

Article

How to *Really* Engage Iran: A Proposal

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Amit K. Chhabra

“We always did feel the same. We just saw it from a different point of view.”

- Bob Dylan, *Tangled Up in Blue*

“Fredo Corleone: I'm your older brother, Mike, and I was stepped over!

Michael Corleone: That's the way Pop wanted it.

Fredo Corleone: It ain't the way I wanted it! I can handle things! I'm smart! Not like everybody says... like dumb... I'm smart and I want respect!”

- Fredo Corleone, *The Godfather: Part Two*

Introduction

After the World Trade Center attacks on September 11, 2001 (“9/11”), American public opinion understandably disfavored talk of negotiating with perceived enemies of the state. In this context, President Barack Obama’s 2008 campaign was criticized for its stated choice to engage Iran directly and to meet its president without preconditions.¹ Thus, it became politically advantageous to appear tough with Tehran;² the harrowing events of the Iran Hostage Crisis in the not-so-distant past added fuel to the fire.³ However, the ultimate question of how the world’s only

¹ See David E. Sanger et. al., *On the Issues – Iran*, N. Y. TIMES, 2008, available at <http://elections.nytimes.com/2008/president/issues/iran.html>.

² *Id.* Senator John McCain, for example, in his 2012 campaign bid for the American presidency insisted that he would not engage with Iran directly. Instead, he favored a coalition approach outside the United Nations, as he knew well that Russia and China would likely block efforts by the United States to push economic and military sanctions against Iran through the Security Council’s Article 41 mechanism. (“The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”) UN Charter, art. 41.

³ The crisis was precipitated by American support for a 1953 coup in favor of the Western-friendly Shah Mohammad Reza Pahlavi over Mohammad Mossadeq and the United States’ refusal to hand over

remaining superpower may legitimately challenge Iran's nuclear pursuits in accordance with international law must not be affected by changing political winds or by a Hollywood director's choice of anti-American depictions.⁴ Thus, this Article first reviews U.S.-Iranian diplomatic history and principles of international law governing the use of force; to American eyes, Iran appears as a bulimic man⁵ with plenty of posturing though indeterminate intentions and nuclear weapon capabilities. Next, the Article looks to lessons learned from dealing with such "rogue" states⁶ as Cuba, North Korea and Libya. The Obama Administration's first term foreign policy presages a continued stalemate with Iran, as Iran tends to not violate international law;⁷ moreover, Iran is unable to abandon one of its most vital

the shah who was visiting for cancer treatment in 1979. *Chronology U.S.-Iran Relations 1906-2002*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/tehran/etc/cron.html> (last visited Nov. 9, 2013). The ill-fated attempt that followed in 1980 to rescue fifty-two American hostages revealed differences between the views of the State Department and the National Security Council, culminating in the public resignation of Secretary of State Cyrus Vance. News headlines made the Carter Administration and its foreign policy team look weak and vacillating, a clear example for the Obama Administration. See *A Short History of the Department of State: The Iranian Hostage Crisis*, U.S. DEPARTMENT OF STATE, <http://history.state.gov/departmenthistory/short-history/iraniancrises> (last visited Nov. 9, 2013).

⁴ The recent Hollywood film *Argo*, for example, depicts Iranian revolutionaries' hateful attacks on the U.S. Embassy and the desperate effort of a U.S.-Canadian venture to evacuate six Americans. These hate-filled images might encourage brinkmanship at a time when diplomacy and understanding are most needed. Official website: <http://argothemovie.warnerbros.com>.

⁵ I use the term "bulimic man" as a twist on the classic fat and thin man scenarios to describe the situation where an attacker *might* – but might not – be able to definitively wreak havoc upon us, and whose intentions escape our detection, and similarly might vacillate; in effect, his "appetite" for destruction is variable. Professor Carter describes a "thin man" dilemma as one where a thin man is falling towards our boat, certainly meaning us harm, though will probably miss us and not accomplish his aim presently. The question posed is whether we should aim to disable him even though rules of anticipatory self-defense would not justify our doing so because he does not clearly pose an imminent threat. And separately, should we attack him later even though he might have changed his mind and no longer intends us harm? Stephen L. Carter, *The Iraq War, the Next War, and the Future of the Fat Man*, 64 STAN. L. REV. 46 (Jan. 16, 2012). A "fat man" dilemma, by contrast, refers to the situation where a fat man is falling towards us and is certain to harm us, though we do not know if he actually intends us any harm; however, we can choose to disable him now.

⁶ The United States State Department maintains a list of state sponsors of terror. See *State Sponsors of Terrorism*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/j/ct/list/c14151.htm> (last visited Nov. 9, 2013) (including Iran on January 19, 1984); but see Ali Mostashari, *Iran: Rogue State?*, M.I.T. CENTER FOR INT'L STUD. AUDIT OF THE CONVENTIONAL WISDOM (September 2005) (challenging the "rogue" title by describing: 1) Iran's strengthened regional economic ties based on its prominence within the energy industry; 2) its nuclear strategy as rational rather than rogue as it can rely on support from China and Russia in the Security Council and also does not view America's imminent use of military force to resolve the nuclear standoff as a serious threat because air strikes are not a plausible solution and tactical nuclear strikes would be disproportionate to the threat posed and subject the United States to far-reaching consequences; 3) Iran's lack of support for al-Qaeda as it allegedly prosecuted three thousand of its members and has little connection to their Saudi or Sunni base that persecutes Iraqi Shi'ites, Iran being a predominantly Shi'ite nation; and 4) that America should therefore revise its estimates of Iran based on its rational and predictable behavior).

⁷ See Amit K. Chhabra, *Autumnal Rage: Playing With Islamic Fire*, 34 U.PENN. J. INT'L L. 389 (2013) (concluding that Obama's first term in office has generally been characterized by respect for

national security interests.⁸ Finally, the Article suggests an alternative negotiation route. After decades of frayed diplomatic relations between the United States and Iran, the same-old strategies will predictably lead to only more frustration and continued deadlock. In this regard, the P5+1⁹ should consider offering Iran the option of withdrawing from the NPT entirely or adhering to an NPT side letter that recognizes its nuclear weapons ambitions by enabling it to become a nuclear-capable state. Such a gesture of even-handedness has the collateral benefit of further revealing the parties' intentions and improving regional peace and security.

I. Background

A. U.S.-Iran Diplomatic History

Efforts by the United States and Iran to cooperate have been generally unsuccessful for decades. In 1953, the United States favored Shah Mohammad Reza Pahlavi over the nationalist Mohammad Mossadeq – and launched a coup to replace him – as a bulwark against the perceived influence of communism and to protect Western oil interests.¹⁰ After the

international law in its choices to intervene in Arab Spring nations). This does not mean, however, that the Obama Administration has been blameless in its conduct on the battlefield, including with respect to its controversial use of drone strikes accompanied by civilian collateral damage in Pakistan and Afghanistan. Moreover, the fact that Vice President Joseph Biden reached out to Iran so soon after the 2012 elections might be an indication that President Obama views his re-election as a mandate and intends to pursue a more aggressive foreign policy vis-à-vis Iran in his second term. Note, though, that some believe the Iranian regime is more durable than some of its neighbors that saw change during the Arab Spring due to its revolutionary message and willingness to forcefully clamp down on unrest. *See* Jean Lachapelle, Lucan Way, & Steven Levitsky, *Crisis, Coercion and Authoritarian Durability: Explaining Diverging Responses to Anti-Regime Protest in Egypt and Iran*, American Political Science Association Annual Meeting, New Orleans (August 31, 2012) (arguing that the Iranian regime's sustained, ideological struggle prepares it to face mass protests with forceful resolution whereas Egypt's powerful police force is less willing).

⁸ In any case, Iran would not be able to conclusively prove an absence of uranium enrichment. Instead, it has affirmatively stated that it will not stop enriching uranium as it is acting within its rights under the nuclear non-proliferation treaty. 2005 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (May 2-27, 2005) [hereinafter "NPT Review Conference"]. Moreover, Iran maintains that its interest in nuclear technology is purely for peaceful purposes; however, the International Atomic Energy Association ("IAEA")'s inspectors have challenged this contention. The lesson of Iraq on similar facts is disturbing. Iraq maintained that it did not possess weapons of mass destruction, and U.N. inspectors confirmed this; however, the George W. Bush administration used minor Kuwait border attacks as a pretext for the 2003 Iraq War.

⁹ The P5+1 group includes Germany and the five permanent members of the United Nations Security Council, namely the United States, Russia, China, United Kingdom and France. Tangible concessions by Iran at this meeting might have paved the road for the easing of sanctions. Marcus George, *Iran's Khamenei Rebuffs U.S. Offer of Direct Talks*, REUTERS (February 7, 2013).

¹⁰ *Chronology U.S.-Iran Relations 1906-2002*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/tehran/etc/cron.html> (last visited Nov. 9, 2013).

success of the Islamic Revolution in 1979,¹¹ Ayatollah Ruhollah Khomeini returned to Tehran, and the United States allowed the shah entry for cancer treatment. As the U.S. ignored requests to return the shah to face “justice,” the Iran Hostage Crisis emerged.¹² When talks failed to release the remaining fifty-two American hostages, President Jimmy Carter announced an embargo of Iranian oil and severed diplomatic relations. A covert U.S. effort to rescue the hostages failed.¹³ Through further negotiations, they were released.¹⁴

In 1982 Iran accused the United States of supporting Israel in the latter’s invasion of Lebanon, to which Iran sent troops in support of Lebanese Muslims.¹⁵ Lebanese Christians allegedly backed by the United States kidnapped four Iranian diplomats, and retaliatory kidnappings by the Lebanese Hezbollah – backed by Iran – followed. Further attacks alleged to have been carried out by Hezbollah occurred at the U.S. Embassy, the Embassy annex and at a Marine barracks in Lebanon; the United States proceeded to re-establish diplomatic relations with Iraq. As a sign of improving relations, the Iran-Contra Affair was an attempt to return American hostages in Lebanon and to covertly supply Iran with arms in violation of Congress’ proscription of dealing with state sponsors of terror. A few years later, the U.S.S. Vincennes shot down an Iran Air passenger plane on a routine flight, leading Ronald Reagan to indicate his regret.¹⁶

In 1993, President Bill Clinton declared his administration’s “dual containment” policy on Iran and Iraq. The idea with respect to Iran was to isolate it for its role in supporting terrorism, undermining Middle East

¹¹ In response to colonialism and nationalism, self-sacrifice in martyrdom served as a rallying ideology in Shi’a Islam and then spread to Lebanese Hezbollah, Palestine and Al Qaeda even though the latter groups are predominantly Sunni. This served in part to reconcile the two main branches of international Islam. See Bernard K. Freamon, *Martyrdom, Suicide, and the Islamic Law of War: A Short Legal History*, 27 FORDHAM INT’L L. J. 299 (2003).

¹² *Chronology U.S.-Iran Relations 1906-2002*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/tehran/etc/cron.html> (last visited Nov. 9, 2013).

¹³ *Id.*

¹⁴ The lesson of confronting Iran during the 444-day ordeal is instructive for the current face-off on potential nuclear weapons development. Then as now, a weaker power seeks to use what leverage it has to force a principle upon a much more powerful opponent. In 1979, the principle was that the U.S. should stay out of Iran’s domestic affairs, which it had violated by staging the coup against Mossadeq. Additionally, the United States refused to hand over the shah who was visiting for medical treatment. An analysis of negotiation strategies during that time shows that an interests-based approach was more effective than a rights-based one, and that hard, power-based bargaining was more effective than soft, concession-based bargaining. Karen A. Feste, *Negotiating with Terrorists: the U.S.-Iran Hostage Crisis*, The International Association for Conflict Management 18th Annual Conference, Seville, Spain (June 2005).

¹⁵ *Chronology U.S.-Iran Relations 1906-2002*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/tehran/etc/cron.html> (last visited Nov. 9, 2013).

¹⁶ *Id.*

peace efforts, and pursuing nuclear weapons. Two years later, he signed an executive order banning trade with Iran. The next year, Americans were injured and killed in the Khobar Towers bombing in Saudi Arabia for which a grand jury indictment pointed to Hezbollah and Iranian officials. In response, the Iran-Libya Sanctions Act placed sanctions upon companies investing \$40 million or more in Iranian or Libyan oil and gas projects. Mohammad Khatami's presidential election in 1997 opened Iran to warming relations with Secretary of State Madeleine Albright in talks the next year, though he still shunned government-level negotiations. Albright called on Iranians to work on a "roadmap leading to normal relations" with the U.S. In 1999, the U.S. eased sanctions to allow American companies to sell food and medical items to Iran. The next year, the U.S. lifted sanctions on Iranian luxury goods and acknowledged its role in the 1953 coup against Mossadeq though did not apologize. Iran's reformists won a majority of Parliament, upsetting the clerics.¹⁷

In 2001, Iran entered into a security agreement with Saudi Arabia, indicating that potential alliances with the Arab world that suspected it of fomenting Shi'ite dissent were possible. In spite of an indictment charging Iranian involvement with the Khobar Towers bombing, Iran denied its role; the U.S. extended sanctions against Iran for another five years. Although Ayatollah Khamanei condemned U.S. strikes in Afghanistan, Iran agreed to perform search-and-rescue missions of U.S. pilots despite their involvement in the Afghanistan campaign that led them to crash in Iran. Iran then entered a military alliance with Russia, after the latter had cut off support for six years due to U.S. pressure. Khatemi condemned the 9/11 attacks, and claimed that U.S. charges of Iranian involvement are an injustice. Secretary of State Colin Powell shook hands with Iranian Foreign Minister Kamal Kharrazi in a United Nations meeting to discuss the post-Taliban government.¹⁸

In 2002, Israeli authorities intercepted a ship carrying arms and intended for the Palestinian Authority. George W. Bush in his State of the Union address included Iran in an "Axis of Evil" that extended to Iraq and North Korea. In response to Senate Foreign Relations Committee Chairman Joe Biden's offer to meet Iranian deputies, Iran indicated that it would not oppose direct talks with American legislators. However, Secretary of Defense Donald Rumsfeld then denounced Iran's, Iraq's, and Libya's alleged role in West Bank bombings. This likely prompted Ayatollah Ali

¹⁷ *Id.*

¹⁸ *Id.*

Khamanei to denounce talks with the United States as useless even though internal reformists continued to press for them.¹⁹

In 2005, Ahmadinejad's election marked a conservative shift. Condoleezza Rice included Iran in her list of "outposts of tyranny."²⁰ The IAEA charged that Iran was violating the NPT by enriching uranium. The next year, Ahmadinejad sent a letter to George W. Bush calling for talks; the U.S. failed to respond directly, although it intimated that it would join Europe in talks if Iran suspended uranium enrichment. In 2007, U.S. and Iranian officials met face-to-face for direct Memorial Day talks. The IAEA claimed that Iran had 2,000 centrifuges enriching uranium; Iran claimed that number was 3,000.²¹ Moreover, a U.S. National Intelligence Estimate indicated that Iran had halted its nuclear weapons program in 2003.²²

In this regard, Security Council resolutions have been issued against Iran.^{23,24} However, these resolutions are inconsistent with Iran's

¹⁹ *Id.*

²⁰ Keith Porter, *Timeline of U.S.-Iranian Relations*, ABOUT.COM,

<http://usforeignpolicy.about.com/od/middleeast/a/timelineusiran.htm> (last visited Nov. 9, 2013).

²¹ Tehran's construction of gas centrifuge-based uranium enrichment facilities can be problematic as they are used to enrich uranium by spinning uranium hexafluoride gas in order to increase the concentration of the uranium-235 isotope. The ensuing low-enriched uranium ("LEU") is useful for nuclear power reactors, though highly enriched uranium ("HEU") can be used for nuclear power reactors or as one of two possible types of fissile materials in nuclear weapons. Iran also has a uranium-conversion facility, which can produce uranium hexafluoride from uranium oxide. Additionally, Iran's construction of a heavy water reactor in Arak can be used to produce both medical isotopes and plutonium that is useful for nuclear weapons if it is separated from the spent fuel via "reprocessing"; Iran claims it will not do so. PAUL K. KERR, CONGRESSIONAL RESEARCH SERVICE, *IRAN'S NUCLEAR PROGRAM: TEHRAN'S COMPLIANCE WITH INTERNATIONAL OBLIGATIONS* (September 18, 2012).

²² *Id.*

²³ Using its Article 41 powers through Resolution 1737, the Security Council placed economic sanctions on Iran due to its previous failure to halt undisclosed uranium enrichment, demanded that such enrichment stop and that other UN member states not supply Iran with any materials that would contribute to nuclear weapons development, and froze the assets of some persons and entities supporting Iran's nuclear proliferation. *Security Council Imposes Sanctions on Iran for Failure to Halt Uranium Enrichment, Unanimously Adopting Resolution 1737 (2006)*, SC/8928 (Dec. 23, 2006), available at <http://www.un.org/News/Press/docs/2006/sc8928.doc.htm>. Similarly, through Resolution 1747, the Security Council broadened S.C. Resolution 1737's effects by banning Iran's arms exports and freezing the assets of additional individuals supporting Iran's nuclear proliferation. *Security Council Toughens Sanctions Against Iran, Adds Arms Embargo With Unanimous Adoption of Resolution 1747 (2007)*, SC/8980 (Mar. 24, 2007), available at:

<http://www.un.org/News/Press/docs/2007/sc8980.doc.htm>. Further, Resolution 1929 requires Iran to suspend uranium enrichment and its heavy-water reactor, to ratify the NPT's Additional Protocol, and to refrain from any ballistic missiles activity capable of delivering nuclear weapons. *Resolution 1929 (2010)*, S/Res/1929 (June 9, 2010), available at:

http://www.iaea.org/newscenter/focus/iaeaairan/unsc_res1929-2010.pdf.

²⁴ Orde F. Kittrie, *Averting Catastrophe: Why The Nuclear Nonproliferation Treaty is Losing its Deterrence Capacity and How to Restore It*, 28 MICH. J. INT'L L. 337, 388-89 (contending, *inter alia*, that Resolutions 1737 and 1747 merely had the effect of stating "we won't help" in Iran's creation of nuclear weapons, rather than "stop, or else" as they only limit trade in nuclear technology with Iran and impose a limited asset freeze; and in any case, the fact that the Iranian regime's motivations include martyrdom ideology and religion imply that it would be willing to accept greater costs than a nation

obligations under the NPT; they go much further due to IAEA inspections and suspicions. In an apparent effort to appease some of these concerns, Iran signed – though did not ratify – the NPT Additional Protocol that provides IAEA inspectors with greater authority to access nuclear production sites and that requires Iran to more comprehensively declare its nuclear activities.²⁵ However, Iran revoked the Additional Protocol in 2006 and informed the IAEA the next year that it would not comply with a provision in its Safeguard Agreement²⁶ requiring it to provide design information for new nuclear facilities as soon as the decision had been made to build them; rather, it preferred to provide this information one hundred and eighty days before introducing nuclear material.²⁷ On this basis, Iran has refused to update design information on its heavy water reactor in Arak and another intended reactor at Darkhovin, and it justifies its failure to previously notify the IAEA of its gas centrifuge uranium enrichment facility called the Fordow facility.²⁸

B. *American Perspective*

President George Washington's Farewell Address reveals a good deal about the philosophical underpinnings of our foreign policy. As he counseled to ensure the "permanency of [o]ur felicity as a people,"²⁹ America should "[o]bserve good faith and justice towards all nations; cultivate peace and harmony with all; [i]t will be worthy of a free, enlightened, and... great nation, to give to mankind the magnanimous and too novel example of a people always guided by an exalted justice and benevolence."³⁰ With these concepts of justice in mind, the early American republic made a genuine attempt to hold its citizens accountable to non-Americans through the Alien Tort Claims Act.³¹

concerned with an economic calculation alone). *See also* Orde F. Kittrie, *Emboldened by Impunity: The History and Consequences of Failure to Enforce Iranian Violations of International Law*, 57 SYRACUSE L. REV. 519 (2007) (concluding that a preventive U.S. or Israeli strike on Iran should not come as a surprise if Security Council unanimity cannot be obtained, especially in light of Iran's ideology that places a premium on terrorism, self-sacrifice, nuclear proliferation, and the annihilation of liberal democracy).

²⁵ *Iran Signs Additional Protocol on Nuclear Safeguards*, IAEA (December 18, 2003), available at <http://www.iaea.org/newscenter/news/2003/iranap20031218.html>.

²⁶ *See infra* note 55.

²⁷ PAUL K. KERR, *supra* note 21, at 5.

²⁸ *Id.*

²⁹ George Washington's Farewell Address to the People of the United States 5 (2000) available at <http://www.gpo.gov/fdsys/pkg/GPO-CDOC-106sdoc21/pdf/GPO-CDOC-106sdoc21.pdf>.

³⁰ *Id.* at 22.

³¹ The Alien Tort Claims Act of 1783 was enacted to govern perceived American misconduct at home that caused actionable harm to non-Americans, 28 U.S.C. § 1350.

Applying Washington's prescription to the situation at hand with Iran, we observe good intentions on the surface by the Obama Administration which faces a unique quandary, one that the author terms a bulimic man dilemma.³² We cannot definitively discern Iran's, perhaps, vacillating intentions. Iran's ability to actually harm us is similarly in flux, in our view, as we are unclear whether it has actually acquired the ability to develop tactical or strategic nuclear weapons, to quickly assemble them, or to conceal them. Moreover, it is not clear that Iran intends us any harm at all, only that it has asserted its rights to peaceful use of nuclear technology as a signatory of the NPT³³ and that it uses provocative language in asserting these rights. Mere threats, of course, are generally considered to be non-actionable. In this regard, Iran does not present an imminent threat of attack. Indeed, any concern that we might have asserted with respect to Iranian nuclear proliferation has arguably weakened due to revised Israeli intelligence estimates that Iran will develop its first nuclear weapons in 2015 or 2016, rather than in 2013.³⁴ Thus, it would appear that we do not have a right to bomb Iran in the same manner as we hunted Al Qaeda operatives and Osama bin Laden to bring them to justice in response to their confessed commissions of – and conspiracy to commit – positive acts of terrorism.³⁵ Additionally, a pre-emptive strike is unjustified as there is no evidence that Iran plans an imminent attack or that it even possesses a single nuclear weapon. The most genuine offer possible in keeping with

³² See discussion *supra* note 5.

³³ In 1970, Iran became a party to the NPT. (“[A]ll Parties to the Treaty are entitled to participate in the fullest possible exchange of scientific information for, and to contribute alone or in co-operation with other States to, the further development of the applications of atomic energy for peaceful purposes”), Non-Proliferation of Nuclear Weapons, pmbl., July 1, 1968, available at <http://www.un.org/en/conf/npt/2005/npttreaty.html> [hereinafter NPT]. Moreover, “the benefits of peaceful applications of nuclear technology, including any technological by-products which may be derived by nuclear-weapon States from the development of nuclear explosive devices, should be available for peaceful purposes to all Parties to the Treaty, whether nuclear-weapon or non-nuclear-weapon States.” *Id.* Additionally, “[n]othing 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.” *Id.* at art. 4, ¶ 1.

³⁴ Jacques E.C. Hymans, *Iran is Still Botching the Bomb*, FOREIGN POL’Y (Feb. 18, 2013) (criticizing Jerusalem’s intelligence estimates of Iran’s proliferation ability, in light of Israel’s estimate as far back as 1992 that Iran would have the bomb by 1999 as well as Prime Minister Benjamin Netanyahu’s estimate in September 2012 that Iran would have the bomb as early as 2013; and charging that American and Israeli estimates should not be driven by politics and ought to consider Tehran’s managerial inefficiencies relative to the West).

³⁵ A charge of “crimes of terrorism” was developed in New York State shortly after 9/11. Additionally, New York case law differentiates acts of terror from gang violence even though both might arguably be driven by a desire to inflict a campaign of intimidation. Sean K. Driscoll, *Are All Terrorizers “Terrorists”?*, HARV. NAT’L SEC. J. (Feb. 7, 2013). Similarly, a foreign state that has been intransigent for many years with respect to its development of nuclear weapons should not now be treated differently than before the war on terror began.

Washington's advice would be to engage Iran without preconditions.³⁶

However, in the nuclear context a misjudgment can be fatal.³⁷ Must we await a devastating attack by nuclear Iran on the United States or its allies before we act? By then, of course, it might be too late for us to weigh options. Some contend that Iran's strategy is to prolong negotiations and delay more thorough inspections while it simultaneously continues to develop nuclear weapons.³⁸ Additionally, others completely disagree with the predictions of Iran's capabilities. For example, an Iranian defector named Mohammad Reza Heydari has indicated that if it is not stopped, Iran will develop a nuclear bomb within a year, will not hesitate to use it against Israel or other enemies, and views nuclear weapons development as a deterrent to western meddling, consistent with its apocalyptic religious beliefs.³⁹ In light of Iraq's similar boasting of its abilities, the United States under President George W. Bush wanted certainty that weapons of mass destructions did not exist even though U.N. weapons inspectors insisted they did not.⁴⁰ Whether President Obama will demand the same of Iran remains to be seen, though it is unlikely if his first term is any indication. Rather, he will continue to act in accordance with international law and continue the diplomacy route of holding talks and encouraging allies that listen to impose Libya-style multilateral sanctions to persuade Iran that nuclear weapons are not in their long-term interest.⁴¹

³⁶ See Mark Hibbs, Ariel Levite, & Pierre Goldschmidt, *IAEA Critical for Making Diplomacy with Iran Work*, CARNEGIE ENDOWMENT FOR INT'L PEACE (June 1, 2012) (re-affirming the importance of the IAEA track in conjunction with the diplomacy track to peace talks).

³⁷ In fact, the IAEA was mistaken for eighteen years, as it did not know about Iran's nuclear facilities until a dissident group named the National Council of Resistance on Iran ("NCFI") volunteered this information. Thomas Fuller, *Iran Rejects UN Nuclear Concerns as "Absurd"*, N. Y. TIMES (August 12, 2005).

³⁸ Irwin Cotler, *Combating Iran's Cycle of Denial, Deception and Delay*, THE JERUSALEM POST (July 19, 2012).

³⁹ Sharona Schwartz, *Former Iranian Official Says Iran Won't Hesitate to Use Nuclear Bombs Against Israel & Others*, THE BLAZE (January 27, 2013) (reciting observations of South American civilian aircraft unloading nuclear weapon parts in Iran, receipt in Iran of uranium from Venezuela, Iranian diplomatic efforts to lure Western nuclear scientists with attractive salaries, dozens of North Korean nuclear scientists helping Iran's nuclear program, and Iran's use of diplomatic pouches to import nuclear weapons parts). Twelver Shi'ite beliefs include a prescription that Muhammad al-Mahdi, the twelfth imam, will return with Jesus at a time of chaos and war to lead the world to peace and establish Islam. Ahmadinejad has indicated, though, that he believes the imam "will come with logic, with culture, with science" and has nothing to do with apocalyptic war. Bridget Johnson, *Who is the 12th imam?*, ABOUT.COM, <http://worldnews.about.com/od/iran/f/12thimam.htm> (last visited Nov. 9, 2013).

⁴⁰ *Inspector: Iraq had no WMD before Invasion*, NBC NEWS (October 6, 2004).

⁴¹ This worked in the case of Libya, which asserted that it was better off without nuclear weapons in light of multilateral sanctions, the need for investments in the oil and gas industry, and the threat of force. The example of Libya, thus, offers hope for multilateral diplomacy in the case of Iran. See Bruce W. Jentleson & Christopher A. Whytock, *Who "Won" Libya? The Force-Diplomacy Debate and its Implications for Theory and Policy*, 30 INT'L SEC. 3, 47-86 (Winter 2005/2006).

C. Iranian Reception to Western Overtures

In its turn, Iran interprets current American efforts as a continuation of American policies aimed at preventing it from dealing with its own affairs. In this context, that means deciding itself whether it wants nuclear technology for peaceful uses alone or for nuclear weapons, just as Western nations, India, Pakistan, and North Korea did. Without more than a simple call for talks or demands that Iran stop enriching, this is understandable in light of the reasons for the Iran Hostage Crisis. From Iran's perspective, the U.S. is the same imperialist power that interfered to stage the 1953 coup.

The NPT requires its nuclear weapons members to share their nuclear technology for peaceful purposes with NPT non-nuclear weapons member states "on a nondiscriminatory basis."⁴² In exchange for taking advantage of the technology-sharing aspects of the NPT, Iran thus has responsibilities to the NPT community. These include a duty to accept safeguards spelled out in a safeguard agreement with the IAEA.⁴³ The IAEA seeks to verify the fulfillment of Iran's obligations to disclose all nuclear activities in order "to prevent the diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices."⁴⁴ The IAEA's demands for safeguards change over time in response to its ongoing site inspection findings. Specifically, the IAEA is concerned that Iran might be diverting its nuclear energy system from peaceful purposes to nuclear weapons. In response, Iran has expressed concern that resolving this issue would unduly require it to provide access to sensitive military information.

Following the Obama-Biden 2008 election campaign's rhetoric and buoyed by a 2012 re-election, Vice President Joe Biden extended a peace offering to Iran by declaring his willingness to engage in direct nuclear talks. He emphasized that talks for talk's sake were not good enough; rather,

⁴² NPT, *supra* note 33, at art. 5 (such powers shall "take appropriate measures to ensure that, in accordance with this Treaty, under appropriate international observation and through appropriate international procedures, potential benefits from any peaceful applications of nuclear explosions will be made available to non-nuclear-weapon States Party to the Treaty on a non-discriminatory basis and that the charge to such Parties for the explosive devices used will be as low as possible and exclude any charge for research and development.").

⁴³ Iran's safeguards agreement provides among other things that an exemption is allowed for special fissionable material of no more than one kilogram, and it also spells out the purposes and frequency of IAEA inspections. *Agreement Between Iran and the International Atomic Energy Agency for the Application of Safeguards in Connection With the Treaty on the Non-Proliferation of Nuclear Weapons*, INFCIRC/214, art. 37(a), 71-73, 78-82, Dec. 13, 1974, available at <http://www.iaea.org/Publications/Documents/Infcircs/Others/infirc214.pdf> [hereinafter "Safeguard Agreement"].

⁴⁴ NPT, *supra* note 33, at art. 3, ¶ 1.

they must be real and tangible.⁴⁵ However, Iran's spiritual leader Ayatollah Ali Khamenei rebuked this offer by declaring talks as deceptive if they are used "as a tactic, a gesture of superpower."⁴⁶ Iranian President Mahmoud Ahmadinejad affirmed this response.⁴⁷ Prospects for an agreement still appeared to be possible at the P5+1 summit on February 26. As those talks also did not yield tangible gains, the claim that Iran's strategy is merely to stall while attaining nuclear weapon capability may now gain hold.⁴⁸ With sanctions⁴⁹ on Iran tightened on February 6 so as to limit its trade with third countries to only bartering, America's hope was that continued multilateral pressure would convince the Iranian leadership to take part seriously in those discussions and concede something tangible and meaningful.⁵⁰ However, some posit that this stance is problematic, as they believe that no degree or extent of sanctions can convince Iran to comply because it is not developing – and has little incentive to develop – nuclear weapons.⁵¹ By this interpretation, the Iranian leadership interprets all offers as insults to its right to develop nuclear technology as envisioned by the NPT, with nothing that it can offer to the IAEA and still save face. Specifically, Iran's demand that the United States show it respect indicates that it wants its own assertion that it has no nuclear weapon ambitions to be accepted without anything more, including a broadened IAEA mandate. From the P5+1

⁴⁵ Adrian Croft & Myra McDonald, *Biden Raises Possibility of Direct U.S.-Iran Talks*, REUTERS (February 3, 2013) ("There is still time, there is still space for diplomacy backed by pressure to succeed. The ball is in the government of Iran's court").

⁴⁶ Nasser Karimi, *Iran: Ayatollah Ali Khamenei Rejects Direct Talks with U.S.*, HUFFINGTON POST (February 7, 2013).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ These sanctions aim to restrict Iran's ability to use funds in the custody of foreign financial institutions and to inhibit Iran's ability to repatriate earnings from the sale of oil by locking up oil revenue in oil-purchasing states. *Treasury Announces Sanctions Against Iran: New Measures Further Constrain Iranian Oil Revenues and Target Those Responsible for Iran's Human Rights Abuses*, U.S. DEPARTMENT OF THE TREASURY (February 6, 2013), available at <http://www.treasury.gov/press-center/press-releases/Pages/tg1847.aspx>.

⁵⁰ David E. Sanger, *Iran's Leader Rejects Direct Talks with U.S.*, N. Y. TIMES (February 7, 2013). By comparison, the unilateral economic embargo by the United States against Cuba cannot be said to have warmed relations between the nations; rather, the unwillingness of third countries to participate in that embargo has reduced the effectiveness of America's unwillingness to trade with the island nation. As discussed in III.C. *infra*, the strategy of multilateral sanctions eventually made Libya more conciliatory.

⁵¹ Seyed Hossein Mousavian, *Ten Reasons Iran Doesn't Want the Bomb*, IRAN REV. (Dec. 8, 2012), available at <http://www.iranreview.org/content/Documents/Ten-Reasons-Iran-Doesn-t-Want-the-Bomb.htm> (listing a history of fatwas against weapons of mass destruction; only short-term regional military advantage; the lack of technological configuration that would suggest nuclear weaponization; the desire to modernize and not become isolated; goodwill offers by Iran to make progress, including to reduce its enrichment if foreign powers will contribute to Iran's energy needs; no stockpiling of enriched uranium; and the absence of a deterrence strategy).

perspective, this is suspect as Iran has allowed IAEA inspectors in the past. Iran's current demand for respect indicates that it has something to hide.

In rejecting talks with the United States at this time, Iran might not be turning its back definitively. Rather, this can be interpreted as a form of preliminary clarification necessitated by "irreconcilable demands"⁵² emanating from the NPT's requirement of IAEA-led safeguards.⁵³ Specifically, Iran wants international recognition of its right to enrich uranium and for related sanctions to be removed. Consistent with this desire, Iran's Mission to the United Nations has indicated its full commitment to the NPT and to cooperating with the IAEA.⁵⁴ On the other hand, the P5+1 have demanded that Iran take measures beyond those called for by the NPT.⁵⁵ These measures include: implementing the NPT's Additional Protocol which enables inspections by the IAEA at military visits; making its nuclear program more transparent; requiring it to respond to inquiries by the IAEA concerning potential military uses of Iran's nuclear activities; limiting uranium enrichment to 20% of capacity; and either converting uranium stockpiles to fuel rods or exporting them if they are not immediately consumed.

There is also a possibility that there is no hope at all. If Iran views the development of nuclear weapons as essential to its national security, then little can be expected from further talks. Along these lines, Professor Westwood points out that the lesson of North Korea might be that "the army eats first...[t]he nuclear program eats first. Countries will give up issues they are not particularly serious about, but they will not give up their core ambitions."⁵⁶ This leads to an interesting query, namely, why should we expect any nation to not be interested in pursuing nuclear weapons, including research on their development if for no other reason than that it might need to develop such weapons in the future? Why should some nations have a monopoly over this knowledge, in the absence of nuclear weapons technology-sharing? From this perspective, the P5+1 expectation

⁵² Seyed Hossein Mousavian, *Embrace the Fatwa*, IRAN REV. (February 9, 2013), available at <http://www.iranreview.org/content/Documents/Embrace-the-Fatwa.htm>.

⁵³ NPT, *supra* note 33, at art. 3, ¶ 1 ("Each Non-nuclear-weapon State Party to the Treaty undertakes to accept safeguards, as set forth in an agreement to be negotiated and concluded with the International Atomic Energy Agency in accordance with the Statute of the International Atomic Energy Agency and the Agency's safeguards system, for the exclusive purpose of verification of the fulfillment (sic.) of its obligations assumed under this Treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices.").

⁵⁴ *Iran Agrees on 'Some Points' with IAEA*, AL JAZEERA (February 13, 2013).

⁵⁵ Seyed Hossein Mousavian, *Embrace the Fatwa*, IRAN REV. (February 9, 2013), available at <http://www.iranreview.org/content/Documents/Embrace-the-Fatwa.htm>.

⁵⁶ See Scott Stearns, *International Community Wants 'Concrete Action' from Iran at Nuclear Talks*, GLOBALSECURITY.ORG (February 24, 2013), available at globalsecurity.org/wmd/library/news/iran/2013/iran-130224-voa01.htm.

that Iran completely eliminate its ability to develop nuclear weapons appears unrealistic and unlikely to lead to a solution. On the other hand, the P5+1 perspective is motivated by the very real allegations of Iranian support for various acts of terrorism.⁵⁷

II. Responsibilities Under International Law

A. *State Sovereignty and the Use of Force*

The NPT re-affirms the United Nations Charter's general proscription on the use of unilateral force, except in the face of an imminent attack⁵⁸ or where the Security Council has expressed its willingness to authorize force due to a "threat to the peace, breach of the peace, or act of aggression."⁵⁹ The purpose of these rules is to respect each nation's interest in maintaining political independence and uncontested sovereignty in its territory.

Moreover, international peace and security are to be obtained and maintained without the use of force where possible; thus, all negotiations should be exhausted before force is even considered.⁶⁰ To this end, states must also refrain from *threatening* to use force. This stipulation supports the principle that "tough talk" might do more harm than good and can obfuscate true – and potentially good – intentions. Of course, this perspective is based on notions of conventional war, in which a responsive

⁵⁷ See discussion *supra* in I.A.

⁵⁸ NPT, *supra* note 33, at pmb1 ("in accordance with the Charter of the United Nations, States must refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations, and that the establishment and maintenance of international peace and security are to be promoted with the least diversion for armaments of the world's human and economic resources"); see also U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence (sic.) if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.").

⁵⁹ U.N. Charter art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."); see also U.N. Charter art. 42 ("Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.").

⁶⁰ See Mary Ellen O'Connell & Maria Alevras-Chen, *The Ban on the Bomb – and Bombing: Iran, the U.S., and the International Law of Self-Defense*, 57 SYRACUSE L. REV. 497 (2007) (arguing that diplomacy should continue as there is no present basis under international law for the use of force against Iran).

strike is possible. As pointed out *supra*,⁶¹ a nuclear strike might not allow the luxury of a response if our capacity to respond is itself annihilated.

In the case of Iran, the acquisition or development of nuclear weapons might be unpopular in world opinion, especially among members of the “nuclear club”⁶² that wish to limit nuclear proliferation. This was similarly the case when India, Pakistan, and North Korea conducted nuclear tests, though does not justify the use of force. There has been no armed attack, and thus self-defense cannot be invoked; additionally, the Security Council has not authorized any action based on an act of aggression.

B. *A Responsibility to Engage*

As Iran and the P5+1 are parties to the NPT, they are obligated to pursue good faith negotiations in order to stop the nuclear arms race and to encourage further disarmament.⁶³ In essence, each NPT member has a duty to keep the peace within the nuclear world. Inherent in this duty – as in all contractual undertakings – is a requirement to not frustrate the essence of the agreement. Thus, if one party suspects that a certain proposal can resolve matters, then it should propose it of its own will and not await another party’s initiative in doing so. In any case, no nation should at all discuss the prospect of military strikes to enforce IAEA-prescribed safeguards if it suspects that a solution may be acceptable to all; doing so would be tantamount to a failure to deal honestly.

C. *Lessons Learned*

One positive sign that the “nuclear club” – and especially the United States and Russia – have emerged from their Cold War mentality with a determination to put concepts such as Mutually Assured Destruction

⁶¹ See the discussion in I.C.

⁶² In addition to the first five nations to successfully test nuclear bombs – the United States, Russia, Britain, France and China – several other nations have joined: India, Pakistan and North Korea. See Kathleen Sutcliffe, *The Growing Nuclear Club*, COUNCIL ON FOREIGN RELATIONS BACKGROUNDER (November 17, 2006), available at <http://www.cfr.org/proliferation/growing-nuclear-club/p12050>.

⁶³ NPT, *supra* note 33, at 6 (“[e]ach of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective 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 under strict and effective international control.”).

("MAD") behind them appears in negotiations expected this year concerning tactical nuclear warheads ("TNW").⁶⁴ As part of the capitalism versus communism ideological divide, the United States and the Soviet Union stockpiled thousands of nuclear weapons during the Cold War,⁶⁵ including TNWs, and are now concerned about ethical and moral issues inherent in using these on a military battlefield. By contrast, strategic nuclear weapons ("SNWs") are not meant to be used on a battlefield but rather to be used, if at all, as a symbolic demonstration of political resolve. New START⁶⁶ was signed in 2010 as an arms reduction treaty between Russia and the United States aimed at reducing SNWs, though not TNWs or stockpiled SNWs; however, it does continue the existing bilateral weapons inspection regime. The lesson of MAD: both sides developed more weapons than necessary, certainly more than enough to obliterate the enemy in the event that it is the victim of a preemptive first strike.⁶⁷

The spread of Communism and the influence of the Soviet Union meant that the U.S.-Soviet confrontation played itself out in various theatres. For example, the Cuban Missile Crisis arose out of mutual distrust between the nations and a Cuban-Soviet common enemy in the United States. One of the aggravating reasons for Cuban mistrust of the United States was the American war against Communism, one of the driving reasons for Cuba to ally with the Soviet Union. Thus, the United States was entirely unwilling to deal respectfully with Cuba due to its Communist control and the fact that Cuba is situated so close to its own territory; rather, the Bay of Pigs invasion and Operation Mongoose illustrated the United States' attempt to overthrow the Cuban government. By contrast, the Soviet Union's influence and missiles forced the United States to show the Soviet

⁶⁴ Dakota Rudesill, *Regulating Tactical Nuclear Weapons* 101 GEO. L.J. (forthcoming 2013), available at http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2166184_code697833.pdf?abstractid=2166184&mirid=2 (positing that a nuclear weapon treaty that includes ongoing monitoring of TNWs, i.e., that is not limited to long-range strategic nuclear warheads ("SNWs") that do not require a delivery vehicle (DV), can move the parties from MAD to mutually-assured security ("MAS"); also suggesting that the advent of globalization implies that any nuclear weapon use has strategic effects).

⁶⁵ The five nuclear powers at the height of the Cold War had stockpiled 70,000 nuclear weapons; that number has now come down to 27,000. Kathleen Sutcliffe, *The Growing Nuclear Club*, COUNCIL ON FOREIGN RELATIONS BACKGROUNDER (November 17, 2006), available at <http://www.cfr.org/proliferation/growing-nuclear-club/p12050>.

⁶⁶ *Treaty Between The United States Of America And The Russian Federation On Measures For The Further Reduction And Limitation Of Strategic Offensive Arms*, U.S.-RUSS., April 8, 2010, available at <http://www.state.gov/t/avc/nedstart/c44126.htm>.

⁶⁷ This was itself a violation of the NPT which provides, in part, that the "maintenance of international peace and security are to be promoted with the *least diversion for armaments* of the world's human and economic resources." NPT, *supra* note 33, at pmb1. (emphasis added). Obviously, the stockpiling and now reduction of nuclear weapons diverted from other compelling human needs, such as the provision of shelter, adequate food and water.

Union some respect, in spite of its Communist leanings. Similarly, Iran's recent rhetoric in response to years of back-and-forth indicate its belief that talking is useless unless the United States is willing to deal with Iran respectfully. Biden's recent invitation to negotiate directly can be interpreted as an attempt to do so; the fact that it was not received favorably is suspect. Similarly, as pointed out in I.C. *supra*, Iran's claim that inspections would be intrusive is also suspect as it has previously and routinely allowed IAEA inspections.

The experience of North Korea's intransigence similarly demonstrates the effects of a nation's imposed isolation. Due to Communist incursions in the north during the Korean War, the United States sided with South Korea and has attempted to isolate the north. Again, North Korea's development of nuclear weapons can be seen as consistent with its desire for respect on the world stage. This explains why it continued to conduct nuclear tests on February 12, 2013 even in the face of the potential loss of its only remaining major ally, China. Indeed, after reports emerged that China and the United States had agreed to draft a Security Council resolution authorizing sanctions against North Korea for doing so,⁶⁸ the latter decided to further aggravate the situation. Avowedly in response to U.S.-South Korean joint military drills that it claims to interpret as preparation for battle, Pyongyang threatened to cancel the 1953 armistice that ended the Korean War on March 11, 2013 and to launch "surgical strikes at any time" to unify the Korean peninsula.⁶⁹ The message is clear: if the West won't respect us because of our political leanings – in this case Communist, just like Cuba – then we will make them respect us by instilling fear of a nuclear holocaust.

If history is any lesson, then a solution that does not take Tehran seriously is unlikely to pass muster. If the P5+1 are serious about advancing the ball,⁷⁰ they must deal delicately with Iran and its aspirations

⁶⁸ Edith M. Lederer, *US, China Agree on Sanctions For North Korea's Nuclear Test, According to UN Diplomats*, HUFFINGTON POST (March 4, 2013).

⁶⁹ Foster Klug, *North Korea Threatens to End Ceasefire With South Over Military Drills, Sanctions*, HUFFINGTON POST (March 5, 2013).

⁷⁰ Due to Iran's "bulimic man" status, it is unclear whether the P5+1 need to be serious about this. If a worst-case scenario is employed, then Iran is close to developing nuclear weapons and should be stopped. However, Iran has not yet committed any major strike against the United States or its allies. If the United States is willing to await such a strike and wishes to respond proportionally, there is precedent for its striking at "the main danger," i.e., nuclear development facilities. Professor Maggs characterizes an Article 51 self-defense attack on Iran's nuclear development facilities as legal if they are proportional to strike at "the main danger" after a conventional armed attack – which can be no more than a routine border skirmish – has occurred. See Gregory E. Maggs, *How the United States Might Justify a Preemptive Strike On a Rogue Nation's Nuclear Weapon Development Facilities Under the U.N. Charter*, 57 SYRACUSE L. REV 465 (2007) (citing as precedent for this position 1. the U.S. invasion of Panama in response to Manuel Noriega's imprisonment of a U.S. citizen working for the

in the same way as they would one another. In this regard, they must view Iran as not just another former imperial colony valuable only because of its oil reserves and strategic geographic location. Iran is a modern state with avowedly theocratic leanings, but with the potential of one day developing into a true democracy just as any European state might. The twist is that MAD might not work with Iran: the regime, due to its religion-based aspirations, looks forward to annihilation and might not be deterred by threats of an American preventive first-strike nuclear attack.

III. A Way Forward?

A. Salient Solutions

To mitigate IAEA concerns, Ahmadinejad has vowed to limit uranium enrichment to 20% if the international community will agree to supply Iran's necessary nuclear material.⁷¹ Additionally, Foreign Minister Ali Akbar Salehi has seized upon the Additional Protocol as a potential solution.⁷² Former Iranian nuclear negotiator Seyed Hossein Mousavian proposes that focus be re-directed entirely from the NPT to the fatwa issued by Ayatollah Khamenei in 2003 banning nuclear weapons and weapons of mass destruction.⁷³ As Foreign Minister Salehi has indicated Iran's willingness to translate this into a secular document that binds it to the fatwa, this might offer one solution. For example, it may offer the possibility that a non-IAEA team inspect the military site at Parcha instead of the IAEA team, as has been insisted.⁷⁴

However, Ambassador Mousavian offers his doubts for a political solution.⁷⁵ First, he indicates that the latest proposal to Iran neither recognizes its right to enrich uranium nor offers sanction relief. Additionally, domestic opposition might make commitments by the Ahmadinejad regime beyond the NPT and Additional Protocol politically

CIA and the killing of a U.S. service member, and 2. the U.S. invasion of Iraq in 2003 based on routine Iraqi missile attacks following the 1993 cease-fire in the aftermath of Kuwait's liberation). However, the precedent is itself questionable and responding to a conventional strike in this manner might also turn the conflict into a nuclear war if Iran has already developed nuclear weapons as well as the ability to conceal them. Recall that if we are correctly characterizing Iran as "bulimic man," then we can only guess at its abilities.

⁷¹ Seyed Hossein Mousavian, *Embrace the Fatwa*, IRAN REV. (Feb. 9, 2013), available at <http://www.iranreview.org/content/Documents/Embrace-the-Fatwa.htm>.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

untenable.⁷⁶

More realistically, one of the NPT's purposes appears to be to convince non-nuclear weapon states to limit their interests to the peaceful development of nuclear technology. The incentive is that nuclear powers will share their nuclear energy technology know-how. However, once a nation signs onto the NPT its obligations are also clear: comply in good faith with IAEA inspectors in accordance with its safeguards agreement. The fact that Iran might be pursuing, or is even interested in learning how to pursue, nuclear weapons is not a new concept. For example, India and Pakistan never signed the NPT, and both now claim to have developed nuclear weapons. This situation led to alarm in the 1990's and the threat of sanctions; however, little materialized, other than two new members in the nuclear arms club. The difference in Iran's case is that it *did* sign the NPT. On this basis, only two responsible ways forward exist, as the ongoing stalemate of disagreement with regard to whether the IAEA is satisfied with Iran's level of cooperation will only lead to more frustration and tough words.

First, Iran can withdraw from the NPT⁷⁷ if it is determined to pursue nuclear weapons or to becoming nuclear-capable. The NPT's architecture allows parties to withdraw under the terms of Article 10 "if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country."⁷⁸

Second, Iran can hope to enter into a "side agreement" with the P5+1 establishing that it will entirely abandon its own pursuit of nuclear weapons – including research – and will open itself up to more exhaustive IAEA inspections. In exchange, the NPT nuclear parties would need to be willing to share their nuclear *weapons* technology and know-how. The Article 8 mechanism allows amendments, though it does not specify if a party-specific side agreement was envisioned.⁷⁹ Whether the variance is characterized as an amendment or a side agreement, the P5+1 arguably have a duty of good faith to *consider* this as they further the ultimate goal of a treaty on "general and complete disarmament under strict and effective international control."⁸⁰ The result would be to render Iran another nuclear-capable state.⁸¹ In fact, most nations with advanced military capabilities

⁷⁶ *Id.*

⁷⁷ This was the path taken by North Korea in 2003.

⁷⁸ NPT, *supra* note 33, at art. 10. Iran's residual obligations as a former NPT member, though, might arguably continue indefinitely; by this logic, an NPT member can never withdraw.

⁷⁹ *Id.* at art. 8.

⁸⁰ *Id.* at art. 6. See the discussion in II.B.

⁸¹ Carey Sublette, 7.5: *Other Nuclear Capable States*, NUCLEAR WEAPONS FREQUENTLY ASKED QUESTIONS (August 9, 2001), available at <http://nuclearweaponarchive.org/Nwfaq/Nfaq7-5.html>

likely already have the ability to develop nuclear weapons, as their national security interests require them to be able to evaluate threats from potential foes and project their own capabilities.⁸²

The way forward, then, depends on Iran's present ability to develop nuclear weapons and the P5+1's willingness to share nuclear weapons technology with it. The question of Iran's – or any other nation's – intentions should not be underestimated: it is highly unlikely that any nation would not be interested in at least acquiring the ability to weaponize nuclear technology⁸³ as this is commonly considered a strong bargaining chip in economic talks.⁸⁴

In fact, one lesson learned from nonproliferation talks with Syria, Iraq, Libya, India, Pakistan, Iran and North Korea is that nuclear weapons talk, as do the threats they pose. The regimes in Libya and Iraq garnered interest in part due to their weapons programs, although this interest was quickly replaced after these programs were dismantled; i.e., once it was clear that they could not use them against Western interests. Syria has similarly been subjected to pressure through Western support of opposition forces. By contrast, the leaders of India, Pakistan, and North Korea have directed their nations to incur sanctions – some effective and some not – but still remain. We appear to be saying that we will leave rising nuclear weapon states alone if they already have at least one nuclear weapon or if they give us business. The embedded assumption in doing so is that a

(describing the non-nuclear but nuclear-capable states: Australia, Canada, Germany, Japan, and the Netherlands).

⁸² *Id.*

⁸³ The counterexample of the former Soviet bloc states that gave up their nuclear weapons is not entirely applicable here as those newly-created states were simultaneously faced with the more daunting challenge of keeping these weapons out of the hands of unidentified – or worse, terrorist – organizations that might unwittingly start a surprise nuclear attack. Instead, Ukraine, Kazakhstan and Belarus transferred their nuclear arsenals to the Russian Federation. The exception is Libya because multilateral sanctions crippled it sufficiently to force it to declare that it had changed its mind and no longer wanted nuclear weapons. However, the fact that Muammar Gaddafi was replaced implies that a watchful Iran would try even harder to distance itself, for example by rejecting even the idea of holding talks at the outset and blaming its opponent. As it turns out, this is precisely the path that Iran has taken in claiming that talks are senseless because the United States is violating a basic precept of negotiations – respect. (Cite)

⁸⁴ See Orde F. Kittrie, *Averting Catastrophe: Why The Nuclear Nonproliferation Treaty is Losing its Deterrence Capacity and How to Restore It*, 28 MICH. J. INT'L L. 337, 399-400, 411, 421 (contending, *inter alia*, that the NPT's deterrent effect has been weakened by the failure of recent sanctions against North Korea, Iran, India and Pakistan to disincentivize these nations from pursuing nuclear weapons; observing counter-examples of more aggressive sanctions that delayed India's nuclear program for twenty-four years; describing strong economic sanctions, the implicit threat of force with Saddam Hussein's capture as precedent, and effective intelligence-gathering as sufficient to convince Libya to dismantle its program and Iraq to allow comprehensive inspections; and suggesting that proliferation detection needs to be strengthened through a Security Council resolution imposing the Additional Protocol's inspection requirements, and by adding incentives to ensure that sanctions are aggressive enough to deter existing and would-be violators.).

nation with a strong economy would not want to disrupt its trade relations with a war. The question of whether the Security Council should demand more from these nations appears to be motivated by trade relations and by the fact that military action could trigger a pre-emptive nuclear attack. This is the category in which Iran would like to belong – a nation “respected.” The means it employs is to be vague about its nuclear abilities, such that we might fear the worst.

If Iran is far enough along to develop its own arsenal or even just one nuclear weapon and wishes to keep it and continue its weapons program, then it should leave NPT, as its present membership is a farce in light of the NPT’s stated purposes of nuclear disarmament and transparency.⁸⁵ However, if it is not far along enough to develop even one weapon and genuinely prefers to only *learn* how to weaponize an enriched stockpile, then the NPT’s duty to negotiate in “good faith”⁸⁶ imposes an obligation on all NPT parties – led by the P5+1 – to consider sharing their nuclear weaponization know-how with Iran. It boils down to a question of trust that the Iranian regime would not then turn around and initiate a nuclear war that would likely engulf itself and others. Iran’s long history of cooperation with IAEA inspectors lends hope that it will opt to benefit itself and the international community by becoming nuclear-capable.

B. *Limitations*

If Iran were to propose either solution, it would reveal its existing abilities, which is a tactical failure for a nation that sources its respect on the world stage at least in part to the vagueness of its weapons potential; again, this is one of the defining characteristics of a bulimic man. Moreover, the likelihood exists that the P5+1 would not accept either of these solutions, particularly as one option requires them to divulge safeguarded nuclear weapons secrets. However, if the P5+1 are amenable to the second option, then they are obligated to propose this as a good faith means for advancing talks. Beyond resolving the current stalemate, this solution would also show Iran that it is being respected by being welcome to the coveted “nuclear club.” Thus, it might serve as a long-term solution given

⁸⁵ NPT, *supra* note 33, at pmb1. (“declaring their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament...desiring...the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a Treaty on general and complete disarmament under strict and effective international control.”).

⁸⁶ See the discussion *supra* in II.B.

that Iran is likely to develop a nuclear weapon in the next few years in any case.

A further complication may be that Iran has already calculated that a demeanor of cooperation as an NPT member is a better bargaining chip than revealing its hand entirely. In other words, the Iranian leadership might prefer the stalemate in spite of sanctions that hurt mainly its people regardless of whether it is actually pursuing nuclear weapons at all; this is possible based on its religion-based confrontational stance that prefers to antagonize the West and aims to annihilate it.

Conclusion

What can we expect next? On the one hand, Iran has determined that it has a right to nuclear technology and – likely – weapons. On the other hand, the Obama Administration has invested resources and rhetoric into “engaging” Iran such that it must show results.⁸⁷ The nature of American diplomacy indicates that Iran’s demands for even-footed respect in negotiations are likely to be unmet if the United States does not wish to be perceived as “soft” on a state sponsor of terrorism.

If U.S.-Iranian competing interests are determined to be irreconcilable, a U.S.-led coalition strike on Iran’s nuclear sites is not out of the question though it would be inconsistent with Obama’s first term foreign policy.⁸⁸ To accomplish this, the United States would have to violate international law’s limits on the use of force if it wished to initiate a preventive strike. Still, the very fact that Biden reached out to Iran so soon after the 2012 elections indicates that a change in tide might be possible. Specifically, although the Obama Administration might have aimed to act consistent with international law in its first term, it might choose to be more creative in its second term in an effort to deal with regimes that have long been suspected of sponsoring terror and more immediately threatening our regional allies, especially Israel. As in the case of the George W. Bush administration’s pursuit of an Iraq invasion, Obama would have precedent in doing so even though no imminent strike is expected.⁸⁹ In essence, Obama might be willing to strike at “bulimic man.” If this occurs, strikes would likely enlist the help of aerial drones in keeping with their increased use by the Obama Administration, though only if they can ensure limited

⁸⁷ *Obama Intimates U.S. to Strike Iran In a Year If Diplomacy Fails*, TIMES OF ISRAEL (March 14, 2013), available at <http://www.timesofisrael.com/obama-intimates-us-to-strike-iran-if-diplomacy-fails-in-2013/> (indicating that a diplomatic solution would obviously yield a more lasting peace).

⁸⁸ See NPT Review Conference, *supra* note 8.

⁸⁹ Along these lines, see the discussion, *supra* note 70.

collateral damage so as to be proportional to the threats posed by the existence of nuclear weapons sites and Iran's suspected ties to groups like Hezbollah and Al Qaeda.⁹⁰ However, the threat posed by a tough-talking Iran might not be much different than that by nuclear-armed North Korea; the only difference is that Iran does not clearly possess nuclear weapons yet. It stands to reason that if the United States did not preemptively strike against a nuclear weapon-pursuing North Korea, then it cannot justify striking Iran.⁹¹

Although the aforementioned "solutions" relate to how the parties might avoid a confrontation at all, in the event that coalition forces – or the United States or Israel unilaterally – decide to destroy Iran's nuclear technology sites, our next concern will be how to avoid an all-out war. This doomsday scenario is unfortunate, as even such supposed arch-enemies as Israelis and Iranians have the capacity to be compassionate and peaceful in the spirit of brotherhood⁹² despite their leaders' provocative war-gaming. With hope and time, the proposed solutions of offering Iran an option to leave the NPT, or to abandon its nuclear weapons program in favor of becoming a nuclear-capable state, will perhaps be able to further the cause of world peace.⁹³

⁹⁰ Israel, for example, was widely condemned for its attack on Iraq's Osirak nuclear facility which it alleged was capable of producing nuclear bombs though had not yet begun production. Despite American military doubts, these strikes were very effective at only targeting the nuclear site without much collateral damage. *1981: Israel Bombs Baghdad Nuclear Reactor*, BBC NEWS (June 7, 1981), available at http://news.bbc.co.uk/onthisday/hi/dates/stories/june/7/newsid_3014000/3014623.stm.

⁹¹ We can also extend the analogy to Pakistan; why was Pakistan's development of nuclear weapons not inhibited? One answer might be that Pakistan was only responding to India's nuclear tests as essential to counter the threat posed, and India's tests were largely excused because it is a strong economic ally. Moreover, Pakistan has historically been a U.S. military ally. Iran does not have the fortune – or misfortune – of being an economic or military ally. By contrast, a post-strike Iran does have the potential to yield valuable oil contracts just as Iraq did. Another answer might be simply that Pakistan had already developed nuclear weapons by the time it was condemned. See Sherwood Ross, *Western Oil Firms Big Winners in Iraq*, COUNTER CURRENTS (January 19, 2012), available at <http://www.countercurrents.org/ross190112.htm>. The same fate likely awaits Iran.

⁹² See, e.g., Ronny Edry, *Israel and Iran: A Love Story?*, TED TALKS, (December 2012), available at http://www.ted.com/talks/israel_and_iran_a_love_story.html (depicting comments by Israelis, Iranians, and other Middle Eastern citizens showing that brotherly love exists in spite of the nuclear confrontation and common assumptions of Muslim-Jewish antipathy).

⁹³ By contrast, the Administration at least recognizes that imposing further sanctions while talks are ongoing could be counter-productive and seen as "negotiat[ing] in bad faith." Geoff Dyer, "Fresh US Sanctions Threaten to Derail Iran Nuclear Talks," *Financial Times* (December 8, 2013) (quoting White House spokesman Jay Carney in response to potential Senate legislation that might impose new sanctions on Iran).