

**EMBOLDENED BY IMPUNITY:
THE HISTORY AND CONSEQUENCES OF FAILURE
TO ENFORCE IRANIAN VIOLATIONS OF
INTERNATIONAL LAW**

Orde F. Kittrie[†]

CONTENTS

INTRODUCTION	519
I. THE ISLAMIC REPUBLIC OF IRAN AND INTERNATIONAL LAW	520
II. NUCLEAR WEAPONS, TERRORISM AND THE IDEOLOGY OF THE IRANIAN REGIME	528
III. IRAN'S NUCLEAR PROGRAM.....	532
A. <i>Delayed Response</i>	533
B. <i>Resolutions 1737 and 1747</i>	539
CONCLUSION.....	548

INTRODUCTION

Eighteen years ago, Syracuse University lost thirty-five students returning from a study abroad program who were on Pan Am 103 the day that flight was blown up over Lockerbie, Scotland, by Libyan agents utilizing a few ounces of plastic explosive. It makes Syracuse an appropriate forum to consider what to do about another rogue state, Iran, that is working to arm itself with the ultimate explosive device, a nuclear weapon.

Many of my fellow participants in this Symposium have focused their papers on the international laws directly applicable to a preemptive strike on Iran's nuclear program. A preemptive strike has many downsides. This

[†] Associate Professor of Law, the Sandra Day O'Connor College of Law at Arizona State University. Prior to joining the ASU law faculty in 2004, the author served for ten years in the Office of the Legal Adviser at the United States Department of State, including for three years as an attorney specializing in nuclear nonproliferation. Readers interested in a broader discussion of the international legal regime relating to nuclear nonproliferation and the international community's reluctance to enforce it may wish to refer to Orde F. Kittrie, *Averting Catastrophe: Why the Nuclear Nonproliferation Treaty is Losing Its Deterrence Capacity and How to Restore It*, MICH. J. INT'L L. (forthcoming 2007), from which Parts II and III of this article are adapted.

paper will focus on how we have arrived at this point of a looming terrible choice between an Iranian nuclear arsenal and a preemptive strike on Iran. Part I of this paper reviews the history of violent violations of international law by the current Iranian regime, beginning with the seizure of American diplomats in 1979, the year Ayatollah Ruhollah Khomeini came to power and founded the regime. The paper analyzes these violations and the international reactions to them and concludes that Iran has yet to be meaningfully sanctioned for any of them. Part II examines the Iranian regime's ideology. Due to its ideology, the value to the Iranian regime of terrorism and nuclear proliferation is particularly high. As a result, sanctions imposed on the regime must be particularly strong if they are to be effective. Part III examines the international community's hesitant and tepid response to Iran's violations of the nuclear nonproliferation legal regime.

I. THE ISLAMIC REPUBLIC OF IRAN AND INTERNATIONAL LAW

The Islamic Republic of Iran has flouted international law with impunity since its founding in 1979 by Ayatollah Ruhollah Khomeini. When Khomeini died in 1989, Ayatollah Ali Khamenei replaced him as Supreme Leader, Iran's most powerful position.¹ Khamenei had served as President of Iran, the country's second most powerful position, from 1981 to 1989, and continues as Supreme Leader at the time of this writing.² Khamenei's rise to the position of Supreme Leader unfortunately has done nothing to temper Iran's penchant for egregiously violating international law.

The Islamic Republic of Iran's first major flouting of international law commenced on November 4, 1979, when a group of student followers of Khomeini seized the United States Embassy in the Iranian capital, Tehran, and took sixty-three American citizens hostage³ with Khomeini's enthusiastic blessing.⁴ Three additional hostages were seized at the Iranian Foreign Ministry.⁵ Thirteen of the sixty-six hostages were released within

1. Profile: Ayatollah Ali Khamenei, BBC NEWS, *available at* http://news.bbc.co.uk/2/hi/middle_east/3018932.stm. At this writing, the President of Iran is Mahmoud Ahmadinejad.

2. *Id.*

3. J.P. Smith, *Clerics Say They Saw 43 of 50 U.S. Hostages; U.S. Cites Iran's 'Game' On Number of Hostages; U.S. Scores Iran on Hostage Numbers*, WASH. POST, Dec. 26, 1979, at A1.

4. KENNETH M. POLLACK, *THE PERSIAN PUZZLE: THE CONFLICT BETWEEN IRAN AND AMERICA* 156 (2005).

5. Smith, *supra* note 3, at A1.

2007]

Emboldened by Impunity

521

two weeks, and one more in July 1980.⁶ Fifty-two American hostages were held for 444 days.⁷

The seizure and holding of the hostages violated a fundamental tenet of international law: the inviolability of diplomatic envoys and embassies.⁸ Treaties violated by the seizure included the Vienna Convention on Diplomatic Relations of 1961⁹ and the Vienna Convention on Consular Relations of 1963.¹⁰ Yet the Security Council contented itself with merely “[u]rgently call[ing] upon the Government of Iran to release immediately” the Embassy personnel.¹¹ Neither of the two Council resolutions relating to the hostage crisis invoked the Security Council’s authority under Chapter VII of the U.N. Charter to order the Government of Iran to release the hostages.¹² Nor did the Security Council impose any sanctions on Iran for its egregious breach of international law.¹³ A U.S. proposal to impose sanctions on Iran was vetoed by the Soviet Union.¹⁴ In the wake of the

6. POLLACK, *supra* note 4, at 153.

7. *Id.* at 183.

8. *See, e.g.*, United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. 4, 16 (Dec. 15) (order in response to request for the indication of provisional measures) (“there is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose”).

9. Vienna Convention on Diplomatic Relations and Optional Protocol in Disputes, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

10. Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261; *see also* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 38 (May 24) (Judgment) (ruling that the hostage seizure and holding put Iran in violation of international law including the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963).

11. S.C. Res. 457, U.N. Doc. S/RES/457 (Dec. 4, 1979). *See also* S.C. Res. 461, U.N. Doc. S/RES/461 (Dec. 31, 1979).

12. *Id.*

13. Articles 41 and 42 of Chapter VII of the U.N. Charter spell out the broad range of sanctions which the Security Council is authorized to impose in order to maintain or restore international peace and security. U.N. Charter art. 41 and 42. Article 41 provides an illustrative list of measures “not involving the use of armed force.” U.N. Charter art. 41. This list includes economic sanctions up to and including a comprehensive economic embargo. *Id.* The Council has imposed such comprehensive embargos on Iraq (S.C. Res. 661, U.N. Doc. S/RES/661 (Aug. 6, 1990)); the former Yugoslavia (S.C. Res. 757, U.N. Doc. S/RES/757 (May 30, 1992)); and Haiti (S.C. Res. 917, U.N. Doc. S/RES/917 (May 6, 1994)); and imposed lesser economic sanctions on over a dozen other countries. *See* Humanitarian Impact of Sanctions, <http://ochaonline.un.org/webpage.asp?site=sanctions>. Article 42 provides an illustrative list of sanctions involving the use of armed force. U.N. Charter art 42.

14. *See, e.g.*, James A. Phillips, *U.S. Policy and the Future of Iran*, HERITAGE FOUNDATION BACKGROUND No. 194, July 8, 1982, *available at* <http://www.heritage.org/Research/MiddleEast/bg194.cfm>; Karen DeYoung, *Soviets Veto Sanctions by U.N. Against Iran*, WASH. POST, Jan. 14, 1980, at A1.

Soviet veto, Iran threatened Western Europe and Japan that they would face retaliatory cuts in the supply of Iranian oil if they joined the United States in multilateral sanctions against Iran.¹⁵ Western Europe and Japan then refused to join the United States in imposing meaningful multilateral sanctions on Iran.¹⁶

The hostages were finally released on January 21, 1981, at the precise moment that Ronald Reagan finished taking the oath of office and succeeded Jimmy Carter as President.¹⁷ The memoirs of several of the Iranian hostage-takers reveal that they had originally intended to hold the diplomats for only a few days but “changed their minds when statements from Washington made it clear that there was no danger of serious action against them.”¹⁸ The hostage takers stated in their memoirs that they finally released the hostages “only because they feared that the new President, Ronald Reagan, might approach the problem ‘like a cowboy.’”¹⁹

Over the following decades, the Islamic Republic of Iran has continued to repeatedly and violently violate international law, either directly or through proxies, without suffering any serious repercussions. On April 18, 1983, a driver crashed a vehicle laden with explosives into the main entrance of the U.S. Embassy in Beirut, killing sixty-three people.²⁰ In 2003, in a case brought by survivors of the attack and relatives of the deceased, U.S. District Court Judge John D. Bates ruled that the government of the Islamic Republic of Iran had orchestrated, funded, and directed the bombing through its agents and co-conspirators who were affiliated with the terrorist organization now known as Hezbollah.²¹ Judge Bates based his conclusion on evidence including expert testimony by Robert Oakley, the U.S. State Department coordinator for

15. Dusko Doder, *Europe, Japan Warned by Iran About Sanctions*, WASH. POST, Jan. 17, 1980, at A18.

16. Leonard Downie, Jr., *Allies Plan Limits to their Support of U.S. Sanctions*, WASH. POST, Jan. 19, 1980, at A12.

17. See, e.g., Nancy Amoury Combs, *Carter, Reagan, and Khomeini: Presidential Transitions and International Law*, 52 HASTINGS L.J. 303, 306 (2001); POLLACK, *supra* note 4, at 172.

18. Bernard Lewis, *The Revolt of Islam*, NEW YORKER, Nov. 19, 2001, at 50.

19. *Id.*; see also Combs, *supra* note 17, at 320-21, 337-8. Compare POLLACK, *supra* note 4, at 170-172 (arguing that Iranian concern about what the Reagan administration might do, given Reagan’s tough talk during the campaign, was one of several factors that prompted the Iranians to end the hostage crisis).

20. POLLACK, *supra* note 4, at 202.

21. *Dammarell v. Islamic Republic of Iran*, 281 F. Supp. 2d 105, 109-113 (D.D.C. 2003) [hereinafter *Dammarell I.*]. The case went through a series of subsequent stages culminating in *Dammarell v. Islamic Republic of Iran*, 2006 U.S. Dist. LEXIS 63263 (D.D.C. 2006), which explicitly upheld the factual findings of *Dammarell I.* *Id.* at 4 n.1.

2007]

Emboldened by Impunity

523

counterterrorism.²² Iran's involvement in this bombing violated the Vienna Convention on Diplomatic Relations of 1961, the Vienna Convention on Consular Relations of 1963, and Article 2(4) of the U.N. Charter.²³ But Iran has never been subjected to Security Council condemnation or sanctions for its role in the attack.

On October 23, 1983, a truck bomb struck a barracks housing U.S. Marine participants in the multinational peacekeeping force in Beirut, killing 241 Marines.²⁴ Almost simultaneously, another truck bomb struck a barracks housing French members of the multinational peacekeeping force, killing fifty-seven.²⁵ In July 1987, Iran's then-Minister of Revolutionary Guards, Mohsen Rafiqdoost, admitted that, "both the TNT and the ideology which in one blast sent to hell 400 officers, NCOs, and soldiers at the Marines headquarters were provided by Iran."²⁶ There is a broad consensus among Western experts that the planning of the attacks was supervised by Iran's ambassador to Syria.²⁷ In May 2003, in a case brought by relatives of some of the U.S. Marines who were killed, U.S. District Court Judge Royce C. Lamberth ruled that the Islamic Republic of Iran was responsible for the Marine barracks attack.²⁸ Lamberth based his conclusion on testimony by expert witnesses including a Hezbollah member who participated in the group that planned the attack, and a declassified National Security Agency intercept of a September 1983 message sent from Iranian intelligence headquarters in Tehran instructing the leader of Hezbollah (then known as Islamic Amal) to "take a spectacular action against the United States Marines."²⁹ Despite the

22. Dammarell I, *supra* note 21, at 111-112.

23. Article 2(4) of the UN Charter states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations." U.N. Charter art 2, para. 4. In U.N. Security Council Resolution 748 of March 31, 1992, the Security Council confirmed as follows that acts of terrorism violate this provision of the Charter:

[r]eaffirming that, in accordance with the principle in Article 2, paragraph 4, of the Charter of the United Nations, every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force. . . .

S.C. Res. 748, U.N. Doc. S/RES/748 (Mar. 31, 1992).

24. POLLACK, *supra* note 4, at 203.

25. *Id.*

26. Rafiqdoost's comments were published in the Tehran daily Ressalat on July 20, 1987. Ladan Boroumand & Roya Boroumand, *Terror, Islam, and Democracy*, 13 J. DEMOCRACY 5, 19 n.18 (2002).

27. POLLACK, *supra* note 4, at 203.

28. *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 61 (D.D.C. 2003).

29. *Id.* at 54-55.

attack's deadly interference with a peacekeeping operation mounted by two permanent members of the Security Council, the Council has yet to either condemn or sanction Iran's involvement in this attack.

Nor did the United States itself exact a price from Iran for the Marine barracks attack. Although U.S. intelligence had quickly collected considerable information regarding Iran's role in the attack,³⁰ the United States chose not to retaliate against Iran.³¹ Instead, on February 7, 1984, the United States pulled its troops out of Lebanon.³² U.S. withdrawal at that time from the Lebanese quagmire may have been wise. However, by leaving without also making Iran pay a price for the attacks on U.S. diplomats and soldiers, the withdrawal, seen in the context of the earlier hostage crisis, sent a message that attacks on the United States—even attacks in flagrant violation of international law—could be undertaken at little to no cost and with the prospect of considerable gains.³³ This lesson played an important role in subsequent Iranian policy toward the United States.³⁴

Iranian violations of international law continued during the 1990s. In Argentina in March 1992, Hezbollah, in coordination with the Iranian Embassy, bombed the Israeli Embassy, killing twenty-nine.³⁵ This attack violated the Israeli diplomats' protections under international diplomatic law and Argentina's rights under Article 2(4) of the U.N. Charter.³⁶ Article 2(4)'s applicability to such acts of terrorism was confirmed that very same month by Security Council Resolution 748, which stated as follows in the course of condemning the Libyan bombing of Pan Am 103:

Reaffirming that, in accordance with the principle in Article 2, paragraph 4, of the Charter of the United Nations, every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force.³⁷

The Security Council has yet to condemn or sanction Iran for its role in destroying Israel's embassy in Buenos Aires.

Another flagrant Iranian violation of Article 2(4) occurred in

30. POLLACK, *supra* note 4, at 203.

31. *Id.* at 204-05.

32. *Id.* at 205.

33. *Id.*

34. *Id.*

35. *Id.* at 267.

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

37. S.C. Res. 748 U.N. Doc. S/RES/748 (Mar. 31, 1992).

2007]

Emboldened by Impunity

525

September 1992, when two gunmen killed four officials of the Iranian Democratic Party of Kurdistan who were sitting in a Greek restaurant, the Mykonos, in Berlin, Germany.³⁸ After a three-year trial that included testimony by 166 witnesses, a German judge ruled that “[t]he Iranian political leadership ordered this crime.”³⁹ “They made a decision to silence an uncomfortable voice,” said the judge, who determined that the killings had been ordered by Iran’s “Committee for Special Operations,” which includes the country’s Supreme Leader and President.⁴⁰ “While the judge’s opinion did not identify the top officials by name, German federal prosecutors during the trial specifically accused Ayatollah Ali Khamenei, Iran’s Spiritual Leader, and President Hashemi Rafsanjani of ordering and approving the killings.”⁴¹ Khamenei has remained Iran’s Supreme Leader until the present day. Rafsanjani is currently head of Iran’s Expediency Council, the number three position in the Iranian leadership.⁴²

The international community’s response to the German verdict was low-key. The Security Council said nothing about the Mykonos assassinations. However, in a concerted move following the verdict, every E.U. country except Greece recalled its ambassador from Iran.⁴³ Economic analysts predicted that with E.U. exports accounting for over forty percent of Iran’s imports, stiff sanctions could result in an Iranian loss of income and access to Western technology that “could devastate Iran . . . forcing it to redirect both its internal policies and foreign policies.”⁴⁴ Yet less than three weeks after the Mykonos verdict, the E.U., pushed by Germany itself,⁴⁵ decided to return its ambassadors to Tehran and to impose no economic sanctions on Iran.⁴⁶ Iran’s President Rafsanjani said: “The Europeans . . . have quickly put their hands up in the air; this is a sign of Iran’s real strength.”⁴⁷ The E.U. decision not to impose economic

38. *Kurdish Leaders Killed in Berlin*, THE GUARDIAN (London), Sept. 19, 1992, at 12.

39. Alan Cowell, *Berlin Court Says Top Iran Leaders Ordered Killings*, N.Y. TIMES, Apr. 11, 1997, at A1.

40. *Id.*

41. *Id.*

42. See, e.g., *Iran: Who Holds the Power?*, BBC News, http://news.bbc.co.uk/2/shared/spl/hi/middle_east/03/iran_power/html/expediency_council.stm (last visited Feb. 20, 2007); Pepe Escobar, *Brave new (Middle Eastern) world; Part 2: The Iranian equation*, ASIA TIMES, Sept. 20, 2002, available at http://www.atimes.com/atimes/Middle_East/DI20Ak02.html.

43. Jacob Heilbrunn, *Bonn Mots*, NEW REPUBLIC, May 19, 1997, at 17.

44. Michael S. Lelyveld, *Iran Terror Case: Who Will Suffer?*, J. COMMERCE, Apr. 14, 1997, at 1A.

45. Heilbrunn, *supra* note 43, at 17.

46. Michael Binyon, *Europe Returns Envoys to Tehran with Rebuke Over Iran-Sponsored Terror*, TIMES (London), Apr. 30, 1997, at 18.

47. Ian Black & Ian Traynor, *Iran Defiant as Row with EU Deepens*, GUARDIAN

sanctions was reportedly prompted at least in part by European businesses “pressing their governments to ensure they will be able to continue to benefit from the American embargo already in place.”⁴⁸ “You cannot reproach us for following our economic interests,” explained the German Foreign Minister, Klaus Kinkel.⁴⁹

In July 1994, a truck filled with explosives destroyed the Jewish cultural center in Buenos Aires, killing eighty-five people and wounding more than 200.⁵⁰ This too was the work of Iran, according to experts including Kenneth Pollack, the National Security Council director for Iran affairs during much of the Clinton Administration.⁵¹ Iranian involvement in the attack was yet another violation of Article 2(4) of the U.N. Charter. Yet thanks in part to a protracted, and at times botched, Argentine investigation, Iran has yet to be held accountable. In late 2006, an Argentine federal judge issued international arrest warrants for former Iranian President Rafsanjani and eight other former Iranian officials (including a former foreign minister) suspected of responsibility for the attack.⁵² Iran said it would refuse to cooperate with the arrest warrants; however, the issuance of the arrest warrants via Interpol subjects the officials to detention and extradition to Argentina should they leave Iran.⁵³

Iran has in recent years continued flouting international law with impunity. Since he came to power in 2005, Iranian President Ahmadinejad has several times urged that Israel be wiped off the map.⁵⁴ These statements violate both the prohibition of “direct and public incitement to commit genocide” contained in Article 3 of the Convention on the Prevention and Punishment of the Crime of Genocide,⁵⁵ to which Iran is a

(London), May 1, 1997, at 10.

48. *EU/Iran: EU Suspends Returns of Ambassadors*, EUROPEAN REPORT, May 3, 1997.

49. *Mixed Response from Europe on Ruling Linking Iran to Killings*, N.Y. TIMES, Apr. 30, 1997, at A5.

50. POLLACK, *supra* note 4, at 267.

51. *Id.*

52. *Argentina Seeks Arrest of Iran's Ex-Leader in 1994 Bombing Inquiry*, N.Y. TIMES, Nov. 10, 2006, at A5.

53. Patrick J. McDonnell, *Argentina Issues Arrest Warrants; Nine Iranian Ex-Officials, Including the President, Are Sought in the 1994 Bombing of a Jewish Center in Buenos Aires*, L.A. TIMES, Nov. 10, 2006, at A5.

54. *See, e.g., Nazila Fathi, Iranian President Stands by Call to Wipe Israel Off Map*, N.Y. TIMES, Oct. 29, 2005, at A3.

55. Convention on the Prevention and Punishment of the Crime of Genocide, art. 3, Dec. 9, 1948, 78 UNTS 277, available at <http://www.hrweb.org/legal/genocide.html> [hereinafter Convention]. Article 2 of the Convention defines genocide as

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c)

2007]

Emboldened by Impunity

527

party,⁵⁶ and the prohibition, contained in Article 2(4) of the U.N. Charter, of “the threat . . . of force against the territorial integrity or political independence of any state.”⁵⁷ The Security Council,⁵⁸ Secretary-General Annan,⁵⁹ and the E.U.⁶⁰ have issued statements condemning Ahmadinejad’s statements and pointing out their inconsistency with Article 2(4), but no sanctions have been imposed.

Iran is currently the world’s most active state sponsor of terrorism, providing Hezbollah and various Palestinian terrorist groups including Hamas with “extensive funding, training and weapons.”⁶¹ Iran’s support for these groups violates several legally binding provisions of U.N. Security Council Resolution 1373 of September 28, 2001, including its requirement that states “[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts.”⁶² Iran’s continued harboring of senior al-Qaeda officials⁶³ violates Resolution 1373’s requirement that all states “[d]eny safe haven to those who finance, plan, support, or commit terrorist acts.”⁶⁴ Professor Maggs’ article for this symposium makes the point that Iran has regularly engaged in or assisted

Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

Id.

56. See Convention, *supra* note 55, at art. 3.

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

58. Fathi, *supra* note 54, at A3; Security Council Condemns Iranian President’s Remarks About Israel, Highlights of the Spokesman’s Noon Briefing (Oct. 31, 2005), available at http://www.un.org/News/ossg/hilites/hilites_arch_view.asp?HighID=417.

59. Annan Dismayed by Remarks About Israel by Iranian President, Highlights of the Spokesman’s Noon Briefing (Oct. 27, 2005), http://www.un.org/News/ossg/hilites/hilites_arch_view.asp?HighID=416 (last visited Feb. 20, 2007); Annan is Clear in Condemnation of Iranian President’s Comments on Israel, Highlights of the Spokesman’s Noon Briefing (Dec. 14, 2005), http://www.un.org/News/ossg/hilites/hilites_arch_view.asp?HighID=452 (last visited Feb. 20, 2007).

60. Iran, Statements by the U.K. Presidency of the European Union (Dec. 17, 2005), available at www.fco.gov.uk.

61. U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON TERRORISM: 2005, at 173, available at <http://www.state.gov/s/ct/rls/crt/cl7689.htm>. Iranian support for Hezbollah and Hamas goes back many years. See, e.g., POLLACK, *supra* note 4, at 256 (stating that “Iran may have been providing HAMAS with as much as \$30 million annually in the early 1990s”); *id.* at 267 (describing Iran’s cooperation with Hezbollah to bomb the Israeli embassy in Buenos Aires in 1992 and Jewish community center in Buenos Aires in 1994); *id.* at 280 (“Iran boosted its financial assistance to [Hezbollah] to \$100 million per year in 1996”).

62. S.C. Res. 1373, ¶ 2(a), U.N. Doc. S/RES/1373 (Sept. 28, 2001).

63. See, e.g., U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON TERRORISM: 2005, *supra* note 61, at 173.

64. S.C. Res. 1373, *supra* note 62, at ¶ 2(c).

with armed attacks against Iraq and Israel, both of which are allies of the United States, and he lists several incidents reported during just the first nine months of 2006.⁶⁵ Yet what has been the international community's response to these various Iranian violations of international law? Not a single Security Council condemnation or sanction.

II. NUCLEAR WEAPONS, TERRORISM AND THE IDEOLOGY OF THE IRANIAN REGIME

Iran's potential acquisition of nuclear weapons is a matter of grave concern for three main reasons. First, the Iranian regime's ideology may make it impossible to deter the Iranian regime from using, or enabling its terrorist proxies to use, nuclear weapons against the United States and Israel. Second, the Iranian regime's record of engagement in and support for terrorism raises concerns that even if Iran does not actually launch nuclear weapons against the United States or Israel, or does not do so immediately, its possession of a nuclear weapons "umbrella" is likely to make it even more self-confident in its terrorist and terrorist-supporting behavior. Third, Iran's aggressive ideology has inspired such fear in its neighbors that many of them seem likely to develop their own nuclear arsenals to counter Iran's.

Iran's dominant Shiite Islamic sect believes that a divine savior, known as the Hidden Imam or Mahdi, has gone into hiding and will reappear at the end of days.⁶⁶ President Ahmadinejad has boasted that the messianic Hidden "Imam gave him the presidency [of Iran] for a single task: provoking a 'clash of civilisations' [sic] in which the Muslim world, led by Iran, takes on the 'infidel' West, led by the United States, and defeats it."⁶⁷ According to Ahmadinejad, this war with the West has already begun.⁶⁸ Ahmadinejad has also said that the Iranian "revolution's main mission is to pave the way for the reappearance of" the Hidden Imam⁶⁹ and that "[w]e should define our economic, cultural and political

65. 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, 481 (2007).

66. See, e.g., EXPECTATION OF THE MILLENNIUM: SHIISM IN HISTORY 7-8 (Seyyed Hossein Nasr, Hamid Dabashi & Seyyed Vali Reza Nasr eds., 1989).

67. Amir Taheri, *The Frightening Truth of Why Iran Wants a Bomb*, TELEGRAPH (London), Apr. 16, 2006, at 22.

68. "Final War" Between Muslims, West – Ahmadinejad, AL JAZEERA, Jan. 21, 2006, http://www.aljazeera.com/me.asp?service_ID=10517.

69. Jay Tolson, *Aiming For Apocalypse*, U.S. NEWS & WORLD REP., May 22, 2006, at 34.

2007]

Emboldened by Impunity

529

policies based on [the policy of] Imam Mahdi's return."⁷⁰

A telling example of Ahmadinejad's religious fervor and its influence on Iranian foreign policy involves his September 2005 speech to the United Nations General Assembly. Ahmadinejad concluded his speech with an appeal to Allah to "hasten the emergence of your last repository, the promised one, that perfect and pure human being, the one that will fill this world with justice and peace."⁷¹ Ahmadinejad later described in videotaped remarks how he felt the hand of Allah entrancing the world's leaders during his speech:

I felt that all of a sudden the atmosphere changed there, and for 27, 28 minutes all the leaders did not blink . . . They were astonished as if a hand held them there and made them sit. It had opened their eyes and ears for the message of the Islamic republic.⁷²

A few months later, when an aircraft crashed in Tehran, killing 108 people, Mr Ahmadinejad promised an investigation. But he also thanked the dead, saying: "What is important is that they have shown the way to martyrdom which we must follow."⁷³ The Iranian regime's exaltation of martyrdom, and willingness to sacrifice the lives of its citizens to achieve its revolutionary goals, was demonstrated during the Iran-Iraq War in the 1980s, when the Iranian regime sent thousands of its own schoolboys—each armed only with a small metal "key to heaven"—to their deaths in human waves across minefields to clear a path for its adult troops.⁷⁴

The Iranian leadership's apocalyptic messianism and reverence for martyrdom are of particular concern in light of its avowed goal of destroying the United States and Israel. As Ahmadinejad has starkly put it: "God willing, with the force of God behind it, we shall soon experience a world without the United States. . . . [T]his goal [is] attainable, and surely can be achieved."⁷⁵ Khamenei explained his antipathy to the United States

70. Richard Ernsberger, Jr., *Religion Versus Reality*, NEWSWEEK, Dec. 12, 2005, at 28.

71. H.E. Dr. Mahmood Ahmadinejad, In the Name of the God of Mercy, Compassion, Peace, Freedom and Justice, Delivered to the Sixtieth Session of the United Nations General Assembly (Sept. 17, 2005) available at <http://www.un.org/webcast/ga/60/statements/iran050917eng.pdf>.

72. Babak Dehghanpisheh and Christopher Dickey, *Devoted and Defiant*, NEWSWEEK, Feb. 13, 2006. Videotape: available at http://www.youtube.com/watch?v=Z_H7af26_Gk.

73. Anton La Guardia, 'Divine Mission' Driving Iran's New Leader, DAILY TELEGRAPH (London), Jan. 14, 2006, at 10.

74. Terence Smith, *Iran: Five Years of Fanaticism*, N.Y. TIMES, Feb. 12, 1984, §6 at 21.

75. *The Zionist Entity and Iran*, GlobalSecurity.org, <http://www.globalsecurity.org/military/world/iran/zionist-entity.htm> (last visited Feb. 11, 2007) (quoting Ahmadinejad speech of Oct. 26, 2005); see also Middle Eastern Media Research Institute, *Special Dispatch Series - No. 1013*, Oct. 28, 2005,

as follows: “[T]he source of all human torment and suffering is the ‘liberal democracy’ promoted by the West.”⁷⁶ According to Hassan Abbassi, chief strategist for the Iranian Revolutionary Guards and a top adviser to President Ahmadinejad: “We have a strategy drawn up for the destruction of Anglo-Saxon civilization . . . There are 29 sensitive sites in the U.S. and in the West . . . [W]e know how we are going to attack them.”⁷⁷ Abbassi explains that, “We have to uproot liberal democracy from the face of the world.”⁷⁸

President Ahmadinejad’s recent statements calling for Israel’s destruction have received considerable attention.⁷⁹ Some analysts argue that the international community should not be overly concerned by Ahmadinejad’s statements because he does not fully control Iran’s nuclear policy.⁸⁰ In addition to the Presidency, the major power hubs in Iran are the Supreme Leader, Ayatollah Khomeini, and the Expediency Council, currently chaired by former Iranian President Rafsanjani.⁸¹ Former Spanish Prime Minister José Maria Aznar has revealed that Khomeini told him in a private meeting that “setting Israel on fire” was a preeminent Iranian goal.⁸² Khomeini explained to Aznar “why Iran must declare war

http://memri.org/bin/articles.cgi?Page=countries&Area=iran&ID=SP101305#_edn1 (last visited Feb. 11, 2007).

76. *Special Dispatch Series – No. 727, Iranian Leader: ‘The Source of Human Torment and Suffering is Liberal Democracy,’* Middle Eastern Media Research Institute, June 4, 2004, <http://memri.org/bin/opener.cgi?Page=archives&ID=SP72704> (last visited Feb. 11, 2007).

77. *Iran: Tehran’s Nuclear Recklessness and the U.S. Response: Hearing before the Subcomm. on Fed’l Fin’l Mgmt., Gov’t Info. & Int’l Sec. of the S. Comm. on Homeland Sec. & Gov’tal Aff.*, 109th Cong. (2005) (testimony of R. James Woolsey, former Dir., Cent. Intelligence Agency).

78. Safa Haeri, *Tehran’s Demons Revisited*, ASIA TIMES, June 26, 2004, available at http://www.atimes.com/atimes/Middle_East/FF26Ak03.html.

79. See, e.g., *Ahmadinejad: Conditions for Removal of Israel are at Hand*, ARUTZ SHEVA, July 10, 2006, available at <http://www.israelnationalnews.com/news.php3?id=106893> (quoting Iranian President Mahmoud Ahmadinejad who stated: “All the conditions for the removal of the Zionist regime are at hand . . . It won’t take long before the wrath of the people turns into a terrible explosion that will wipe the Zionist entity off the map”); *Iranian Leader: Wipe Out Israel*, CNN.COM, Oct. 26, 2005 (quoting Iranian President Mahmoud Ahmadinejad as saying “God willing, with the force of God behind it, we shall soon experience a world without the United States and Zionism”).

80. See, e.g., Gareth Porter, *Khomeini In Control and Ready to ‘Haggle,’* ASIA TIMES, May 31, 2006, available at http://www.atimes.com/Middle_East/HE31Ak03.html.

81. See, e.g., *Iran: Who Holds the Power?*, BBC NEWS, available at http://news.bbc.co.uk/2/shared/spl/hi/middle_east/03/iran_power/html/expediency_council.stm.

82. Yossi Verter, *Aznar: Khomeini Said in 2001 Iran Aimed to ‘Set Israel Alight’*, www.haaretz.com, Mar. 15, 2006, available at

2007]

Emboldened by Impunity

531

on Israel and the United States until they are completely destroyed.”⁸³ Rafsanjani, the chair of the other power hub in Iran, said the following in a speech at Tehran University: “the use of even one nuclear bomb inside Israel will destroy everything. However, it will only harm the Islamic world. It is not irrational to contemplate such an eventuality.”⁸⁴

The Iranian regime’s apocalyptic messianism and exaltation of martyrdom may make it impossible to deter Iran from using nuclear weapons to achieve its avowed aims of destroying the United States and Israel.⁸⁵ The relatively stable U.S.-Soviet balance of terror based on mutual assured destruction⁸⁶ may not be replicable with respect to Iran. Iran could launch the nuclear assault itself directly or, more likely and for the sake of “plausible deniability,” use one of its terrorist proxies as it did with the bombings in Lebanon and Argentina.⁸⁷

However, even before Iran launches a nuclear attack, and indeed even if it never does, an Iranian nuclear arsenal will make Iran far more dangerous than it is today. The current Iranian government is already the world’s leading state supporter of terrorism.⁸⁸ An Iranian nuclear arsenal would serve Iran as a “nuclear umbrella,” making countries victimized by Iranian-sponsored terrorism even more reluctant to retaliate against Iran. This would likely make Iran an even more self-confident supporter of terrorism. Iran could also harm Western security interests by simply threatening to use its nuclear weapons. A very unhealthy precedent for such nuclear blackmail has already been set by North Korea, which made

<http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=694562>.

83. *Id.*

84. Ali Akbar Hashemi-Rafsanjani, Chairman, Expediency Council, Qods Day Speech at Tehran University (Dec. 14, 2001) (BBC Worldwide Monitoring trans.) *available at* <http://www.globalsecurity.org/wmd/library/news/iran/2001/011214-text.html>.

85. *See, e.g.*, Bernard Lewis, *August 22*, WALL ST. J., Aug. 8, 2006, at A10 (Princeton Professor Emeritus Lewis, a leading expert on Islam, described “the apocalyptic worldview of Iran’s present rulers” and asserted that “[f]or people with this mindset, MAD [mutual assured destruction] is not a constraint, it is an inducement.”).

86. *See* Scott D. Sagan, *How to Keep the Bomb from Iran*, FOREIGN AFF., Sept./Oct. 2006 (stating that “[a]lthough deterrence did work with the Soviet Union and China, there were many close calls; maintaining nuclear peace during the Cold War was far more difficult and uncertain than U.S. officials and the American public seem to remember today”).

87. William J. Broad, *Plowshare or Sword?*, N.Y. TIMES, May 25, 2004, at F1 (stating that “[i]f Iran goes nuclear, you worry that Hezbollah goes nuclear,” said Paul Leventhal, president of the Nuclear Control Institute, a private group in Washington, referring to the Iran-backed terrorist group”).

88. *See, e.g.*, U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON TERRORISM: 2005, *supra* note 61, at 173. (finding that “Iran remained the most active state sponsor of terrorism”).

the following threat less than two days after its initial nuclear weapons test: “We hope the situation will be resolved before an unfortunate incident of us firing a nuclear missile comes. That depends on how the U.S. will act.”⁸⁹

Another danger of Iran acquiring a nuclear arsenal is that many of its neighbors in the Middle East would feel compelled to follow suit. The fear that an Iranian nuclear arsenal will unleash a cascade of proliferation across the Middle East was heightened by the disclosure in November 2006 that six Arab states have recently begun to accelerate efforts to acquire nuclear technology.⁹⁰ An editorial in the Egyptian government daily newspaper *Al-Ahram* put it as follows: “Iran’s nuclear capability . . . will spur many powers in the region to develop a nuclear program.”⁹¹ Such a cascade of proliferation in the Middle East would likely lead to the worldwide collapse of the already tottering nuclear non-proliferation treaty (NPT) regime.⁹² In addition, the proliferation of nuclear weapons in the Middle East tinderbox, with its existing border disputes, religious fanaticism, ethnic hatreds, unstable governments, terrorist groups, and tendency for conflicts to spiral out of control, seems likely to result in nuclear war.

III. IRAN’S NUCLEAR PROGRAM

Despite the grave dangers posed by the Iranian nuclear weapons program, the international community has responded hesitantly and tepidly to Iran’s longstanding violations of the nuclear nonproliferation legal regime. In August 2002, the International Atomic Energy Agency (IAEA) discovered, through a tip from a dissident group, an eighteen-year pattern of noncompliance by Iran with its NPT obligations to report various

89. *Official Warns U.S. Actions Could Prompt North Korean Missile*, INT’L HERALD TRIB., Oct. 10, 2006.

90. Richard Beeston, *Six Arab States Join Rush to Go Nuclear*, TIMES (London), Nov. 4, 2006.

91. H. Avraham, Middle Eastern Media Research Institute, *Inquiry & Analysis Series – No. 277, Arab Media Reactions to Iran’s Nuclear Project*, May 23, 2006 (quoting editorial in *AL-AHRAM*, Apr. 16, 2006); see also Roe Nahmias, *Mubarak Hints: We’ll Develop Nukes*, ynetnews.com, Jan. 5, 2007, available at <http://www.ynetnews.com/articles/0,7340,L-3348600,00.html> (stating that Egyptian President Mubarak hinted that if Iran proceeds to attain nuclear weapons, Egypt will follow suit).

92. The U.N. Secretary-General’s High-Level Panel on Threats, Challenges and Change recently warned of “the erosion and possible collapse of the whole [nuclear nonproliferation] Treaty regime,” explaining: “We are approaching a point at which the erosion of the non-proliferation regime could become irreversible and result in a cascade of proliferation.” The Secretary-General, *Report of the Secretary-General’s High-Level Panel on Threats, Challenges and Change*, at 39-40, U.N. doc. A/59/565 (Dec. 1, 2004).

2007]

Emboldened by Impunity

533

nuclear activities.⁹³ Over those eighteen years, Iran had built major nuclear facilities without telling the IAEA, and without the IAEA detecting them.⁹⁴

A. Delayed Response

The first written report in which the IAEA Director General declared Iran's non-compliance to the IAEA Board of Governors came almost a year later in June 2003.⁹⁵ A subsequent report by the Director General to the Board of Governors in November 2003 provided more detail on Iran's breach of its NPT safeguards obligations.⁹⁶ Pierre Goldschmidt, IAEA Deputy Director General from 1999 to July 2005, has stated that the Iranian non-compliance detailed in the IAEA's "damning report to its Board of Governors" in November 2003 "should have been reported to the UNSC [U.N. Security Council] as foreseen in the Agency's statute."⁹⁷ Yet the IAEA Board of Governors failed to report Iran's non-compliance to the Security Council until February 2006, two-and-a-half years later.⁹⁸ This two-and-a-half year delay in reporting Iran clearly violated the IAEA's own governing statute. Article XII(C) of the IAEA Statute provides in relevant part as follows:

The inspectors shall report any non-compliance to the Director General

93. Pierre Goldschmidt, *Decision Time on Iran*, N.Y. TIMES, Sept. 14, 2005, at A29; see *News Conference with Alireza Jafarzadeh, Representative of the National Council of Resistance of Iran Subject: New Information on Top-Secret Projects of the Iranian Regime's Nuclear Program*, FED. NEWS SERV., Aug. 14, 2002, available at <http://www.lexis.com>; see also *Iran Has Sites to Make N-arms, Rebels Say*, DESERET NEWS, Aug. 15, 2002, at A6.

94. See Nazila Fathi, *Iran: Minister Says "Nuclear Spies" Worked for U.S. and Israel*, N.Y. TIMES, Dec. 23, 2004, at A11 (noting that in 2002, an Iranian dissident group "revealed the existence of a secret nuclear facility in Natanz and a heavy-water complex near Arak. At the time, the United Nations nuclear monitoring agency was unaware of them.").

95. Int'l Atomic Energy Agency [hereinafter IAEA], *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, Report by the Director General*, IAEA Doc. GOV/2003/40, at 7 (June 6, 2003) (stating that "Iran has failed to meet its obligations under its Safeguards Agreement with respect to the reporting of nuclear material, the subsequent processing and use of that material and the declaration of facilities where the material was stored and processed").

96. See IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, Report by the Director General*, IAEA Doc. GOV/2003/75 (Nov. 10, 2003).

97. Statement of Dr. Pierre Goldschmidt, Visiting Scholar with Carnegie Foundation of Int'l Peace, *Is the Nuclear Non-proliferation Regime in Crisis? If so, why? Are there remedies?*, Address Before the Charlottesville Comm. on Foreign Relations (May 11, 2006), at 5, available at http://www.carnegieendowment.org/static/npp/Goldschmidt_CCFR_May_2006.pdf [hereinafter Goldschmidt].

98. IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, Report by the Director General*, at 2, IAEA Doc. GOV/2006/15 (Feb. 27, 2006) [hereinafter IAEA DG Report of Feb. 27, 2006].

who shall thereupon transmit the report to the Board of Governors. The Board shall call upon the recipient State or States to remedy forthwith any non-compliance which it finds to have occurred. The Board shall report the non-compliance to all members and to the Security Council and General Assembly of the United Nations.⁹⁹

This language gives the IAEA no choice but to promptly report non-compliance to the Security Council and General Assembly. The provision does not state that the Board *may* report the non-compliance, it directs that the “Board shall report the non-compliance.”¹⁰⁰ While XII(C) does state that the Board “shall call upon” the relevant state to “remedy” the non-compliance, the provision gives no indication that this effort to remedy must, or even can, delay the report.¹⁰¹

This lack of ambit for delay in the Board reporting non-compliance to the Security Council contrasts starkly with the requirement elsewhere in Article XII(C) that the Board delay before imposing IAEA punitive measures such as suspension of IAEA technical assistance.¹⁰² Article XII(C) states that such IAEA punitive measures “may” be taken in the event of “failure of the recipient State or States to take fully corrective action within a reasonable time.”¹⁰³ The drafters of the IAEA statute clearly knew how to authorize a “reasonable” delay before Board action, but no such delay was authorized when it came to the act of reporting non-compliance to the Security Council. The IAEA Board’s delay of over two-and-a-half years in reporting Iran’s non-compliance to the Security Council was flatly inconsistent with the IAEA Statute.

Goldschmidt suggests three main reasons for the lack of support on the IAEA Board for prompt reporting of Iranian non-compliance.¹⁰⁴ First, many states insisted there was “no evidence” that the undeclared material and activities were related to a nuclear weapons program, even though “they were all well aware that the Agency had neither the authority nor the means required to prove that this could be the case before it is too late.”¹⁰⁵ Second, some states feared that letting the Iran noncompliance issue “out of the IAEA’s hands” could facilitate the United States taking military action against Iran as it had against Iraq.¹⁰⁶ Third, some states “fear[ed] that if

99. Statute of the Int’l Atomic Energy Agency, art. XII(C), Oct. 23, 1956, *available at* http://www.iaea.org/About/statute_text.html [herein after IAEA Statute].

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. Goldschmidt, *supra* note 97, at 5.

105. *Id.*

106. *Id.*

2007]

Emboldened by Impunity

535

Iran was referred to the Security Council, Russia and China would use their veto right to block any resolution adverse to the Islamic Republic, as was the case for North Korea, with no concrete outcome whatsoever.”¹⁰⁷ Thus the IAEA failed to abide by its own statute’s requirement that non-compliance be reported forthwith to the Security Council in part out of fear that Security Council inaction would reveal the nuclear nonproliferation regime as toothless.

By the time the IAEA reported Iranian noncompliance to the Security Council in February 2006, Iran had been found to be in possession of documents relating to “the fabrication of nuclear weapons components,” and the Agency had information regarding Iranian tests “which could have a military nuclear dimension.”¹⁰⁸ While the international community fruitlessly negotiated with Iran during the years preceding the report to the Security Council, Iran “made stunning advances in mastering all technological aspects of uranium conversion and enrichment without incurring any negative repercussion.”¹⁰⁹ Iranian officials have crowed about how the negotiations between it and the West have bought Iran time to move forward with its nuclear program.¹¹⁰ They insist that this progress has created “facts on the ground” which are “irreversible.”¹¹¹

The Security Council finally issued its first resolution with respect to Iran’s nuclear program on July 31, 2006.¹¹² Resolution 1696 called upon Iran to take several steps, including suspending enrichment-related and reprocessing activities, which Iran had already been called upon to undertake by the IAEA in its Board of Governors Resolution of February 2006.¹¹³ Resolution 1696 also expressed the Security Council’s “intention,” in the event Iran had not taken such actions by August 31, 2006, to “adopt appropriate measures” under Article 41 of the U.N. Charter

107. *Id.*

108. IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, Board of Governors Resolution*, IAEA Doc. GOV/2006/14, at 2, (Feb. 4, 2006) [hereinafter IAEA BOG Iran Resolution of Feb. 4, 2006]; IAEA DG Report of Feb. 27, 2006, *supra* note 98, at 8.

109. Goldschmidt, *supra* note 97, at 8.

110. *See, e.g.*, Phillip Sherwell, *How We Duped the West, by Iran’s Nuclear Negotiator*, TELEGRAPH, May 3, 2006, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/03/05/wiran05.xml>; Middle East Media Research Institute, *Chief Iranian Nuclear Affairs Negotiator Hosein Musavian: The Negotiations with Europe Bought Us Time to Complete the Esfahan UCF Project and the Work on the Centrifuges in Natanz*, Aug. 12, 2005, <http://memri.org/bin/articles.cgi?Page=archives&Area=sd&ID=SP95705>.

111. Elaine Sciolino, *Iran is Not Cooperating, Agency Says*, N.Y. TIMES, Apr. 28, 2006, at A1 (quoting Gholamreza Aghazadeh, head of Iran’s Atomic Energy Organization).

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

113. *Id.* at ¶ 7; *see* IAEA BOG Iran Resolution of Feb. 4, 2006, *supra* note 108.

“to persuade Iran to comply.”¹¹⁴ Article 41 authorizes the Security Council to impose sanctions that do not involve “the use of armed force.”¹¹⁵ The IAEA Director General, in reports to the IAEA on August 31, 2006 and November 14, 2006, made clear that Iran had failed to take the steps that Resolution 1696 required it to perform by August 31.¹¹⁶

On December 23, 2006, in Resolution 1737, the Security Council finally imposed sanctions on Iran for its nuclear nonproliferation violations.¹¹⁷ Three months later, in Resolution 1747 of March 24, 2007, the Security Council responded to Iran’s failure to comply with the requirements of Resolution 1737 by slightly augmenting its sanctions on Iran.¹¹⁸ Prior to assessing the sanctions imposed by Resolutions 1737 and 1747, it is important to consider Iran’s economic situation and vulnerabilities.

Iran’s economy has been boosted, and its negotiating leverage enhanced, by the relatively high price of oil. Iran has the second-largest oil reserves of any country in the world¹¹⁹ and is located in the heart of the Persian Gulf region, where its military is in striking distance of approximately two-thirds of the world’s total crude oil reserves.¹²⁰ Oil prices seemed in 2006 to rise or fall depending on whether sanctions on Iran appeared imminent,¹²¹ and would likely skyrocket if Iranian supplies were cut off or if Iran moved to cut off supplies from the Persian Gulf to the rest of the world. Iran’s oil wealth also makes it a lucrative export market, with total exports to Iran from Russia, China, France, and Britain expected to top \$22 billion dollars in 2006, up from \$18 billion dollars in 2005.¹²²

However, Iran’s heavy dependence on oil export revenue and other

114. S.C. Res. 1696, *supra* note 112, ¶ 8.

115. U.N. Charter art. 41. Article 42, which contains the Security Council’s authority to approve military action “as may be necessary to maintain or restore international peace and security,” was not mentioned in Resolution 1696.

116. See IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, Report by the Director General*, IAEA Doc. GOV/2006/53 (Aug. 31, 2006); IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, Report by the Director General*, IAEA Doc. GOV/2006/64 (Nov. 14, 2006).

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

118. S.C. Res. 1747, U.N. Doc. S/RES/1747 (Mar. 24, 2007).

119. Neil King, Jr. and Mark Champion, *Nations’ Rich Trade with Iran is Hurdle for Sanctions Plan*, WALL ST. J., Sept. 20, 2006, at A1.

120. Jefferson Morley, *The Nuclear Politics of Oil*, WASH. POST, June 13, 2006, http://blog.washingtonpost.com/worldopinionroundup/2006/06/the_nuclear_politics_of_oil.html (last visited Feb. 12, 2007).

121. *Id.*

122. King & Champion, *supra* note 119.

2007]

Emboldened by Impunity

537

foreign trade leaves it highly vulnerable to economic sanctions.¹²³ The Iranian government draws between forty and fifty percent of its budget from oil export revenues,¹²⁴ and some ninety percent of Iran's population receives its income from the state.¹²⁵ In addition, Iran depends on other countries to refine forty percent of the gasoline it needs for internal consumption.¹²⁶ Notwithstanding its oil wealth, Iran's economy has been so mismanaged that the living standard of the average Iranian today is lower than it was at the time of the Islamic revolution in 1979.¹²⁷ According to official reports, which may be understated, unemployment among Iranian young people is at thirty-four percent, and headed towards fifty percent.¹²⁸ Wealthy Iranians have already moved over \$200 billion out of Iran since President Ahmadinejad took office in 2005.¹²⁹ Many Iranians, including student groups, have strongly criticized the Iranian government for endangering its economy and international relationships over the nuclear issue, and sanctions could strengthen the hand of these opposition figures.¹³⁰

Russia has blocked Security Council imposition of strong sanctions on Iran¹³¹ even though Russia says it opposes Iran developing nuclear

123. See, e.g., Thomas Friedman, *The Bus is Waiting*, N.Y. TIMES, Oct. 11, 2006, at A27 (“... [I]f China and Russia told Iran that they would join in the toughest possible U.N. economic sanctions on Tehran if it persisted in its nuclear program, the ayatollahs would . . . back down.”).

124. *OPEC Revenues: Country Details: Iran*, United States Energy Information Administration, June 16, 2005, <http://www.eia.doe.gov/emeu/cabs/orevcoun.html>.

125. Lionel Beehner, *What Sanctions Mean for Iran's Economy*, COUNCIL ON FOREIGN RELATIONS, May 5, 2006, http://www.cfr.org/publication/10590/what_sanctions_mean_for_irans_economy.html?breadcrumb= default.

126. Bret Stephens, *How to Stop Iran (Without Firing a Shot)*, WALL ST. J., May 16, 2006, at A15, available at <http://www.opinionjournal.com/wsj/?id=110008382>.

127. Bernard Gwertzman, *Takeyh: Iran's Populace Largely Opposes Nuclear Program*, COUNCIL ON FOREIGN RELATIONS, March 2, 2005, <http://www.cfr.org/publication/7885/takeyh.html>.

128. Jahangir Amuzegar, *Iran's Unemployment Crisis*, MIDDLE EAST ECONOMIC SURVEY, vol. XLVII, no.41, Oct. 11, 2004, <http://www.mees.com/postedarticles/oped/a47n41d01.htm>.

129. Stephens, *supra* note 126, at A15.

130. See, e.g., Golnaz Esfandiari, *Iran: Reformist Student Group Calls For Suspension Of Nuclear Activities*, RADIO FREE EUROPE/RADIO LIBERTY, Apr. 19, 2006, <http://www.rferl.org/featuresarticle/2006/04/3684d1a3-43d9-4450-be3f-1a43f5b1afe8.html>; Alireza Ronaghi, *Iran Reformists Slam Government's Nuclear Policy*, REUTERS, Jan. 6, 2007, http://today.reuters.com/news/articlenews.aspx?type=topnews&storyid=2007-01-06T145030Z_01_RON648403_RTRUKOC_0_US-IRAN-REFORMERS.xml; Neil King, Jr., *Dissent in Tehran Buys West*, WALL ST. J., Feb. 9, 2007, at A5.

131. Maggie Farley, *U.N. Security Council Votes to Impose Sanctions on Iran*, L.A. TIMES, Dec. 24, 2006, available at <http://www.latimes.com/news/nationworld/world/la-fg->

weapons.¹³² Russia's opposition to strong sanctions on Iran is apparently driven by the desire to continue lucrative deals to sell Iran weapons,¹³³ nuclear reactors, and other high-tech machinery,¹³⁴ and by Russia's view that Iran is a useful geopolitical counterbalance to the United States.¹³⁵ According to Dimitri Simes, a Russia expert who is president of the Nixon Center think tank in Washington, D.C., "It is clear that Moscow will not support any meaningful resolution that would interfere with Russia's trade with Iran."¹³⁶ Alexei Arbatov, the Director of the Center for International Security at the Russian Academy of Sciences and former deputy chair of the Russian parliament's defense committee, says that "[t]here is no doubt that Russia does not want Iran to acquire nuclear weapons"¹³⁷ but notes that "Russia has huge political and economic interests with Iran."¹³⁸ Arbatov has slammed the Russian position as "self-defeating" because the Russian position demands that "Iran give away something very dear to it, while simultaneously removing all tough levers to enforce such a concession."¹³⁹

China has joined Russia in opposing strong sanctions on Iran.¹⁴⁰ China's opposition stems in considerable part from its interest in Iranian fuel. China currently buys eighteen percent of its crude oil from Iran (some 338,000 barrels per day, about \$7 billion to \$10 billion per year, depending

iran24dec24,0,5680060.story?coll=la-home-headlines; Colum Lynch, *Sanctions on Iran Approved by U.N.*, WASH. POST, Dec. 24, 2006, at A1; Paul Kerr, *Security Council Broadens Iran Sanctions*, ARMS CONTROL TODAY, Apr. 2007.

132. See, e.g., Mikhail Kamynin, *The Spokesman of Russia's Ministry of Foreign Affairs, Answers a Question from RIA Novosti Regarding Comments by US Ambassador to the UN, John Bolton, Alleging Russian Leadership's Lack of Consensus Over Iran's Nuclear Program*, MINISTRY OF FOREIGN AFFAIRS OF THE RUSSIAN FEDERATION, June 10, 2006, <http://www.partnershipforglobalsecurity.org/Projects%20and%20Publications/News/Nuclear%20News/2006/614200642857PM.html#1D> ("Russia is actively involved in international efforts to unblock the problem by diplomatic methods on the basis of a common position on the inadmissibility of nuclear weapons in Iranian possession.").

133. See Morley, *supra* note 120. See also, e.g., King & Champion, *supra* note 119 (in December 2005, Russia agreed to sell Iran a \$700 million air defense missile system); *Bomb and Bombast*, *infra* note 167.

134. See, e.g., Nikolai Sokov, *The Prospects of Russian Mediation of the Iranian Nuclear Crisis*, CENTER FOR NONPROLIFERATION STUDIES, Feb. 17, 2006, <http://cns.miis.edu/pubs/week/060217.htm>; *Bomb and Bombast*, *infra* note 167.

135. Alexei Arbatov, *Russia and the Iranian Nuclear Crisis*, carnegieendowment.org, May 23, 2006, <http://www.carnegieendowment.org/publications/index.cfm?fa=print&id=18364>.

136. King & Champion, *supra* note 119.

137. Arbatov, *supra* note 135.

138. *Id.*

139. *Id.*

140. Farley, *supra* note 131; Lynch, *supra* note 131, at A1.

2007]

Emboldened by Impunity

539

on price fluctuations).¹⁴¹ In December 2006, amidst negotiations in the Security Council over the sanctions to be included in Resolution 1737, China signed a \$16 billion deal to develop Iran's North Pars gas field and was negotiating a deal to develop Iran's Yadavaran oil field.¹⁴²

B. Resolutions 1737 and 1747

Before Russia and China finally agreed to the sanctions imposed on Iran by Resolution 1737, they managed to both delay the sanctions and water them down.¹⁴³ Invoking Chapter VII of the U.N. Charter,¹⁴⁴ which authorizes the Council to impose legally binding requirements on U.N. member states, Resolution 1737 orders Iran to take several measures. Principally, Iran must:

- Suspend all enrichment-related and reprocessing activities.¹⁴⁵ Resolution 1737 makes clear that the full force of the Council's authority stands behind the enrichment-related and reprocessing suspension previously "deem[ed] necessary" by the IAEA in its February 4, 2006 resolution¹⁴⁶ and "demand[ed]" by the Security Council in its Resolution 1696.¹⁴⁷ Iran previously insisted it had an "inalienable right" under NPT Article IV to engage in the nuclear energy activities it was undertaking and that neither the NPT nor the IAEA Statute provided a legal basis for requiring Iran to suspend these activities.¹⁴⁸ Resolution 1737's binding suspension conclusively undermines Iran's argument because, as UN Charter

141. See, e.g., William Mellor & Le-Min Lim, *To Slake its Thirst for Oil, China Scours Backwaters of the World*, INT'L HERALD TRIB., Sept. 26, 2006, <http://www.iht.com/articles/2006/09/26/bloomberg/sxpetro.php>; King & Champion, *supra* note 119.

142. Ruba Husari, *Iran, China Sign Deal for North Pars Gas Field*, OIL DAILY, Dec. 21, 2006.

143. Farley, *supra* note 131; Lynch, *supra* note 131, at A1.

144. *Id.* p.mbl.

145. *Id.* at ¶ 2(a).

146. IAEA BOG Iran Resolution of Feb. 4, 2006, *supra* note 108, at ¶ 1.

147. S.C. Res. 1696, *supra* note 112, at ¶ 2.

148. See, e.g., *Continued Analysis of 1696*, Carnegie Endowment for Int'l Peace Proliferation News, http://www.carnegieendowment.org/static/npp/analysis_8-29-06.htm. Interestingly, Iran has continued such rhetoric even since the passage of Resolution 1737. See, e.g., Bill Varner, *UN Imposes First Sanctions on Iran's Nuclear Program*, Bloomberg.com, Dec. 23, 2006, <http://www.bloomberg.com/apps/news?pid=20601087&sid=asGYyD8czwU8&refer=home> (including the following quote from an Iranian Foreign Ministry statement: "[The] new resolution will not be an obstacle in the way of Iran's nuclear progress . . . The Iranian nation . . . within the framework of nuclear Non-Proliferation Treaty and its undeniable rights, will continue its program.").

Articles 25 and 103 specify,¹⁴⁹ the obligation to comply with Security Council decisions prevails in case of conflict with rights under the NPT or any other treaty.

- Suspend work on all heavy water-related projects.¹⁵⁰ Resolution 1737's order to Iran to suspend this work contrasts with the IAEA's February 2006 resolution, which merely "deem[ed] it necessary" for Iran to "reconsider" its construction of a research reactor moderated by heavy water.¹⁵¹
- Refrain from exporting certain specified nuclear and ballistic missile equipment and technology.¹⁵² This provision has no counterpart in either the IAEA's February 2006 resolution or Resolution 1696.
- Provide "such access and cooperation as the IAEA requests to be able to verify" the suspensions and "resolve all outstanding issues, as identified in IAEA reports."¹⁵³ This provision makes clear that the full force of the Council's authority stands behind the IAEA's requests for access and cooperation and gives the IAEA more access authority (as much additional authority as it "requests") to resolve Iran nuclear issues than the limited authority it had under the NPT and Iran's IAEA safeguards agreement.

Resolution 1737 also imposes several sanctions on Iran until such time as Iran has fully complied with the requirements of the Security Council and IAEA.¹⁵⁴ These measures principally include: (1) restrictions on the export to Iran of certain specified nuclear and ballistic missile items, materials, equipment, and technology,¹⁵⁵ and (2) a freeze of overseas assets of twelve named officials and ten institutions associated with Iran's proliferation-sensitive nuclear activities or the development of nuclear weapon delivery systems.¹⁵⁶ In addition, Resolution 1737 requests that the IAEA Director General provide within sixty days a report on Iranian compliance with the resolution.¹⁵⁷ The resolution commits the Council, in the event that the report finds Iranian noncompliance, to adopting "further appropriate measures under Article 41" of the UN Charter (i.e., measures not involving the use of armed force) "to persuade Iran to comply with this

149. U.N. Charter art. 25, art. 103.

150. S.C. Res. 1737, *supra* note 117, at ¶ 2(b).

151. IAEA BOG Iran Resolution of Feb. 4, 2006, *supra* note 108, at ¶ 1.

152. *Id.* at ¶ 7.

153. *Id.* at ¶ 8.

154. *Id.* at ¶ 24(b).

155. *Id.* at ¶ 3-6.

156. *Id.* at ¶ 12-15, annex.

157. *Id.* at ¶ 23.

2007]

Emboldened by Impunity

541

resolution and the requirements of the IAEA.”¹⁵⁸

On February 22, 2007, the IAEA Director General reported that Iran had not complied with the requirements of Resolution 1737.¹⁵⁹ In response to Iran’s continuing non-compliance, the Council, in Resolution 1747 of March 24, 2007, imposed a ban on the export of arms by Iran¹⁶⁰ and extended the foreign asset freeze imposed by Resolution 1737 to fifteen additional named Iranian officials and thirteen additional Iranian entities.¹⁶¹ Resolution 1747 also requested that the IAEA Director General provide, within sixty days, a report on Iranian compliance with Resolutions 1737 and 1747.¹⁶² In addition, Resolution 1747 committed the Council, in the event that the report found Iranian noncompliance, to adopting “further appropriate measures under Article 41” of the U.N. Charter to “persuade Iran to comply.”¹⁶³ The original draft of Resolution 1747 by France, Germany, and the United Kingdom had included bans on the travel of relevant Iranian officials and on arms exports to Iran, but these were removed at the behest of Russia and China.¹⁶⁴

Resolutions 1737 and 1747 are too weak to coerce Iran into compliance, contain Iran’s ability to advance its nuclear weapons program, or deter other states from following Iran’s lead and developing their own nuclear weapons program.¹⁶⁵ The primary purpose of the sanctions was coercive.¹⁶⁶ But as of late April 2007, Resolutions 1737 and 1747 had

158. *Id.* at ¶ 24(c).

159. IAEA, *Implementation of the NPT Safeguards Agreement and Relevant Provisions of Security Council Resolution 1737 (2006) in the Islamic Republic of Iran, Report by the Director General*, IAEA Doc. GOV/2007/8 (Feb. 22, 2007).

160. S.C. Res. 1737, *supra* note 117, at ¶ 5.

161. *Id.* at ¶ 4, annex I.

162. *Id.* at ¶ 12.

163. *Id.* at ¶ 13(c).

164. *See, e.g.*, Kerr, *supra* note 131.

165. *See, e.g.*, Helene Cooper & Steven R. Weisman, *West Tries a New Tack to Block Iran’s Nuclear Agenda*, N.Y. TIMES, Jan. 2., 2007, at A1 (“[F]ew believe that the sanctions resolution that passed Dec. 23 has the muscle to sway Iran to abandon its nuclear ambitions”); *Bomb and Bombast*, TIMES (London), Dec. 28, 2006, at 14 (“[N]o one is so naïve as to expect that the regime’s ambitions will be thwarted by freezing the assets of a handful of Iranian companies and officials.”); Farley, *supra* note 130 (“Security Council diplomats . . . privately conceded that they did not expect the bans to have a significant effect.”); R. Nicholas Burns, Under Secretary for Political Affairs, *Conference Call on UN Sanctions Resolution 1737*, Dec. 23, 2006, <http://www.state.gov/p/us/rm/2006/78246.htm> [hereinafter Burns Conference Call] (“We don’t think this resolution is enough in itself. We want the international community to take further action”).

166. *See, e.g.*, Burns Conference Call, *supra* note 165 (“The aim of sanctions is . . . to drive up the cost to the Iranians of . . . thumbing their nose at the international community by proceeding with these nuclear technological programs [W]e want to let the Iranians know that there is a big cost to them, and we hope that those Iranians who wish to . . .

clearly not succeeded in coercing Iran into compliance. Iranian President Ahmadinejad dismissed Resolution 1737 as “superficial,”¹⁶⁷ and the Iranian Foreign Ministry derided it as “weak.”¹⁶⁸ Ali Larijani, Iran’s chief nuclear negotiator, announced on the day Resolution 1737 passed that Iran’s response would be to accelerate its nuclear program by starting the very next day to install 3,000 centrifuges at its Natanz enrichment plant.¹⁶⁹ The day after the Council passed Resolution 1747, Iran announced that it would reduce rather than increase its cooperation with the IAEA,¹⁷⁰ the Iranian foreign minister denounced the sanctions as “illegal,” and President Ahmadinejad said the sanctions would not halt Iran’s uranium enrichment “even for a second.”¹⁷¹ Two weeks after Resolution 1747 passed, Ahmadinejad announced, in a ceremony accompanied by chants of “death to America,”¹⁷² that Iran had made a dramatic leap forward in its nuclear program by beginning to enrich uranium on an industrial scale and declared a national holiday to celebrate that fact.¹⁷³

Iran’s flouting of the resolutions is not surprising, as the total costs imposed on the Iranian leadership by the resolutions are far less than the costs it would expect to incur from complying with the resolutions’ demands. The ban on exporting sensitive technology to Iran is riddled with exceptions, including a large one for exports to the Russian-built Iranian

negotiate . . . will then be in a stronger position to argue that’s the best case for Iran.”); *Israel Welcomes UN Resolution; Iran Calls Sanctions ‘Illegal,’* www.haaretz.com, Dec. 23, 2006 (France’s Foreign Minister Philippe Douste-Blazy said in a statement following the vote: “our objective remains convincing Iran to conform with its international commitments.”); *UN Unanimously Approves Iran Resolution*, ASSOC. PRESS, Dec. 23, 2006 (Russia’s UN ambassador Vitaly Churkin said Russia voted in favor of sanctions because it wants to send “a serious message” to Iran “to lift remaining concerns over its nuclear program.”); *Security Council Imposes Sanctions on Iran*, U.N. DEP’T OF PUB. INFO., Dec. 23, 2006, <http://www.un.org/News/Press/docs/2006/sc8928.doc.htm> (Chinese UN ambassador Wang Guangya stated following the vote that “Sanctions were not the end, but a means to urge Iran to return to negotiations.”).

167. *Bomb and Bombast*, TIMES (London), Dec. 28, 2006, at 14.

168. *Iran Starts Activities at 3,000-Centrifuge Site: Hosseini*, ISLAMIC REPUBLIC NEWS AGENCY, Dec. 24, 2006, available at <http://www.irna.com/en/news/view/line-24/0612241444135344.htm>.

169. Farley, *supra* note 131; Parisa Hafezi, *Iran Vows to Press on With Uranium Enrichment*, REUTERS, Dec. 24, 2006, available at http://today.reuters.com/news/articlenews.aspx?type=worldnews&storyID=2006-12-24T193915Z_01_SP171548_RTRUKOC_0_US-IRAN-NUCLEAR.xml.

170. Kerr, *supra* note 131.

171. Nasser Karimi, *Iran: Sanctions Won’t Halt Enrichment*, A.P., Mar. 26, 2007, available at <http://abcnews.go.com/International/print?id=2980613>.

172. Robert Tait & Julian Borger, *Iran Raises Stakes with Claim of Nuclear Leap*, GUARDIAN (London), at 1.

173. Nazila Fathi, *Iran Says It Can Enrich Uranium on an Industrial Scale*, N.Y. TIMES, Apr. 10, 2007, at A3.

2007]

Emboldened by Impunity

543

nuclear reactor at Bushehr.¹⁷⁴ The asset freezes are expected to have limited immediate impact, as the Security Council's long, public negotiations over the sanctions resolutions provided the targets with sufficient advance warning that they could withdraw their overseas assets before the freezes were imposed.¹⁷⁵ The U.S. government is encouraging foreign governments and banks to interpret the resolutions' financial restrictions as aggressively as possible,¹⁷⁶ and the aggressive use of U.S. banking regulations both before and since the resolutions' passage has succeeded in deterring a few Western banks from doing business with Iran.¹⁷⁷ But the resolutions' financial restrictions are so limited in scope and full of exceptions that it is doubtful that even an aggressive implementation will have a significant coercive effect. The weakness of the sanctions imposed by Resolutions 1737 and 1747 stands in stark contrast to major Russian and Chinese transactions with Iran that were unaffected by the sanctions and thus represent leverage lost.¹⁷⁸

Having spent vast sums to develop a nuclear weapons program, the Iranian leadership could hardly be expected to surrender it in exchange for removal of a very limited trade ban and asset freeze. This would be so even if the Iranian leadership perceived its self-interest in Western capitalist terms. But the Iranian leadership is, as discussed in Part II, motivated by a religious conviction that exalts martyrdom and suffering.¹⁷⁹ In comparison with a purely economic calculation, the Iranian regime's ideology causes it to ascribe greater cost to complying with the sender's demand to shut down the nuclear weapons program and lesser cost to any

174. Burns Conference Call, *supra* note 165.

175. *See, e.g.*, David Cortright, *Can Iran's Nuclear Activities be Thwarted*, USA TODAY MAG., May 2006, at 24, May 2006, http://www.fourthfreedom.org/Applications/cms.php?page_id=225 ("News reports suggest that Iran is moving financial assets out of Western banks in anticipation of potential sanctions.").

176. Cooper & Weisman, *supra* note 165.

177. *Id.*

178. For example, Russia is in the process of delivering to Iran twenty-nine Tor-M1 anti-aircraft missile systems bought by Iran for \$1.4 billion dollars. *Russian Anti-aircraft Weapons Sales to Syria, Iran on Schedule*, AGENCE FRANCE PRESS, Jan. 2, 2007, available at <http://www.dawn.com/2007/01/01/welcome.htm>. The anti-aircraft systems are being stationed around Iran's civilian nuclear sites. *Id.* In addition, during the week prior to the passage of Resolution 1737, China's national oil corporation signed a \$16 billion agreement with Iran related to liquefied natural gas. Burns Conference Call, *supra* note 165. Since Resolution 1737 did not involve fuel sanctions, it did not cover the Chinese-Iranian deal. *Id.* The Bushehr nuclear reactor which Russia is building in Iran and was exempted from the sanctions is an \$800 billion project. Lynch, *supra* note 131, at A1.

179. *See, e.g.*, Tolson, *supra* note 69; Matthias Kuntzel, *Ahmadinejad's Demons*, NEW REPUBLIC, Apr. 24, 2006, at 15.

suffering that may be imposed by sanctions.

Resolutions 1737 and 1747 are also likely too weak to effectively contain Iran's nuclear weapons program. The ban on exporting sensitive nuclear technology to Iran is so complicated and full of exceptions that it will be far more difficult to enforce than, for example, a comprehensive trade embargo. In particular, there is concern that Iran will use legal nuclear programs at Bushehr as a cover to continue to receive training and technology useful for its nuclear weapons program.¹⁸⁰

Nor were the Resolution 1737 and 1747 sanctions on Iran sufficiently strong to change the cost-benefit calculations of, and thus deter, other countries that might be contemplating nuclear proliferation. A ban on trade in sensitive nuclear technology and limited freeze on assets is simply not a sufficient disincentive. Indeed, less than two weeks after the passage of Resolution 1737, Egyptian President Hosni Mubarak hinted that if Iran proceeds to attain nuclear weapons, his country will follow suit.¹⁸¹

Resolutions 1737 and 1747 explicitly paved the way for consideration of future stronger sanctions by committing the Council to adopt "further appropriate measures under Article 41" of the UN Charter "to persuade Iran to comply" in the event that the IAEA Director General's report were to find continuing noncompliance.¹⁸² However, these references to Article 41 may have also reduced pressure on the Iranian leadership. In appearing to limit future additional sanctions to measures adopted under Article 41 of the U.N. Charter, Resolutions 1737 and 1747 seem to be ruling out Article 42 military sanctions against Iran.¹⁸³ In the meantime, Iran is moving aggressively towards nuclear weapon capability and may well achieve that capability before the sanctions are ramped up to a level sufficient to coerce

180. Lynch, *supra* note 131, at A1.

181. Roe Nahmias, *Mubarak Hints: We'll Develop Nukes*, Jan. 5, 2007, <http://www.ynetnews.com/articles/0,7340,L-3348600,00.html>.

182. S.C. Res. 1737, *supra* note 117, ¶¶ 23-24; S.C. Res. 1747, *supra* note 118, ¶¶ 12-13.

183. See Howard LaFranchi, *Will EU and US Be Tougher Now on Iran?*, CHRISTIAN SCI. MONITOR, Dec. 27, 2006, at 1 (quoting nonproliferation expert Henry Sokolski as saying, "So much has been grandfathered and exempted [by the resolution] that what can be looked at in 60 days won't be that interesting.") Following the vote on Resolution 1737, the French ambassador was asked by the media: "You say, Ambassador, that if Iran doesn't comply, the Security Council is determined to act. Does that keep the military option open?" The French ambassador responded: "No, no, it is clear that in this case new measures will be taken under Article 41 of Chapter 7." *Media Stakeout with Ambassador Emyr Jones Parry, British Permanent Representative to the United Nations; Ambassador Jean-Marc De La Sabliere, French Permanent Representative to the United Nations; Ambassador Thomas Matussek, German Permanent Representative to the United Nations* FED. NEWS SERV., Dec. 23, 2006.

2007]

Emboldened by Impunity

545

or contain it. The United States has emphasized Resolution 1737's value as a legal foundation upon which some senders will be able to build additional stronger sanctions. As Under Secretary Burns put it:

As we worked over the last 18 months to try to convince countries to be more vigorous on their own, using their own legal systems or institutions such as the European Union to take more vigorous action, the constant refrain to us was, well, we can't do that because the UN Security Council hasn't established a sanctions regime. That has now happened . . . [and] opens the way for further action outside the Security Council by states that wish to send a more clear and a tougher message to the Iranians.¹⁸⁴

A comprehensive boycott of Iran by the E.U., which supplies forty-four percent of Iran's imports,¹⁸⁵ might quickly succeed in coercing Iran to cease its nuclear weapons program. But there was no sign as of late April 2007 that the E.U. planned to impose vigorous additional sanctions against Iran.

One analyst justifiably called Resolution 1737 "a textbook example of targeted sanctions."¹⁸⁶ Targeted sanctions are "intended to focus coercive pressure on those responsible for wrongdoing, while minimizing unintended negative impacts."¹⁸⁷ Targeted sanctions explicitly seek to limit the impact of sanctions on the populace at large by focusing sanctions as much as possible on the activities and assets of particular individuals in the society who are responsible for the objectionable behavior that prompted the sanctions.¹⁸⁸ They aim to do so by denying "access to specific products or activities that are necessary to the conduct of an objectionable policy and that are valuable to decision-making elites."¹⁸⁹ The principal types of targeted sanctions deployed by the Security Council thus far in its history have included bans on flights into and out of the target country; bans on foreign travel by decision-making elites; the freezing of

184. Burns Conference Call, *supra* note 165.

185. European Commission Bilateral Trade Relations: Iran, http://ec.europa.eu/trade/issues/bilateral/countries/iran/index_en.htm (last visited Feb. 13, 2007).

186. *Iran Defiant in the Face of UN Nuclear Sanctions*, Foreign Policy Association, Dec. 24, 2006, available at http://www.fpa.org/newsletter_info2584/newsletter_info.htm (last visited Dec. 28, 2006).

187. David Cortright & George A. Lopez, *Introduction: Assessing Smart Sanctions: Lessons from the 1990s*, in SMART SANCTIONS: TARGETING ECONOMIC STATECRAFT 2 (2002).

188. Kimberly Ann Elliott, *Analyzing the Effects of Targeted Sanctions*, in SMART SANCTIONS: TARGETING ECONOMIC STATECRAFT 172 (2002).

189. David Cortright & George A. Lopez, *Reforming Sanctions*, in THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY 170 (2004).

overseas financial assets connected to the target regime; and embargoes on trade in specific commodities on which the regime is particularly dependent, including arms, fuel, luxury goods, and key export commodities such as diamonds.¹⁹⁰

Resolutions 1737 and 1747 target Iranian officials directly involved in Iran's sensitive nuclear programs while avoiding placing any hardships on ordinary Iranians,¹⁹¹ and consequently provide the Iranian populace with little incentive to pressure the regime into compliance.¹⁹² The resolutions also aim to deny Iran access to specific products necessary to the conduct of its objectionable nuclear policy. However, Resolutions 1737 and 1747 make far from full use of the range of possible targeted sanctions. There is no ban on arms or refined petroleum sales to Iran, and even those sanctions that are imposed are strikingly narrow in scope. For example, Resolutions 1737 and 1747 focus sanctions on a handful of Iranian officials at the implementation level of the nuclear weapons program, leaving untouched the decision-makers in charge of Iran's nuclear weapons policy. Even with respect to those officials subjected to sanctions, the resolutions impose asset freezes, but not travel bans. In addition, the ban on sensitive nuclear exports to Iran is so complex and full of exceptions as to likely render it nearly ineffective. The Resolution 1737 and 1747 sanctions thus suffer from the characteristic deficiency of targeted sanctions: even if implemented to maximum effect, they are highly unlikely to impose sufficient costs to achieve their purposes.

The international community has learned in recent years that comprehensive sanctions can stop both illicit nuclear weapons programs and terrorism. It was discovered, in the wake of the U.S. occupation of Iraq, that the IAEA's special inspections regime for Iraq, coupled with comprehensive Security Council sanctions, had destroyed Iraq's nuclear weapons program and kept it from restarting.¹⁹³ Strong, universally

190. *Id.* at 170-72.

191. Press Release, United States Mission to the United Nations, Statement by Ambassador Alejandro Wolff, Acting U.S. Permanent Representative to the United Nations, on the Adoption of Security Council Resolution 1747 on Iran, Mar. 24, 2007, available at http://www.un.int/usa/07_064.htm (“[T]hese measures we are adopting today are in no way meant to punish the civilian population of Iran. Resolution 1747 is properly tailored to target Iranian institutions and officials that support Iran’s nuclear and missile programs.”).

192. Karimi, *supra* note 171. (“Saeed Laylaz, an Iranian political commentator, said that until the sanctions hit normal Iranians . . . and the drafters of the U.N. resolution went to great pains to point out that they did not intend that Iranians would continue to shrug them off.”).

193. See Central Intelligence Agency, COMPREHENSIVE REPORT OF THE SPECIAL ADVISOR TO THE DCI ON IRAQ’S WEAPONS OF MASS DESTRUCTION (Sept. 30, 2004 and March 2005 addenda), available at <http://www.gpoaccess.gov/duelfer>; George A. Lopez & David Cortright, *Containing Iraq: Sanctions Worked*, FOREIGN AFF., July/Aug. 2004.

2007]

Emboldened by Impunity

547

implemented sanctions induced Libya's government, "a regime that had become synonymous with international terrorism,"¹⁹⁴ to forsake terrorism and completely and verifiably relinquish its nuclear, chemical, and biological weapons programs. Libya ceased its support for terrorism following the Security Council's imposition on it of strong sanctions in 1992 and 1993.¹⁹⁵ In exchange for removal of the Security Council sanctions, Libya, in August 2003, formally accepted responsibility for the bombing of Pan Am Flight 103 and paid \$2.7 billion in compensation to its victims.¹⁹⁶ In addition, Libya announced on December 19, 2003, that it had decided "to get rid of [weapons of mass destruction (WMD)] materials, equipment and programs, and to become totally free of internationally banned weapons."¹⁹⁷ Libya proceeded to allow a team of British and American government experts to enter the country and completely dismantle its WMD infrastructure by April 2004.¹⁹⁸

The sanctions contained in Resolutions 1737 and 1747 are far weaker than the sanctions which stopped the Iraqi and Libyan nuclear weapons programs. Indeed, the sanctions imposed on Iran by Resolutions 1737 and 1747 are weaker than those the Council had previously imposed in response to many lesser threats to international peace and security. The Resolution 1737 and 1747 sanctions are weaker than the sanctions previously imposed by the Security Council on South Africa in response to apartheid,¹⁹⁹ and Liberia²⁰⁰ and Cote D'Ivoire during their civil wars;²⁰¹ and far weaker than those imposed on Sierra Leone in response to its May 1997 military coup,²⁰² the Federal Republic of Yugoslavia during the

194. Stephen D. Collins, *Dissuading State Support of Terrorism: Strikes or Sanctions? (An Analysis of Dissuasion Measures Employed Against Libya)*, 27 STUDIES IN CONFLICT & TERRORISM 1, 16 (2004).

195. Bruce W. Jentleson and Christopher A. Whytock, *Who "Won" Libya?*, 30 INT'L SECURITY 47, 68 (Winter 05/06).

196. Felicity Barringer, *Libya Admits Culpability In Crash of Pan Am Plane*, N.Y. TIMES, Aug. 16, 2003, at A6.

197. *Libyan Call Against Arms*, N.Y. TIMES, Dec. 20, 2003, at A10 (text of Libyan government statement).

198. Judith Miller, *Gadhafi's Leap of Faith*, WALL ST. J., May 17, 2006, at A18.

199. See, e.g., S.C. Res. 418, ¶ 2, U.N. Doc. S/RES/418 (Nov. 4, 1977) (prohibiting "any provision to South Africa of arms and related materiel of all types.").

200. See, e.g., S.C. Res. 1521, ¶ 2, 6, 10, U.N. Doc. S/RES/1521 (Dec. 22, 2003) (prohibiting provision to Liberia of "arms and related materiel of all types," barring "direct or indirect import of all rough diamonds from Liberia," banning import of all "timber products originating in Liberia").

201. See, e.g., S.C. Res. 1572, ¶ 7, U.N. Doc. S/RES/1572 (Nov. 15, 2004) (prohibiting export to Cote d'Ivoire of "arms or any related materiel," imposing travel ban and foreign asset freeze on various leaders).

202. See, e.g., S.C. Res. 1132, ¶¶ 5, 6, U.N. Doc. S/RES/1132 (Oct. 8, 1997) (banning travel by members of the Sierra Leone leadership, prohibiting "the sale or supply to Sierra

Bosnian crisis,²⁰³ and Haiti in response to its 1991 military coup.²⁰⁴

CONCLUSION

Due to its ideology, the value to the Iranian regime of terrorism and nuclear proliferation is particularly high. Yet, as this paper demonstrates, the price the international community has exacted from this regime for its violations has thus far been remarkably low.

We are here today discussing to what extent the U.S. should feel constrained by international law in preempting a rogue regime that has proven itself to feel unconstrained by international law and has, due to a lack of enforcement, in fact not been constrained by international law.

We have reached this point in large part because the international community has time and again refused to hold the Iranian regime to its obligations. This situation is tragic in and of itself. But it also raises larger questions about the ability of the collective security system on which the U.N. Charter is based to effectively counter the two greatest security challenges of our time: terrorism and especially the proliferation of nuclear weapons.

Under the collective security system, states renounce the temptation to take unilateral preventive forceful action against a potential aggressor on the assumption that the collective will come to their rescue if they are attacked.²⁰⁵ This bargain is particularly tenuous with respect to nuclear

Leone . . . of petroleum and petroleum products and arms and related materiel of all types.”).

203. *See, e.g.*, S.C. Res. 713, ¶ 6, U.N. Doc. S/RES/713 (Sept. 25, 1991) (imposing a “general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia”); S.C. Res. 757, ¶ 4, 5, 7, U.N. Doc. S/RES/757 (May 30, 1992) (prohibiting all imports from the Federal Republic of Yugoslavia (FRY) and all exports, except medicine and certain foodstuffs, to the FRY; barring provision of funds to government, commercial undertakings, and persons of and within FRY; prohibiting all aircraft travel to and from FRY; suspending scientific, technical, cultural and sports exchanges with FRY); S.C. Res. 820, ¶ 21, U.N. Doc. S/RES/820 (Apr. 17, 1993) (freezing foreign assets of government and commercial undertakings of FRY, prohibiting provision in relation to FRY of all except certain services).

204. *See e.g.*, S.C. Res. 841, ¶¶ 5, 8, U.N. Doc. S/RES/841 (June 16, 1993) (prohibiting the sale or supply to Haiti of “petroleum or petroleum products or arms and related material of all types”; freezing foreign assets of Haiti government); S.C. Res. 917, U.N. Doc. S/RES/917, ¶¶ 3, 6, 7, U.N. Doc. S/RES/917 (May 6, 1994) (banning travel by Haitian coup participants, military, police, and their immediate families; prohibiting all imports from Haiti; prohibiting all exports to Haiti except medicines, food and informational materials).

205. Thus Articles 2(4) and 51 of the U.N. Charter provide that member states must wait to exercise their right of self-defence until “an armed attack occurs against” them and may exercise that right only “until the Security Council has taken measures necessary to maintain international peace and security.” U.N. Charter art. 2, para. 4., 51.

2007]

Emboldened by Impunity

549

weapons, where an attack could cause enormous damage before any rescue could occur. The rescue must thus come before the attack, in the form of sanctions sufficient to coerce or contain the potential proliferator. If the Russian and Chinese veto threat continues to prevent such sanctions from being imposed, it should come as no surprise if Iran's foremost potential victims, the United States and Israel, conclude in light of Iran's ideology that they are left with no choice but to launch a preventive strike rather than face the risk of an Iranian nuclear arsenal.