



## Constructing a Legal Case Against Iran's Right to Enrich within the International Court of Justice

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The Islamic Republic of Iran was in noncompliance with its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) for 18 years. Its failure to acknowledge the development, or even existence, of a vast nuclear program clearly left Iran outside its obligations contained in its 1974 safeguard agreement. Noncompliance lasted until 2003 when a group of Iranian dissidents provided information to the International Atomic Energy Agency (IAEA) regarding the true nature and scope of Iran's nuclear activities. Since then, the international community, led by the U.K., Germany, and France (the EU-3), tried to reach an agreement acceptable to all parties involved. Their goals were both to bring the Islamic Republic back into favorable status under the NPT and to lay to rest the international community's fears about Iran's pursuit of nuclear technology.

These efforts have been hampered by a number of issues including Iran's perceived security threats, economic and energy concerns, and, notably, its insistence that it has the right to enrich uranium for peaceful purposes under the NPT. On several occasions, the president of Iran, Mahmoud Ahmadinejad, has asserted that Iran has the "right to develop its nuclear program."<sup>1</sup> He claims that because Iran's intentions are peaceful,

and its nuclear technology industrial, its activities are protected by its status as a party to the Treaty. Any offer to settle the current crisis that has not explicitly recognized Iran's right to uranium enrichment has been rejected by Iranian negotiators on this ground.

For its part, the EU-3 have expressed, at different times, varying opinions on the alleged right. During the initial stages of negotiation, the group was careful to avoid direct confrontation. Under the Paris Agreement, signed in November 2004, the European negotiators allowed language in the agreement that termed Iran's suspension of enrichment activities as voluntary. The implication of such language, and its acceptance, is that the right to enrich does exist. If there had been no such right, the EU-3 would presumably have been on firmer ground to extract such a concession without Iran's cooperation given its non-compliant status of its safeguard agreement.

Almost a year later, that opinion seemed to have changed. In a September 2005 letter to the *Financial Times*, Robert Cooper, Director-General for External Relations and Political-Military Affairs in the European Council Secretariat, concluded: "[T]here is no such right. The Treaty gives its adherents the right to benefits from the peaceful uses of nuclear energy."<sup>2</sup> Whether this opinion has been held by the EU-3 throughout its negotiations with Iran, or has been precipitated by Iranian recalcitrance, a determination regarding the disputed right to enrich may help resolve the present impasse, as well as those that may arise in the future.

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## ESTABLISHMENT OF THE RIGHT TO ENRICH: THE IAEA

In order to determine whether the right to enrich uranium does exist within the NPT, reference must be made to the intentions of the Treaty's drafters. First, an examination of the context in which the document was created is necessary. Indeed, the Treaty was preceded by the creation of the IAEA, largely due to President Dwight D. Eisenhower's "Atoms for Peace" policy. After witnessing the horrific and destructive capabilities that nuclear technology had created, President Eisenhower was determined to construct an international system that would, instead, facilitate its peaceful uses. His original proposal envisioned an international body that would serve as the repository of fissionable material and the guarantor of its peaceful use. He recognized that, "[i]f at one time the United States possessed what might have been called a monopoly of atomic power... the knowledge now possessed by several nations will eventually be shared by others, possibly all others."<sup>3</sup>

In fact, secrecy did not prevent the spread of the dangerous technology, as the UK and Soviet Union successfully tested nuclear weapons in 1949 and 1952, respectively. Eisenhower's prediction eventually became reality. For example, espionage during the United States' secretive "Manhattan Project" greatly accelerated the production of the Soviet Union's nuclear arsenal.<sup>4</sup> Later, although it too possessed nuclear technology, the Soviet Union opposed the creation of an IAEA-type agency before a universal ban on nuclear weapons "because the widespread use of nuclear power would result in the proliferation of weapon-grade material."<sup>5</sup>

In the meantime, discussions shifted from creating a "bank" for fissile material to one which would facilitate cooperation among the parties and provide controls for the safe production of nuclear energy. Although Soviet concerns were shared by the U.S., planning continued for the creation of the agency without a universal ban. In 1955, during the run up to deliberations over the IAEA Statute, the newly-created U.S. Atomic Energy Commission "pointed out to the State Department that reactors fueled with slightly enriched uranium produced significant quantities of plutonium, which could be diverted to nuclear weapons."<sup>6</sup> At the time, however, it was recognized that as long as states were in the business of using atoms for peace, they would always be creating the capability to use atoms for war. Moreover, the U.S. was concerned that if the regulations of the new agency appeared too

stringent, non-nuclear states would be discouraged from joining.<sup>7</sup>

Besides such political concerns, it was recognized that any proposals for "the safeguards of diversion of nuclear material would be effective [only] over the next decade, as... the United States could not predict what technical developments might take place [in the future]."<sup>8</sup> In other words, given that the same processes were used in both creating military and peaceful nuclear material, and that nuclear technology was still a nascent science, it would be impossible to restrict the former without infringing on the latter. To do so would have also implied that the list of prohibited activities was comprehensive, thereby creating the possibility that future innovations leading to the production of nuclear weapons would be outside the realm of safeguards.

After years of discussion and preparation, the IAEA Statute finally entered into force on July 29, 1957. The self-proclaimed "Atoms for Peace" agency began its work of "promot[ing] safe, secure, and peaceful nuclear technologies"<sup>9</sup> amidst a recent history of nuclear weapons proliferation and an emerging nuclear science. Further, the proposition that countries should give up all domestic capabilities in regard to nuclear research and development had been explicitly rejected in favor of a system that would supervise the nature of each country's nuclear program in return for non-military assistance.<sup>10</sup>

## THE THREAT OF THE NON-PROLIFERATION OF NUCLEAR WEAPONS

The NPT was created as a direct result of proposals made by the Irish delegation to the UN over the course of seven years. The second of two resolutions produced by these efforts was General Assembly Resolution 2028 (XX), which came before the General Assembly in 1965, suggesting the adoption of a treaty dealing with the nonproliferation of nuclear weapons.<sup>11</sup> The resulting Treaty, it was hoped, would facilitate peaceful nuclear technology while simultaneously stemming the proliferation of nuclear weapons. The grand bargain – or balance – the Treaty sought to make was to codify the non-nuclear-weapon status of the vast majority of states in return for their ability to enjoy nuclear technologies. The final version of the Treaty was concluded in 1968 and came into force in 1970.

The first drafts of the Treaty (submitted by the U.S. and Soviet Union) did not reflect the eventual outcome. In fact, they did not include reference to "peaceful uses" at all. Article IV (which specifically addresses this subject) was only later added at the insistence of the non-nuclear-weapon states to safeguard their right to

enjoy nuclear technology. The final version of Article IV, number 1, codified the right as follows:

Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes.<sup>12</sup>

The terms *develop, research, production, and use* do not provide explicit insight into which technologies are afforded to non-nuclear-weapon states. Rather, the right remains relatively undefined, giving way to different interpretations. As early as 1977, the U.S. became concerned about such open ended language and its consequences. Its efforts to elicit similar concern, however, were resisted by several non-nuclear-weapon states at that year's Salzburg International Conference on Nuclear Power and its Fuel Cycle.<sup>13</sup> Further, enrichment was listed as among the peaceful uses of nuclear technology at the Geneva Conference of Non-Nuclear-Weapon States in 1968,<sup>14</sup> and so could have been understood as such, by all parties, at the ratification of the Treaty.

The principle that non-nuclear-weapon states may undertake enrichment processes can be found in the Treaty's preambulatory language:

[A]ll Parties to the Treaty are entitled to...contribute *alone* [emphasis added] or in co-operation with other States, to the further *development* [emphasis added] of the applications of atomic energy for peaceful purposes.<sup>15</sup>

While the Treaty does codify non-nuclear-weapon states as such, it was clearly not meant to relegate them as exclusively recipients of nuclear technology. Instead, they are entitled to develop such technology on their own and in accordance with the terms of the NPT. Given that peaceful uranium enrichment technology did exist when the Treaty was ratified, it follows that this was included in this allowance. Therefore, since General Assembly Resolution 2028 (XX) stated that the Treaty created "should be void of any loop-holes,"<sup>16</sup> it is difficult to argue, as has President George W. Bush and IAEA Director General Mohamed ElBaradei,<sup>17</sup> that the parties to the NPT have only been able to enrich uranium by taking advantage of such a "loop hole."

If enriching uranium is not prohibited under the IAEA Statute, and is even implicitly granted as an inalienable right under the text of the NPT, countries that insist they enjoy this right – such as Iran – must be correct. Although it seems like an inconceivable allowance that all members of the NPT would have been given this right at

ratification, it may have been the only way to ensure the required support for the Treaty from the beginning. The benefits derived from this one article were, for the non-nuclear-weapon states, "the most tangible counterparts to their renunciation to acquire nuclear weapons."<sup>18</sup>

The principles first set forth in President Eisenhower's "Atoms for Peace" policy make up half of the grand bargain enshrined within the NPT. The Treaty, in turn, ensures that all countries will have the opportunity to enjoy the benefits of nuclear technology, whether alone, or with the assistance of the nuclear-weapon states. Like many rights, however, these too are limited by complementary obligations. In this case, non-nuclear-weapon states give up their pursuits of nuclear weapons and use this technology solely for peaceful purposes.

### LIMITS ON THE RIGHT TO ENRICH

"Four decades ago," Graham Allison writes, "President John F. Kennedy predicted that by the end of the 1970s, 25 countries would have nuclear weapons."<sup>19</sup> Fortunately, this prediction did not materialize. The number of states with nuclear weapons has nevertheless nearly doubled since the 1970s, with well over a dozen countries now possessing uranium enrichment technology.<sup>20</sup> This places many of them only a "screwdriver's turn" from weaponizing their nuclear programs. Some, including President Bush, consider it a fatal flaw that the NPT allows all parties to acquire the technological means to be able to build a nuclear weapon on very short notice. Capability, though, is only one component of a military program; and, it is largely allowed (within the right to enrich) for all non-nuclear-weapon states under the terms of Article IV. In fact, this language is broad enough to interpret the grant of "capability" to extend to all activities short of those prohibited in Articles I and II.

Whereas the allowance for nuclear technology is made "to the fullest possible"<sup>21</sup> extent in order to allow for the "further development of the applications of nuclear energy,"<sup>22</sup> under the Treaty, explicit prohibitions fall only on nuclear weapons. While one purpose of an enrichment program might be to construct nuclear weapons, such activities are merely

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circumstantial and do not, themselves, constitute a weapons program. However, because such a literal reading might lead to the conclusion that quantities of uranium enriched even to 100 percent  $U^{235}$  are permissible – a situation that would be clearly contrary to the object and purpose of the Treaty – there also must exist a defining element used in the determination of the legality of an enrichment program. Under the NPT that element is simple: *intent*.

Although determining the objectives of even the most transparent states can sometimes be difficult, that intentions are important in determining the legality of a nuclear program is alluded to under Articles II and III. Under these articles, not only is a state prohibited from manufacturing a nuclear device, its compliance will be monitored under a safeguards agreement negotiated between the state and the IAEA. Such oversight allows the international community to monitor the nuclear programs of all parties for the possible diversion of nuclear materials. Further, Article IV makes the right to enrichment (as a peaceful use of nuclear technology) dependent on compliance with Articles I and II. Even the sequence of the articles – the operative part of the Treaty begins by stating obligation – might suggest that the rights given by the Treaty are dependent on fulfillment of a party's responsibilities. Therefore, only when a state has adequately proven its peaceful intentions is it allowed to pursue enrichment activities. In other words, the burden falls on a state to prove that it has complied with its explicit obligations before it can enjoy any of the rights granted implicitly by Article IV.

Such an interpretation seems also to be in line with that which was originally held by the U.S. Senate at the time of NPT ratification:

[I]t is doubtful that any general definition or interpretation, unrelated to specific fact situations could satisfactorily deal with all such situations...facts indicating that the purpose of a particular activity was the acquisition of a nuclear explosive device would tend to show noncompliance...while the placing of a particular activity under safeguards would not, in and of itself settle the question... [Enrichment] would not be a 'per se' violation of the NPT.<sup>23</sup>

This is not substantially different than what has been established under international law. "Fact situations" have been frequently determined by the IAEA in the form of reports on the compliance of states with their safeguard agreement.

Under these premises, the IAEA and the international community have overseen an acceptable, even desired, level of proliferation in the form of enrichment technology. In fact, in spite of what President Bush has described as a willingness of cynical regimes to exploit a loophole in the Treaty, it has only been through the implicit acquiescence and sometimes overt assistance of the international community that some countries have been able to obtain sensitive nuclear technology, while others have been labeled international pariahs because of their pursuits. By creating a system in which the right to enrich is dependent on a state's ability to prove its peaceful intentions, proliferation has been curtailed by controlling access to the nuclear fuel cycle.

At various times since the inception of the NPT, several states have appeared to approach the limits of legality under this paradigm. In most cases, however, the extent of the enrichment program's legality was never addressed. Only one state, Brazil, has ever successfully defended its intentions in the face of substantial international criticism. In this instance significant parallels to the present impasse are found. By examining Brazil's case, insights into the relevant criteria used to determine Iran's right to enrich can be drawn.

#### **DIFFERENT "PEACEFUL NUCLEAR PROGRAMS": BRAZIL & IRAN**

After conducting a nuclear weapons program throughout the 1980s, the Brazilian government publicly renounced its efforts in 1990 and signed the NPT in 1997.<sup>24</sup> Nevertheless, it did not give up nuclear technology altogether. Like Iran, it later announced its intentions to enrich uranium for peaceful purposes. Additionally, it eventually barred IAEA inspectors from certain facilities, leading to an impasse over what were perceived as uncooperative measures. In both instances, Iran and Brazil insisted on the legality of their activities, including enrichment. In Brazil's case, however, its right to enrich uranium was never challenged.

Basic comparisons between the programs do not answer the question of why the international community has disputed the legality of Iran's program while Brazil's existed unfettered. It was not the size or sophistication of either program that led to this conclusion. While even recently

Iran's ability to construct a single nuclear warhead was estimated to be at least five years away,<sup>25</sup> Brazil's Resende facility could have produced dozens of weapons per year.<sup>26</sup>

In spite of its potential weapons technology, Brazil continually insisted that its program was solely for peaceful purposes. The plausibility of such statements was supported by several mitigating factors, including Brazil's active role in creating, and current membership in, the Treaty of Tlatelolco, which prohibited nuclear weapons throughout Latin America and the Caribbean. This treaty was consistent with the later creation of the Bilateral Agency for Nuclear Account and Control between Brazil and Argentina in 1991.<sup>27</sup> Further, although Brazil's military dictatorship had pursued nuclear weapons (and even provided nuclear assistance to Iraq in the 1980s), Brazil's most recent constitution stipulates: "[A]ll nuclear activity within the national territory shall only be admitted for peaceful purposes."<sup>28</sup> Finally, and perhaps most importantly, there was no evidence to suggest Brazil was seeking to enrich uranium for nuclear weapon use. Since its democratic government took power, the country had compiled a record of compliance with the nonproliferation regime that precluded doubts about its rejection of nuclear weapons.

While concern existed over the precedent that Brazil would set for future proliferators, then-U.S. Secretary of State Colin Powell stated:

We have no concerns about Brazil moving in a direction of anything but peaceful nuclear power, of course, and in creating their own fuel for their power plants. There's no proliferation concern on our part.<sup>29</sup>

Conversely, there has been substantial concern surrounding Iran's intentions. The IAEA itself adopted a resolution which noted that:

[An] absence of confidence that Iran's nuclear program is exclusively for peaceful purposes [has] given rise to questions that are within the competence of the Security Council.<sup>30</sup>

Harsher words have been delivered by representatives of both the U.S. and the negotiating European countries which cited specific discrepancies and made direct allegations regarding the existence of a military program.<sup>31</sup>

Iran has publicly insisted that its enrichment program is for peaceful purposes and

that the country stands against the creation or use of any kind of chemical, biological, or nuclear weapon.<sup>32</sup> In spite of such pronouncements, its actions have suggested otherwise. Iran remains one of the most prominent sponsors of terrorism in the world. It has funded radical Islamist groups such as Hezbollah, Islamic Jihad, and Hamas, and continues to encourage similar activity in Iraq. Last year, Prime Minister Tony Blair singled out Iran with a stern warning to cease operations in Iraq after it was suspected that Iran had been providing training for suicide bombers at bases inside Lebanon.<sup>33</sup> Also, recent statements by President Ahmadinejad that Israel must be "wiped off the map"<sup>34</sup> have made the thought of a nuclear-armed Iran unacceptable. Although senior Iranian officials later backed-off such harsh rhetoric, Ahmadinejad recently stated that Israel is "heading toward annihilation," that it amounts to a "permanent threat" to the Middle East, and that it will be "eliminated."<sup>35</sup> These are ominous words from a state that had previously pursued a covert nuclear program for 18 years in defiance of its international obligations.

As to its status as a party to the NPT, Iran acknowledges it has not fully met the requirements of its safeguard agreement in the past. It maintains, however, that since 2003 when its nuclear program was revealed, it has gone beyond the standards of necessary compliance and undertaken a series of steps to regain international confidence that have not been reciprocated. Nevertheless, the IAEA, in its report from March 8, 2007 regarding the implementation of the safeguard agreement in Iran, continued to cite at least three issues that have not been adequately resolved:

1. The inadequacy of the information available on its centrifuge enrichment program;
2. The existence of a generic document related to the fabrication of nuclear weapon components; and
3. The lack of clarification about the role of the military in Iran's nuclear program, including, as mentioned above, about recent information available to the Agency concerning alleged weapon studies that could involve nuclear material.<sup>36</sup>

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NPT Safeguards Agreement would clearly constitute grounds for the Security Council to pursue corrective action against the Islamic Republic.<sup>37</sup> The three points contained in the March 8 report, however, may also be used to establish forfeiture of enrichment rights and may prove more crucial for the EU-3 and the U.S. in resolving the current crisis. Although Iran normally would enjoy the right to enrich uranium as a party to the NPT, it may not currently exercise that right until it has fully satisfied the IAEA Board of Governors' inquiries on these outstanding matters. In sum, Iran has lost the right to enrich.

### THE PRESENT CRISIS: ANOTHER WAY FORWARD

Many of the legal questions at issue have been lost amidst the virulent political rhetoric surrounding the current crisis. Iran has demanded that its absolute right to enrich be recognized by any proposed solution, while EU-3 negotiators are careful not to do so explicitly.<sup>38</sup> Moreover, in the U.S., rumors persist that the administration has stepped up covert operations within the Islamic Republic and may be preparing for military strikes.<sup>39</sup> Such circumstances make it is easy to understand why diplomacy has so far been unsuccessful. Now that the dossier of Iran's nuclear activities has been sent to the Security Council, a diplomatic solution seems even less likely. It is nevertheless premature to assume that all measures short of coercion have been exhausted.

As Iran remains defiant in the face of a second round of Security Council sanctions, negotiators will have to be creative in order to avoid further escalation of the security situation in the region. Substantial hurdles to a resolution remain, such as the fractured nature of the Council on this issue and the fact that the EU-3 has implicitly recognized Iran's right to pursue an enrichment program when it accepted its promise not to do so as voluntary. However, the Security Council does, for example, have the ability – even responsibility – under Article 36(3) of the UN

Certainly, Iran's actions and statements cast doubts on its intentions for an enrichment program. Further, the IAEA Board of Governors' finding in September 2005 that Iran is in breach of its obligations under its

Charter, to refer legal matters to the International Court of Justice (ICJ).<sup>40</sup> While Iran is not among the countries that submit to the compulsory jurisdiction of the ICJ, the Security Council may request an advisory opinion crafted to provide insight into the legality of Iran's current enrichment program. The argument of those opposed to Iran's enrichment activities would be based on the limited right to enrich.

A state has enrichment rights as a party to the NPT, but these rights are predicated on maintaining good standing before the IAEA. A formal indication by the IAEA that there are outstanding issues or questions regarding the peaceful nature of a country's intentions means that it forfeits those rights – even if those issues do not constitute a material breach. In this case, the report of March 8 could easily be used to demonstrate that such issues exist. With an ICJ opinion in hand, the Security Council, under the authority of Article 39 to maintain international peace and security, could instruct Iran to cease enrichment activities. Such instructions would be given with the understanding that, although Iran did at one point have the right to enrich, it lost that right because of its failure to satisfy fully all questions regarding the peaceful nature of its nuclear program. By determining that Iran has a right – even though temporarily lost – to develop nuclear technology, there may open a small window of opportunity for both sides to return to negotiations. Indeed, the move represents a gamble. Given the circumstances at this juncture, though, it may be this option that yields the most benefits.

### WHAT IRAN GAINS

Iran has deprived the ICJ of jurisdiction over its actions both by virtue of its non-consent to compulsory jurisdiction under Article 36 of the ICJ Statute and by stipulating an alternative dispute settlement mechanism under Article 22 of its Safeguards Agreement with the IAEA. By attempting to obtain an advisory opinion that outlined a right to enrich that is contingent on a state's benevolent intentions, however, such action need not be either explicitly directed against Iran or adversarial in nature. This is also important since a major goal must be to keep Iran party to the Treaty – especially since, in recent

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months, Iran has stated that if it is the target of collective action by the Security Council, it would withdraw from the NPT.<sup>41</sup>

Under the ICJ Statute, the Security Council would be able to formulate a question for the court specifically tailored to the present crisis. Article 36(2) states:

Questions shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.<sup>42</sup>

Specifically, the Court might be asked to address whether a right to enrichment exists under the NPT and, if it does, what the limitations to that right are. Given the above analysis, it seems highly possible that a response might be partially favorable to all parties to the present dispute.

It is likely an opinion would be delivered reading at least some right to enrich into the NPT and that prior IAEA findings of noncompliance would be sufficient to suspend Iran's enrichment rights. Iran would have no direct recourse against the decision to seek an opinion of the ICJ. Such an opinion would also deprive Iran of its claim that the West is seeking to stymie the development of non-nuclear states.

Ironically, if this argument was successful, Iran would achieve what it has sought all along: official recognition of its legal right to pursue uranium enrichment. It would also follow, however, that it has lost this right temporarily. The incentive to regain its enrichment rights would provide a new carrot, in addition to the already-looming sticks, that might lure Iran back to the negotiating table in hopes of regaining what it had at least

temporarily lost. Rather than risk Security Council paralysis, this option would send the parties back to negotiations under new circumstances. Iran had recently hinted that it might be willing to return to talks with the EU-3<sup>43</sup> and such a change might be just the instigation it needs. In the past, however, negotiations have been hampered by the unwillingness of either side to offer

concessions if they enjoy a position of strength. While Iran would be negotiating from a position of less power, so too would the EU-3. Iran would also have more to gain from the potential outcome of the talks than is presently offered.

The larger question is whether Iran would comply with the ICJ's interpretation of the limits on its enrichment rights or directions of the Security Council. Given the benefits involved with cooperation in such an interpretation, it might take the opportunity to step down from its bellicose rhetoric to pursue a legitimate nuclear program and improved relations with the international community. This may be the last face-saving option available for Iran to avoid what might otherwise be a path toward inevitable conflict.

### WHAT THE INTERNATIONAL COMMUNITY GAINS

Since it currently seems the U.S. will not tolerate inaction indefinitely, and Iran is similarly unwilling to give up its nuclear program, military strikes against the Islamic regime loom over all attempts to resolve the present situation diplomatically. Since strikes are not guaranteed to be successful and sure to be met with widespread international criticism – even resistance

– it could do more harm than good in the long-term. Iran has recently said it would respond to any such provocation “with double the intensity,” having the ability to strike the U.S. anywhere in the world.<sup>44</sup> Unless military strikes achieved regime change, strikes might only set back Iran's program by a few years while at the same time solidifying public opinion around its nuclear program.<sup>45</sup> More emphasis should be given to diplomatic means than has so far been allowed. This is especially true if, as this solution would potentially provide, an opportunity remains to negotiate. If President Bush is sincere in his claim that all options are on the table, he would do well to consider this among them.

For the West, this may mean the paradox of nonproliferation is that they must recognize the right of all parties to the NPT to enrich uranium if it is to be controlled. Uncontrolled, ElBaradei predicts, “We will see the addition of 30 or 40

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countries... who are virtual nuclear weapon states in the next 10 to 20 years."<sup>46</sup> With nuclear enrichment technology already widespread, it will be impossible to stop it from spreading further. Therefore, it will be imperative that this process be tightly managed as it occurs. To this end, enrichment must be addressed explicitly by the international community; and an advisory opinion from the ICJ is perhaps the least controversial way to begin. Assuming that the arguments in favor of a limited right to enrichment have merit, and that Iran would be willing to comply with the advisory opinion, it would hold significant benefit for those on the other side of the negotiations.

EU-3 negotiators would not be in a worse situation if a limited right to enrich were found by the ICJ. Since the burden of proof would fall on Iran, and since it has failed to meet the threshold set by the IAEA, it has not proven its prima facie case. This is enough to disallow the continuation of enrichment activities. Iran would therefore have to approach the negotiations under the premise that it is under a legal obligation not to conduct enrichment activities.

This would also, at least temporarily, keep Iran as an NPT member and provide negotiators with the opportunity to work indefinitely without the threat, or even the legal possibility, that Iran walk away and restart its enrichment program. Worse, in recent months, President Ahmadinejad has threatened to withdraw from the NPT.<sup>47</sup> The recognition of tangible benefits would demonstrate that this is not in Iran's best interests. If the U.S. and Europe push too hard on Iran, the alternative could end up being that the Islamic Republic moves forward enriching uranium outside of the NPT or any IAEA safeguards oversight.

While Iran enriching uranium under any circumstances might seem like an intolerable situation, a limited right to enrich may be the best option in the short to medium term. The U.S. has stated that safeguards against nuclear proliferation currently embodied within the NPT are insufficient and unsustainable.<sup>48</sup> Even if it were successful at negotiating a new agreement on nonproliferation, however, Iran would most likely not join – or the U.S. would not allow it to under the current circumstances. It must be ensured that Iran's entire program be indefinitely conditioned on the legal obligation that it maintain good standing before the IAEA and under a sufficient system of inspections to be negotiated over the next several months. In the meantime, the international community would be able to devise a strengthened nonproliferation regime to which it might be made compulsory that Iran accede.

Mounting a legal case against Iran also postpones the decision on coercive actions (either sanctions or military strikes) until a greater degree of cohesion can be formulated around the appropriate steps forward. There is certainly no consensus among Security Council members to authorize military action at this time. Russia and China have even expressed their aversion to sanctions.<sup>49</sup> If such opposition continues within the Council, the only option available to the U.S. would be unilateral action. Recognizing this, President Bush recently stated: "Diplomacy is my first choice and [it's] just beginning."<sup>50</sup> While this proposal does not solve the Iranian nuclear crisis, it does halt Iran's march toward nuclear weapons capability while negotiations continue. Creating a limited right to enrich could begin this process anew by luring all parties back to the table. If these negotiations were unsuccessful, they would also begin to provide the legal grounds on which the U.S. could base future actions.

President Bush has publicly conceded the right of Iran to have a peaceful program, saying:

Some of us are wondering why they need civilian nuclear power anyway. They're awash with hydrocarbons. Nevertheless, it's a right of a government to want to have a civilian nuclear program.<sup>51</sup>

A legal solution could recognize and encompass the right to enrich under the NPT. The question then becomes, as Robert Cooper has put it: "Is Iran's program peaceful?"<sup>52</sup> Iran's cooperation is crucial in answering this question. If it is offered, the West may have the opportunity to satisfy itself of its security concerns, while at the same time, create safeguards that will ensure no diversion of enriched material occurs to Iran's military program or terrorist operations. The program would not only have to be proven peaceful now, but presumably, maintain that designation or risk future revocation of its legitimacy.

Finally, the possibility remains that Iran continues to be recalcitrant and fails to comply with the directions of the Security Council. In this case, the gambit will not have affected the ability of the Council to make a determination on Iran's previous breach of its safeguard agreement. In fact, the case for a harsher posture against Iran will be strengthened if the determination is made that Iran's enrichment program is illegitimate due to its conception under deceptive circumstances. Iran's disregard for international law would be

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highlighted and the futility of attempting to cajole it into agreement would be exposed.

## CONCLUSION

The NPT has been criticized for its creation of two classes of states: those trusted with nuclear weapons and those that may never pursue them. The U.S. has not conceded anything, however, in the present crisis, demanding that Iran never be allowed to have nuclear technology. IAEA Director General ElBaradei rejects such a subjective claim:

We must abandon the unworkable notion that it is morally reprehensible for some countries to pursue weapons of mass destruction yet morally acceptable for others to rely on them for security - and indeed to continue to refine their capacities and postulate plans for their use.<sup>53</sup>

By establishing the limited right to enrich, the negotiators may get as close as is possible under the current nonproliferation regime to allowing for such moral judgments. Under such a doctrine, those who did not satisfy the IAEA, and in turn the P-5-controlled Security Council, would not enjoy full rights under the NPT. In other words, Iran would have to placate the IAEA or face the loss of its enrichment rights.

This solution, of course, does not change the fact that Iran has proven itself to be a belligerent and disruptive force throughout the Middle East. This will probably be the case the into foreseeable future. Secretary of State Condoleezza Rice has even gone so far as to say that the U.S. faces "no greater challenge from a single country" than the one posed by Iran.<sup>54</sup> The thought that the world's "most active state sponsor of terrorism"<sup>55</sup> and member of President Bush's Axis of Evil might attain near nuclear-weapons status seems intolerable to many in the U.S. Short of regime change, however, the possibilities for discontinuing Iran's enrichment technology are limited. After 18 years of concealment and covert assistance the program is well underway. However, the Security Council now might have the opportunity to change Iran's behavior, if not its nuclear course. How this is done, and how the beginnings of a new nonproliferation regime will move forward, are in the balance.

*The views and opinions expressed in articles are strictly the author's own, and do not necessarily represent those of Al Nakhlah, its Advisory and Editorial Boards, or the Program for Southwest Asia and Islamic Civilization (SWAIC) at The Fletcher School.*

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