATO. See Zuberi, *Nuclear Nonproliferation*, *supra* note 88, at 81-82; Zuberi, *Crisis*, *supra* note 103, at 129-30. NATO argues that it is not in violation. There are interesting treaty law arguments on both sides. For starters see Otfried Nassauer, *Nuclear Sharing in NATO: Is it Legal?*, SCI. FOR DEMOCRATIC ACTION, May 2001, available at http://www.ieer.org/sdfiles/vol_9/9-3/nato.html; Martin Butcher et al., *NATO Nuclear Sharing and the NPT - Questions to Be Answered*, BERLIN INFO. CTR. FOR TRANSATLANTIC SEC., June 1997, available at <http://www.bits.de/public/researchnote/rn97-3.htm>; Karel Koster, *NATO Nuclear Doctrine and the NPT*, BRITISH AM. SEC. INFO. COUNCIL BRIEFING, June 29, 2004, available at <http://www.basicint.org/pubs/20040629NATO-nuclear-Koster.htm>; *NATO's Positions Regarding Nuclear Non-Proliferation, Arms Control and Disarmament and Related Issues*, <http://www.nato.int/issues/nuclear/position.html> (last visited Mar. 3, 2008).

¹⁶⁹ Mohamed ElBaradei, *Saving Ourselves From Self-Destruction*, N.Y. TIMES, Feb. 12, 2004, at A37.

States “the major culprit” in the erosion of the NPT.¹⁷⁰ Carter wrote, “While claiming to be protecting the world from proliferation threats in Iraq, Libya, Iran and North Korea, American leaders not only have abandoned existing treaty restraints but also have asserted plans to test and develop new weapons . . . They also have abandoned past pledges and now threaten first use of nuclear weapons against nonnuclear states.”¹⁷¹ Prominent American nuclear expert and diplomat Thomas Graham has extensively criticized nuclear weapon states for weakening the NPT by not holding up their part of the bargain and has called for increased U.S. compliance with NPT obligations.¹⁷² Even former U.S. Secretary of Defense Robert McNamara, hardly the most dovish of foreign policy thinkers, has characterized “current U.S. nuclear weapons policy as immoral, illegal, militarily unnecessary and dreadfully dangerous.”¹⁷³

The point of recognizing the legitimacy of some non-nuclear weapon states’ grievances is not that these states necessarily enjoy the moral upper hand in the nuclear non-proliferation debate. Rather, the aim is to undermine such a conclusion about the moral superiority of the nuclear weapon states’ position. Considering these criticisms dispels the rhetorically convenient myth that the two sides in the battle of nuclear proliferation are the freedom-loving and peace-preserving states opposed to proliferation on one front and the evil and rogue proliferators on the other.¹⁷⁴ The truth is that every state’s position on proliferation is to a large extent driven by security interests and other political considerations. The self-centered and unfounded presupposition of being in the right in the crusade against non-proliferation inhibits an understanding of the other side’s position. As such it is unhelpful to finding a mutually acceptable way forward. So it is with aversion to moralistic pronouncements and with sensitivity to the security priorities of the two sides that we approach the central question of how international law can aid in resolving the conflict over Iran’s nuclear development.

IV. A PROPOSED WAY FORWARD: POLITICS IN THE SHADOW OF THE LAW

One could approach the dispute over Iran’s nuclear development by asking which side is right. Who is “right” can have a narrow or a broad meaning. The narrow meaning is who is right in a strictly legal sense, i.e. whose position is more in conformity with the NPT. As should be apparent from the criticisms in Part III(b), the NPT is unlike the paradigmatic

¹⁷⁰ Jimmy Carter, *Saving Nonproliferation*, WASH. POST, Mar. 28, 2005, at A17.

¹⁷¹ *Id.*

¹⁷² GRAHAM, *supra* note 88, *passim*, for example 18, 50-51, 57-58.

¹⁷³ Robert S. McNamara, *Apocalypse Soon*, 143 FOREIGN POL’Y 29, 29 (2005).

¹⁷⁴ For an expression of this myth see for example President Bush’s speech outlining U.S. WMD proliferation policy. President Announces New Measures to Counter the Threat of WMD, *supra* note 104.

domestic legal instrument, deviation from which is anomalous and commonly regarded as wrong. The NPT has been violated left and right. It seems dysfunctional in light of the domestic comparison (though, as will be seen, it is a functional international legal instrument insofar as it has worked with a relatively high degree of success to help deter nuclear proliferation). So to pose the question who is right in the narrow legal sense is unrealistic and unproductive.¹⁷⁵

The broader meaning is who is right from the point of view of global order, i.e. whose position better serves the future of humanity as a whole. The enormous variety of variables and goals to be considered probably renders this inquiry practically impossible. Furthermore, answering this question may actually be detrimental to the object of my project, which is to find common ground between the two camps (which in turn inures to everyone's benefit). In the language of the domestic analogue, my object is not to judge between the sides but to propose a settlement. For the settlement to be possible, however, it is necessary to be candid about the strengths and weaknesses of both sides' positions. It is for this reason, and not to find out who is right, that the infirmities in both sides' arguments have been pointed out.

Therefore I ask not who is right but what can be done to solve the problem. The next subsection presents and defends my proposal. The second subsection outlines substantive concessions that Iran and its negotiating partners should make to increase the likelihood of success in the negotiations.

a. *Procedure*

I contend that the best strategy for getting past the current impasse in resolving the Iran nuclear crisis is for Iran and the United States, as well as China and Russia, and possibly also Britain, France and Germany, to conduct negotiations on the issue under the IAEA umbrella and within the NPT framework. The best way to bring the parties together is for the IAEA, preferably through its well-regarded Director General ElBaradei, to initiate and host a series of discussions among high-level foreign policy officials of the aforementioned states. The discussions could start as more informal meetings and later develop into official conferences. The parties would agree that the IAEA would keep the substance of the proceedings secret at the request of any party. The initiative for hosting successive phases of negotiations and announcing their progress should rest with the IAEA, which, however, should do so in response to input from all parties. The final outcome of the negotiations should be announced by the IAEA and be couched in terms that indicate IAEA's sanction and approval. The IAEA should have the authority to interpret the final resolution and hold the parties to it. The ultimate substantive legal frame of

¹⁷⁵ See also *supra* note 107.

reference of the outcome (and seemingly also of the negotiations) should be the NPT.¹⁷⁶

As should be apparent from the title, the essence of this proposal is to provide an “objective” and “neutral” legal cover or safety net for enhanced politicking. By creating an aura of impartiality, this authoritative “non-political” veneer can make possible a groundbreaking compromise hitherto impossible for reasons of domestic and international politics. Such legal covers are most urgently needed when the parties are eager to compromise and a compromise that suits both parties’ interests better than conflict is substantively possible but procedurally and politically difficult. A legal cover can, in the language of economic theory,¹⁷⁷ surmount barriers to efficient bargaining.¹⁷⁸ That is, there are times when a Pareto-superior solution exists but is not adopted for behavioral (psychological), political or other reasons. In these situations, a procedural face-saving mechanism can come to the rescue by taking political and reputational costs out of the equation. The Iran-United States face-off¹⁷⁹

¹⁷⁶ The proposal may seem skeletal to the reader. There are reasons, elucidated below, for keeping it bare-bones.

¹⁷⁷ I refer to economic theory to illuminate the problem by putting it in a new theoretical light, and to provide pointers to readers who may be interested in exploring the literature. My proposed solution is a common sense one, and does not involve economic analysis (except perhaps at a superficial, intuitive level). Readers not interested in the matter can safely ignore the references to economic jargon, which I have tried to keep sparse.

¹⁷⁸ The literature is vast and multifarious, and I can only provide pointers. For a collection of articles exploring strategic and tactical, psychological, and structural barriers to conflict resolution from a multi-disciplinary perspective see KENNETH ARROW ET AL., *BARRIERS TO CONFLICT RESOLUTION* (1995). The introductory chapter of this book provides a useful primer to the problems of negotiation and conflict resolution. On the role of mediation in solving the problems of negotiation between rational actors see Jennifer G. Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323 (1994). For some experimental work on bargaining see Alvin Roth, Michael W. K. Malouf & J. Keith Murnighan, *Sociological Versus Strategic Factors in Bargaining*, 2 J. ECON. BEHAV. & ORG. 153 (1981); K. Binmore, A. Shaked & J. Sutton, *Testing Noncooperative Bargaining Theory: A Preliminary Study*, 75 AMER. ECON. REV. 1178 (1985); Colin Camerer & Richard Thaler, *Anomalies: Ultimatums, Dictators and Manners*, 9 J. ECON. PERSP. 209 (1995); Alvin E. Roth, *Bargaining Experiments*, in *HANDBOOK OF EXPERIMENTAL ECONOMICS* (Alvin E. Roth & J. Kagel eds., 1995); James Andreoni, Marco Castillo & Ragan Petrie, *What Do Bargainers’ Preferences Look Like? Exploring a Convex Ultimatum Game*, 93 AMER. ECON. REV. 672 (2003).

¹⁷⁹ Focusing on the United States and Iran does not imply that other parties are irrelevant to the process of conciliation. But it is apparent from the political capital both countries have dedicated to the controversy that they believe to be the actors with the highest at stake. Israel aside, their positions are the widest apart among relevant players. Thus it is uncontroversial to suggest that bringing Iran and the United States close to agreement will go far in resolving the conflict.

over Iran's development of nuclear technology is a case in which interest convergence is possible but for considerations of national pride and image. The conflict is therefore particularly amenable to a legal cover solution. Consider the parties in turn.

The United States responded with an uncompromisingly confrontational attitude to the attacks of September 11, 2001. President Bush declared a "war on terror" of immensely broad sweep, affirming as early as September 20, 2001 that "Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated . . . Americans should not expect one battle, but a lengthy campaign, unlike any other we have ever seen."¹⁸⁰ He styled the battle as one between "freedom and fear, justice and cruelty," "civilization's fight[,] the fight of all who believe in progress and pluralism, tolerance and freedom," a battle whose stakes are no lighter than "human freedom—the great achievement of our time, and the great hope of every time."¹⁸¹ Bush went on to famously declare: "[W]e will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime."¹⁸²

Thus, through the notion of "harboring," an ideological vision of the war on terrorism was combined with a revolution in the law of state responsibility. The Bush administration has not concretely defined what it understands to constitute "harboring," but indications of its meaning can be gleaned from a letter sent to the UN Security Council on the eve of the war in Afghanistan. In it the U.S. government intimated that "the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by [al Qaeda] as a base of operation" was sufficient to render the Taliban responsible for al Qaeda's acts on 9/11, thus justifying a U.S. war in "self-defense."¹⁸³ This standard of attribution makes it eas-

¹⁸⁰ George W. Bush, Address to a Joint Session of Congress and the American People, Sept. 20, 2001 (transcript available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>).

¹⁸¹ *Id.* Similar Manichean imagery has been repeated countless times hence. *See, e.g.,* George W. Bush, Remarks by the President to United Nations General Assembly, Nov. 10, 2001 (transcript available at <http://www.whitehouse.gov/news/releases/2001/11/20011110-3.html>); Remarks by the President at the 20th Anniversary of the National Endowment for Democracy at the United States Chamber of Commerce, Nov. 6, 2003 (transcript available at <http://www.whitehouse.gov/news/releases/2003/11/20031106-2.html>).

¹⁸² Bush, Sept. 2001 address, *supra* note 180 (emphasis added).

¹⁸³ Letter from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001).

ier than all preexisting standards to find a state responsible for the conduct of an entity within its territory.

The jurisprudence of state responsibility, though unclear in articulating a uniform standard of attribution, had clearly not contemplated as liberal a standard as the Bush administration has urged since 9/11. In *Nicaragua v. United States*, the International Court of Justice held that the acts of Nicaraguan contras could be attributed to the United States only if the United States had issued specific instructions to them.¹⁸⁴ This standard is infinitely more restrictive than “harboring.” In *Prosecutor v. Tadic*, the International Criminal Tribunal for the Former Yugoslavia held that responsibility for the actions of the Bosnian Serb Army could be imputed to the state of Serbia if the state exercised “overall control” over the Army.¹⁸⁵ The *Tadic* standard makes it easier than *Nicaragua* to find a state responsible for the conduct of entities acting in its territory, but is still a far cry from the elusive notion of “harboring.” Finally, the United Nations International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts contains requirements for holding a state legally responsible for the conduct of an entity that make it harder than the “harboring” standard to find a state responsible.¹⁸⁶

Indeed, none of these three standards of state responsibility would have justified the U.S. war in Afghanistan based on the attribution of al Qaeda’s conduct to the Taliban. My discussion of various standards of state responsibility is not intended to shed light on the legality *vel non* of the U.S. war in Afghanistan (hence my ignoring the issue of preemptive self-defense). Rather, the overview illuminates how the new, expansive notion of state responsibility makes it more difficult for the United States to compromise with Iran.

The combination of the binary vision of the war on terror and the liberality with which the United States associated terrorists with states “har-

¹⁸⁴ Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

¹⁸⁵ *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, ¶ 145 (Oct. 2, 1995). See also *id.*, ¶¶ 137-45 (discussing three alternative tests of control to be applied in different circumstances to determine whether the attribution of state responsibility is warranted).

¹⁸⁶ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (extracts from the Report of the International Law Commission on the Work of its Fifty-Third Session, Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10, U.N. Doc. A/56/10), ch. II (Nov. 2001). Particularly relevant for our purposes are Article 8 (the entity acted “on the instructions of, or under the direction or control of” the state), Article 9 (in committing the act the entity was “exercising elements of the governmental authority” of the state), and Article 11 (the “State acknowledges or adopts the conduct in question as its own”). The foregoing survey merely provides snapshots from the international law jurisprudence on state responsibility, and is in no way meant as an exhaustive or in-depth analysis of the topic.

boring” them put Iran close to the top of the American blacklist, despite Iran’s lack of involvement in 9/11 and Iranian cooperation with the United States during its campaign in Afghanistan.¹⁸⁷ In his 2002 State of the Union Address, President Bush included Iran in the famous “axis of evil” that “threaten the peace of the world.”¹⁸⁸ Iran has been on the U.S. State Department’s list of State Sponsors of Terrorism since 1984.¹⁸⁹ It is the official view of the U.S. government that in 2005 “Iran remained the most active state sponsor of terrorism.”¹⁹⁰ The United States alleges that the Iranian government holds considerable influence over and helps groups which the United States considers terrorists. These include most prominently the Lebanese Shi’a group Hezbollah,¹⁹¹ as well as Palestinian groups Islamic Jihad and HAMAS, and militant groups opposing the American occupation of Iraq.¹⁹² The United States also accuses Iran of failing to prosecute or extradite or identify al Qaeda members it holds in detention.¹⁹³ Most immediately related to the nuclear issue, the U.S. State Department notes, “Iran presents a particular concern, given its active sponsorship of terrorism and its continued development of a nuclear program. Iran is also capable of producing biological and chemical agents or weapons. Like other state sponsors of terrorism with WMD programs, Iran could support terrorist organizations seeking to acquire WMD.”¹⁹⁴

Iran’s image in the American mind fares no better when seen from a longer-term perspective. The Iranian revolution of 1979 is widely thought to claim a great share in aiding the rise of militant political Islam,¹⁹⁵ which may be seen as a broad historical movement that gave birth to al

¹⁸⁷ See, e.g., Kenneth Katzman, Iran: Current Developments and U.S. Policy, CRS Issue Brief for Congress at 6 (Jan. 3, 2002), available at <http://www.iwar.org.uk/news-archive/crs/7974.pdf>; Tom Hundley, *Iranian Leaders Have Stake in Taliban’s Fall*, CHI. TRIB., Oct. 28, 2001 at C1; R.K. Ramazani, *US, Don’t Turn Your Back on Iran*, CHRISTIAN SCI. MONITOR, Feb. 7, 2002, at 11.

¹⁸⁸ George W. Bush, The President’s State of the Union Address (Jan. 29, 2002) (transcript available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>).

¹⁸⁹ United States Department of State, State Sponsors of Terrorism (2005), available at <http://www.state.gov/s/ct/c14151.htm> (last visited Mar. 3, 2008); see also <http://www.state.gov/s/ct/rls/crt/2005/64337.htm> (last visited Mar. 3, 2008).

¹⁹⁰ *Id.*, ch. 6, available at <http://www.state.gov/s/ct/rls/crt/2005/64337.htm> (last visited Mar. 3, 2008).

¹⁹¹ *Id.*

¹⁹² *Id.*, ch. 5, available at <http://www.state.gov/s/ct/rls/crt/2005/64344.htm> (last visited Mar. 3, 2008).

¹⁹³ *Id.*, ch. 6.

¹⁹⁴ *Id.*

¹⁹⁵ See, e.g., WILLIAM L. CLEVELAND, A HISTORY OF THE MODERN MIDDLE EAST 423-24, 440-49 (3d ed. 2004); GILLES KEPEL, JIHAD: THE TRAIL OF POLITICAL ISLAM (Anthony E. Robert, trans., I.B. Tauris & Co. Ltd 2002) (2000).

Qaeda and other Islamists groups. Furthermore, the hostage crisis of 1979-81, during which militant Iranian students seized the U.S. embassy in Tehran and held most American citizens working there hostage for 444 days, has left bitter and long-lasting memories in the United States.¹⁹⁶ In view of this long history of hostility and the uncompromising rhetoric with which the United States has styled its war against terror, it is perhaps not surprising that the Bush administration has refused, against overwhelming advice to the contrary,¹⁹⁷ to conduct meaningful negotiations with Iran.¹⁹⁸

Nor does Iran lack heavy rhetorical and historical inertia against talking to the United States. The 1979 revolution had a staunchly anti-American component, captured most succinctly in Ayatollah Khomeini's frequent use of the famous epithet "great Satan" or the lesser-known "mother of corruption" to describe the United States.¹⁹⁹ Despite what most would see as a gradual thaw in the ideological zeal of the Islamic Republic since its early days,²⁰⁰ the regime retains its anti-American stance. Iran and the U.S. have not had diplomatic relations since 1980.²⁰¹ The Irangate affair and McFarlane's visit to Tehran in 1986 presented a brief flicker of hope for improved relations. The initiative failed, culminating in unflinching American economic, military and intelligence sup-

¹⁹⁶ On the hostage crisis see DAVID FARBER, *TAKEN HOSTAGE: THE IRAN HOSTAGE CRISIS AND AMERICA'S FIRST ENCOUNTER WITH RADICAL ISLAM* (2006); MARK BOWDEN, *GUESTS OF THE AYATOLLAH: THE FIRST BATTLE IN AMERICA'S WAR WITH MILITANT ISLAM* (2006). The very titles of the books are indicative of the central place of the hostage crisis in the U.S. war on terrorism in the minds of some Americans. For a somewhat revisionist account from the point of view a hostage-taker-turned-reformist see MASOUMEH EBTEKAR & FRED REED, *Takeover in Tehran: The Inside Story of the 1979 U.S. Embassy Capture* (2001).

¹⁹⁷ The most prominent example is of course the Iraq Study Group Report, commonly known as the Baker-Hamilton Report. JAMES A. BAKER, III ET AL., *THE IRAQ STUDY GROUP REPORT* 7, 32-33, 36-38 (2006), available at http://www.usip.org/isg/iraq_study_group_report/report/1206/iraq_study_group_report.pdf. The counsel to "talk to Iran" is most often made in the context of the American predicament in Iraq rather than with regard to the nuclear issue, but the reasons behind the refusal to negotiate are the same in both cases.

¹⁹⁸ There have been some signals of U.S. willingness to engage Iran but, as will be shown below, none amount to much more than a pro forma gesture. The May 2006 Rice initiative is possibly the only exception. See *supra* Part II.

¹⁹⁹ 11 RUHOLLAH KHOMEINI, *BOOK OF LIGHT* 88; 15 RUHOLLAH KHOMEINI, *BOOK OF LIGHT* 437. (The "Book of Light" is a comprehensive (censored) collection in Farsi of Khomeini's speeches and writings.)

²⁰⁰ See generally NIKKI R. KEDDIE, *MODERN IRAN: ROOTS AND RESULTS OF REVOLUTION* 263-84 (2003); CLEVELAND, *supra* note 195, at 438-39, 529-33.

²⁰¹ With the prolongation of the hostage crisis, the United States broke diplomatic relations with Iran on April 7, 1980.

port of Saddam Hussein's Iraq in its war against Iran.²⁰² The American military then shot down an Iranian civilian flight in 1988, killing 290 civilians, including 258 Iranians.²⁰³ Iranian-American relations did not significantly improve following the end of the Iraq-Iran war. The ascendancy of popular reformist president Mohammad Khatami in 1997 raised hopes for improved relations. But the successes of Khatami's foreign policy of conciliation in Europe and the Persian Gulf region and the fanfare surrounding his "dialogue of civilizations" did not translate into a breakthrough in American-Iranian relations.²⁰⁴ The official Iranian attitude towards the United States has hardened since the 2005 election of Mahmoud Ahamdinejad to presidency.

The roots of the Iranian pride issue go deeper than three decades of bad relations with the United States. National pride and self-sufficiency was a central message of the 1979 revolution, captured in the early revolutionary slogans "Independence, Freedom, Islamic government," and "Neither East nor West, the Islamic Republic." The emphasis on battling foreign influence is usually seen as a reaction to what many Iranians saw as a long history of unjust imperialist meddling in internal Iranian affairs and exploitation of Iranian resources, the principal culprits being Britain and Russia in the 19th to mid-20th centuries and the United States since 1953.²⁰⁵ Iranian aversion to foreign power was fortified during the Iraq-

²⁰² Coming at a critical moment of weakness for Iraq, American aid helped turn the tide of the war against Iran. See generally DILIP HIRO, *THE LONGEST WAR: THE IRAN-IRAQ MILITARY CONFLICT* (1991); ADAM TAROCK, *THE SUPERPOWERS' INVOLVEMENT IN THE IRAN-IRAQ WAR* (1998); Sepehr Shahshahani, *Khomeinists as Realists: An Inquiry into the Prolongation of the Iraq-Iran War of 1980-1988* 21-26 (Nov. 5, 2004) (unpublished B.A. thesis, University of Chicago) (on file with author and the Regenstein Library, University of Chicago).

²⁰³ On July 3, 1988, USS Vincennes, probably navigating in Iranian waters, shot down, in Iranian airspace, Iran Air Flight 655 flying between Bandar Abbas and Dubai. The United States maintains that the shooting was accidental and has never apologized, with then Vice President George H.W. Bush declaring "I will never apologize for the United States of America—I don't care what the facts are." *Perspectives*, NEWSWEEK, Aug. 15, 1988, at 15. Iran says the shooting was intentional. For a concise overview of the incident see TAROCK, *supra* note 202, at 177-81; see also WILLIAM M. FOGARTY, *FORMAL INVESTIGATION INTO THE CIRCUMSTANCES SURROUNDING THE DOWNING OF IRAN AIR FLIGHT 655 ON 3 JULY 1988* (1988), available at <http://homepage.ntlworld.com/jksonc/docs/ir655-dod-report.html>; *Investigation into the Downing of an Iranian Airliner by the U.S.S. "Vincennes": Hearing Before the S. Comm. on Armed Services, 100th Cong.* (1989), available at <http://homepage.ntlworld.com/jksonc/docs/ir655-sasc-19880908.html>. Iran took the matter to the International Court of Justice, but the parties eventually agreed to discontinue the case. *Aerial Incident of 3 July 1988 (Iran v. U.S.)*, 1996 I.C.J. 79 (Order of Discontinuance of Feb. 22).

²⁰⁴ See, e.g., KEDDIE, *supra* note 200, at 271-72.

²⁰⁵ See, e.g., KEDDIE, *supra* note 200, at 189-213; CLEVELAND, *supra* note 195, at 441-44.

Iran war of 1980-88. Western (particularly American and French) and regional support of Iraq, the international arms embargo of Iran, and the United Nations' attitude toward the war led many Iranians to conclude that the Islamic Republic of Iran had only itself to rely on in the global arena.²⁰⁶ The post-war presidencies of Rafsanjani (1989-1997) and Khatami (1997-2005) saw a gradual relaxation of the national self-sufficiency imperative, especially in the areas of international trade and foreign investment and to a lesser extent with respect to tolerance of Western cultural influence.²⁰⁷ However, the lessons of the Iraq-Iran war still loom large, and self-sufficiency remains a priority in Iranian security policy.

Indispensable to the idea of self-sufficiency is the image of self-sufficiency. The one thing that Iran cannot tolerate is the impression that it was forced to compromise following a show of force or threat of international isolation. Abbas Maleki, former Iranian deputy foreign minister,²⁰⁸ simply and effectively underscored this point in an interview I had with him in January 2007: "The Iranian revolution means that if someone slaps you slap them right back, then sit down and think about whether it was a good idea. We lost many things, especially in the economic field. Countries like South Korea which were economically behind us before the revolution are now more advanced. But now we are independent."²⁰⁹ "We will not be set back by sanctions," he went on to say. "Iran is ready to compromise, as long as the compromise is *face-saving*."²¹⁰ It is important to note in this regard that Iran has styled many concessions it has made during the nuclear row as "voluntary compliance."

The long history of Iranian and American confrontational rhetoric and policy brings to light a phenomenon that can be called a "proud child" problem: each side is weary of extending a hand of truce and offering a meaningful concession before the other side does it first, for fear that the other side's rejection would find the first party humiliated by a long-time adversary.²¹¹ The history of animosity and distrust between the United States and Iran and of Iranian mistrust of the West in general also illuminates each side's reluctance to believe the other side's long-term promises. This is particularly evident when it comes to Western guaran-

²⁰⁶ On the war and external involvement therein see generally HIRO, *supra* note 202; TAROCK, *supra* note 202.

²⁰⁷ See generally KEDDIE, *supra* note 200, at 263-84.

²⁰⁸ Abbas Maleki was deputy foreign minister of Iran from 1989 to 1997, when Ali Akbar Velayati was foreign minister.

²⁰⁹ Interview with Abbas Maleki, former deputy foreign minister of Iran, in Tehran, Iran (Jan. 9, 2007).

²¹⁰ *Id.* Maleki used the English phrase "face-saving."

²¹¹ The absence of United States-Iran diplomatic relations (*see supra* note 201 and accompanying text) and the multiplicity of foreign policy voices in Iran (*see infra* Part IV(b)) both undermine the ability to make credible commitments and thus exacerbate the proud child problem.

tees for supplying nuclear fuel to Iran in exchange for its suspension of uranium enrichment.

A legal cover solution can break the deadlock caused by these pride and trust problems. A relatively trusted and neutral third-party, in this case the IAEA, can work around the parties' reluctance to propose meaningful talks by taking the initiative itself. This would make it likelier that the parties will come together to talk in the first place. Once they have come together, IAEA oversight makes a compromise more likely by increasing the probability of both good offers and acceptances. It makes good offers more likely by reducing the cost of rejection: since the parties make their offers to the IAEA and (if they prefer) secretly, rather than directly to the other side and publicly, they have little fear of being proven a fool in front of all the world if they are rejected. It makes acceptances more likely for two reasons: first because better offers are more likely to produce acceptance; and second because the appearance of objective mediation and NPT-centrality helps avoid the impression that the final compromise was a result of pressure (e.g. Iran was afraid of economic sanctions or isolation) or of superior bargaining position (e.g. the United States was not in the best position to threaten Iran militarily because of its problems in Iraq and Afghanistan).²¹² The U.S. government could reject domestic criticism of compromising with supporters of terrorism by claiming that it has only played it fair by standards of international law.²¹³ Similarly, the Iranians would avoid the impression of having been strong-armed. In short, the process seems foolproof: if it produces a mutually acceptable compromise, all the better; if not, no one's pride will have been scathed by extending a hand that was not taken.

²¹² Of course no amount of secrecy or IAEA-centrality can put an end to speculation about the "real" reasons behind the compromise. Yet it is a fact that, however transparent the cover, states prefer to emphasize factors other than being overpowered as the reason for their compromises.

²¹³ Of course there are those in the United States who claim that given superior American power and the irrelevance of international law the United States should not play it by international law but rather do what it thinks best for its own interest. For a popular exposition of this idea see Charles Krauthammer, *The Curse of Legalism: International Law? It's Purely Advisory*, NEW REPUBLIC, Nov. 6, 1989, at 44, 44-46, 50 ("Go in, do what you have to do, and then call in the lawyers to find some retroactive legal justification . . . [I]n many of the tough [cases,] the law—international law—is an ass. It has nothing to offer. Foreign policy is best made without it."). There is no question, however, that even in the United States the crime of complying with international law carries lighter political penalties than the sin of compromising with terrorists. Moreover, the suggestion that the United States could claim it was playing by international law to avoid the domestic charge of being soft with terrorists does not mean that what is happening in reality is traditional compliance with the law. International law is emphatically playing a role, but as a cover for politics rather than a sovereign command backed by force.

Assuming that the argument that a legal cover mechanism is the solution to the Iran nuclear problem is found persuasive, it remains to be shown why the NPT and the IAEA are the best choices for supplying the legal cover. After all, this Note has reviewed the NPT regime's many compliance problems²¹⁴ and claimed that the NPT "has been violated left and right."²¹⁵ Why then should the NPT and the IAEA supply the legal cover? The answer is that the NPT is the only legal instrument on point. There is simply no other treaty, much less customary international law, that speaks directly to the issue at hand. That is why all sides' arguments throughout the crisis have been couched in reference to NPT and in deference to the IAEA.

But the NPT is not a good potential legal cover only because it is the *only* candidate (though given the weaknesses of alternative approaches that would be enough). It has also been a relatively successful instrument of international law, contrary to popular perception following the emergence of Iran and North Korea as potential nuclear powers. It is important to keep in mind the nuclear horizon before the NPT went into effect. President Kennedy famously warned in 1963 that in the 1970s the United States could be facing 15 to 25 states with nuclear weapons integrated into their military arsenals.²¹⁶ This means, taking the number 20 and assuming "in the 1970s" to mean 1975, around 16 new nuclear weapon states every 12 years. (There were four nuclear weapon states at the time Kennedy made the prediction.) At this rate, the period 1965 to 2007 would have seen the emergence of 56 new nuclear weapon states.²¹⁷ In fact, with the NPT in place, only four, not 56, states have acquired nuclear weapons in this 42-year period.²¹⁸ This success story is all the more remarkable in view of the fact that today virtually every industrialized state is technologically capable of acquiring nuclear weapons in at most a few years.²¹⁹ Furthermore, four of the states that acquired nuclear weap-

²¹⁴ *Supra* Part III(b).

²¹⁵ *Supra* Part IV.

²¹⁶ Joseph Cirincione, *The Asian Nuclear Reaction Chain*, 118 FOREIGN POL'Y 120, 122 ("15 to 20 to 25"); Thomas Graham, Jr., *The Significance of the NPT*, Statement Before the Bipartisan Task Force on Non-proliferation, U.S. House of Representatives (June 18, 2003) (putting the number at 25 to 30). The statement is often quoted but the source for it never cited. The Kennedy quote was based on a briefing paper by Secretary of Defense McNamara. Memorandum from the Secretary of State on Diffusion of Nuclear Weapons With and Without a Test Ban Agreement (Feb. 12, 1963) (*available at* http://www.armscontrolwonk.com/Diffusion_63.pdf).

²¹⁷ The phrase is used not in its technical NPT sense but meaning states with nuclear weapons.

²¹⁸ This figure discounts states that have acquired but later given up their weapons. *See supra* note 89.

²¹⁹ For example, it is known that Canada has been capable of producing nuclear weapons since as far back as 1945. WILFRID EGGLESTON, *CANADA'S NUCLEAR STORY*, ch. 12 (1965). On Canada see generally JOHN CLEARWATER, *CANADIAN*

ons—by design (South Africa) or inadvertently (Belarus, Kazakhstan, and Ukraine, which ended up with nuclear weapons in the wake of the Soviet Union’s collapse)—gave them up and signed on to the NPT.²²⁰

Of course, the fact that the slump in the growth of nuclear-weapon states coincided with the reign of the NPT does not necessarily mean that the NPT caused this slump. This is not the place to explore the reasons for the long-term success of nuclear non-proliferation.²²¹ Suffice it to say,

NUCLEAR WEAPONS: THE UNTOLD STORY OF CANADA’S COLD WAR ARSENAL (1998). On Japan see generally JAPAN’S NUCLEAR FUTURE: THE PLUTONIUM DEBATE AND EAST ASIAN SECURITY (Selig S. Harrison ed., 1996). On Brazil see Sharon Squassoni & David Fite, *Brazil’s Nuclear History*, ARMS CONTROL TODAY, Oct. 2005.

²²⁰ On South Africa see David Albright, *South Africa Comes Clean*, BULL. OF THE ATOMIC SCI., May 1993; David Albright & Mark Hibbs, *South Africa: The ANC and the Atom Bomb*, BULL. OF THE ATOMIC SCI., Apr. 1993. On Belarus see Angela Charlton, *Belarus Relinquishes Last Nuclear Missile*, CHI. TRIB., Nov. 28, 1996, at 49; *Belarus, Nation Removes Its Last Nuclear Missile*, L.A. TIMES, Nov. 28, 1996, at A49. On Ukraine see Steven Komarow, *Sunflowers Replace Silos in Nuclear-Free Ukraine*, USA TODAY, June 5, 1996, at 5A; Jane Perlez, *Sunflower Seeds Replace Ukraine’s Old Missile Sites*, N.Y. TIMES, June 5, 1996, at A10. On Kazakhstan see *Last of Ballistic Missile Silos Torn Down*, CHI. TRIB., Sep. 8, 1996, at C6. On the nuclear weapons of the former Soviet republics see generally AMY A. WOOLF, NUCLEAR WEAPONS IN THE FORMER SOVIET UNION: LOCATION, COMMAND, AND CONTROL, Cong. Res. Service Rep. 91-144 (1996), available at <http://www.fas.org/spp/starwars/crs/91-144.htm>.

²²¹ Using the term “success” is not intended to imply that the spread of nuclear weapons is necessarily detrimental to world security. Contrary to popular opinion, the existence of a causal relationship between the spread of nuclear weapons and world insecurity is by no means a settled conclusion. Those who think the spread of nuclear weapons may be better stress their deterrent effect and conclude that they make wars less likely; those against nuclear proliferation focus on the high stakes of nuclear war, the likelihood of nuclear accidents, the possibility of “irrational” behavior by some states, and the specter of terrorists getting their hands on nuclear weapons. For a primer to the debate see SCOTT D. SAGAN & KENNETH N. WALTZ, *THE SPREAD OF NUCLEAR WEAPONS: A DEBATE RENEWED* (2002). These general outlooks notwithstanding, the question of the security effects of nuclear proliferation must be addressed on a case-by-case basis. Furthermore, in every case it is important to specify whose security we are talking about. In the case at hand, it is one question whether a nuclear Iran is good for U.S. security, another question whether a nuclear Iran is good for world security as a whole or for the security of particular countries and regions, and yet another question whether a nuclear Iran is good for Iranian security. Popular discourse in the United States often skips over these distinctions, assuming naturally that security means American security. I do not understand the global and American security consequences of Iran’s acquiring nuclear weapons to be as apocalyptic as Washington portrays them to be. At least one American commentator shares this view. See Barry R. Posen, *A Nuclear-Armed Iran: A Difficult But Not Impossible Policy Problem*, CENTURY FOUND. REP., Dec. 6, 2006; Barry R. Posen, *We Can Live With a Nuclear Iran*, N.Y. TIMES, Feb. 27, 2006, at A19.

however, that a consensus of scholars considers the NPT to be the heart of the global nuclear non-proliferation regime.²²² More importantly, states pledge allegiance to the NPT; only four UN member-states are not signatories.²²³ During the course of the Iran nuclear crisis, no party has proclaimed that it demands anything beyond the NPT or would not live up to its obligations under the NPT—though the reality be otherwise.²²⁴

In sum, without going so far as to state that the NPT is responsible for the long-term success of non-proliferation, it is fair to state at least that the NPT commands near-universal lip service. There is no better legal cover than an international treaty that speaks directly to the issue, commands the pledged allegiance of all but four states in the world, and enjoys the overwhelming endorsement of legal commentators. What veteran Iranian politician Mohammad Javad Larijani²²⁵ told me in an interview in January 2007 effectively underscores the vital potential of the NPT in the face of negotiation breakdown: “If they don’t trust us, we don’t trust them either. So let’s propound [our demands] in the framework of the NPT, and no more.”²²⁶

Notwithstanding the merits of this view, it is unquestionable that at this juncture the policies of the world’s major powers proceed from the assumption that a nuclear Iran would be very dangerous for everyone who matters. (Interestingly, however, there are indications that the view that a nuclear Iran would be a major security threat is not unanimously shared. Then French President Jacques Chirac remarked in February 2007 that a nuclear Iran would not be “very dangerous.” “Where will it drop it, this bomb? On Israel? It would not have gone 200 metres into the atmosphere before Tehran would be razed.” Angelique Chrisafis, *Nuclear-Armed Iran Would Not Be Very Dangerous, Says Chirac*, GUARDIAN, Feb. 2, 2007. Chirac quickly retracted the statement, saying he should have “understood that perhaps I was on the record.” *Id.*) World powers are not open to the argument that it won’t be the end of the world if Iran acquired nuclear weapons; all their efforts are accordingly directed towards preventing the realization of this prospect. Furthermore, as this Note will show, Iran is open to relinquishing its nuclear program. Therefore, as a practical matter, I focus on what is the best way to stop Iran from acquiring nuclear weapons.

²²² See *supra* note 88.

²²³ See <http://disarmament.un.org/TreatyStatus.nsf> for a list of signatories. See also <http://disarmament.un.org/wmd/npt/index.html>.

²²⁴ See *supra* Part III(b).

²²⁵ Mohammad Javad Larijani has held various political posts in the Islamic Republic of Iran. He was, *inter alia*, vice minister of foreign affairs during the final stages of the Iraq-Iran war and a member of the fourth and fifth parliaments (Majles). He is the older brother of Ali Larijani, who, as secretary of the Supreme National Security Council, served as Iran’s chief nuclear negotiator from August 2005 (when Ahmadinejad became president) until October 2007.

²²⁶ Interview with Mohammad Javad Larijani, former vice minister of foreign affairs, in Tehran, Iran (Jan. 13, 2007).

b. *Substance*

Having outlined the contours of a procedural breakthrough mechanism, I will now discuss some substantive policy suggestions that can contribute to the likelihood of the procedure's success. It would be folly to attempt to prescribe the exact shape of an ideal compromise. But both sides can take starting steps that will make them lose nothing and gain badly needed goodwill and trust.²²⁷

First consider the United States. A dramatically helpful first step by the United States would be a formal and unequivocal disavowal of regime change in Iran as an objective of American foreign policy. Such a declaration would be immensely effective in addressing the all-important pride element in post-revolutionary Iranian foreign policy.²²⁸ As previously mentioned, Iran is acutely sensitive to the impression of being bullied. An assurance by the strongest state in the world that military threat is not an option would avoid belittlement and build goodwill towards the United States in Iran.

Similarly, a formal disavowal of regime change will weaken the hawks and strengthen the doves of Iran's foreign policy elite. Mahmoud Ahmadinejad won the 2005 Iranian presidential race on a populist platform of wealth redistribution and far-reaching economic promises to the poor.²²⁹ More than two years into his presidency, Ahmadinejad has by most accounts failed to deliver on his promises, a fact that has eroded his early mass appeal and emboldened his critics.²³⁰ U.S. intimidation of Iran gives the pressured Ahmadinejad the perfect deflector for turning popular attention away from his mediocre performance to the specter of a foreign threat. Using the bogymen of a foreign enemy to silence domestic opposition is a classic politician's trick. Recent American examples include George W. Bush's use of the terrifying image of terrorists attacking America and its values during the 2004 American presidential campaign to obscure his unimpressive economic performance²³¹ and Clinton's bombing of Iraq at the height of the Monica Lewinsky scan-

²²⁷ See *supra* Parts II and IV(a) on the problem of trust.

²²⁸ See *supra* Part IV(a).

²²⁹ See Michael Slackman, *Upstart in Iran Election Campaigns as Champion of Poor*, N.Y. TIMES, June 23, 2005, at A8; *After Vote, Reformers See Their Chances Fading in Iran*, CHI. TRIB., June 26, 2005, at C8; Sepehr Shahshahani, *Iran: The Triumph of Populism* (June 25, 2005) (unpublished manuscript, on file with author).

²³⁰ See Sadeq Zibakalam, *Political Problems Mount for Ahmadinejad*, BBC NEWS, Feb. 26, 2007, http://news.bbc.co.uk/2/hi/middle_east/6396873.stm; Frances Harrison, *Growing Pressure on Ahmadinejad*, BBC NEWS, Jan. 16, 2007, http://news.bbc.co.uk/2/hi/middle_east/6267105.stm; *Criticism of Ahmadinejad Mounts*, BBC NEWS, Jan. 23, 2007, http://news.bbc.co.uk/2/hi/middle_east/6290101.stm.

²³¹ See Gary C. Jacobson, *The Bush Presidency and the American Electorate*, 33 PRESIDENTIAL STUD. Q. 701, 707-08 (2003).

dal.²³² The best recent example in the Iranian context comes from the 1980-81 period of domestic unrest immediately following the 1979 revolution. The Islamists used Iraq's invasion (beginning in September 1980) of parts of Iran to rally the Iranian populace behind the young Islamic Republic and portray domestic rivals as traitors, a tactic that helped lift the Islamists to dominance in their conflicts with other political factions that had helped the 1979 revolution succeed.²³³ Today, Iran's nuclear hawks can mask the disastrous consequences of their inflexibility—an increasing international isolation that amounts to burning the harvest of Khatami's eight years—only by hiding behind Ahmadinejad's personal popularity. Ahmadinejad's popularity, in turn, is no longer at its peak,²³⁴ because like many a populist he has not realized the dreams he had nurtured. His popularity can be maintained only if the United States makes him into a national anti-imperialist hero by pressuring Iran. A formal disavowal of regime change as a foreign policy goal of the United States

²³² See Jake Tapper, *The Truth about Clinton and "Wag the Dog,"* ABC NEWS, Sep. 24, 2006, http://blogs.abcnews.com/politicalpunch/2006/09/the_truth_about.html (providing a collection of contemporary reactions); see also Guy Gugliotta & Juliet Eilperin, *Tough Response Appeals to Clinton Critics,* WASH. POST, Aug. 21, 1998, at A17; Frank Bruni, *Wagging Tongues in "Incredibly Cynical Times,"* N.Y. TIMES, Aug. 21, 1998, at A12; James Gerstenzang, *The U.S. Strikes Back: U.S. Action Conjures Up Scenario from "Wag the Dog,"* L.A. TIMES, Aug. 21, 1998, at A17; Mick LaSalle, *With Coincidences, "Wag the Dog" Takes on Life of Its Own,* S.F. CHRON., Aug. 21, 1998, at A3.

²³³ See, e.g., JOHN BULLOCH & HARVEY MORRIS, *THE GULF WAR: ITS ORIGINS, HISTORY AND CONSEQUENCES* 57-69 (1991).

²³⁴ It is the consensus among many observers is that Ahmadinejad is not at the zenith of popularity. See *supra* note 230. I find the consensus anecdotally sound based on my two most recent visits to Iran—one in summer 2005, when a vibrant and charming Ahmadinejad carried the day against the old Rafsanjani, and the other in winter 2007, when many people seemed disillusioned with him. One must caution, however, that there is no systematic evidence of popular opinion, as reliable for example as polls conducted in the United States on presidential approval ratings, to support the conclusion of Ahmadinejad's fall from popular grace. In fact, I have found indications, both in personal conversations with ordinary Iranians and in reports of Ahmadinejad's shrewd visits to economically deprived areas (borrowing the American concept of the "permanent presidential campaign"), that Ahmadinejad still enjoys considerable popularity. On Ahmadinejad's visits see Frances Harrison, *On Tour with Iran's President,* BBC NEWS, Oct. 14, 2006, http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/6047904.stm; Ahmadinejad to Visit Varamin, Pakdasht, Islamshahr over Weekend, IRANIAN NEWS AGENCY (IRNA), Oct. 17, 2006. The reformist movement in Iran has an alarming tendency to equate the opinions of the so-called intelligentsia and the petty bourgeoisie with public opinion at large, a tendency that led to its resounding defeat in the presidential elections of 2005. It will be well-advised, for its own sake if not for any others', not to repeat that mistake by over-reading the indications of Ahmadinejad's popular downfall.

would deprive Ahmadinejad and Iran's hawks of the only public opinion boost they can hope for.

Finally, a formal disavowal of regime change can help reverse the perverse incentive structure created by U.S. policy towards Iraq and North Korea. Iran was given the distinction of belonging to "the axis of evil" in 2002.²³⁵ Subsequently, of the other two axes of evil the one that had nuclear weapons suffered some international diplomatic pressure; the one that had no nuclear weapons was invaded, its government toppled, its social and economic infrastructure decimated, and its people murdered and displaced. Today its civilians die daily by a hundred,²³⁶ with the civilian death toll between 81,500 and 89,000 as of late February 2008 and counting.²³⁷ Millions of refugees are outpouring²³⁸ by over 100,000 a month.²³⁹ The country is being choked in the throes of a bloody civil war. The conclusion is hard to miss for Iran—we better get nukes if we want to survive.²⁴⁰ A similar calculus prevails in North Korea, which has long demanded a non-aggression pledge from the United States as a condition for giving up its nuclear ambitions.²⁴¹ The harm U.S. policy has wrought

²³⁵ George W. Bush, The President's State of the Union Address (Jan. 29, 2002), available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>.

²³⁶ Kirk Semple, *Iraqi Death Toll Rises Above 100 Per Day*, *U.N. Says*, N.Y. TIMES, July 19, 2006, at A1.

²³⁷ See Iraq Body Count, <http://www.iraqbodycount.org>.

²³⁸ *Iraqi Refugee Crisis: International Response Urgently Needed*, REFUGEES INT'L BULL., Dec. 5, 2006, <http://www.icva.ch/doc00002154.pdf> (reporting over two million Iraqi refugees as of December 2006, with more than 1.8 million displaced in neighboring countries and 500,000 displaced within Iraq; an increasing rate of exodus; counting more than 700,000 refugees in Syria and Jordan each; reviewing the non-existent response of the United States and the inadequate response of the UN); Matt Weaver, *Warning over Spiraling Iraq Refugee Crisis*, GUARDIAN, Dec. 7, 2006 ("biggest refugee crisis in the world"); Kenneth M. Pollack & Daniel L. Byman, *Iraqi Refugees: Carriers of Conflict*, ATLANTIC MONTHLY, Nov. 2006, <http://www.theatlantic.com/doc/200611/iraqi-refugees>; Scott Wilson, *Iraqi Refugees Overwhelm Syria*, WASH. POST, Feb. 23, 2005, at A18 (reporting the disruptive effects of more than 700,000 Iraqi refugees in Syria as of February 2005).

²³⁹ Weaver, *supra* note 238.

²⁴⁰ This is not to imply that the only difference between Iraq and North Korea in the eyes of the Bush administration was that one had nuclear weapons and the other did not. Still, it is hard to disagree that the absence of nuclear weapons played an important role in the U.S. calculus whether to attack Iraq, and that the presence of nuclear weapons plays some part in the U.S. calculus whether to use the military option against North Korea. The deterrent effect will be much higher in the presence of a viable second-strike capability. Even if one does not agree with these arguments, it is impossible to disagree that they command many followers. At the very least, the disparity between U.S. policies vis-à-vis Iraq and North Korea has made it a great deal easier for pro-nuclear factions in Iran to support acquisition of nuclear weapons.

²⁴¹ See Julia Preston, *North Korea Demands U.S. Agree to Nonaggression Pact*, N.Y. TIMES, Oct. 26, 2002, at A8; Steven Weisman, U.S. Weighs Reward if North Korea

to the incentive structure of states that are not allies of the United States and are on the nuclear threshold may take decades to reverse.²⁴² A formal American disavowal of regime change would aid the reversal.

If these are the benefits of disavowing regime change,²⁴³ what of its harms? There are none. If regime change in Iran was ever seen as a viable course of American policy, the experience of Iraq now makes this view untenable.²⁴⁴ Some may think that the United States is served by

Scraps Nuclear Arms, N.Y. TIMES, Aug. 13, 2003, at A3; Khang Hyun-sung, Peace Bid Unlikely to Impress North, S. CHINA MORNING POST, Dec. 1, 2006, at 16.

²⁴² It warrants mention that American nuclear cooperation with India (not to mention Israel) also creates the impression that countries that acquire nuclear weapons are not only not punished but are rewarded by the United States. See Kuppuswamy, *supra* note 88, at 3-4; CORERA, SHOPPING FOR BOMBS, *supra* note 6, at 247.

²⁴³ From the point of view of international law, the dilemma of humanitarian intervention (which is not identical but closely related to regime change) is the antinomy between the two peremptory norms of state sovereignty and human rights. Former UN Secretary General Kofi Annan grippingly captured the tension when he said, "To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might ask—not in the context of Kosovo—but in the context of Rwanda: If, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold? To those for whom the Kosovo action heralded a new era when States and groups of States can take military action outside the established mechanisms for enforcing international law, one might ask: Is there not a danger of such interventions undermining the imperfect, yet resilient, security system created after the Second World War, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents, and in what circumstances?" Press Release, UN Secretary General, Secretary-General Presents His Annual Report to General Assembly, UN Doc. SG/SM/7136, GA/9596 (Sept. 20, 1999). See W. Michael Reisman, *Why Regime Change Is (Almost Always) a Bad Idea*, 98 AM. J. INT'L L. 516 (2004) (arguing that "modern international law has resolved this antinomy [in favor of] state sovereignty . . . in all but the most egregious instances of widespread human rights violations," reviewing modern instances of regime change, suggesting criteria for assessing the lawfulness of regime change (but failing to run the case of Iraq through the test), and warning of the practical difficulty of regime change).

²⁴⁴ See, e.g., PAUL ROGERS, IRAN: CONSEQUENCES OF A WAR 12 (2006), available at http://www.oxfordresearchgroup.org.uk/publications/briefing_papers/pdf/IranConsequences.pdf (concluding that an attack on Iran by the United States or Israel would make "a protracted and highly unstable conflict virtually certain . . . Iran would . . . withdraw from the Non-Proliferation Treaty and engage in a nuclear weapons programme as rapidly as possible. This would lead to further military action against Iran, establishing a highly dangerous cycle of violence."); FRANK BARNABY, WOULD AIR STRIKES WORK? (2007), available at http://www.oxfordresearchgroup.org.uk/publications/briefing_papers/pdf/wouldairstrikeswork.pdf (concluding that air strikes to take out Iran's nuclear facilities would not be able to stop Iran's nuclear

the appearance of keeping regime change on the table, even if it really does not consider it a viable policy, because otherwise it would be giving away its best bargaining chip vis-à-vis Iran. This view is misguided. The threat of regime change is so incredible in view of the American overstretch in Iraq and domestic frustration with that war²⁴⁵ that the benefits of preserving regime change as a bargaining chip are outweighed by the benefits of disavowing it.

Some may object that the United States has for all practical purposes given the assurance of no regime change. There is some support for this view. In a recent press conference, Secretary of Defense Robert Gates proclaimed in frustration, “for the umpteenth time, we are not looking for an excuse to go to war with Iran. We are not planning a war with Iran.”²⁴⁶ Likewise, White House Press Secretary Tony Snow recently affirmed, “Let me assure you and others that we do not intend to attack Iran.”²⁴⁷ Unfortunately, however, high-level U.S. declarations on the subject have been contradictory and inconsistent. American officials often discount suggestions of planning a war with Iran but in the same breath affirm that no option is off the table. For example, in an interview with the BBC, Undersecretary of State for Political Affairs Nicholas Burns urged diplomatic solutions to the crisis while at the same time stating that the United States pursues a policy of “weakening Iran in the region.”²⁴⁸ In the first three months of 2007 the BBC Persian Service website carried headlines assuring one day that the United States has no

development and would lead to hardened Iranian efforts to acquire nuclear weapons). A foreword to the Barnaby book by Hans Blix, former UN chief WMD inspector in Iraq, states that attacks on Iran would be “disastrous and counterproductive,” inevitably result in “tragedy and regional turmoil” as in Iraq, and “lead to the result they were meant to avoid – the building of nuclear weapons within few years.” *Id.* Both the Rogers and Barnaby reports are by the Oxford Research Group (ORG), a highly respected international security think tank in Britain. ORG was remarkably prescient in its dire predictions of the consequences of a U.S. attack on Iraq. See PAUL ROGERS, *IRAQ: CONSEQUENCES OF A WAR* (2002), available at http://www.oxfordresearchgroup.org.uk/publications/briefing_papers/pdf/iraqbriefing.pdf (correctly predicting that an American invasion would result in the deaths of many thousands of innocent Iraqi civilians and lead to increased support for al Qaeda).

²⁴⁵ Popular frustration was manifest in the results of the November 2006 Congressional elections and the overwhelmingly critical debates that ensued in both Houses of Congress over the war.

²⁴⁶ News Transcript, Defense Department Media Roundtable with Secretary of Defense Robert Gates and Chairman of the Joint Chiefs of Staff General Peter Pace (Feb. 15, 2007), <http://www.defenselink.mil/Transcripts/Transcript.aspx?TranscriptID=3890>.

²⁴⁷ *America Assures It Does Not Intend to Attack Iran*, BBC PERSIAN, Jan. 17, 2007, http://www.bbc.co.uk/persian/iran/story/2007/01/070116_si-wmj-whitehouse-iran.shtml.

²⁴⁸ Parviz Kamyab, *America Is After Weakening Iran*, BBC PERSIAN, Jan. 13, 2007, http://www.bbc.co.uk/persian/iran/story/2007/01/070113_an-burns.shtml.

plans for attacking Iran and warning the other day that U.S. policy against Iran is increasingly militant and hostile.²⁴⁹ The closest the United States ever came to a disavowal of regime change was Condoleezza Rice's statement in an April 2007 interview with the Financial Times that the Bush administration's Iran policy was not directed at regime change but at a "change in regime behaviour."²⁵⁰ This was a welcome softening of rhetoric. In the same interview, however, Rice affirmed that providing Iran with security assurances would be impossible.²⁵¹

Perhaps more important than equivocal words, U.S. actions provide little assurance that the military option is off the table. Recent hostile actions include the initiative to isolate Iran in the Middle East,²⁵² spurious statements about the strength of evidence linking Iran to Iraqi insurgents (particularly suspect in view of the notorious cooking of intelligence in the prelude to the Iraq war),²⁵³ and the internationally condemned American raid on the Iranian liaison office in Irbil in northern Iraq.²⁵⁴

²⁴⁹ See, e.g., *supra* notes 247, 248 and *infra* note 251.

²⁵⁰ Lionel Barber et al., *Rice Calls on Tehran to Attend Summit on the Future of Iraq*, FIN. TIMES, Apr. 23, 2007 at 1.

²⁵¹ *Rice: We Are Not After Regime Change in Iran*, BBC PERSIAN, Apr. 23, 2007, http://www.bbc.co.uk/persian/iran/story/2007/04/070423_an-rice.shtml. British policy declarations were similarly inconsistent. Tony Blair repeated Bush's statement that "we cannot ignore any options" in the same speech in which he proclaimed that "no one talks of a military attack on Iran or has plans for such an action." *Blair: No One Has Plans for Attacking Iran*, BBC PERSIAN, Feb. 6, 2007, http://www.bbc.co.uk/persian/iran/story/2007/02/printable/070206_shr-iran-blair-attack.shtml.

²⁵² See Ahmad Zeydabadi, *Bush's Speech: A Focus on Iraq and Isolating Iran*, BBC PERSIAN, Jan. 11, 2007, http://www.bbc.co.uk/persian/worldnews/story/2007/01/070111_la-az-bush-speech.shtml; Ahmad Zeydabadi, *Rice in the Middle East: Attempt at a Regional Coalition Against Iran*, BBC PERSIAN, Jan. 13, 2007, http://www.bbc.co.uk/persian/iran/story/2007/01/070113_mv-az-rice-middle-east.shtml. The ingenious recent policies of the Iranian government, including the fiasco surrounding the arrest of the 15 British seamen in the Persian Gulf and the arrest of Iranian-American researcher Haleh Esfandiari in Iran, show that Iran is in need of no American assistance in ensuring its international isolation. On the British seamen see *infra* notes 294-301 and accompanying text. On the Haleh Esfandiari affair see Neil MacFarquhar, *Prominent Iranian-American Academic Is Jailed in Tehran*, N.Y. TIMES, May 9, 2007, at A9; Robert Tait, *Iran Accuses US Academic of Instigating "Soft Revolution"*, GUARDIAN, May 23, 2007, at 24; Robin Wright, *Academics May Boycott Iran over Scholar's Detainment*, WASH. POST, May 20, 2007, at A20 (discussing widespread condemnation of Esfandiari's detainment and quoting Noam Chomsky to the effect that Esfandiari's the detainment is "a gift" to American hawks urging military action against Iran).

²⁵³ See, e.g., *Top US General Doubts Iran Proof*, BBC NEWS, Feb. 14, 2007, <http://news.bbc.co.uk/2/hi/americas/6360469.stm>.

²⁵⁴ See Robin Wright & Nancy Trejos, *U.S. Troops Raid 2 Iranian Targets in Iraq, Detain 5 People*, WASH. POST, Jan. 12, 2007, at A16; Molly Hennessy-Fiske, *The Conflict in Iraq; Raid Criticized*, L.A. TIMES, Jan. 12, 2007, at A8 (reporting Iraqi and

Famed investigative reporter Seymour Hersh has repeatedly written of U.S. plans for military actions in Iran.²⁵⁵ There have been reports of U.S. attack plans as late as February 2007.²⁵⁶ In sum, the words and actions of the United States government have provided little assurance that it does not plan to attack Iran. A high-level (preferably presidential), formal, unqualified disavowal of regime change in Iran by the United States would greatly raise the likelihood of success in resolving the current impasse.

The second substantive step the United States should take to maximize the likelihood of negotiated success is to scrupulously refrain from the heroic Manichean rhetoric of spreading liberty, freedom, and democracy across the world, particularly the Middle East. The vision of democratic dominoes has characterized the post-9/11 approach of the Bush administration's policy toward the Middle East, more so since the weapons of mass destruction rationale for the war in Iraq collapsed under the weight of the evidence. President Bush's speech on the subject in November 2003 is exemplary. Comparing the war on terror to the American "sacrifice for liberty" in World Wars I and II, the Korean War, the war in Vietnam, and the fight against "Soviet tyranny," Bush affirmed that a "commitment to democracy . . . in the Middle East . . . must be a focus of American policy for decades to come."²⁵⁷ The president went on to declare that "The regime in Tehran must heed the democratic demands of the Iranian people or lose its last claim to legitimacy."²⁵⁸

These paternalistic exhortations on political theory by the self-proclaimed champion of liberty are offensive to any state. They are particularly offensive to Iran, in light of the importance of national pride and independence, particularly after the revolution.²⁵⁹ Moreover, the 1953 CIA-engineered coup d'état that toppled the popular government of Mohammad Mosaddeq and subsequent staunch American support of the dictatorial Shah make American lectures on democracy bitterly hypocriti-

Kurdish condemnation); Iraq urges U.S. to Free 5 Iranians, CHI. TRIB., Jan. 15, 2007, at 18 (reporting Iraqi and Kurdish calls to free the detainees); Iraq Backs Iranians Seized by US, BBC NEWS, Jan. 12, 2007, http://news.bbc.co.uk/2/hi/middle_east/6255335.stm (reporting Iraqi and Russian condemnation).

²⁵⁵ See, e.g., Seymour M. Hersh, *The Coming Wars*, NEW YORKER, Jan. 24, 2005, at 40; Seymour M. Hersh, *The Iran Plans: Would President Bush Go to War to Stop Tehran from Getting the Bomb?*, NEW YORKER, Apr. 27, 2006, at 30.

²⁵⁶ US "Iran Attack Plans" Revealed, BBC NEWS, Feb. 20, 2007, http://news.bbc.co.uk/2/hi/middle_east/6376639.stm.

²⁵⁷ George W. Bush, Remarks by the President at the 20th Anniversary of the National Endowment for Democracy, United States Chamber of Commerce (Nov. 6, 2003), available at <http://www.whitehouse.gov/news/releases/2003/11/20031106-2.html>.

²⁵⁸ *Id.*

²⁵⁹ See *supra* Part IV(a).

cal to Iranians.²⁶⁰ More importantly, when viewed side by side with the aforementioned apprehensions created by U.S. policy towards Iraq, the rhetoric of democratization may lead Iranian leaders to think that Iran may be a target of U.S. military attacks. This fear in turn raises the incentive to acquire nuclear weapons and strengthens the Iranian hardliners against the reformists. This point is not lost on Iranian reformists. Nobel Peace Prize winner Shirin Ebadi and Akbar Ganji, two of the most prominent domestic critics of the current Iranian regime, have spoken out against forced democratization by the United States and stressed that democracy can come only from within.²⁶¹ Fortunately, the American rhetoric on spreading liberty has recently become less frequent and less pronounced. All sides will benefit if Washington never picks it up again.

Having mentioned what the United States can do to improve the prospects of a negotiated breakthrough, it is time to put forward some suggestions for measures on Iran's part. The first important goodwill-building step would be for Iran to suspend uranium enrichment. Iran does not need to style this as a permanent suspension, but it would be best if it refrains from specifying deadlines, temporal or tied to specific events, for its termination.

Currently Iran steadfastly refuses to suspend enrichment as a precondition for talks, arguing that it has a right to peaceful nuclear technology under the NPT. This argument may be "correct" under Article IV(1) of the NPT.²⁶² But being a legal stickler is unhelpful. As previously explained, because of the NPT dual use problem,²⁶³ Iran's assertion that it has a right to peaceful nuclear technology under the NPT, even if correct, is cold comfort to those who are worried about a possible diversion of Iranian nuclear technology to non-peaceful purposes. In fact, the correctness of the Iranian argument would be the very source of its inability to comfort. For the very reason that Iran *can legally* develop ostensibly peaceful nuclear technology under the NPT and later turn around and "go nuclear," the argument goes, Iran needs to take measures beyond

²⁶⁰ Following the 1951 nationalization of the Iranian oil industry under the popular government of Mohammad Mosaddeq, a coup d'état masterminded by American and British intelligence services restored to power the deposed Mohammad Reza Shah Pahlavi in 1953. See generally MUSADDIQ, *IRANIAN NATIONALISM, AND OIL* (James A. Bill & Wm. Roger Louis, eds., 1988). On the coup see MOHAMMAD MOSADDEQ AND THE 1953 COUP IN IRAN (Mark J. Gasiorowski & Malcolm Byrne, eds., 2004); STEPHEN KINZER, *ALL THE SHAH'S MEN: AN AMERICAN COUP AND THE ROOTS OF MIDDLE EAST TERROR* (2003). The United States continued to support the monarch, much to the chagrin of many Iranian people, who overthrew him in 1979.

²⁶¹ Akbar Ganji, Money Can't Buy Us Democracy, N.Y. TIMES, Aug. 1, 2006, at A15; Craig S. Smith, In Speech, Nobel Winner Rebukes the U.S., N.Y. TIMES, Dec. 11, 2003, at A20; Shirin Ebadi & Hadi Ghaemi, The Human Rights Case Against Attacking Iran, N.Y. TIMES, Feb. 8, 2005, at A25.

²⁶² Or it may not be. See *supra* note 107.

²⁶³ See *supra* Part III(b).

what it is legally required to do under the NPT to assure all parties of its peaceful intentions. There is some evidence to substantiate the accusation that Iran is smartly taking advantage of NPT's dual use weakness to the fullest possible extent. Iran had the largest network of front companies purchasing dual-use equipment for ostensibly legitimate reasons but possibly directed towards a bomb program.²⁶⁴ Although there is no evidence even remotely resembling a "smoking gun" to establish Iran's intent to produce weapons, an 18-year history of concealing the nuclear program, only partly accurate revelations about its nature and extent, and Iranian links to the A.Q. Khan network provide ample cause for worry.²⁶⁵

It is true that the 2007 American National Intelligence Estimate's "high confidence" conclusion that "in fall 2003, Tehran halted its nuclear weapons program" should assuage some of these worries.²⁶⁶ It is also true that Iran may argue that its concealment has nothing to do with masking a nuclear weapons program and everything to do with a distrust of the West, especially the United States. That distrust is arguably reasonable in view of Iran's post-revolutionary isolation.²⁶⁷ But if Iran has good reason to be suspicious, the same is also true of those alarmed by its program. After all, India, Pakistan, North Korea and Israel did not announce their intention to build nuclear weapons beforehand. Furthermore, it stretches the credulity of some to believe that the country commanding the second largest proven resources of natural gas and the third largest proven resources of oil in the world²⁶⁸ needs an independent full-fledged nuclear generation industry to meet its needs. This is especially suspicious in view of the fact that Iran produces more electricity than it consumes, imports only about one percent of the electricity it consumes, and has an electricity export-to-import ratio of about 1.2.²⁶⁹ Iran's claim that it needs a full-fledged nuclear industry for its meager needs is, in the words of former Iranian deputy foreign minister Maleki, "akin to raising cows in your house to provide you with your daily glass of milk. You're better off just buying it from the grocer."²⁷⁰

²⁶⁴ CORERA, SHOPPING FOR BOMBS, *supra* note 6, at 67. There is no evidence that the material was in fact directed towards a bomb program.

²⁶⁵ See *supra* Part II. See also CORERA, SHOPPING FOR BOMBS, *supra* note 6, at 67.

²⁶⁶ NIE, *supra* note 85.

²⁶⁷ See *supra* note 199-207 and accompanying text.

²⁶⁸ Statistics are from CIA WORLD FACTBOOK 2007, available at <https://www.cia.gov/cia/publications/factbook/index.html> (last visited Mar. 4, 2008).

²⁶⁹ *Id.*

²⁷⁰ Interview with Abbas Maleki, *supra* note 209. Others are less suspicious of Iranian motives. Underscoring a worldwide move away from depletable energy sources, Larijani told me, "Why we need atomic energy is a matter for us decide." Interview with Mohammad Javad Larijani, *supra* note 226. It is possible that the lower environmental costs and longer-term durability of nuclear energy are a good

The proposal that Iran should suspend uranium enrichment may sound too good to be true. It is obvious, one might object, that if Iran suspended enrichment we would not be stuck in the current impasse; the problem is that they never will. This view is inaccurate. To begin with, Iran has suspended enrichment several times but resumed following the breakdown of negotiations.²⁷¹ Furthermore, though it appears that suspension is now one of Iran's absolute "won't do"s, the face-saving legal cover mechanism and the reciprocal steps to be taken by the United States would make suspension much more likely, both by altering the calculus of Iranian leaders and by strengthening those Iranian politicians who support suspension.

Once suspension is accomplished, there has to be some form of arrangement to ensure that Iran will obtain the nuclear power it claims it needs. This can be done through some form of joint-venture fuel-sharing arrangement—for example enrichment on Iranian soil done by an international staff; an international consortium of nuclear power suppliers with all consortium members' guaranteeing to step in if one party defaults; an IAEA-sponsored fuel bank; or the establishment of a nuclear reserve (like the U.S. Strategic Petroleum Reserve) inside Iranian territory.²⁷²

Iran must understand that given the current international political climate a demand for indigenous Iranian-controlled production of nuclear power without any more supervision than directly mandated by the NPT is not sustainable without international isolation. And Iranian leaders do in fact understand this, as I learned from prominent Iranian foreign policy thinkers on both sides of the Iranian political aisle. Describing some of the nuclear sharing arrangements noted above, Maleki told me, "Iran is ready to compromise, as long as the compromise is *face-saving*."²⁷³ Larijani, closer to the foreign policy establishment currently in power, told me:

If the world would sell us fuel we wouldn't go after it ourselves. We are willing to talk to America, but we need "mutual commitments with verifiable policies." If America compromises we will just save our R&D [research and development] and will not produce fuel at all. . . . Let us verify that they will give us [the fuel] and let them

reason why Iran is after it. The argument that whatever the reason it is a matter of internal Iranian affairs, though correct, misses the point about trust.

²⁷¹ See *supra* Part II.

²⁷² For a more detailed examination of these possibilities see Abbas Maleki & Matthew Bunn, Finding a Way Out of the Iranian Nuclear Crisis (March 23, 2006) (Paper for the Belfer Center for Science and International Affairs at the John F. Kennedy School of Government, Harvard University) (*available at* http://bcsia.ksg.harvard.edu/whatsnew.cfm?program=STPP&nt=top&pb_id=523).

²⁷³ Interview with Abbas Maleki, *supra* note .

verify that we won't do anything [i.e. will not divert to non-peaceful purposes]. But the big problem is confidence. On both sides.²⁷⁴

As explained in the discussion of the legal cover solution, the problem is one of style, not substance. Currently it is politically unfeasible for those in Iran who are genuinely committed to a solution to unilaterally propose the bargain that will be good for Iran and its international negotiating partners. In the presence of a legal safety net, however, the optimal bargain could be struck.

The second step Iran should take is to refrain from the radical claims and aggrandized rhetorical flourishes that characterize many of Ahmadinejad's statements. For example, Ahmadinejad's likening Iran's nuclear progress to a train without breaks or reverse gears²⁷⁵ only makes resolution more difficult by portraying Iran as unreasonable and inflexible. Most notoriously, calling into question the Holocaust²⁷⁶ is nothing but shooting oneself in all four limbs. There has been some controversy over what exactly Ahmadinejad has said, whether he has been mistranslated, and whether he is actually an "anti-Semite,"²⁷⁷ but these points are unimportant. Going anywhere near questioning the occurrence of the Holocaust and hosting a conference featuring a former Ku Klux Klan Grand Wizard are simply idiotic. One explanation is that such jamboree is aimed at portraying Ahmadinejad as a stalwart against Israeli aggression, an image that could score points for Iran in the Arab world. But some sympathy in the streets of Cairo is unquestionably an infinitesimal gain at the dear price of international condemnation and isolation at a time when Iran is desperately in want of goodwill. If Iran wants to criticize Israel, it can do so without saying a word about the Holocaust. Iran should steer clear of inflammatory rhetoric.

Last but not least, Iran must respect the one-voice principle of international affairs. It is widely recognized that in its dealings with other states a state needs a sole representative or core of representatives whose word

²⁷⁴ Interview with Mohammad Javad Larijani, *supra* note 226. The phrase inside quotation marks was said in English.

²⁷⁵ Brian Knowlton, Iran Takes Bold Tone on Eve of Meetings, *Int'l Herald Trib.*, Feb. 26, 2007, at 1.

²⁷⁶ See, e.g., Iranian President Calls the Holocaust a "Myth," *L.A. TIMES*, Dec. 15, 2005, at A5; Iranian President Says Holocaust Was "Fabricated," *USA TODAY*, Dec. 15, 2005, at 16A; Iranian President Repeats Denial of Holocaust, *INDEPENDENT*, Dec. 15, 2005, at 26; see also Nazila Fathi, Iran Draws Holocaust Skeptics to Conference, *INT'L HERALD TRIB.*, Dec. 12, 2006, at 4; Robert Tait, *Holocaust Deniers Gather in Iran for "Scientific conference,"* *GUARDIAN*, Dec. 12, 2006, at 16; *Across Europe, Outrage over Meeting of Holocaust Deniers in Iran*, *INT'L HERALD TRIB.*, Dec. 12, 2006.

²⁷⁷ See, e.g., *Iranian Leader "Not Anti-Semite,"* *BBC NEWS*, Sept. 21, 2006, http://news.bbc.co.uk/2/hi/middle_east/5368458.stm; Jonathan Steele, *If Iran Is Ready To Talk, The US Must Do So Unconditionally*, *ZNET*, June 4, 2006, <http://www.zmag.org/content/showarticle.cfm?itemid=10373>.

can be trusted as that of their respective state. This maxim has found expression in various principles of international law. For example, it is customary for states to give a person “full powers”²⁷⁸ in treaty negotiations. The Vienna Convention on the Law of Treaties, the primary international instrument on treaty law, precisely articulates the idea of “full powers.”²⁷⁹ It goes on to mandate that a person is considered as representing a state for treaty-related purposes if he produces full powers or if it can be implied from state practice and other relevant circumstances that it was a state’s intention to clothe him with full powers.²⁸⁰ Accordingly, certain officials such as heads of state and foreign ministers are presumed to represent their state in certain treaty-related matters without the necessity of formally producing full powers.²⁸¹ The one-voice principle also finds expression in two corollary principles of customary international law—first that international law is indifferent to the domestic process through which a state complies with its international legal obligations (as long as it complies with them) and second that a state cannot successfully invoke domestic law as a defense to its breach of international obligations. Peering into the body politic of each state is so impractical that international law treats states as unitary legal entities for the purposes of interstate legal obligations.

The core rationale of the one-voice maxim is that it enables credible commitments. Given the multiplicity and diversity of actors, it would be impossible to involve the whole panoply of every state’s government in international negotiations—hence the need for small groups. And negotiation is but a wasteful sham if its outcome cannot be relied upon—hence the necessity that the small group be trusted as the voice of an entire nation. It is therefore apparent that every state must respect the one-voice principle if it is to find any place in the global arena as a reliable partner. Otherwise it will be found untrustworthy not only in legal dealings but in all international diplomacy, much to the frustration of other states and above all to its own detriment.

Unfortunately, Iran has shown an uncanny tendency to trample on the one-voice principle. The internal power structure of the Islamic Republic is murky to outsiders. Especially when it comes to foreign policy and its

²⁷⁸ Black’s Law Dictionary defines “full powers” as “An official document designating a person to represent a country for (1) negotiating, adopting, or authenticating the text of a treaty, (2) expressing the consent of the country to be bound by a treaty, or (3) accomplishing any act with respect to the treaty.” BLACK’S LAW DICTIONARY 695 (8th ed. 2004).

²⁷⁹ VCLT Article 2(1)(c) states, “‘full powers’ means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty.” VCLT, *supra* note 107, art. 2(1)(c).

²⁸⁰ *Id.*, art. 7(1).

²⁸¹ *Id.*, art. 7(2).

grand issues—for example the nuclear crisis, Iran’s policy in Iraq, and American-Iranian relations—no one has a good idea who calls the shots. The Senate testimony of nuclear expert and Iran-watcher James Walsh is a case in point. Describing seven or eight individual and organizational power centers with potential influence on Iranian nuclear decisionmaking, Walsh was ultimately unable to point to any hierarchy that would enable an interested foreign statesperson to focus on any entity as the carrier of Iran’s final word.²⁸² Other observers have similarly found the Iranian foreign policy decisionmaking structure opaque and have been unable to venture beyond “educated guesses.”²⁸³ Having avidly pursued the foreign policy of the Islamic Republic, I am also unable to arrive at a narrower list. The decisionmaking core probably includes, from the inner circle to the edges, Leader Ali Khamenei; former President, current head of the Expediency Discernment Council and Chairman of the Assembly of Experts Akbar Hashemi Rafsanjani; the Corps of Guardians of the Islamic Revolution (usually known as the Revolutionary Guards), currently led by Mohammad Ali Jafari; President Mahmoud Ahmadinejad; the Supreme National Security Council, a national security team comprising high-level government officials from various branches of government;²⁸⁴ the Army of the Islamic Republic of Iran; the Defense Ministry, currently led by Mostafa Mohammad Najjar, preceded by Ali Shamkhani; the Iranian Atomic Energy Agency; and possibly former President Mohammad Khatami. The influence of certain behind-the-scene clerics and militant pressure groups is impossible to estimate. The most comical manifestation of the dearth of information about the decisionmakers in Iran’s nuclear program was the U.S. State Department’s use of Google to discover the names of key Iranian officials in order to put them on the list of targets in the American draft for UN Security Council sanctions.²⁸⁵

What is bothersome is not so much the wide variety of influential politicians; the groupthink nature of the Islamic Republic’s decisionmaking has probably served the regime well throughout the years. Group leadership causes a wider range of ideas to be pitted against one another and

²⁸² Jim Walsh, Testimony before the Subcommittee on Federal Financial Management, Government Information & International Security, Committee on Homeland Security & Governmental Affairs U.S. Senate 6-8 (July 20, 2006).

²⁸³ SHAHRAM CHUBIN, *WHITHER IRAN? REFORM, DOMESTIC POLITICS, & NATIONAL SECURITY* 38-39, 78-79 (2002).

²⁸⁴ As of October 20, 2007, the secretary of the Supreme National Security Council is Saeed Jalili. Jalili succeeded Ali Larijani, who had succeeded Hassan Rohani on August 15, 2005, after Ahmadinejad became president. See Nazila Fathi & Michael Slackman, *Iran’s Nuclear Envoy Quits; Talks in Doubt*, N.Y. TIMES, Oct. 21, 2007, at A8; *Larijani Appointed Iran’s Top Nuclear Negotiator*, INDO-ASIAN NEWS SERVICE, Aug. 15, 2005; Sadeq Saba, *Iran Hardliner Heads Nuclear Team*, BBC NEWS, Aug. 8, 2005, http://news.bbc.co.uk/2/hi/middle_east/4131694.stm.

²⁸⁵ Dafna Linzer, *Seeking Iran Intelligence, U.S. Tries Google*, WASH. POST, Dec. 11, 2006, at A1.

decreases the likelihood of single-minded foolhardiness of the kind that has brought demise to the likes of Saddam Hussein. The problem is that no single voice finally comes out of the multitude. Iran can think with many heads, but it must learn to speak with one voice. There are many countries with more participatory decisionmaking structures than Iran, but at the end of the day a decision is made and when it is announced no one undermines it. Not so in the Islamic Republic.

In August 2004, in the midst of critical talks between IAEA officials and Iranian diplomats, then Defense Minister Ali Shamkhani jumped into the scene from nowhere with disturbingly militant rhetoric about the nuclear program and the U.S. presence in the Persian Gulf, even warning of the possibility of an Iranian preemptive attack.²⁸⁶ Another example of internal Iranian division is the nakedly hostile competition between Rafsanjani and Ahmadinejad. Prior to Iran's first successful use of centrifuge devices to enrich uranium, President Ahmadinejad had foretold of national "good news." Right before he was to announce the news, however, Rafsanjani cramped his style by announcing it in an interview with the Kuwaiti news agency.²⁸⁷ The announcement apparently followed verbal altercations between the former presidential rivals on the proper direction of Iranian foreign policy.²⁸⁸ Similarly, in January 2007, as international pressure mounted on Iran and the specter of a third UN Security Council Resolution loomed large, Iran pursued a divided strategy: Ahmadinejad and certain Revolutionary Guards commanders proceeded with militant rhetoric, even warning of the possibility of an Iranian closure of the strait of Hormoz in case of heightened international pressure, just as Iranian diplomats cautiously emphasized the importance of moderation and diplomacy in resolving the crisis.²⁸⁹

Iran also showed vacillation and internal division in its response to ElBaradei's January 2007 proposal for simultaneous suspension of UN Security Council sanctions and Iran's uranium enrichment. The proposal initially raised hopes of a breakthrough. Chief nuclear negotiator Ali Larijani called it "contemplatable" and voices within Iran, including former Presidents Khatami and Rafsanjani, were increasingly critical of

²⁸⁶ *Iranian Minister of Defense on Possible Iranian Preemptive Strike*, MIDDLE EAST MEDIA RES. INST. (MEMRI), Aug. 20, 2004, <http://www.memritv.org/Transcript.asp?P1=212>.

²⁸⁷ Ahmad Zeydabadi, *Iran's "Atomic Good News" and Rafsanjani's Preemption*, BBC PERSIAN, Apr. 11, 2006, http://www.bbc.co.uk/persian/iran/story/2006/04/060411_mj-nuc-surprise-rafsanjani.shtml.

²⁸⁸ *Id.*

²⁸⁹ Ahmad Zeydabadi, *Iran's Nuclear Program and Ahmadinejad's Role*, BBC PERSIAN, Jan. 21, 2007, http://www.bbc.co.uk/persian/iran/story/2007/01/printable/070121_nh-iran-nuclear.shtml.

Ahmadinejad's bellicose stance.²⁹⁰ However, Larijani changed course in a matter of days, probably as a result of negative domestic input, complaining that the proposal was not "mature" enough and that the crisis was not amenable to a "simple one-line solution."²⁹¹ Larijani also canceled his planned trip to the Munich security conference in early February 2007, where observers hoped he would hold talks with high-level European officials and possibly even the Americans.²⁹² Perhaps the most comical of these incidents was the abrupt break-up of "historic" Iranian-American talks in Sharm el-Sheikh in May 2007. Foreign ministers of the countries had met after much consternation and with grand historical anticipations, only to have the Iranian foreign minister walk out of the room in protest to a female violinist's dress.²⁹³ If Iran did not want to participate in the meeting it should have decided so beforehand; to take part and then shirk under the most stupid of pretexts betrays an embarrassing lack of foreign policy coherence.

The row over Iran's capture of 15 British navy personnel in the Gulf, though not directly related to the nuclear issue, is a perfect symbol of Iran's problem of speaking with a fractured voice in charting its grand strategy. On March 23, 2007 Iran seized 15 British naval personnel in northern Persian Gulf, alleging that they were illegally operating in Iranian waters.²⁹⁴ Britain insisted that the seamen were in Iraqi waters fulfilling a UN mandate and demanded their release.²⁹⁵ The crew was paraded on Iranian television more than once, admitting illegal entry into Iranian waters and declaring that they had become victims of Britain's adventurous policies in Iraq.²⁹⁶ Meanwhile the rhetoric in Iran grew increasingly belligerent. Ahmadinejad called for the "arrogant" British

²⁹⁰ Sadeq Saba, *ElBaradei's New Proposal: Peaceful Resolution of the Iran Nuclear Crisis?*, BBC PERSIAN, Jan. 29, 2007, http://www.bbc.co.uk/persian/iran/story/2007/01/070129_ss-irannuclear.shtml.

²⁹¹ *US Rejects Iran Nuclear "Timeout,"* BBC NEWS, Jan. 30, 2007, http://news.bbc.co.uk/2/hi/middle_east/6312011.stm. The U.S. refusal to embrace the proposal may have also played a role in Iran's change of heart in this instance, again underscoring the pride problem.

²⁹² *Cancellation of Larijani's Trip to the Munich Security Conference*, BBC PERSIAN, Feb. 9, 2007, http://www.bbc.co.uk/persian/iran/story/2007/02/printable/070209_mv-larijani-munich.shtml.

²⁹³ Jonathan Beale, *Brief Encounters at Sharm el-Sheikh*, BBC NEWS, May 5, 2007, http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/6627557.stm.

²⁹⁴ Mary Jordan & Robin Wright, *Iran Seizes 15 British Seamen*, WASH. POST, Mar. 24, 2007, at A11.

²⁹⁵ British and Iranian versions of events are available at *The Capture of the UK Crew*, BBC NEWS, Mar. 30, 2007, http://news.bbc.co.uk/2/hi/in_depth/6502805.stm.

²⁹⁶ *See Iran TV Shows Seized UK Navy Crew*, BBC NEWS, Mar. 28, 2007, http://news.bbc.co.uk/2/hi/uk_news/6503657.stm; *see also Transcript of Faye Turney's Letters*, BBC NEWS, Mar. 30, 2007, http://news.bbc.co.uk/2/hi/uk_news/6509581.stm.

to apologize over the illegal entry.²⁹⁷ Crowds demonstrating in front of the British embassy in Tehran demanded an apology and the seamen's trial.²⁹⁸ Then, in an abrupt about-face, Ali Larijani announced that Iran was keen on resolving the crisis through diplomatic channels and was not intent on a trial.²⁹⁹ Britain responded positively, and the crew were released the next day.³⁰⁰ It was clear to any close observer that Larijani's announcement indicating Iran's desire for a diplomatic solution was key to resolving the crisis. The unanswered question was what and who motivated Iran's sudden change of heart. The sense of bafflement was captured in a BBC article that asked "Who called the shots in Iran crisis?" and answered, "no-one outside a small, elite circle in Iran really knows."³⁰¹

The fractured voice problem is known among Iran's policymaking elite. When I put the question to him, Larijani shook his head, shrugged his shoulders, and simply admitted, "We do not speak with one voice."³⁰² The result is that foreign diplomats do not know who to talk to and whose word to trust, making Iran an unpredictable and unreliable actor. Iranian leaders must learn to set domestic political differences aside and speak with a unitary voice in sensitive national security matters, lest their myopic insistence on divisions spell national disaster to the detriment of them all.

V. CONCLUSION

This Note reviewed the historical development of the Iran nuclear crisis and described the machinery of the NPT regime, the international legal framework currently in place to deal with nuclear proliferation. I reviewed the inadequacies of the NPT regime and detailed the history of noncompliance by the nuclear haves and have-nots. Viewed in light of its shortcomings, it became clear that the NPT regime cannot be trusted to solve the Iran nuclear problem in the same way we expect domestic law to regulate conduct and punish misbehavior. It would be naïve to attempt to find a way out of the current impasse by conventional legal reasoning, i.e. analyzing the positions of Iran and of those opposed to its

²⁹⁷ *Ahmadinejad Demands British Apology Over Sailors*, AGENCE FRANCE PRESS, Mar. 31, 2007; Paul Reynolds, *Britain and Iran Raise the Stakes*, BBC NEWS, Mar. 31, 2007, http://news.bbc.co.uk/go/pr/fr/-/2/hi/uk_news/6502947.stm.

²⁹⁸ *Protests at UK's Tehran Embassy*, BBC NEWS, Apr. 1, 2007, http://news.bbc.co.uk/2/hi/uk_news/6516711.stm.

²⁹⁹ *UK "Shares Iran Diplomacy Desire"*, BBC NEWS, Apr. 3, 2007, http://news.bbc.co.uk/go/pr/fr/-/2/hi/uk_news/6519947.stm.

³⁰⁰ Tom Hundley, *Iran Frees Sailors as a "Gift" to Britain*, CHI. TRIB., Apr. 5, 2007, at C9.

³⁰¹ Pam O'Toole, *Who Called the Shots in Iran Crisis?*, BBC NEWS, Apr. 5, 2007, http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/6531505.stm.

³⁰² Interview with Mohammad Javad Larijani, *supra* note 226.

nuclear development and trying to determine which side is right from the point of view of NPT. But if the NPT is helpless as sovereign command backed by force, the regime of norms it sets in place can come to the rescue as a legal cover providing a safety net for political negotiations. I proposed negotiations, initiated and supervised by IAEA, involving Iran and the United States, as well as possibly Britain, France, Germany, Russia, and China. NPT would provide the frame of reference during the negotiations. The final results would be approved by the IAEA. By smoothing over the torrents of pride and creating the appearance of neutrality, this legal cover would move both sides to extend their hands without fear of being rebuked, thus eliminating political barriers to a bargain that is beneficial for all.

Having outlined the procedural mechanism that can facilitate an optimal bargain, I suggested some substantive steps to be taken by the United States and Iran to increase the likelihood of negotiated success once the legal cover is in place. The United States should formally and unequivocally disavow regime change as an objective of American policy towards Iran and abstain from the rhetoric of spreading liberty and democracy. Iran should suspend uranium enrichment, strictly refrain from combative rhetoric, and speak with one voice.

In conclusion, it is worth pondering the implications of the tragic progression of the Iran nuclear crisis. I started writing this Note in late December 2006. Since then, every significant development in the Iran nuclear issue has been negative: four UN Security Council Resolutions against Iran; increasing hostility between Iran and the United States, manifest in the American seizure of Iranian personnel in Irbil and Iran's detention of an Iranian-American researcher; increasing tension between Iran and its European negotiating partners, as seen in the row over Iran's capture of 15 British seamen; and the lack of any indication that even a temporary compromise is at hand. It does not take a cynic to conclude that we suffer not from a dearth of solutions but from the lack of will to find any. After all, who does not understand that seizing Iranian officials in Iraqi territory can bring nothing but harm, or that questioning the Holocaust will only increase tension? Such actions cannot be miscalculated efforts to find a compromise. They are monkey wrenches thrown in to forestall one. It takes extraordinary optimism to deny that powerful forces in the camps of the two most important actors, Iran and the United States, have little use for a non-confrontational solution. The problem, therefore, is not so much proposing a mechanism that can break the deadlock but finding influential politicians who care enough to do so. It would not be far from realism to end on this sad note. But perhaps the use of a proposal like mine would be to force a brighter delineation of positions. Because its initiative rests with a well-meaning third-party and because it is hard for either side to spin it as a one-sided ploy designed to cheat rather than to find common ground, a legal cover solution makes it difficult for those who oppose it to appear as anything but coveters of

crisis. Thus exposed, it is to be hoped that the sane majority in both countries will not keep them in the seat of power for long. May time be on the side of the sane.