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The Iranian Nuclear Issue, the End of the American Century, and the Future of International Order

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**THE IRANIAN NUCLEAR ISSUE,
THE END OF THE AMERICAN
CENTURY, AND THE FUTURE OF
INTERNATIONAL ORDER**

*Flynt Leverett**

INTRODUCTION

This essay is grounded in two basic propositions. The first is that the United States and the Islamic Republic of Iran have emerged as the leading antagonists in a new Middle Eastern “Cold War” —a struggle over American primacy in the Middle East that shapes its geopolitics, even as the region is going through dramatic changes on multiple levels. The second is that how the U.S.-Iranian competition for influence plays out will have profound consequences not just for the Middle East, but also for the legal frameworks, rules-based regimes, and mechanisms of global governance that shape international order in the 21st century. This is especially true with

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regard to U.S.-Iranian disagreements over the Islamic Republic's nuclear activities.

Strategic competition between America and Iran and its implications for international order play out against a backdrop of the progressive diminution of U.S. leadership in world affairs—the end of what Andrew Bacevich has called “the short American century.”¹ Since Henry Luce proclaimed the American century's commencement in 1941, and especially since the Cold War's end, America's status as the preeminent power in the Middle East has been crucial to its global standing. At the same time, official American self-presentation and a considerable body of commentary and scholarship have linked U.S. primacy to the provision of global public goods; these include the transactional platforms and political and security arrangements needed to sustain economic openness and encourage continuing liberalization. The provision of such public goods has been bound up with the elaboration of rules-based regimes for key dimensions of international security (e.g., the Nuclear Non-Proliferation Treaty) and global commerce.

For decades, Washington has relied on perceptions of America as benevolent hegemon to legitimate first its post-World War II dominance over the non-communist world and then its post-Cold War primacy, in the Middle East and globally. However, U.S. administrations have also sought to manage the provision of public goods to ensure and maximize American power and influence—often in ways that contravene the image of America as benevolent hegemon.²

¹ Andrew Bacevich, *Life at the Dawn of the American Century*, in *THE SHORT AMERICAN CENTURY: A POSTMORTEM* 1-14 (Andrew Bacevich ed., 2012).

² See, e.g., DANIEL H. JOYNER, *INTERPRETING THE NUCLEAR NON-PROLIFERATION TREATY* 6-20 (2011) (discussing how, in its early advocacy for what would become the Nuclear Non-Proliferation Treaty, the United States was only concerned with forestalling the proliferation of nuclear weapons to preserve its strategic advantages as one of two nuclear superpowers; it was only in response to pressure from non-nuclear weapons states that America reluctantly agreed to include in the Treaty a commitment by nuclear weapons states to nuclear disarmament and recognition of all states' right to the peaceful use of nuclear technology). The relationship of these three core principles in the Treaty and the ramifications of this relationship for the Iranian nuclear issue is treated at greater

As the United States experiences relative decline, this approach becomes less and less sustainable.³ Its perpetuation is also

length below, and in other articles in this issue of the journal by Daniel Joyner, *Iran's Nuclear Program and International Law*, 2 PENN. ST. J. L. & INT'L AFF. 282 (2013), and Richard Butler, *NPT: A Pillar of Global Governance*, 2 PENN. ST. J. L. & INT'L AFF. 272. See also ANDREW BACEVICH, AMERICAN EMPIRE: THE REALITIES AND CONSEQUENCES OF U.S. DIPLOMACY 1-6, 32-54, 71-116 (2002) (discussing how American policymakers calculated that the promotion of economic globalization after the Cold War ended would ensure America's global primacy well into the 21st century); Robert Gilpin, *The Rise of American Hegemony*, in TWO HEGEMONIES: BRITAIN 1846-1914 AND THE UNITED STATES 1946-2001, 165-82 (Patrick Karl O'Brien & Armand Clesse eds., 2002), <https://www.mtholyoke.edu/acad/intrel/ipe/gilpin.htm> (discussing how, in a Cold War context, Washington leveraged its hegemonic position in post-World War II regimes for international trade and monetary relations to lock Western Europe and Japan into security-dependent alliances with the United States); ROBERT GILPIN, THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS 90 (1987) (discussing how the United States shifted from a more "benevolent" to a more "predatory" mode of economic hegemony in the 1960s and 1970s to manage its growing current account and fiscal deficits); ERIC HELLIENER, STATES AND THE REEMERGENCE OF GLOBAL FINANCE: FROM BRETTON WOODS TO THE 1990S (1996) (discussing how the promotion of financial liberalization in the 1960s, 1970s, and 1980s allowed the United States to leverage its unique structural advantages in international finance to ensure its continued leadership in international economic affairs even as its position in global manufacturing eroded); Flynt Leverett & Hillary Mann Leverett, *The Balance of Power, Public Goods, and the Lost Art of Grand Strategy: American Policy toward the Persian Gulf and Rising Asia in the 21st Century*, 1 PENN. ST. J.L. & INT'L AFF. 202, 210-11 (2012), <http://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1010&context=jlia> (discussing how America's commitment to secure the flow of Persian Gulf oil and gas to international markets has never had that much to do with America's own energy demand, being motivated to a much greater extent by Washington's interest in reinforcing its strategic influence in other important parts of the world where Persian Gulf hydrocarbons fill critical parts of the energy mix). Since September 11, 2001, the compatibility of aspects of America's "war on terror" with international law has been roundly challenged; likewise, the 2003 invasion and subsequent occupation of Iraq—justified by Washington as essential to Middle East and global security—is seen by most of the international community as illegal. The application of use of force doctrine to the Iranian nuclear case is also treated at greater length below, and in other articles in this issue of the journal by Mary Ellen O'Connell & Reyam El Molla, *The Prohibition on the Use of Force for Arms Control: The Case of Iran's Nuclear Program*, 2 PENN. ST. J. L. & INT'L AFF. 315 (2013) and James Houck, *Caroline Revisited: An Imagined Exchange Between John Kerry and Mohammad Javad Zarif*, 2 PENN. ST. J. L. & INT'L AFF. 293 (2013).

³ See Michael Mastanduno, *System Maker and Privilege Taker: U.S. Power and the International Political Economy*, 61 WORLD POL. 121 (2009), for more on this point.

prospectively dangerous for U.S. interests. Because the structure of contemporary international relations is shaped by social as well as material factors, the perceived legitimacy of a great power's actions matter greatly.⁴ As new powers rise, they can leverage Washington's hegemonic abuses to marshal resistance to America's strategic ambitions and delegitimize its primacy, thereby weakening its international position.⁵

Today, the U.S. posture toward the Islamic Republic is the most potent driver of hegemonic unilateralism in American foreign policy. Washington's determination to preserve its ambitions for dominance in the Middle East puts it on a collision course with the Islamic Republic, with its strong commitment to foreign policy independence. With a coterie of European hangers-on, the United States is focused on forcing the Islamic Republic to abandon its nuclear program, accept open-ended U.S. and Israeli military dominance in the Middle East, and acquiesce in its (Western-sponsored) transformation into a secular liberal state. On a regional level, this makes negotiating plausible solutions with Tehran, on the nuclear issue and other challenges, virtually impossible. It also puts America's Iran policy at odds with material and social reality in the

⁴ See Leverett & Mann Leverett, *supra* note 2, at 220-21, for a discussion of the importance of legitimacy for American primacy in the Middle East.

⁵ This is an underappreciated but increasingly salient aspect of what Robert Pape generically describes as "soft balancing"—the use of "nonmilitary tools" to "delay, complicate, or increase the costs" of a unipolar leader's hegemonic assertions that threaten other states' interests. In Pape's presentation, leveraging "the rules and procedures of important international organizations" and advancing "strict interpretations of neutrality"—and, I would add, of other aspects of international law—figure among the nonmilitary tools that can be deployed to constrain a unipole's initiatives. See Robert Pape, *Soft Balancing Against the United States*, 30 INT'L SEC. 7, 17, 36 (2005),

http://belfercenter.ksg.harvard.edu/files/1019-is-30-1_final_02-pape.pdf. See also Martha Finnemore, *Legitimacy, Hypocrisy, and the Social Structure of Unipolarity: Why Being a Unipole Isn't All It's Cracked Up to Be*, 61 WORLD POL. 58 (2009), [http://www.polisci.wisc.edu/Uploads/Documents/IRC/Finnemore%20\(2009\).pdf](http://www.polisci.wisc.edu/Uploads/Documents/IRC/Finnemore%20(2009).pdf) (discussing how institutions, laws, and rules—even those originally championed by a unipolar power—have internal logics of their own that are hard for unipoles to control, and how "unrestrained hypocrisy" by a unipole undermines the legitimacy of its primacy); Shirley Scott, *International Law As Ideology: Theorizing the Relationship between International Law and International Politics*, 5 EUR. J. INT'L L. 1 (1994), <http://207.57.19.226/journal/Vol5/No3/art1.pdf>.

Middle East, contributing to the accelerating erosion of U.S. standing in one of the world's most vital areas.

On a global level, determination to compel Iran's surrender prompts ever more assiduous efforts by America and its partners to coerce other states into pressing Tehran. In the process, the United States violates basic principles of rules-based regimes for nuclear nonproliferation, trade, and other vital issues. Similarly, the lurking threat that Washington will launch yet another Middle Eastern war to cut Iran down to size—reflected in U.S. officials' regular reminders that “all options are on the table” —breaks international law regarding the use of force. This, too, is detached from strategic reality—as the Obama administration's self-inflicted debacle over its declared intention to use military force against the Syrian government following the use of chemical weapons in Syria on August 21, 2013 vividly demonstrated. The United Nations Security Council was not about to authorize such a venture—and, in the end, neither the Arab League, NATO, the British parliament, nor even the U.S. Congress was prepared to endorse it. This episode suggests that, as America's relative decline proceeds, the credibility of its threats to use force for blatantly hegemonic purposes is eroding as well—which means that continued resort to such threats is not just illegal, but self-damaging in strategic terms.

Relative decline challenges the United States to share the prerogatives of global governance, especially with rising powers in the global South. Such collaboration would enhance prospects for more effective global governance by aligning responsibility and capacity more accurately; it would also help sustain America's influence, even as its relative power declines. By contrast, abusively hegemonic assertions will provoke intensifying backlash from non-Western powers that will damage America's long-term position in international affairs. That is why the manner in which the U.S.-Iranian competition for influence in the Middle East plays out over the next few years—and how the United States conducts itself in this competition—will decisively affect both America's international standing and the dynamics of international order in the 21st century.

This essay, organized in four sections, looks at the prospective impact of U.S.-Iranian tensions over Iran's nuclear

activities on global governance. The first section examines the Iranian challenge to America's hegemonic ambitions in the Middle East and, more particularly, how the Iranian nuclear program fits into Tehran's counter-hegemonic strategy. The second section lays out how U.S.-Iranian differences over the Islamic Republic's nuclear activities reflect two very different conceptions of international order. The third and fourth sections then consider how these different conceptions of world order lead Washington, Tehran, and their respective supporters to different positions on what the Nuclear Non-Proliferation Treaty means for the Iranian case, and on what international law says about the prospective use of force against Iran's nuclear infrastructure.

I. IRAN, THE UNITED STATES, AND THE MIDDLE EAST'S SHIFTING BALANCE OF POWER

Since World War II, and especially since the end of the Cold War, the United States' status as the Middle East's preeminent power has been, as noted, crucial to its global primacy. America's unique capability to project conventional military power into the Middle East has enabled it to assume responsibility for the physical security of hydrocarbon flows from the Persian Gulf, on which the global economy depends, and to become the presumptive enforcer of order in the region. This muscle has given the United States extraordinary economic and political influence in the Middle East, which in turn has reinforced American dominance in other important parts of the world.

Today, the biggest challenges to the highly militarized political and security order that Washington has worked for decades to consolidate in the Middle East are posed by, associated with, or potentially exploitable by the Islamic Republic of Iran. Hillary Mann Leverett and I have developed a particular take on the U.S.-Iranian competition for influence in the region, which we develop in our book, *Going to Tehran: Why the United States Must Come to Terms with the Islamic Republic of Iran*.⁶ Our take is captured in two related

⁶ FLYNT LEVERETT & HILLARY MANN LEVERETT, *GOING TO TEHRAN: WHY THE UNITED STATES MUST COME TO TERMS WITH THE ISLAMIC REPUBLIC OF IRAN* (2013).

assessments: first, that the United States is, in relative terms, a declining power in the Middle East; and second, that the biggest beneficiary of America's regional decline is the Islamic Republic of Iran.⁷

Those unsure whether they agree with these assessments should compare the positions of the United States and the Islamic Republic in the Middle East on the eve of the 9/11 attacks, just over a decade ago, to their positions today. On the eve of 9/11, every Middle Eastern government was either reflexively pro-American (like Egypt and Turkey), in negotiation to become pro-American (like Qadhafi's Libya and Bashar al-Assad's Syria), or staunchly anti-Iranian (like Saddam Husayn's Iraq and Afghanistan under the Taliban). Today, because of elections, governments in Iraq, Lebanon, Libya, Palestine, Tunisia, and Turkey are no longer reflexively pro-American or anti-Iranian. All are now pursuing more independent foreign policies—which means they are less enthusiastic about strategic cooperation with the United States and more open to the Islamic Republic. The same could have been said for post-Mubarak Egypt, too, at least until a July 2013 military coup deposed its first democratically elected (and Islamist) government. To the extent that any post-coup Egyptian government is interested in maintaining even a modicum of public support, it cannot afford to be seen as wholly subordinate to the United States (or Israel). This will surely correlate with the pursuit of at least some measure of foreign policy independence. In August 2013, for example, Egypt aligned with Algeria, Iraq, and Lebanon to block an Arab League consensus to endorse U.S. military action against Syria over the Assad government's alleged use of chemical weapons.

As a result of these developments, the United States is in a profoundly weaker position and the Islamic Republic is in a significantly stronger position in the Middle East today than they were on the eve of 9/11. *Going to Tebran* argues that this shift in the Middle East's balance of power is happening both because of serious U.S. mistakes in the region and because of an Iranian national security strategy that has enabled Tehran to leverage U.S. mistakes to its very considerable advantage.

⁷ *Id.* at 1-11.

A. America's Counterproductive Quest for Middle Eastern Hegemony

When we refer to U.S. policy mistakes—including but by no means limited to the Iraq War—we do not identify them as idiosyncratic products of the George W. Bush administration. Rather, they stem from a much deeper source that cuts across Democratic and Republican administrations. We describe it as the United States giving in to a post-Cold War temptation to act as an imperial power in the Middle East. For the past twenty years, America has not been content to maintain its military primacy in the Middle East, defend its interests there, and legitimize its presence by soberly and effectively managing the regional balance of power. Instead, it has tried to remake the Middle East in accordance with American preferences, working to coerce political outcomes there with the aim of consolidating a highly militarized, pro-American regional order.

The United States did this by retaining military forces on the ground in Saudi Arabia and other Arab states after the first Gulf War (something it did not do, to any significant degree, during the Cold War, and which led directly to the emergence of Al-Qa'ida and the 9/11 attacks). It did this by leveling sanctions against Saddam Husayn's regime that led to the deaths of more than a million Iraqis, half of them children; by invading Afghanistan and Iraq after 9/11 and pursuing prolonged occupations in these countries that have killed hundreds of thousands of civilians; and by helping Israel consolidate a nearly absolute freedom of unilateral military initiative.⁸ As it has pursued these policies, the United States has also worked to isolate the Islamic Republic of Iran diplomatically, to press it economically, and to foment its collapse.⁹

Taken together, these policies constitute what *Going to Tebran* calls the imperial turn in U.S. Middle East policy. Pursued with little regard for on-the-ground realities, this imperial turn has proven not just quixotic but deeply damaging to American interests. Strategic failures in Afghanistan and Iraq have squandered human and material resources, while underscoring for the world, and especially for Middle

⁸ Leverett & Mann Leverett, *supra* note 2, at 216-20.

⁹ LEVERETT & MANN LEVERETT, *supra* note 6, at 279-84, 328-54.

Eastern publics, the limits of what American military can accomplish.¹⁰ More fundamentally, the imperial thrust of American policy has decimated the perceived legitimacy of American purposes in the Middle East for the vast majority of the people living there. Twenty years ago, perhaps even ten years ago, that fact might not have seemed so significant. But today, when Middle Eastern publics are becoming more politically engaged and when their opinions are mattering more than ever before, this is strategically devastating for the United States.

When he first ran for president in 2008, Barack Obama professed to understand this challenge; he pledged to change what he called the “mindset” that had gotten America into the strategic mistake of invading Iraq and, more broadly, to recast America’s Middle East policies. Instead, he has pursued the same sorts of policies—including on Iran—as his predecessors, policies that did significant damage to America’s strategic position. As a result, the Middle East’s balance of power has shifted even further away from the United States and its allies on Obama’s watch than at the end of George W. Bush’s presidency.¹¹

B. Iran’s Counter-Hegemonic Strategy.

On the other side of the U.S.-Iranian divide, the Islamic Republic has developed a counter-hegemonic national security strategy. This strategy has enabled the Islamic Republic not only to survive, but also to carve out enough strategic autonomy over the past 34 years to attain a high degree of political consolidation and to achieve a wide range of impressive developmental outcomes. By building a domestic order and pursuing a foreign policy that attracts Middle Eastern populations, it has also been able to take advantage of American mistakes to improve its own position in the Middle East.¹²

¹⁰ This point is also made in Stephen M. Walt, *The End of the American Era*, NAT’L INTEREST, Oct. 25, 2011, at 10-11.

¹¹ See Leverett & Mann Leverett, *supra* note 2, at 222-23. On Iran more specifically, also see LEVERETT & MANN LEVERETT, *supra* note 6, at 354-67.

¹² While many Western commentators argue that the Islamic Republic’s internal politics and illegitimacy will undermine it and “solve” America’s Iran

Going to Tehran draws on years of discussions with Iranian diplomats, national security officials, and politicians to explain how the world looks, strategically, from their point of view. Looking at a map, one sees that Iran shares land, littoral, and maritime borders with fifteen states.¹³ Virtually all have been hostile to the idea of an Islamic Republic in Iran. Several have been more than just hostile: the Islamic Republic's eastern neighbor—Afghanistan, under the Taliban—stormed the Iranian consulate in Mazar-e Sharif, killing Iranian diplomats. Its western neighbor—Iraq, under Saddam Husayn, with help from other Arab neighbors and America—invaded it, killing 300,000 Iranians. Today, many of those same Arab neighbors host thousands of U.S. troops and billions of dollars of the deadliest U.S. weapons systems, all poised to attack the Islamic Republic.¹⁴

To deal with these challenges, the Islamic Republic has worked to develop conventional and asymmetric defensive capabilities, but it has virtually no capacity to project military power offensively beyond its borders.¹⁵ The real key to Iran's foreign policy gains in the region has been what *Going to Tehran* calls its “soft power” strategy.¹⁶ One of the remarkable things about the shift in the Middle East's balance of power over the last decade or so, away from the United States and its allies and toward Iran and its allies, is that this shift has virtually nothing to do with the Islamic Republic's use of military force or economic coercion. The Islamic Republic has not

problem, the Islamic Republic is, in fact, supported by a sizable majority of Iranians living there and is not about to implode—a topic treated at greater length in this issue of the journal by Hillary Mann Leverett, [How Precipitous a Decline? U.S.-Iranian Relations and the Transition from American Primacy](#), 2 PENN. ST. J. L. & INT'L AFF. 328 (2013).

¹³ They are Afghanistan, Armenia, Azerbaijan, Bahrain, Iraq, Kazakhstan, Kuwait, Oman, Pakistan, Qatar, Russia, Saudi Arabia, Turkey, Turkmenistan, and the United Arab Emirates.

¹⁴ See LEVERETT & MANN LEVERETT, *supra* note 6, at 45-59, for a discussion on Iranian threat perceptions.

¹⁵ On the Islamic Republic's military capabilities, see *id.* at ch. 2.

¹⁶ Harvard's Joseph Nye defines soft power as the ability to get others to “want what you want,” rather than coercing them to do what you want through hard military or economic power. See JOSEPH S. NYE, BOUND TO LEAD: THE FUTURE OF AMERICAN POWER 31 (1990). Also see LEVERETT & MANN LEVERETT, *supra* note 6, 90-101, for a discussion of Iran's soft power strategy.

invaded any country or sanctioned any state; its rise is much more about the growth of its soft power.

Recall my earlier point about the intensifying mobilization of Middle Eastern publics and the growing importance of those publics' opinions and attitudes in determining on-the-ground political outcomes. The Middle East's balance of power is progressively less defined by hard military capabilities, where the United States has clear advantages and the Islamic Republic is relatively deficient, and more and more defined in terms of who can appeal to regional publics, where the Islamic Republic has real advantages. In this context, Iran is pursuing a strategy that galvanizes regional publics' grievances against the United States and Israel and against their own unrepresentative regimes that cooperate, in various ways, with the United States and Israel. The Islamic Republic, in effect, aligns itself with those publics, and with public opinion itself, to constrain hostile, unrepresentative, and pro-Western neighboring governments from working with the United States to attack it. Over the years, Tehran has reinforced these aspects of its soft power strategy by picking political winners as its allies in key regional arenas—e.g., Hizballah in Lebanon, Shi'a Islamist and Kurdish parties in Iraq, and HAMAS in Palestine.¹⁷

Washington dismisses much of this as Iranian “support for terrorism.” But, with all due respect for the paramilitary capabilities of Iranian-supported groups resisting Israeli occupation, or resisting violent *jibadi* elements like Al-Qa'ida and the Taliban, the most interesting thing about these groups is that, when given the chance, they win elections. And they win for the right reasons—because they authentically represent unavoidable constituencies with real and legitimate grievances. When the United States refuses to deal with these groups by calling them terrorist organizations, it reduces even further its chances of constructively influencing regional developments, and opens up even more political space for Iran.

The soft power logic of Iranian strategy applies even in the case of Syria and the ongoing conflict there. It has become conventional wisdom in Washington that whatever soft power gains

¹⁷ LEVERETT & MANN LEVERETT, *supra* note 6, at 64-78.

the Islamic Republic had accrued in the Middle East over the past decade or so have been squandered as a result of the support that Tehran and its Hizballah allies have extended to Syrian President Bashar al-Assad and his government. But Iran and Hizballah have a very different assessment. They evaluate the Syrian conflict as the product of a U.S.- and Saudi-instigated campaign for regime change in Damascus, motivated by American and Saudi interest in undermining the Islamic Republic's security and weakening its regional position.¹⁸ Hizballah, for its part, identifies a "U.S.-Israeli-*takfeeri* project" that has been unleashed in Syria, aimed at changing Syria's strategic orientation in order to enfeeble Iran and Hizballah's capacity to resist American and Israeli hegemonic aspirations in the region.¹⁹ Iranian and Hizballah officials recognize that backing the Assad government has cost the Islamic Republic and Hizballah some of the enormous standing that they have built up with Sunni Arab publics—especially as Saudi Arabia and others on the Arab side of the Persian Gulf work assiduously to cast the Syrian conflict in sectarian terms. But in their calculations, as regional appreciation grows that the Syrian conflict is, at its core, about resistance, the sectarian issue will fade.²⁰ In the meantime, the Islamic Republic

¹⁸ See Kayhan Barzegar, *Rouhani, Iran Key to Political Solution in Syria*, AL-MONITOR (June 17, 2013), <http://www.al-monitor.com/pulse/originals/2013/06/iran-hassan-rouhani-geneva-syria.html>, for information about the Iranian policy toward Syria.

¹⁹ Discussions with Hizballah representatives in Beirut, Lebanon. (June 2013). See also Sayyid Hassan Nasrallah, Hizballah Secretary-General, Speech on Hizballah's Resistance and Liberation Day (May 25, 2013) and Sayyid Hassan Nasrallah, Hizballah Secretary-General, Speech on Hizballah's Injured Fighter Day (June 14, 2013), for discussions of the Syrian conflict. In a religious context, the Arabic word *takfeer* refers to the practice of declaring someone claiming to be Muslim as *kaafir*, pl, *kuffar*—an unbeliever masquerading as a pious person. It is a prominent aspect of the kind of *salafi* Islam championed by Muhammad Ibn 'Abd al-Wahhab, the 18th century preacher whose religious ideas continue to ground the form of Islam officially promulgated by Saudi Arabia, both at home and abroad. Over the last thirty years, *takfeeri* ideology—which is, among other things, anti-Shi'a in orientation—has been a powerful motivator for Saudi-supported *jihadi* movements (e.g., Afghan *mujahideen*, parts of whom evolved into Al-Qa'ida and the Taliban, and, more recently, *jihadi* groups in Iraq, Libya, and Syria, some of which have publicly affiliated themselves with Al-Qa'ida).

²⁰ For further discussion, see *Hal intabat julat Qusayr wa tudā'yāthā* [Has the Qusayr round ended and what are its implications?] (Interview with Flynt Leverett), MIN AD-DAKHIL (Al-Mayadeen), July 7, 2013,

retains vastly higher favorability ratings with Arab and other regional publics than the United States.²¹

C. Understanding Iran's Nuclear Program

How does Iran's nuclear program fit into its foreign policy and national security strategy? To answer this question, it is important to consider first what the program actually comprises.

In terms of reactor infrastructure, Iran currently operates the Tehran Research Reactor (TRR)²² that, among other things, produces medical isotopes for cancer patients, under international safeguards.²³ Additionally, Iran now operates a Russian-built power reactor at Bushehr, on the Persian Gulf, also under safeguards, and is building a heavy water reactor at Arak. Besides reactors, Iran is developing indigenous fuel cycle capabilities. In its main enrichment plant at Esfahan and in a newer site at Fordo, Iran is enriching uranium, again

http://www.almayadeen.net/ar/Programs/Episode/dmqS2FYuUkeiDqH3AP3_4w/2013-07-07-اتجاهات داعية-والا-قصد-ير-جولة-اند-تهت-هل. It is also notable that, while HAMAS declined to fight for the Assad government after the Syrian conflict broke out and relocated its external political leadership from Damascus, it has not called for Assad's removal. In discussions in Doha, Qatar in May 2013, senior HAMAS officials said that they continue to hold that a negotiated settlement between the Syrian government and the opposition is the only way to end the conflict—essentially the same position taken by Iran and Hizballah.

²¹ See Flynt Leverett & Hillary Mann Leverett, *Iran and the United States—What Really Matters to Middle Eastern Publics?*, HUFFINGTON POST, Mar. 6, 2013, http://www.huffingtonpost.com/flynt-and-hillary-mann-leverett/iran-and-the-united-state_b_2821860.html, for information on this point. See also SHIBLEY TELHAMI, *THE WORLD THROUGH ARAB EYES: ARAB PUBLIC OPINION AND THE RESHAPING OF THE MIDDLE EAST* 129-30, 134-35, 137-43 (2013).

²² America originally gave the TRR to the Shah—who openly stated his intention to develop nuclear weapons—in the 1960s. Initially, the TRR ran on uranium fuel enriched to weapons-grade levels. After the Iranian Revolution, the Islamic Republic reconfigured it to run on fuel enriched to just below 20 percent, greatly reducing the proliferation risks of its operation. LEVERETT & MANN LEVERETT, *supra* note 6, at 86-87.

²³ The TRR is located on the fringes of the University of Tehran campus in the middle of the city; one can see it from the conference room of the university's Faculty of World Studies, where Hillary Mann Leverett and I have given guest seminars.

under safeguards, to the 3-4 percent level needed to fuel power reactors and to the near-20 percent level required by the TRR.²⁴

Since the early 1990s, American and Israeli intelligence services have warned that Iran is three to five years away from acquiring nuclear weapons. Yet twenty years into this constantly resetting forecast, no intelligence agency has come remotely close to producing hard evidence that Iran is trying to fabricate nuclear weapons. Even at the near-20 percent level, Iran is below both the International Atomic Energy Agency's (IAEA) 20-percent threshold for highly enriched uranium and the 90-plus-percent level for bomb-grade material. The IAEA has, for years, consistently affirmed that there has been no diversion of nuclear material from Iran's nuclear facilities, and has never found evidence Iran is enriching anywhere close to weapons-grade levels. Indeed, American and Israeli intelligence services currently say that Iran is, at this point, not working to fabricate nuclear weapons.²⁵

Going to Tebran identifies two powerful reasons why the Islamic Republic is unlikely to build such weapons. First, there is strong consensus among Iranian political and policy elites that acquiring a relatively small nuclear arsenal would diminish, not enhance the Islamic Republic's security.²⁶ Second, beyond this strategic rationale, both Imam Khomeini, the Islamic Republic's "founding father" and its first Supreme Leader, and Ayatollah Khamenei, the current Leader, have declared that nuclear weapons violate Islamic law, that they are *haram*—forbidden by God.

One may discount this as mere talk, but there is an important precedent where the Islamic Republic also walked the walk on this issue. During the Iran-Iraq War in the 1980s, Iran was subjected for years to chemical attack—against civilian as well as military targets—while the United States (which was backing Saddam Husayn's war of aggression against the fledgling Islamic Republic) blocked the United Nations Security Council from taking any action on the matter. As the attacks continued, Iranian military commanders asked for

²⁴ LEVERETT & MANN LEVERETT, *supra* note 6, at 81-85.

²⁵ *Id.* at 85.

²⁶ *Id.* at 85-86.

Khomeini's authorization to use the infrastructure inherited from the Shah to mass produce chemical weapons agents and fabricate chemical weapons, so as to be capable of retaliating in kind against Iraqi chemical attacks. Khomeini said no, holding that chemical weapons were *haram* (forbidden by God) and that the Islamic Republic would not use them, even though it was being regularly subjected to chemical attack.

Khomeini and Khamenei have both said that nuclear weapons, like chemical weapons, violate God's law. In a system that legitimates itself in no small part on the basis of its perceived adherence to Islamic law, that is not a trivial thing.²⁷

So if the Iranian nuclear program is not a weapons program, what are its purposes? Three stand out. First, while a lot of Western commentary derides the suggestion that the program has an economic rationale, there are, in fact, real economic and technological benefits that Iran accrues from its nuclear activities. They allow Iranian scientists, engineers, and technicians to develop expertise (for example, in centrifuge technology) applicable beyond the nuclear arena and to establish new sectors (for example, producing medical isotopes) for the Iranian economy. Iran already exports electricity to Afghanistan, Iraq, Pakistan, and Turkey, and wants to expand such exports in the future. Developing nuclear energy for the purpose of power generation directly supports this ambition. It also prospectively allows the Islamic Republic to devote more of its oil to export or to value-adding processes like oil-based petrochemicals. Likewise, nuclear energy frees up natural gas for injection into aging oil fields and for cultivating petrochemicals and other gas-based industries.²⁸

Second, from a security perspective, the way that the program has developed suggests that it is partly aimed at giving the Islamic Republic some measure of what is often called a nuclear option by allowing Iranian scientists and engineers to develop at least some of the core competencies for fabricating nuclear weapons, but without actually building them. Policy elites across the Iranian political

²⁷ *Id.* at 87.

²⁸ *Id.* at 87-88.

spectrum acknowledge that perceptions the Islamic Republic is developing such a nuclear option have deterrent value even without overt weaponization. Furthermore, the nuclear program gives Tehran leverage to compel Washington to come to terms with it, making the nuclear issue an attractive point of entry for dealing with the United States and other major powers on larger strategic questions.²⁹

Third—and most importantly—the program’s main strategic purposes are political rather than military. The Islamic Republic is pursuing its nuclear rights in defiance of America and Israel—and that has powerful resonance not just at home but across the region. Some Arab leaders may not like the Iranian program, but polls of predominantly Sunni Arab populations show large majorities have been strongly supportive of Iran’s nuclear efforts. Some even show large majorities of Arabs thinking it would be a good thing if Iran acquired nuclear weapons.³⁰

And that brings us back to Iran’s soft power strategy. Through its narrative—not its drones or tanks or even its centrifuges, but its narrative—the Islamic Republic is using the political awakening of Middle Eastern publics to alter the very nature of power politics in the region. The Middle East’s balance of power is becoming, more and more, a balance of influence. The Islamic Republic is both encouraging and taking advantage of this transition to enhance its own regional standing.

II. ALTERNATIVE CONCEPTIONS OF INTERNATIONAL ORDER

The resulting shift in the Middle East’s balance of power—simultaneously distributional (affecting who has relative power) and essential (about the basis of power)—poses a high-stakes challenge for U.S. foreign policy. For its own interests, and on classic balance-of-power grounds, America needs strategic rapprochement with the Islamic Republic. But Washington’s longstanding determination to suppress the emergence of independent power centers in the Middle East continues to warp U.S. policy choices toward the Islamic

²⁹ *Id.* at 88, 90.

³⁰ *Id.* at 88-90. *See also* Leverett & Mann Leverett, *supra* note 21; TELHAMI, *supra* note 21, at 135-38.

Republic and the region more generally. It also warps the U.S. attitude toward global governance.

U.S.-Iranian tensions over the Islamic Republic's nuclear activities reflect two different ways of thinking about international order. One might be described as a positivistic, rules-focused approach. In this approach, substantive and procedural norms for international behavior are created by the consent of independent, sovereign states. Thus, international order is based very much on *lex lata*, what the law actually is, not *lex ferenda*, what the law (from one ideological view or another) should be. From a positivistic perspective, rules and norms, once created, are to be interpreted very narrowly, in terms of both how they are interpreted and who interprets them.

The alternative is a more policy-oriented—one might say results-oriented—approach. From this perspective, what matters are the policy goals and values that motivate the creation of particular rules and norms—not the rules and norms themselves, but the goals and values underlying them. In further contrast to the positivistic approach, the policy-oriented approach ascribes a special role in interpreting rules and norms to the most powerful states in the system—those states with the resources and willingness to act in order to enforce the rules.³¹

If one looks at who supports one of these approaches over the other, the positivistic approach is very much favored by non-Western states. States in what we used to call the Third World have sharply criticized “colonial” international law for having warped the positivist principle of consent as the basis for international legal rules and obligations. But, with a universalized respect for national self-determination, they have also embraced a positivist orientation to international law as an indispensable foundation for globalizing core legal principles of sovereign equality and non-interference in states’

³¹ See the following sources for more on the contrasts between these approaches: ANTHONY CLARK AREND, LEGAL RULES AND INTERNATIONAL SOCIETY 67-86 (1999); Tai-Heng Cheng, *Making International Law Without Agreeing What It Is*, 10 WASH. U. GLOBAL STUD. L. REV. 1 (2011); and David Kleimann, *Positivism, the New Haven School, and the Use of Force in International Law*, 3 BSIS J. INT'L STUD. 26 (2006) (focusing on use of force questions).

internal affairs.³² From a non-Western perspective, it is only through this kind of positivism that international law, rules, and norms might actually constrain established powers as well as rising powers and the less powerful.

Correspondingly, the policy-oriented approach tends to be favored by Western powers—above all, by the United States. Its modern intellectual roots go back to the 1950s and 1960s and the so-called New Haven school of international law, forged by a network of scholars based largely at Yale Law School, the central figures in which were Myres McDougal and Harold Lasswell. Whatever their scholarly ambitions to reconstruct international legal methodology, the main policy-oriented goals of McDougal, Lasswell, and their *protégés* (as opposed to mere students, some of whom took very different policy positions) was to justify U.S. foreign policy in the Cold War context, especially regarding nuclear weapons, Third World intervention, and use-of-force questions.³³ Another prominent Yale

³² See Agreement (with exchange of notes) on trade and intercourse between Tibet Region of China and India (April 29, 1954), 299 United Nations Treaty Series 57 (1958); Scott, *supra* note 5, at 2-3; S. PRAKASH SINHA, *NEW NATIONS AND THE LAW OF NATIONS* (1967); RAM PRAKASH ANAND, *NEW STATES AND INTERNATIONAL LAW* (1972); RAM PRAKASH ANAND, *INTERNATIONAL LAW AND DEVELOPING COUNTRIES: CONFRONTATION OR COOPERATION* (1987); Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT'L L. 77, 79-82 (2003); Dai Bingguo, *Asia, China and International Law*, 11 CHINESE J. INT'L L. 1 (2012); Christopher Clapham, *Sovereignty and the Third World State*, 47 POL. STUD. 522, 522-29 (1999); James Thuo Gathii, *International Law and Eurocentricity*, 9 EUR. J. INT'L L. 184 (1998); Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 WIS. INT'L L.J. 353 (1998); M. Sornarajah, *Power and Justice: Third World Resistance in International Law*, 10 SINGAPORE Y.B. INT'L L. 19 (2006); Ram Prakash Anand, *Attitude of the Asian-African States toward Certain Problems of International Law*, 15 INT'L & COMP. L.Q. 55 (1966); S. Prakash Sinha, *Perspective of the Newly Independent States on the Binding Quality of International Law*, 14 INT'L & COMP. L.Q. 121 (1965); Steven Weber *et al.*, *A World Without the West*, NAT'L INT., Summer 2007, at 25-28; and *Background: Five principles of peaceful coexistence*, XINHUA, June 14, 2004, http://news.xinhuanet.com/english/2005-04/08/content_2803638.htm.

³³ For representative presentations drawn from a sizable bibliography, see the following: Myres McDougal, *Foreword* to ROGER H. HULL & JOHN C. NOVOGROD, *LAW AND VIETNAM* at vii-ix (1968); Myres McDougal, *Foreword* to JOHN NORTON MOORE, *LAW AND THE INDO-CHINA WAR* at vii, xi (1972); Myres S. McDougal & Norbert A. Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 YALE L.J. 648 (1958), reprinted in MYRES MCDUGAL ET AL.,

law professor and dean, Eugene Rostow (who became a leading neoconservative foreign policy intellectual in the 1970s, 1980s, and 1990s) also contributed to this agenda.³⁴ In the post-9/11 period, the policy-oriented approach continues to have high-profile advocates in the legal academy, encompassing neoconservative advocates of American unilateralism and preventive war on the right and liberal champions of humanitarian intervention and the “responsibility to protect” on the left.³⁵ Certainly, over the last half century, its logic has

STUDIES IN WORLD PUBLIC ORDER (1960); Myres McDougal & Harold Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT’L L. 1 (1959), reprinted in MCDUGAL ET AL., STUDIES IN WORLD PUBLIC ORDER (1960); and W. Michael Reisman, *Deterrence and International Law*, 4 N.Y.L. SCH. J. INT’L & COMP. L. 339 (1983). For examples of contrary positions taken by international legal scholars trained at Yale during McDougal and Lasswell’s heyday, see the following: Richard Falk, *Casting the Spell: The New Haven School of Law*, 104 YALE L.J. 1991 (1995) (reviewing HAROLD D. LASSWELL & MYRES S. MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE, AND POLICY (1992)); Richard Falk, *Toward A Legal Regime For Nuclear Weapons*, 28 MCGILL L.J. 519 (1983); Richard Falk, Lee Meyrowitz, & Jack Sanderson, *Nuclear Weapons and International Law*, INDIAN J. INT’L L. 541 (1980); Richard A. Falk, *International Law and the United States Role in the Vietnam War*, 75 YALE L.J. 1122 (1966); Burns H. Weston, *Nuclear Weapons and International Law: Prolegomenon to General Illegality*, 4 N.Y.L. SCH. J. INT’L & COMP. L. 227 (1983); and Burns H. Weston, *Nuclear Weapons Versus International Law: A Contextual Reassessment*, 28 MCGILL L.J. 542 (1983).

³⁴ See, e.g., Eugene Rostow, *Is There a Legal Basis for Nuclear Deterrence Theory and Policy?*, in LAWYERS AND THE NUCLEAR DEBATE: PROCEEDINGS OF THE CANADIAN CONFERENCE ON NUCLEAR WEAPONS AND LAW 175 (1988); EUGENE ROSTOW, *TOWARD MANAGED PEACE: THE NATIONAL SECURITY INTERESTS OF THE UNITED STATES, 1759 TO THE PRESENT* (1995).

³⁵ On the neoconservative side, see, for example, Robert J. Delahunty & John Yoo, *Great Power Security*, 10 CHI. J. INT’L L. 35 (2009); Jack Goldsmith, *Fire When Ready*, FOR. POL’Y (March 19, 2012), http://www.foreignpolicy.com/articles/2012/03/19/fire_when_ready; Eric Posner, *Think Again: International Law*, FOR. POL’Y (Sept. 17, 2009), http://www.foreignpolicy.com/articles/2009/09/17/think_again_international_la; and John Yoo, *Using Force*, 71 U. CHI. L. REV. 729 (2004). On the liberal side, see, for example, Allen Buchanan & Robert Keohane, *The Preventive Use of Force: A Cosmopolitan Institutional Proposal*, 18 ETHICS & INT’L AFF. 1 (2004); Lee Feinstein & Anne-Marie Slaughter, *A Duty to Prevent*, FOR. AFF., Jan.-Feb. 2004; Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT’L L. 283 (2004); Anne-Marie Slaughter, *Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform*, 99 AM. J. INT’L L. 619 (2005); Thomas Weiss, *R2P After 9/11 and the World Summit*, 24 WIS. INT’L L.J. 741 (2006); Anne-Marie Slaughter, *Was the Libyan Intervention Really an Intervention?*, ATLANTIC, Aug. 26, 2011,

been strongly reflected in the perspectives that U.S. administrations, Democratic and Republican, have brought to bear in legal analyses of foreign policy questions.

III. THE IRANIAN CASE AND THE NUCLEAR NONPROLIFERATION REGIME

Tensions between these divergent conceptions of world order condition U.S.-Iranian disagreements over the status of the Islamic Republic's nuclear activities under the international nuclear nonproliferation regime, which rests on the foundation of the Nuclear Non-Proliferation Treaty (NPT). The NPT, which opened for signature in 1968 and entered into force in 1970, is the international community's main vehicle for regulating nuclear energy-related technologies in both civil and military applications.³⁶ It is appropriately understood as a set of three interrelated commitments by parties, which are divided into two categories, nuclear-weapon states [hereinafter "weapons states"] and non-nuclear-weapon states [hereinafter "non-weapons states"].

- In Article II and Article III, non-weapons states—like Iran—commit not to build or acquire nuclear weapons.
- In Article VI, weapons states—the United States, Russia, Britain, France, and China—commit to good faith negotiations for nuclear disarmament.
- In Article IV and Article V, all agree that parties have an "inalienable right" to use nuclear technology for peaceful purposes "without discrimination"—and are obligated to

<http://www.theatlantic.com/international/archive/2011/08/was-the-libyan-intervention-really-an-intervention/244175/>; Anne-Marie Slaughter, *Intervention, Libya, and the Future of Sovereignty*, ATLANTIC, Sept. 4, 2011, <http://www.theatlantic.com/international/archive/2011/09/intervention-libya-and-the-future-of-sovereignty/244537/>; and Ivo Daalder & James Steinberg, *Preventive war, A useful tool*, L.A. TIMES, Dec. 4, 2005, at M3, <http://articles.latimes.com/2005/dec/04/opinion/op-preemptivewar4>.

³⁶ JOYNER, *supra* note 2, at 3, 20.

facilitate the exercise of that right, especially by non-weapon states.³⁷

There have long been strains between weapons states and non-weapons states over weapons states' poor compliance with their commitment to disarm. Today, though, these tensions are particularly acute over perceived tensions between NPT signatories' commitment to nonproliferation and their commitment to enabling the peaceful use of nuclear technology.

A. Reading (and Misreading) the NPT

The two alternative conceptions of international order outlined above give rise to very different perspectives on interpreting the NPT regarding this issue. One perspective—grounded in the positivistic model of international law and global governance—gives the Treaty's three core bargains equal standing. The other—grounded in the policy-oriented model—holds that non-weapons states' commitment to nonproliferation trumps those by weapons states to nuclear disarmament and by all to the peaceful use of nuclear technology. Conflict between these perspectives is especially sharp over fuel cycle technology, the ultimate “dual use” capability (for the same material that fuels power and research reactors can, at higher levels of fissile isotope concentration, be used in nuclear bombs).

For those holding that the NPT's three core bargains have equal standing, the right of non-weapons states to safeguarded enrichment is clear—from the Treaty itself, from its negotiating history, and from subsequent practice, with at least a dozen non-weapons states building fuel-cycle infrastructures potentially capable of supporting weapons programs. From a positivistic perspective, the denial of that right by a handful of powerful states amounts to an effort to rewrite the NPT unilaterally. Not surprisingly, the camp espousing this position includes the non-Western world, virtually in its entirety. By contrast, those claiming that nonproliferation trumps the NPT's two other core bargains claim that there is no treaty-based

³⁷ Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161, <http://www.un.org/disarmament/WMD/Nuclear/NPT.shtml>.

“right” to enrich. From a policy-oriented perspective, the manner in which non-weapons states pursue the peaceful use of nuclear technology must necessarily be subordinated to the NPT’s overriding goal of stopping the spread of nuclear weapons. This position is advocated primarily by Western powers, including the United States.

Strikingly, Washington once held that the right to peaceful use includes the indigenous development of safeguarded fuel cycle capabilities. In 1968, as America and the Soviet Union, the NPT’s sponsors, prepared to open it for signature, U.S. officials told Congress that the Treaty permitted non-weapons states to pursue the fuel cycle.³⁸ Since the Cold War’s end, though, the United States—along with Britain, France, and Israel—has been determined to constrain the diffusion of fuel cycle capabilities to non-Western states. Their main motive has been to maximize America’s freedom of unilateral military initiative and, in the Middle East, that of Israel.

Thus, the United States has come to hold that there is no treaty-based right for non-weapons states to pursue fuel cycle capabilities, and that weapons states and their allies with nuclear industries are entitled to decide which non-weapons states can possess fuel cycle technologies. From these premises, in the early 2000s the Bush administration sought a worldwide ban on transferring fuel cycle technologies to countries not already possessing them.³⁹ The Obama administration then pushed the Nuclear Suppliers’ Group to make such transfers conditional on recipients’ acceptance of the Additional Protocol to the NPT—an instrument devised at U.S. instigation in the 1990s to enable more intrusive and proactive inspections in non-weapons states.⁴⁰

Non-Western states see these efforts to constrain the diffusion of fuel cycle capabilities as a far greater threat to the NPT’s integrity than Iran’s nuclear activities. Among rising powers, Brazil and South Africa—both nonproliferation exemplars for joining the NPT as non-weapons states after forsaking weapons programs

³⁸ Daniel Joyner, *The Security Council as Legal Hegemon*, 43 GEO. J. INT’L L. 225, 243 (2012).

³⁹ JOYNER, *supra* note 2, at 47-51, 55-60, 78-87.

⁴⁰ *Id.* at 110-12.

during democratization (including, in South Africa's case, dismantling six fully fabricated nuclear bombs that Israel helped the *apartheid* regime to assemble)—have been especially resolute in defending non-weapons states' right to the fuel cycle. With Argentina, they resisted U.S. efforts to make transfers of fuel cycle technology contingent on non-weapons states' acceptance of the Additional Protocol (which Brazil has refused to sign), ultimately forcing Washington to compromise.⁴¹

B. The NPT and Iranian Enrichment

Currently, the conflict over how to read the NPT with respect to non-weapons states' fuel cycle activities is engaged most prominently over whether Iran, as a non-weapons party to the Treaty, has a right to enrich uranium under international safeguards. Disagreements over the issue are effectively blocking efforts to resolve the controversy over the Islamic Republic's nuclear program through diplomacy.

In the Iranian case, just four countries—the United States, Britain, France, and Israel (which is not a signatory to the NPT)—have led the charge to deny the Islamic Republic's right to enrich. In these countries' official view, Iran has forfeited whatever "right" to enrich that its representatives might assert because of problems in its compliance with its IAEA safeguards agreement that cast doubt on the peaceful nature of its nuclear program. Western and Israeli intelligence services also claim that the Islamic Republic has done at least theoretical work on aspects of nuclear weapons design and fabrication, thereby raising further serious questions about the peaceful nature of its program. Since 2006, moreover, the United Nations Security Council has adopted seven resolutions calling on Iran to suspend its fuel cycle activities.⁴² The Islamic Republic has yet

⁴¹ David Jonas, John Carlson, Richard Goorevich, *The NSG Decision on Sensitive Nuclear Transfers: ABACC and the Additional Protocol*, ARMS CONTROL ASSOCIATION (Nov. 2012), http://www.armscontrol.org/act/2012_11/The-NSG-Decision-on-Sensitive-Nuclear-Transfers-ABACC-and-the-Additional-Protocol.

⁴² S.C. Res. 1696, U.N. Doc. S/RES/1696 (July 31, 2006); S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 23, 2006); S.C. Res. 1747, U.N. Doc. S/RES/1747 (Mar. 24, 2007); S.C. Res. 1803, U.N. Doc. S/RES/1803 (Mar. 3, 2008); S.C. Res. 1835, U.N. Doc. S/RES/1835 (Sept. 27, 2008); S.C. Res. 1887, U.N. Doc.

to comply with these resolutions, prompting Western criticism of its failure to meet its “international obligations.” For America and its British, French, and Israeli partners, any diplomatic solution to the Iranian nuclear issue will require Iran to terminate its fuel cycle activities—or, at least, to stop them on an open-ended and long-term basis (at least a decade, if not longer).⁴³

In contrast, the “BRICS” (Brazil, Russia, India, China, South Africa) and the Non-Aligned Movement (with 120 countries representing nearly two-thirds of U.N. members) have unequivocally recognized Iran’s right—as well as that of other non-weapons states—to develop safeguarded indigenous fuel cycle capabilities.⁴⁴ Their position strongly reflects both a positivistic conception of international order and an interpretation of the NPT ascribing equal standing to its three core bargains.

From a positivistic point of view, none of the claims by Western intelligence agencies about Iranian research on nuclear weapons design and fabrication has been substantiated by hard evidence, and none contradicts the IAEA’s continuing affirmation of Iran’s non-diversion of nuclear material. Through a positivistic prism, moreover, one cannot legitimately hold that the NPT prohibits the Islamic Republic from seeking the same standing, in terms of its nuclear infrastructure and capabilities, as Japan, Canada, and others

S/RES/1887 (Sept. 24, 2009); and S.C. Res. 1929, U.N. Doc. S/RES/1929 (June 9, 2010).

⁴³ Discussions with American, British, and French officials. Western powers demand that Iran promptly stop enriching at the near-20 percent level; it must then comply with Security Council calls to cease all enrichment. U.S. officials say that Iran might be “allowed” a circumscribed enrichment program, after suspending for a decade or more; on this point, *see also* Robert Einhorn, *Getting to ‘Yes’ with Iran*, FOR. POLY (July 10, 2013), http://www.foreignpolicy.com/articles/2013/07/10/getting_to_yes_with_iran. London and Paris insist that “zero enrichment” is the only acceptable long-term outcome.

⁴⁴ *See BRICS Summit draws clear red lines on Syria, Iran*, BRICS POST (Apr. 3, 2013), http://thebricspost.com/brics-summit-draws-clear-red-lines-on-syria-iran/#.Uewc_UrD-AI; Jason Ditz, *Non-Aligned Movement Unanimously Backs Iran’s Civilian Nuclear Program*, ANTIWAR.COM (Aug. 31, 2012), <http://news.antiwar.com/2012/08/31/non-aligned-movement-unanimously-backs-irans-civilian-nuclear-program/>.

that joined the Treaty as non-weapons states but are widely seen as able to produce nuclear weapons in relatively short order, should they choose to do so. Mohamed ElBaradei, the Nobel laureate under whose leadership the IAEA correctly assessed Iraq's lack of weapons of mass destruction (WMD) when every Western intelligence agency got it wrong, has said that developing nuclear weapons capability—not weapons, but competencies needed to make them—is “kosher” under the NPT.⁴⁵

For many positivistically-inclined analysts, the Security Council resolutions calling on the Islamic Republic to suspend enrichment violate Iran's rights as both a sovereign state and as a party to the NPT. By extension, they also violate United Nations Charter provisions directing that the Security Council act “in accordance with the purposes and principles of the United Nations” and “with the present charter” and are, thus, invalid.⁴⁶ Additionally, the first of these resolutions, from 2006—on which all of the subsequent resolutions are based—reflects an assessment of Tehran's intent to build nuclear weapons that America's own intelligence community repudiated in 2007. This repudiation arguably nullifies the legal basis for all seven resolutions calling on Iran to suspend enrichment.⁴⁷

For non-Western states and others holding that the NPT's three core bargains have equal standing, the outlines of a diplomatic solution to the Iranian nuclear issue are as clear as Iran's right to enrich: recognition of Iran's nuclear rights in exchange for greater transparency in its nuclear activities. Working with Turkey, Brazil brokered the Tehran Declaration in May 2010, in which Iran accepted U.S. terms to swap most of its then stockpile of enriched

⁴⁵ See Mohamed ElBaradei, A New Global Security System Towards a World Free From Nuclear Weapons at John F. Kennedy School of Government, Harvard University (Apr. 26, 2010), <http://forum.iop.harvard.edu/content/new-global-security-system-towards-world-free-nuclear-weapons-conversation-mohamed-el>.

⁴⁶ For a brilliant exposition of this argument, see Joyner, *supra* note 38.

⁴⁷ Flynt Leverett & Hillary Mann Leverett, *America's Iran Policy and the Undermining of International Order*, *WORLD FIN. REV.*, July-August 2013, at 40, <http://law.psu.edu/file/TWFR%20Jul-Aug%202013America%20Iran-v2.pdf>.

uranium for fuel for its research reactor.⁴⁸ The Declaration, though, also recognized Iran's right to enrich; for this reason, the Obama administration rejected it.⁴⁹ Through the Non-Aligned Movement and other fora, non-Western states regularly reiterate their view that a negotiated settlement of the Iranian nuclear issue will require Western acknowledgment of the Islamic Republic's nuclear rights. From this premise, Security Council resolutions requiring Iran to suspend, rather than encourage, productive diplomacy.⁵⁰ Even Russia and China, the Security Council's two non-Western members, who acquiesced in all seven resolutions telling Tehran to suspend, note regularly that there will be no diplomatic solution absent Western recognition of Iran's nuclear rights.⁵¹

The basic idea of recognizing Iran's nuclear rights, as a sovereign state and as a signatory to the NPT (including the right to enrich uranium under international safeguards), in exchange for greater transparency surrounding Iran's nuclear activities, has long been the core of the Islamic Republic's approach to nuclear diplomacy with the P5+1 (the five permanent members of the U.N. Security Council plus Germany). Since Hassan Rohani's election as Iran's president in 2013, the Islamic Republic's new foreign minister, Javad Zarif, has advanced a substantive proposal to the P5+1 for resolving the nuclear issue on this basis, within a finite period. But the Obama administration and its British and French partners continue to insist, effectively, that "transparency is not enough"—

⁴⁸ See *Text of the Iran-Brazil-Turkey deal*, Julian Borger's *Global Security Blog*, GUARDIAN, May 17, 2010, <http://www.guardian.co.uk/world/julian-borger-global-security-blog/2010/may/17/iran-brazil-turkey-nuclear>.

⁴⁹ See Flynt Leverett & Hillary Mann Leverett, *Flynt Leverett Debates Obama's Iran Policy with Dennis Ross*, RACE FOR IRAN (Jan. 12, 2012), <http://www.raceforiran.com/flynt-leverett-debates-obama%E2%80%99s-iran-policy-with-dennis-ross>.

⁵⁰ On the unhelpful impact of the Security Council resolutions on nuclear diplomacy with Tehran, see, for example, Reza Nasri, *To Nudge Iran Talks, New Resolution Needed*, CHRISTIAN SCI. MONITOR (Apr. 25, 2013), <http://www.csmonitor.com/layout/set/print/Commentary/Opinion/2013/0425/To-nudge-Iran-talks-new-UN-resolution-needed>.

⁵¹ Conversations with Russian and Chinese officials suggest that Moscow and Beijing acquiesced to these resolutions partly to keep the United States in the Security Council on the Iranian nuclear issue, where they can exert ongoing influence—and restraint—over Washington.

that, if Iranian enrichment can be tolerated at all (and it remains unclear that Washington, London, and Paris are prepared to tolerate it), the Western powers must become, in essence, co-managers of the Iranian nuclear program, determining which Iranian nuclear facilities must be closed and which might be allowed to remain open, determining not how many additional centrifuges Iran might be allowed to install in the future but how many centrifuges it must dismantle to satisfy the United States (and Israel).

How these differences over Iran's nuclear activities are handled will profoundly affect the future of the nuclear nonproliferation regime. In his contribution to this symposium, Daniel Joyner rigorously scrutinizes the NPT and the various legal sources for the IAEA's dealings with Iran; from this analysis, he comes down on the side of an essentially positivistic reading of the Iranian nuclear case.⁵² Just as importantly, he and Richard Butler both warn that warped interpretations of the NPT, distorted readings of the IAEA's legal sources, and biased application of the law by America and its European hangers-on will further undermine the functioning of the current nonproliferation regime, the credibility and legitimacy of which are already eroding for ever larger parts of the international community.⁵³

IV. THE IRANIAN NUCLEAR CASE AND USE OF FORCE DOCTRINE

Tensions between the two divergent conceptions of international order described above are also reflected in debates over the proper interpretation of use of force doctrine⁵⁴ and its application to the Iranian nuclear case. To put the question in its simplest form, if some states judge, based on their particular (and almost certainly policy-oriented) readings of the NPT, that the Islamic Republic is in violation of its Treaty obligations, can they find legal justification for a preventive attack against it?

⁵² Joyner, *supra* note 2.

⁵³ Butler, *supra* note 2.

⁵⁴ See Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699 (2005) (outlining four schools of thought, two of which, labeled "strict constructionist" and "imminent threat," fall into what is described here as the positivist camp, and two of which, labeled "qualitative threat" and "charter-is-dead," fall into the policy-oriented camp).

The perceived risk of a U.S. or Israeli attack on Iranian nuclear facilities (and, in the U.S. case, perhaps other targets) waxes and wanes. With Rohani's election, the resumption of nuclear talks between the P5+1 and Iran, and the Obama administration's failed plan to strike Syria, the likelihood of military action seems, at least for now, to have declined. But, if the United States and its British and French partners are not prepared to adopt a more positivistic reading of the NPT and to deal with the Iranian nuclear issue on such a basis, then the current diplomatic effort between Iran and the P5+1 will fail. And if diplomacy fails, the perceived risk of a U.S. or Israeli strike on the Islamic Republic's nuclear infrastructure will rise once again, particularly as that infrastructure continues to develop and expand. What does international law have to say about this?

Under a positivistic reading of international law, there are two circumstances under which a state may legitimately use force. One is when the United Nations Security Council has adopted a resolution under Chapter VII of the United Nations Charter authorizing the use of force in response to a specified threat to international peace and security. The other is under a narrow reading of the right of individual or collective self-defense as defined in Article 51 of the Charter. This requires evidence of either an actual armed attack or a threat of attack so imminent that a forceful response to it satisfies a strict construal of the legal principle of necessity and can be carried out in compliance with the legal principle of proportionality.⁵⁵ In the absence of a Chapter VII resolution from the Security Council or a case meeting such a rigorous definition of self-defense, a state does not have the right to use force.

It is highly unlikely that there will be a Security Council resolution authorizing the use of force against Iran over its nuclear activities, which eliminates one of the two potential legal justifications for attacking Iranian nuclear targets. In the Iranian case, Russia and China have learned from what they consider the bitter experience of the Council's engagement on WMD issues prior to the 2003 invasion of Iraq, when Western powers justified the invasion in part by arguing that resolutions adopted more than a decade earlier in

⁵⁵ See *id.* (expanding on the "strict constructionist" and "imminent threat" schools); Kleimann, *supra* note 30; Mary Ellen O'Connell, *supra* note 2.

connection with the first Persian Gulf war also authorized the use of force against Iraq in 2003.⁵⁶ As a result, Moscow and Beijing have made sure that Security Council resolutions dealing with the Iranian nuclear issue state explicitly that nothing in them can be construed as authorizing the use of force, and that such authorization would require separate action by the Council.

But the lack of Security Council authorization does not definitively constrain policy-oriented analysts and American officials, who tend to downplay the centrality of the Council for contemporary decision-making about the use of force.⁵⁷ Some argue that the threat of “WMD-seeking rogue states” has attenuated traditional readings of the United Nations Charter on the Council’s role in addressing threats to international peace and security.⁵⁸ Others, like neoconservative John Yoo, go so far as to argue that the United States is entitled simply to ignore the Council on the grounds that it “lacks political legitimacy” and “is contrary to both American national interests and global welfare because it subjects any intervention, no matter how justified or beneficial, to the approval of authoritarian nations.”⁵⁹

With the Security Council deemed irrelevant, the policy-oriented case for launching a war against the Islamic Republic over its nuclear activities relies on the notion of preventive self-defense.⁶⁰ Consider, in this regard, Matthew Kroenig’s widely noted brief for U.S. strikes on Iran’s nuclear infrastructure. Kroenig begins his brief by asserting “the true danger that a nuclear-armed Iran would pose to U.S. interests in the Middle East and beyond” is so great as to

⁵⁶ This point was especially salient in the arguments that the British and Australian governments offered; while some American officials, most notably Secretary of State Colin Powell, suggested that the United States shared the official British and Australian view, this argument was not a major part of the Bush administration’s formal case for war. See Alex Bellamy, *International Law and the War With Iraq*, 4 MELB. J. INT’L L. 497 (2003), for further discussion on this topic.

⁵⁷ Murphy, *supra* note 52, (discussing the “charter-is-dead” school).

⁵⁸ Matthew Waxman, *The Use of Force Against States that Might Have Weapons of Mass Destruction*, 31 MICH. J. INT’L L. 1 (2009).

⁵⁹ John Yoo, *An Unavoidable Challenge*, NAT’L REV. (Dec. 31, 2011), <http://www.nationalreview.com/articles/286953/unavoidable-challenge-john-yoo>.

⁶⁰ This was also a major part of the Bush administration’s case for invading Iraq in 2003. See Bellamy, *supra* note 54.

require, at least for Kroenig and other like-minded analysts, a heightened, post-9/11 formulation of imminent threat. As for proportionality, Kroenig posits that “a military strike intended to destroy Iran’s nuclear program, if managed carefully, could spare the region and the world a very real threat and dramatically improve the long-term national security of the United States.”⁶¹

For this to work, though, the definition of “U.S. interests in the Middle East and beyond” and “the long-term national security of the United States” must be stretched to encompass not just physical security but what might more accurately be described as hegemonic preference. Consider what Kroenig himself writes regarding the real motive for a prospective U.S. attack on Iran: “a nuclear armed Iran would immediately limit U.S. freedom of action in the Middle East.”⁶² The reasoning underlying John Yoo’s advocacy of a preventive U.S. attack on Iran is even more expansively hegemonic:

The United States has assumed the role, once held by Great Britain, of guaranteeing free trade and economic development, spreading liberal values, and maintaining international security. An attack on Iranian nuclear facilities, though it would impose costs in human lives and political turmoil, would serve these interests and forestall the spread of conflict and terror.⁶³

From a positivistic perspective, this amounts to a reading of the right of self-defense so tortured that virtually no other state besides the United States (or Israel) would accept it as justification for a preventive attack against the Islamic Republic. But this is precisely the argument that will be deployed, if and when the time comes, to validate U.S. strikes against Iranian nuclear facilities. U.S. government lawyers are already drafting their briefs, should President Obama decide in the next three years that the development of the

⁶¹ Matthew Kroenig, *Time to Attack Iran: Why a Strike Is the Least Bad Option*, FOR. AFF., Jan-Feb. 2012, at 77, <http://www.foreignaffairs.com/articles/136917/matthew-kroenig/time-to-attack-iran>.

⁶² *Id.* at 78.

⁶³ Yoo, *supra* note 57.

Islamic Republic's fuel cycle capabilities has gone too far for his strategic or political comfort.

How the debate over the prospective use of force by the United States against Iran's nuclear infrastructure plays out will have hugely important implications for the future of world order. In her contribution to this symposium, Mary Ellen O'Connell presents a rich exposition and defense of the U.N. Charter regime regarding the use of force, along with an essentially positivistic application of this regime and other relevant law to the prospective use of force against Iranian nuclear targets. This leads her to a firm rejection of the unilateral resort, by the United States or others, to armed coercion against the Islamic Republic.⁶⁴ James Houck, in his contribution, evinces sympathy for arguments that a strict reading of the U.N. Charter regime is not universally helpful to real-world decision-makers in an era of WMD and demonstrated threats of terrorism. Nevertheless, he also notes that, at this point, he has seen no evidence or argument to date in the public domain leading him to judge that a predicate currently exists for an armed attack on Iran.⁶⁵

How this debate plays out will also have enormous implications for America's position in the international community. As Americans engage in the debate, they would do well to consider James Houck's observation that there is much in public discussions of these issues in the United States that is undermining and disrespectful of international law.⁶⁶ Such a trend, if perpetuated, will prove corrosive not only of the prospects for genuinely rules-based international order in the 21st century, but also of America's standing and role in world affairs.⁶⁷

Restoring America's international standing and influence—and boosting the prospects for rules-based international order in the 21st century—will require very substantial strategic revision by the United States. Consider, once again, the Obama administration's

⁶⁴ O'Connell, *supra* note 53.

⁶⁵ See Presentation of James Houck at Symposium, video available at <http://elibrary.law.psu.edu/jlia>.

⁶⁶ *Id.*

⁶⁷ This is explored more deeply in Mann Leverett, *supra* note 12.

publicly announced plan to use force—without any legal justification under the U.N. Charter—in Syria. After August 21, 2013, much of America’s political class was initially still inclined to support President Obama’s call for military action. Much of the mainstream media comported themselves with the same lack of journalistic rigor that so many media outlets displayed in evaluating the Bush administration’s case for illegally invading and occupying Iraq in 2003. But, in 2013, the American public rejected a sitting president’s case for imperial war—and rejected it overwhelmingly, to a point where even many congressmen and senators who would otherwise have backed Obama’s initiative concluded that, this time, they could not do so. It is not yet possible to know if Americans’ rejection of Obama’s call for illegal and strategically dysfunctional U.S. military action against Syria represents the beginning of a true sea change in popular attitudes about American foreign policy. Perhaps it was simply the product of a contingent concatenation of circumstances—post-Iraq/(not quite) post-Afghanistan/post-Libya “war weariness,” frustration with a slow economic recovery and an uncertain long-term economic future, etc. But perhaps Americans are at least at the start of a true learning curve. Only time will tell.