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How the United States Might Justify a Preemptive Strike on a Rogue Nation's Nuclear Weapon Development Facilities Under the U.N. Charter

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Symposium

**A Nuclear Iran: The Legal Implications
of a Preemptive National Security Strategy**

**HOW THE UNITED STATES MIGHT JUSTIFY A PREEMPTIVE
STRIKE ON A ROGUE NATION'S NUCLEAR WEAPON DE-
VELOPMENT FACILITIES UNDER THE U.N. CHARTER**

Gregory E. Maggs*

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* Professor of Law, George Washington University Law School. This essay is part of a symposium entitled “A Nuclear Iran: The Legal Implications of a Preemptive National Security Strategy” held at the Syracuse University College of Law on October 26-27, 2006. I would like to thank the other participants on the panel, Col. Samuel Gardiner (U.S.A.F. ret.), Professor Mary Ellen O’Connell, and Professor Robert F. Turner for their very helpful constructive criticism and suggestions. Professors Adam Hirsch, Laird Kirkpatrick, Sean Murphy, Dick Pierce, and Roger Trangsrud also assisted me with their comments.

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*466 Thesis and Disclaimers

This essay addresses a legal question: “Under the United Nations Charter, how might the United States justify a preemptive strike on a rogue nation’s nuclear weapons development facilities?” The essay answers this question by arguing that the United States would not have to rely on controversial theories like “self-defense in response to an imminent attack” or “anticipatory self-defense.”¹ On the contrary, as this essay demonstrates with numerous recent and widely-publicized examples, the nations that the United States most likely would strike, Iran and North Korea, constantly are engaging in conventional armed attacks and other aggression against allies of the United States.² Provided that certain likely conditions are met, these hostile actions could justify the United States in using military force against these nations’ nuclear weapons development facilities under historically-accepted interpretations of the United Nations Charter (“U.N. Charter”).

Before explaining this contention, I must make two very important disclaimers. First, I specifically do not assert in this essay that the United States should attack Iran, North Korea, or any another nation. Instead, I merely seek to describe a legal theory under which the United States might justify military action against rogue nations. In international relations, as in many other contexts, some actions which are lawful still may not be a

¹ See *infra* Part III.

² See *infra* Part IV.

good idea. Military policy experts currently disagree on whether a lawful attack against North Korea's or Iran's nuclear weapons facilities would do more harm than good.³ Although this policy issue unquestionably has great significance, I express no opinion about it here.

Second, I also do not assert that any argument the United States might make in favor of a preemptive strike on a rogue nation's nuclear weapons development facilities will succeed as a matter of international diplomacy. Some foreign governments and international institutions appear ready to condemn any United States military action regardless of the legal arguments that the United States makes. Even close allies from time to time have disagreed with military actions that the United States has attempted to justify under the U.N. Charter. While diplomatic considerations are always important, they are beyond the scope of this paper.

In addition to these disclaimers, one other matter also requires preliminary attention. When I presented this paper at the symposium, a speaker who opposed a preemptive strike on Iran as a matter of military policy objected to an academic inquiry into the legality of a strike on Iran. He suggested that legal scholars should not publicize arguments that might give the United States government an excuse for launching an attack, given that an attack in his view was a very bad idea.

Although I can understand the concern, I disagree with the recommendation. The capable lawyers in the United States government presumably have already thought about these matters. As this essay will show, the United States has relied on similar arguments in the past in other contexts. So essays of this kind seem unlikely to change the behavior of the United States in any way. In contrast, the leaders of Iran and North Korea apparently have not given the arguments presented in this essay sufficient attention. If these nations recognized that their numerous conventional armed attacks on allies of the United States might give the United States a legal justification for attacking their nuclear weapons facilities, they very well might reconsider their behavior. They might decide to cease their unlawful armed attacks on U.S. allies. Or if for some reason they persist in unlawful aggression, they may hesitate to spend further sums developing nuclear weapons that the United States justifiably could destroy.⁴ No one

³ See Sam Gardiner, *Et Maintenant en Avant: Preemption and the Planning for Iran*, 57 *Syracuse L. Rev.* 443 (2007).

⁴ By way of comparison, in 1989, General Manuel Noriega knew that the United States was looking for a legal justification for invading Panama. Accordingly, Noriega took "meticulous" care to avoid a direct conflict between Panamanian

who favors peace could object to these possible consequences of publicizing the United States' right to use military force.

I. Background

The term "rogue nation" has no official government definition. But as used by prominent politicians, the term generally refers to tyrannies that lack normal diplomatic relations with the United States and other democracies and engage in or threaten to engage in international terrorism or aggression.⁵ The President and members of Congress from both parties *468 cite Iran and North Korea as examples of rogue nations.⁶

For many years, the United States has distrusted rogue nations, has avoided helping them, and even has imposed sanctions on them.⁷ But generally speaking, the United States has not felt substantially threatened by them. Despite their hostile rhetoric and intentions, rogue nations generally have lacked the ability to combat the United States militarily in a conventional conflict. The United States has known this, and so have the rogue nations, and this understanding has promoted peace.

But Iran and North Korea now appear to be developing nuclear weapons.⁸ With such weapons, these nations could threaten to attack the

Defense Forces and the United States military. See Bob Woodward, *The Commanders* 92, 158 (1991).

⁵ See White House, *The National Security Strategy of the United States of America 13-14* (2002), available at <http://www.whitehouse.gov/nsc/nss/2002/nss5.html> [hereinafter *NSS 2002*] (describing common attributes of "rogue nations").

⁶ See, e.g., *id.* at 14 (White House characterization of North Korea and Iran as "rogue nations"); Reid: America Expects Accountability on Iran, *U.S. Newswire*, June 19, 2006 (Senator Minority Leader Harry Reid calling Iran and North Korea "rogue nations"); Frist Touts Senate Accomplishments, *States News Service*, Sept. 30, 2006 (Senator Majority Leader Bill Frist describing North Korea and Iran--misquoted as "Japan"--as rogue nations); *Missile Defense Bill Targets N. Korea: U.S. Lawmakers*, *Asian Pol. News*, July 5, 1999 (Former Speaker of the House Dennis Hastert describing North Korea as a rogue nation).

⁷ For an official description of the United States' relations with Iran and North Korea, see U.S. Department of State, *Background Note: Iran*, <http://www.state.gov/r/pa/ei/bgn/5314.htm> (last visited Oct. 11, 2006); see also U.S. Department of State, *Background Note: North Korea*, <http://www.state.gov/r/pa/ei/bgn/2792.htm> (last visited Apr. 26, 2007).

⁸ See Evan Ramstad et al., *North Korea Cites a Successful Test of Nuclear Weapon*, *Wall St. J.*, Oct. 9, 2006, at A3 (discussing North Korea's claims that it has detonated a nuclear bomb). See also Neil King Jr., *Politics & Economics: At*

United States or its allies in a very serious manner.⁹ Merely by possessing such weapons, Iran might bring an end to Israel; as Israeli Deputy Minister of Defense Ephraim Sneh has said, when faced with the threat of nuclear weapons in Iranian hands, “most Israelis would prefer not to live here; most Jews would prefer not to come here with their families; and Israelis who can live abroad will.”¹⁰ Iran and North Korea also could prevent or discourage the United States from deploying military forces in areas where they possibly might face attack. Or they could allow their nuclear weapons, intentionally or unintentionally, to fall into the hands of terrorists who might use them against the United States.

***469** The possibility that terrorists might acquire nuclear weapons is particularly troubling given the events of September 11, 2001. On that infamous day, al-Qaida terrorists, who had found support in the then-rogue nation of Afghanistan, attacked the United States with hijacked commercial airliners. In a horrific manner, they callously murdered 2,973 men, women, and children. But the terrorists did more than just carry out a brutal assault, they also showed conclusively that the United States has enemies who feel absolutely no moral restraint when it comes to killing others. Although the 9/11 fiends succeeded in killing almost 3,000 souls, they surely would have destroyed 30,000 lives if they could have—or even 300,000 or three million. The total number of deaths was limited by the physics of the hijacked aircraft and of the buildings that they struck, not by any measure of human compassion. If al-Qaida’s unrestrained mass murderers had possessed nuclear weapons on September 11, 2001, would they not have attempted to use them to kill every last person in New York and Washington?

In 2002, confronted with this barbarous mentality, the White House announced a new policy with respect to nuclear weapons. In a document called the “National Security Strategy” (NSS 2002), the President argued that the United States must prevent rogue nations that may harbor or assist terrorists from ever acquiring weapons of mass destruction.¹¹ The

U.N., Iran President Defends Nuclear Activity, *Wall St. J.*, Sept. 20, 2006, at A8 (discussing how Iran admits to having a uranium enrichment program, but claims that it is peaceful; the United States distrusts this claim).

⁹ See Bret Stephens, *Paging Dr. Strangelove*, *Wall St. J.*, Oct. 17, 2006, at A15 (discussing various threats that North Korea might make now that it has acquired nuclear weapons).

¹⁰ Gil Hoffman, Sneh: IDF Must Be Ready to Stop Iran, *Jerusalem Post* (internet ed.), Nov. 10, 2006, <http://www.jpost.com/servlet/Satellite?pagename=JPost%2FJPArticle%2FShowFull&cid=1162378366509>.

¹¹ See NSS 2002, *supra* note 5, at 13-16.

document further asserted in unmistakable terms that the United States will resort to preemptive military strikes on nuclear weapon facilities if the need arises.¹² The White House now has repeated this position in its 2006 National Security Strategy (NSS 2006).¹³ At least one other nation, Israel, appears to have adopted a similar policy.¹⁴

The United States previously did not assert this position. In the Cold War, the United States dealt with the threat of nuclear weapons through the policy of “mutual assured destruction.”¹⁵ The leaders of the Soviet Union knew that they and their empire would cease to exist if they ever employed nuclear weapons against the United States.¹⁶ The United States had the capacity and willingness to respond to Soviet atomic attacks with ***470** guaranteed nuclear annihilation of the Soviet Union.¹⁷ The policy, as dreadful as it may sound, ultimately appears to have worked. The Soviet Union no longer exists, and both sides in the Cold War avoided using their nuclear weapons.

Surely the President and other political leaders in the United States would prefer to eliminate the threat posed by rogue nations’ nuclear weapons development programs without resorting to military attacks. The United States in fact recently accomplished this goal when dealing with Libya. In December 2003, Libya agreed to end its nuclear weapons development program in exchange for the United States’ dropping economic sanctions and agreeing to improve relations.¹⁸ In the words of Prime Minister Shukri Ghanem, Libya eventually came to realize that its weapons of mass destruction development program was “hugely expensive” and that it “didn’t even necessarily make [Libya] safer.”¹⁹

¹² See *id.*

¹³ See White House, *The National Security Strategy of the United States of America* (2006), available at <http://www.whitehouse.gov/nsc/nss/2006.html> [hereinafter *NSS 2006*].

¹⁴ See Hoffman, *supra* note 10 (quoting the Israeli Deputy Defense Minister as saying “that’s why we must prevent this regime from obtaining nuclear capability at all costs”).

¹⁵ See Thomas Graham, Jr., *Common Sense on Weapons of Mass Destruction 90-91* (2004).

¹⁶ See *id.* at 91.

¹⁷ See *id.*

¹⁸ See Christopher Cooper, *U.S. to End Some Libya Sanctions: Executive Order Imposed by Reagan Will be Lifted as Reward for Cooperation*, *Wall St. J.*, Mar. 24, 2004, at A6.

¹⁹ Vivienne Walt, *Meeting Muammar*, *Slate Magazine*, Dec. 16, 2004.

But the United States cannot always count on diplomacy in dealing with rogue nations. The United States rarely engages in diplomatic negotiations with Iran and North Korea.²⁰ Even if more discussions could take place, the United States knows from experience that these nations often do not keep their diplomatic promises.²¹ The United States also cannot rely solely on threats of retaliation as it did with the former Soviet Union. Iran and North Korea for whatever reason do not seem very concerned about the possibility of mutual assured destruction.²²

***471** In contemplating whether the United States should resort to preemptive military strikes against rogue nations' nuclear weapons development facilities, many questions arise. One of these questions--but surely not the only one--is whether United States' obligations under the U.N. Charter would permit such military action. This essay answers that legal question in the affirmative.

II. The United Nations Charter

The U.N. Charter is a multilateral treaty that the United States, Iran, North Korea, and most other nations of the world have ratified.²³ This treaty generally forbids members of the United Nations to use military force against foreign countries. Article 2, paragraph 4 insists that all members of the United Nations ("U.N.") "refrain in their international

²⁰ The United States does not conduct bilateral negotiations with North Korea. Instead, it insists on six-party talks--i.e., negotiations involving the North Korea, South Korea, the United States, Japan, China, and Russia. See Press Briefing by Tony Snow, Oct. 5, 2006, available at <http://www.whitehouse.gov/news/releases/2006/10/20061005-8.html>. For nearly three decades, the United States also has not engaged in direct talks with Iran. See Helene Cooper & Elaine Sciolino, Two Tracks on Iran: Keep Talking, and Weigh Penalties, N.Y. Times, Sept. 17, 2006, sec. 1, at 8.

²¹ See Michael Rubin, The U.S. vs. Iran, Wall St. J., Sep. 20, 2006, at A26 (describing how Iran has broken previous commitments); Michael Schroeder & David S. Cloud, Leading the News: North Korea Broke Nuclear Accords, U.N. Agency Says, Wall St. J., Feb 13, 2003, at A3 (same for North Korea).

²² Natan Sharansky, Failing a Terror Test, L.A. Times, Sept. 12, 2006, at B13 ("Considering the apocalyptic fanaticism of Iran's leader, it is an open question whether the current regime in Tehran is capable of being deterred through the threat of mutually assured destruction."); John B. Stimpson, Missile Defense Can't Rest, Boston Herald, Aug. 5, 2006, at 16 (arguing that "offensive deterrence through mutually assured destruction.... only works when country leaders are rational" and therefore is ineffective with North Korea).

²³ See United Nations, List of Member States, available at <http://www.un.org/Overview/unmember.html>.

relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”²⁴ This restriction is sometimes controversial,²⁵ but no one doubts its meaning. Absent some exception, bombing or firing missiles at a foreign country’s nuclear weapons development facilities clearly would fall within its ambit.

The U.N. Charter provides or recognizes two exceptions to the general prohibition in Article 2, paragraph 4. First, the U.N. Security Council can authorize military force if necessary to maintain or restore peace, provided that certain factual conditions are met.²⁶ Second, a nation may act to protect itself or its allies in self-defense.²⁷ Article 51 of the U.N. Charter (“Article 51”) says: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and *472 security”²⁸

Obtaining new Security Council authorization for military strikes against rogue nations’ nuclear weapons development facilities seems wholly unrealistic. China, Russia, and France each have veto power in the Security Council, and they typically do not see eye-to-eye with the United States.²⁹ All of these nations generally want to curb U.S. power. And they also have more specific reasons for opposing military strikes on Iran and North Korea. France and Russia have important business dealings with

²⁴ U.N. Charter art. 2, para. 4.

²⁵ The U.N. Charter’s general prohibition on using force unless justified by self-defense may have promoted peace by reducing the number of international conflicts since 1945. But the prohibition has come at a price; for example, it arguably has barred humanitarian military intervention in places like Rwanda, Kosovo, or Darfur because such intervention does not really constitute self-defense. See Young Sok Kim, Responsibility to Protect, Humanitarian Intervention and North Korea, 5 J. Int’l Bus. & L. 74, 89 (2006) (concluding that under article 2, paragraph 4, “unilateral humanitarian intervention without the express authorization of the UN Security Council is a violation of international law”).

²⁶ See U.N. Charter art. 42 (empowering the Security Council to authorize such “action by air, sea, or land forces as may be necessary to maintain or restore international peace and security”).

²⁷ U.N. Charter at art. 51.

²⁸ Id.

²⁹ See Neil King, Jr. & Marc Champion, Embargo Politics: Nations’ Rich Trade With Iran is Hurdle For Sanctions Plan, Wall St. J., Sept. 20, 2006, at A1.

Iran.³⁰ China has extensive trade with North Korea,³¹ but more importantly, China worries that a collapse of the North Korean government could send refugees and other problems across its borders.³² So, if the United States decides to use military force in a manner consistent with the U.N. Charter, it would either have to use existing Security Council authorization or it would have to justify the force on grounds of self-defense under Article 51.

III. Three Views on the Permissibility of Preemptive Strikes

Many other writers already have addressed the question of preemptive strikes on nuclear weapons development facilities.³³ These writers appear to fall into three schools of thought. First, most writers assert that preemptive strikes are not permitted because Article 51 only recognizes a right to use military force in response to an actual “armed attack.”³⁴ Accordingly, these writers believe that the United States cannot engage in a preemptive strike against rogue nations’ nuclear weapons development facilities.³⁵ Second, some writers believe that Article 51 permits a nation to use force in response not just to an actual armed attack, but also when facing an “imminent armed attack.”³⁶ However, this broader view still would not justify a preemptive strike unless the United States or its allies faced an immediate threat of attack, which they do not. Third, still other *473 writers, including the President, express a different opinion, and argue for an expanded right of “anticipatory self-defense” that would allow armed attacks, at least against nuclear weapons development facilities. The following discussion summarizes these views.

A. Preemptive Strikes Are Not Permitted

The most widely held view appears to be that Article 51 recognizes that a nation has an inherent right to respond in self-defense only after it has suffered an actual armed attack.³⁷ This view finds strong support in the text

³⁰ *Id.*

³¹ See Andrew Batson, *China’s Response to North Korea Will Set Tone for Broader Talks*, *Wall St. J.*, Oct. 12, 2006, at A4.

³² See Norimitsu Onishi, *North Korea Warns of More Nuclear Tests*, *N.Y. Times*, Oct. 12, 2006, at A14.

³³ See, e.g., Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 *Vill. L. Rev.* 699, 706-19 (2005) (summarizing a variety of views on the subject).

³⁴ *Id.* at 706-07.

³⁵ *Id.*

³⁶ *Id.* at 711.

³⁷ *Id.* at 708.

of Article 51, the practice of the Security Council and General Assembly, the decisions of the International Court of Justice, and the opinions of learned commentators on international law.³⁸ Under this view, no nation may engage in a preemptive strike of any kind against another nation.³⁹

Consider first the text of Article 51: “Nothing . . . shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . .”⁴⁰ The words “if an armed attack occurs” appear to impose a condition that is antithetical to the whole idea of a preemptive strike. By definition, a preemptive strike occurs before any actual “armed attack” happens.

Could Article 51 merely be suggesting one possible instance in which a nation could use force in self-defense—that is, after an armed attack—while leaving open the possibility of using military force in other instances? The *expressio unius est exclusio alterius* canon of construction (i.e., to say one is to exclude the other) would say the answer is no. If the U.N. Charter sought to allow nations to respond in self-defense in other circumstances, then presumably it would have mentioned that possibility in Article 51. Article 51 in fact speaks only of military action undertaken in response to an armed attack.

The U.N. Security Council generally has supported this interpretation of Article 51 in its resolutions. The clearest precedent concerns an incident in which Israeli aircraft entered Iraq and bombed the Osirak nuclear facility near Baghdad on June 7, 1981.⁴¹ Israel attempted to justify the attack on grounds of self-defense under Article 51, arguing that Iraq was in the *474 process of developing nuclear weapons that would threaten Israel.⁴² But the U.N. Security Council, with the support of the United States, issued a resolution that rejected Israel’s position and “strongly condemn[ed]” Israel’s attack on the Osirak nuclear facility as a violation of Article 2, paragraph 4.⁴³ Although the resolution does not express a rationale, the

³⁸ Murphy, *supra* note 33, at 708-10.

³⁹ *Id.*

⁴⁰ U.N. Charter art. 51.

⁴¹ See David K. Shipler, *Israeli Jets Destroy Iraqi Atomic Reactor*, N.Y. Times, Jun. 9, 1981, at A1.

⁴² See Excerpts from Speech by Israeli Delegate to U.N., N.Y. Times, Jun. 20, 1981, sec. 1, at 5. Israel also argued that Iraq was still at war with Israel because Iraq had not signed an armistice with Israel following the 1948, 1967, and 1973 armed conflicts in which Iraq had participated. *Id.*

⁴³ S.C. Res. 487, U.N. Doc. S/RES/487 (June 19, 1981).

Security Council evidently concluded that Israel could not act in self-defense under Article 51 prior to an actual armed attack by Iraq.

Other evidence of the Security Council's restrictive interpretation of Article 51 arose in 1985, when the Security Council (with the United States abstaining) condemned Israel for bombing the Palestinian Liberation Organization's headquarters in Tunisia.⁴⁴ The strike came after terrorists killed three Israelis on a yacht in Cyprus.⁴⁵ Israel again argued that its military response was lawful under Article 51 because it was acting in self-defense to prevent future attacks.⁴⁶ But the Security Council characterized Israel's response as an "act of armed aggression . . . against Tunisian territory" made "in flagrant violation" of Article 2, paragraph 4 of the U.N. Charter.⁴⁷ The Security Council apparently did not see the terrorist strike in Cyprus as an "armed attack" on Israel, and did not think that Israel could act preemptively under Article 51 merely because it feared future attacks.

The General Assembly has also interpreted Article 51 conservatively. In 1986, for example, the General Assembly condemned the United States for violating the U.N. Charter when the United States bombed Libya after Libyan agents killed American service members in a terrorist bombing of a Berlin nightclub.⁴⁸ The General Assembly apparently did not believe that the United States had suffered an "armed attack" and therefore did not believe that the United States could justify the military response in self-defense under Article 51. If the General Assembly would condemn a military strike following an actual attack of this kind, a fortiori it would look with disfavor on a wholly preemptive strike.

The International Court of Justice has never squarely confronted the *475 issue of preemptive strikes. But the tribunal has specifically held that a nation's mere possession of nuclear weapons does not violate Article 2, paragraph 4 or give other nations the right to use military force in self-defense under Article 51.⁴⁹ In addition, the court has interpreted

⁴⁴ See Bernard Gwertzman, U.S. Defends Action in U.N. on Raid, N.Y. Times, Oct. 7, 1985, at A3.

⁴⁵ See Associated Press, Israel Calls Bombing a Warning to Terrorists, N.Y. Times, Oct. 2, 1985, at A8.

⁴⁶ See Gwertzman, *supra* note 44.

⁴⁷ S.C. Res. 573, U.N. Doc. S/RES/573 (Oct. 4, 1985).

⁴⁸ See G.A. Res. 41/38, U.N. Doc. A/RES/41/38 (Nov. 20, 1986).

⁴⁹ See *Legality of the Threat or Use of Nuclear Weapons* (United Nations), 1996 I.C.J. 226, 247 (Jul. 8) (holding that whether possession of nuclear weapons violates article 2(4) "depends upon whether the particular use of force envisaged [through possession of the weapons] would be directed against the territorial integrity or

Article 51 in the same restrictive manner as the Security Council and General Assembly, leaving no doubt that it considers an actual armed attack necessary before a nation can act in self-defense. For example, in *Nicaragua v. United States*, the court held that the United States could not use military force against Nicaragua in collective self-defense under Article 51.⁵⁰ Although Nicaragua had engaged in cross-border incursions into Honduras and Costa Rica, and had supplied arms to rebels in El Salvador, the court held that these minor activities did not amount to an “armed attack” of the kind that Article 51 requires.⁵¹ The court surely would not have allowed the United States to strike preemptively if these acts had not occurred.

Similarly, in *Oil Platforms (Islamic Republic of Iran v. U. S.)*, the International Court of Justice held that the United States improperly had destroyed two Iranian oil platforms in the Persian Gulf.⁵² The United States argued that it had acted in self-defense because it suspected Iran of firing a missile from the platforms that struck at U.S.-flagged ship in the waters of Kuwait.⁵³ But the court held that the United States could not use force in self-defense because the attack on a ship was not really an armed attack on the territory of the United States, because the attack did not cause grave harm, and because the United States did not have clear proof that Iran had committed the attack.⁵⁴ If the United States cannot respond after an actual attack of this kind, then certainly it cannot respond prior to an actual attack.

Based on these and other incidents, most international scholars appear to believe that preemptive military strikes are not permitted under the U.N. Charter. Professor Mary Ellen O’Connell, for instance, has concluded that the only “clear exception to the general prohibition on the unilateral use of force” is that “[s]tates may use force in self-defense against an armed attack.”⁵⁵ Professors Michael J. Glennon, Chris Bordelon, Brendan M.

political independence of a State....”). *Id.* at 246-47.

⁵⁰ See *Military and Paramilitary Activities in and Against Nicaragua (Nic. v. U. S.)*, 1986 I.C.J. 14, 103 (June 27) [hereinafter *Nicaragua*].

⁵¹ See *id.* at 119-20.

⁵² *Oil Platforms (Iran v. U. S.)*, 2003 I.C.J. 161 (Nov. 6) [hereinafter *Oil Platforms*].

⁵³ See *id.* at 185.

⁵⁴ See *id.* at 191-92.

⁵⁵ Mary Ellen O’Connell, *The American Society of International Law Task Force on Terrorism, The Myth of Preemptive Self-Defense*, at 5 (2002), available at <http://www.asil.org/taskforce/oconnell.pdf> (last visited Oct. 13, 2006).

Howe, Jasper S. Kim, Jane E. Stromseth, and Richard M. Gardner all have reached essentially the same conclusion.⁵⁶

B. Preemptive Strikes May Be Permitted in Response to “Imminent” Armed Attacks

The second most widely accepted view is that Article 51 recognizes a right to use military force in response not only to an actual armed attack but also when faced with an “imminent” armed attack--e.g., enemy warships on the horizon, troops massed on the border, and planes in the air--even if the imminent attack has not yet begun.⁵⁷ This interpretation relies on historic practice reaching at least back to the Caroline Case of 1842.⁵⁸ In the Caroline Case, Canadian rebels opposing the British government took refuge in New York State near Niagara Falls.⁵⁹ In response, British forces crossed into the United States and attacked a rebel ship called the Caroline.⁶⁰ When the United States complained about the intrusion into U.S. territory, the British government apologized, and the United States accepted the apology.⁶¹ In the course of communications with the British, Secretary of State Daniel Webster agreed that a nation could strike in self-defense, even before suffering an attack, when the “necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”⁶² But both the United States and the United

⁵⁶ See Michael J. Glennon, *Military Action Against Terrorists Under International Law: The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 *Harv. J.L. & Pub. Pol’y* 539, 553 (2002); Chris Bordelon, *The Illegality of the U.S. Policy of Preemptive Self-Defense Under International Law*, 9 *Chap. L. Rev.* 111, 111-12 (2005); Brendan M. Howe & Jasper S. Kim, *Legality, Legitimacy and Justifications for Military Action Against North Korea*, 11 *U.C. Davis J. Int’l L. & Pol’y* 229, 233 (2005); Jane E. Stromseth, *Law and Force after Iraq: A Transitional Moment*, 97 *Am. J. Int’l L.* 628, 636 (2003); Richard N. Gardner, *Neither Bush nor the “Jurisprudes”*, 97 *Am. J. Int’l L.* 585, 585-86 (2003).

⁵⁷ See U.N. Charter art. 51.

⁵⁸ *Id.*

⁵⁹ See Ian Johnstone, *Jus Ad Bellum: The Next Iraq*, 11 *ILSA J. Int’l & Comp. L.* 395, 397-98 (2005).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Letter from Secretary of State Daniel Webster to Special Minister to the United States, Lord Alexander Baring Ashburn, (Aug. 6, 1842), <http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm> (last visited Oct. 10, 2006) [hereinafter Webster Letter].

*477 Kingdom accepted that the “the facts in the case of the ‘Caroline’ [did not] make out a case of such necessity for the purpose of self-defence.”⁶³

The United States and the United Kingdom, in other words, each recognized that a nation can strike across its border in self-defense before suffering an actual armed attack if the strike is necessary to prevent an imminent assault. This view received little criticism in the years that followed. The right to respond to an imminent attack thus arguably became part of the customary international law regarding a nation’s inherent right of self-defense long before the creation of the U.N. Charter.⁶⁴

Under this theory, the United States could exercise military force to destroy a rogue nation’s nuclear weapons before suffering an actual attack. For example, if the United States somehow knew that a rogue nation had started a missile launch sequence or was sending a ship with a bomb into a U.S. harbor, the United States could destroy the weapon before it actually detonated on U.S. soil. Although an actual armed attack would not have occurred, the imminence of an armed attack would give the United States grounds for using force.

Although common sense supports the idea of self-defense in response to an imminent armed attack, a difficult question is how to reconcile the theory with the text of Article 51, which appears to permit military action in self-defense only after a nation has suffered an actual armed attack. A possible argument focuses on the Article’s use of the words “inherent right of individual or collective self-defence.”⁶⁵ An inherent right is an essential or intrinsic right. If self-defense is an essential right of nations, then arguably the nations that signed the U.N. Charter did not intend to diminish that right. While Article 51 addresses only the specific principle that a nation may respond in self-defense to an armed attack, the inherent right of self-defense may extend beyond this one principle; it may include the right to respond to an imminent attack under the theory expressed by Daniel Webster in the Caroline case. Under this so-far-untested theory, as Mikael Nabati has explained, “[t]he right of self-defense would be an independent and autonomous right preexisting the Charter rules and not subordinated to the requirements set forth in Article 51 . . . and the words ‘inherent right’

⁶³ Id.

⁶⁴ See Murphy, *supra* note 33, at 729-30.

⁶⁵ U.N. Charter art. 51.

were meant to preserve the right of self-defense as defined by customary international law.”⁶⁶

*478 Although this interpretation of Article 51 finds no express support in the practice of the U.N., the various organs of the U.N. also arguably have not rejected it. For example, while the Security Council condemned Israel for destroying the Osirak nuclear facility, its resolution did not contain any general legal reasoning about preemptive strikes.⁶⁷ Perhaps the resolution merely rejected any self-defense justification that Israel might have had on the particular facts; the Security Council might have reached a different decision if Israel had struck the nuclear facilities after Iraq had massed its armed forces and threatened an immediate attack.

However, even if the inherent right of self-defense permits a preemptive strike designed to thwart an imminent attack, the United States could not rely on this right in destroying Iran or North Korea’s nuclear development facilities. The United States does not face an imminent nuclear attack by these nations. Although these nations are engaged in threatening behavior, they do not pose a threat that, in the words of Daniel Webster, is “instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”⁶⁸

C. Preemptive Strikes May Be Permitted as a Form of “Anticipatory Self-Defense”

According to a much less widely held view, a nation has—or at least should have—a right of anticipatory self-defense that can justify a preventative strike in special circumstances even if the nation has suffered no armed attack and faces no imminent danger. The White House, as mentioned earlier, explicitly adopted this view in its National Security Strategy of 2002.⁶⁹ Expressly seeking to expand the theory that a nation may respond to an imminent threat, the NSS 2002 says:

We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, poten-

⁶⁶ Mikael Nabati, *International Law at a Crossroads: Self-defense, Global Terrorism, and Preemption (A Call to Rethink the Self-Defense Normative Framework)*, 13 *Transnat’l L. & Contemp. Probs.* 771, 790-91 (2003).

⁶⁷ See S.C. Res. 487, U.N. Doc. S/RES/487 (June 19, 1981).

⁶⁸ See Webster Letter, *supra* note 62.

⁶⁹ NSS 2002, *supra* note 5, at 15.

tially, the use of weapons of mass destruction--weapons that can be easily concealed, delivered covertly, and used without warning.⁷⁰

The NSS 2002 concludes that “the magnitude of potential harm that could be caused by our adversaries’ choice of weapons, do not permit” the *479 option of waiting until an attack already has occurred.⁷¹ The NSS 2002 therefore endorses the use of preemptive force to prevent threats from arising. The NSS 2006 repeats this view.⁷²

This position also has other policy arguments in its favor. Professor Philip Bobbitt, for example, has written that “preemption [is] an absolute necessity” given the “disguised” nature of terrorist attacks.⁷³ Mutual assured destruction--a theory of defense consistent with a requirement of an armed attack--cannot prevent nuclear strikes against the United States if the United States does not have a clear enemy at which to strike back. And the use of force in self-defense in response to an imminent attack cannot protect the United States if the United States does not know when a strike is about to occur. So if the United States wants to protect itself, perhaps it must prevent the creating of weapons of mass destruction that may fall into terrorists’ hands.

But the NSS 2002’s position on preemptive strikes has three significant problems. First, the theory lacks clear legal footing under the text of Article 51 and historic practice.⁷⁴ Indeed, although the NSS 2002 says that the “United States is committed to lasting institutions like the United Nations,”⁷⁵ the document does not cite the U.N. Charter or attempt to reconcile its position with the practices of the Security Council and General Assembly.

Second, the theory has no logical stopping point. Although the NSS 2002 focuses on nuclear weapons and rogue nations, a country conceivably could use similar logic to conduct a preemptive strike on anything that, in the long term, might pose a serious threat. The NSS 2002 attempts to address this concern with the following assurance: “The United States will

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See NSS 2006, *supra* note 13.

⁷³ Philip Bobbitt, *Waging War Against Terror: An Essay for Sandy Levinson*, 40 *Ga. L. Rev.* 753, 772-73 (2006).

⁷⁴ See Johnstone, *supra* note 58, at 397; see also Michael J. Glennon, *The UN Security Council in a Unipolar World*, 44 *Va. J. Int’l L.* 91, 95-96 (2003) (criticizing the NSS 2002).

⁷⁵ See NSS 2002, *supra* note 5, at vi.

not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression.”⁷⁶ But will this vague promise of self-restraint by the United States really prevent other nations from abusively claiming a right to engage in preemptive strikes?

Finally, the theory of preventative self-defense has an unsavory past. The Nazis, for example, defended their aggression against the Soviet Union *480 in World War II as a preventive act in self-defense.⁷⁷ Hans Fritzsche, the director of the Nazi Propaganda Ministry, testified at Nuremberg that the Nazis strived to justify the attack on the Soviet Union on these grounds: “[I]t is correct to say that after the attack on the Soviet Union it was the main task of German propaganda to justify the necessity of this attack. Therefore we had to emphasize again and again that we had merely prevented a Soviet attack.”⁷⁸ The Japanese likewise sought to justify their assault on Pearl Harbor on grounds of prevention.⁷⁹ The “Fourteen Part Message” that the Japanese ambassador delivered to the United States on December 7, 1941, for instance, explained that Japan was forced to act because the United States and the United Kingdom “[w]hile manifesting thus an obviously hostile attitude . . . have strengthened their military preparations perfecting an encirclement of Japan, and have brought about a situation which endangers the very existence of the Empire.”⁸⁰ In other words, Japan claimed it was attacking the United States before the United States could strike Japan.

IV. An Overlooked Reality: Rogue Nations Regularly Commit Actual Armed Attacks and Other Aggression Against U.S. Allies

The foregoing discussion has shown that most writers believe either (1) that the United States cannot lawfully conduct a preemptive military strike against a rogue nation’s nuclear weapons development facilities under the U.N. Charter, or (2) that the United States could take this action but only under a new and controversial expansion of existing law. In my view, this analysis is incomplete. What is missing from the debate is recognition of

⁷⁶ Id. at 15.

⁷⁷ 17 The Trial of German Major War Criminals Sitting at Nuremberg, Germany 294 (1946).

⁷⁸ Id.

⁷⁹ Japanese Note to the United States (Dec. 7, 1941), Dept. of State Bulletin, Vol. V, No. 129, Dec. 13, 1941, available at <http://www.yale.edu/lawweb/avalon/wwii/p3.htm>. With supreme hutzpah, the same message scolded the United States and Great Britain for preparing to attack Germany and Italy “in the name of self-defense.” Id.

⁸⁰ Id.

a very important fact: The rogue nations that the United States most likely would strike, Iran and North Korea, constantly are engaging in conventional armed attacks and other aggressive actions that would justify the use of military force against them under historically accepted interpretations of the U.N. Charter. The following discussion seeks to demonstrate this claim by referring to widely circulated but oddly overlooked media accounts of Iran and North Korea's military aggression.

***481 A. Armed Attacks by Iran**

Iran's apparent development of nuclear weapons does not amount to an "armed attack" under Article 51 of the U.N. Charter. But developing nuclear weapons is by no means the only aggressive action that Iran currently is undertaking. On the contrary, Iran is constantly engaging in or assisting with armed attacks against Iraq and Israel, both of which are allies of the United States. Consider the following incidents reported during just the first nine months of 2006:

- In September 2006, Iranian troops seized members of the Iraqi security forces and their interpreter as the Iraqis were patrolling their side of the Iraq-Iran border.⁸¹
- In August 2006, a senior Kurdish official reported that artillery shells had been fired from Iran into remote villages in the Kurdish part of Iraq. Over a four day period, these shells killed two civilians and injured four others.⁸²
- In July of 2006, the Israeli military reported that "dozens of Iranian Revolutionary Guards are in southern Lebanon as trainers and advisers to Hezbollah"⁸³ These Iranian personnel "train special missile-launching units."⁸⁴ On one occasion, Hezbollah terrorists struck an Israeli Navy ship with a sophisticated Iranian missile.⁸⁵

⁸¹ See Edward Wong, Iranian Troops Arrest 5 From Iraqi Security Forces on Border, N.Y. Times, Sept. 9, 2006, at A7.

⁸² See Edward Wong & Yerevan Adham, Iranian Shells Land in Kurdish Villages in Northern Iraq, Killing 2, N.Y. Times, Aug. 20, 2006, sec. 1, at 8.

⁸³ Jad Mouawad & Steven Erlanger, Israel Bombards Lebanon After Hezbollah Hits Haifa With Missiles, N.Y. Times, Jul. 17, 2006, at A1.

⁸⁴ Id.

⁸⁵ See Mark Mazzetti & Thom Shanker, Arming of Hezbollah Reveals U.S. and Israeli Blind Spots, N.Y. Times, Jul. 19, 2006, at A12.

- In June 2004, Iran captured three British vessels and detained their crew in Iraqi waters along the Iraq-Iran border.⁸⁶
- In March 2006, Secretary of Defense Donald Rumsfeld announced that “Iran had recently been infiltrating paramilitary personnel into Iraq ‘to do things that are harmful.’”⁸⁷
- In January 2006, the Iranian Navy reportedly engaged in a gun battle *482 with Iraqi coast guardsmen. Iran captured nine Iraqis and injured one.⁸⁸ Article 51 recognizes that nations have an inherent right to use military force “in collective self-defense if an armed attack occurs.”⁸⁹

These incidents certainly sound like armed attacks within the meaning of Article 51. If they are, then the United States could use them to justify military action against Iran on behalf of its allies Iraq and Israel. This military action presumably could include destruction of any legitimate military target, including nuclear weapons development facilities, absent some other restriction. This essay discusses possible objections below.⁹⁰

B. Armed Attacks and Armistice Violations by North Korea

North Korea has engaged in many serious armed attacks on South Korea in the past decade. South Korea routinely has responded to these armed attacks by using military force in self-defense. Here are some prominent examples:

- In June 2002, a North Korean naval vessel crossed into South Korean waters.⁹¹ The South Korean navy directed the North Korean ship to leave and fired warning shots.⁹² The North Korean ship then attacked, sinking a South Korean vessel, killing four South Korean marines, and injuring twenty-two marines and sailors.⁹³ South Korean vessels

⁸⁶ See Wong, *supra* note 82, at A7.

⁸⁷ Steven R. Weisman, Cheney Warns of “Consequences” for Iran on Nuclear Issue, *N.Y. Times*, Mar. 8, 2006, at A1. See also Rubin, *supra* note 21 (describing how Iran’s Islamic Revolutionary Guards Corps has sent substantial numbers of operatives into both Afghanistan and Iraq to destabilize their governments).

⁸⁸ Robert F. Worth, Al Jazeera Shows Kidnapped U.S. Journalist, *N.Y. Times*, Jan. 18, 2006, at A8.

⁸⁹ U.N. Charter art. 51.

⁹⁰ See *infra* part VI.

⁹¹ See Don Kirk, North and South Korea Trade Charges over Naval Clash, *N.Y. Times*, Jun. 30, 2002, sec. 1, at 12.

⁹² *Id.*

⁹³ *Id.*

returned fire. The number of North Korean casualties, if any, were not revealed.⁹⁴ Other North Korean naval incursions occurred later that year, with more shots fired.⁹⁵

- In June 1999, North Korean naval vessels crossed the maritime border and opened fire on South Korean vessels; the South Korean navy responded by sinking a North Korean torpedo boat and seriously damaging another vessel.⁹⁶ At least 20 North Korean *483 sailors were killed.⁹⁷
- In December 1998, a North Korean submersible spy vessel penetrated South Korean waters.⁹⁸ South Korean forces fired warning shots, but the vessel did not leave. Instead, the North Korean craft fired on the South Korean vessels.⁹⁹ South Korea responded by firing at and sinking the North Korean craft.¹⁰⁰
- In July 1998, South Korea found a dead North Korean armed infiltrator on its coast along with a submersible craft capable of carrying up to five persons.¹⁰¹ The North Korean was wearing diving gear and was carrying a machine gun, a hand grenade, and radio transmission and photographic equipment.¹⁰² He apparently died of a heart attack.
- In July 1998, a North Korean submarine became entangled in South Korean fishing nets in international waters just outside of South Korea's territorial seas.¹⁰³ The submarine had been carrying both North Korean

⁹⁴ See Don Kirk, Four Killed as North and South Korean Navy Vessels Trade Fire, N.Y. Times, Jun. 29, 2002, at A5.

⁹⁵ In November 2002, North Korean Navy patrol boats crossed the western sea border on two occasions, prompting the South Korean Navy to fire warning shots. See S. Korea Says Warning Shots Fired at N. Korean Patrol Boat, Asian Political News, Nov. 25, 2002.

⁹⁶ See Sheryl WuDunn, South Korea Sinks Vessel from North in Disputed Waters, N.Y. Times, Jun. 15, 1999, at A1.

⁹⁷ See also North and South Korean Vessels Clash at Sea, N.Y. Times, Jun. 25, 2001, at A8 (describing the 1999 incident).

⁹⁸ See Nicholas D. Kristof, North Korean Vessel Is Chased and Sunk Off Coast of South, N.Y. Times, Dec. 18, 1998, at A4.

⁹⁹ Id.

¹⁰⁰ Id.

¹⁰¹ See Nicholas D. Kristof, Dead Diver From North Puts Seoul on Alert, N.Y. Times, Jul. 13, 1998, at A9.

¹⁰² Id.

¹⁰³ See Reuters, South Urges Joint Inquiry on North Korea Sub, N.Y. Times, Jul. 1, 1998, at A7.

commandos and navy crewmen.¹⁰⁴ Although the commandos apparently killed the crewmen and themselves to avoid capture, evidence revealed that the commandos recently had infiltrated South Korea.¹⁰⁵

- In September 1996, a North Korean submarine carrying armed North Korean commandos ran aground in South Korea.¹⁰⁶ A massive manhunt led to the capture of twenty of these commandos in South Korean territory.¹⁰⁷ These are only some of the armed attacks that have occurred. A recent media report says that “North Korean . . . naval patrols still often cross into South Korean waters, with the South’s navy ships occasionally *484 responding with warning shots.”¹⁰⁸

All of these armed attacks would justify South Korea or its allies in taking military action in self-defense under Article 51, as South Korea in fact routinely does. Again, barring objections discussed below, this military action could include destruction of North Korea’s nuclear weapons development facilities.¹⁰⁹

In the case of North Korea, the United States might have an additional basis for using military force. In 1951, the United States went to war in North Korea with U.N. authorization¹¹⁰ and U.N. forces.¹¹¹ This armed conflict between the United States and North Korea never formally ended. Instead, the United States and North Korea merely signed an armistice that put a cease fire in place.¹¹²

Article I, paragraph 6 of the armistice says that “[n]either side shall execute any hostile act within, from, or against the demilitarized zone.”¹¹³ Paragraph 9 of the armistice says that “No person, military or civilian, shall

¹⁰⁴ Id.

¹⁰⁵ Id.

¹⁰⁶ See Nicholas D. Kristof, Koreans Kill 7 Northern Infiltrators as Manhunt Widens, N.Y. Times, Sept. 20, 1996, at A3.

¹⁰⁷ See id.

¹⁰⁸ See Le Jong-Heon, N. Korea’s Next Challenges, UPI, Oct. 13, 2006.

¹⁰⁹ See infra part VII.

¹¹⁰ See S.C. Res. 82, P 25, U.N. Doc. S/1501 (June 25, 1950); S.C. Res. 83, P 27, U.N. Doc. S/1511 (June 27, 1950).

¹¹¹ See Howard S. Levie, How it All Started--and How it Ended: A Legal Study of the Korean War, 35 Akron L. Rev. 205, 215-17 (2002).

¹¹² See id. at 222-25.

¹¹³ Korean War Armistice Agreement, July 27, 1953, U.S.-Korea, art. I, para. 6, available at <http://news.findlaw.com/hdocs/docs/korea/kwarmacr072753.html>.

be permitted to enter the demilitarized zone except . . . persons specifically authorized to enter by the Military Armistice Commission.”¹¹⁴ North Korea has violated these provisions in the past on many occasions.¹¹⁵ Its violations include many incursions by sending small groups of armed soldiers into the demilitarized zone.¹¹⁶ North Korea in fact violated the armistice in the same week that it first tested a nuclear device, with many shots fired as a result.¹¹⁷

Ideally, negotiations should settle violations of this kind. But if ***485** negotiations fail, the United States presumably could resume hostilities on grounds that North Korea has committed a material breach of the armistice.¹¹⁸ And once re-engaged in hostilities, the United States might attack North Korea’s nuclear weapons development facilities as a legitimate military target.

In conclusion, these numerous incidents show that the United States would not have to rely on a controversial reinterpretation of Article 51 to justify military action against Iran or North Korea. Both countries regularly engage in armed attacks against allies of the United States. Article 51 would allow the United States, acting in collective self-defense, to use military force to respond to these attacks. In the case of North Korea, the United States also presumably could justify military force based on a material violation of the armistice agreement if it were to occur. Once the United States has a ground for using military force against the rogue

¹¹⁴ Id. at art I, para. 9.

¹¹⁵ See Korea Demilitarized Zone Incidents, [http:// www.globalsecurity.org/military/ops/dmz-list.htm](http://www.globalsecurity.org/military/ops/dmz-list.htm) (last visited Oct. 15, 2006) (describing dozens of serious incidents in the Demilitarized Zone between 1967-2001).

¹¹⁶ See Nicholas D. Kristof, North Korean Soldiers Fire Shots in the DMZ, Seoul Says, N.Y. Times, May 18, 1996, § 1, at 3 (describing North Korean incursions into the demilitarized zone in May); Steven Erlanger, U.S. Puzzling Over Motives of North Korea in the DMZ, N.Y. Times, Apr. 9, 1996, at A1 (describing other North Korean incursions into the demilitarized zone in April); Andrew Pollack, Nuclear Fears? Korea’s Noodle Sales Say No, N.Y. Times, May 9, 1994, at A4 (describing other North Korean incursions into the demilitarized zone in April).

¹¹⁷ See Reuters, Koreas Trade Warnings over Border, N.Y. Times, Oct. 9, 2006, at A6 (reporting that South Korea fired more than 60 machine-gun rounds as warning shots after five North Korean soldiers impermissibly crossed a military demarcation line).

¹¹⁸ See Levie, *supra* note 111, at 225 (noting that in 1996, North Korea denounced the armistice. If this action constitutes a repudiation, North Korea may already be in material breach).

nation, it could direct that force against nuclear weapons development facilities as a legitimate military target, subject to limitations discussed below.

V. Precedents for Using Justified Military Force To Accomplish Greater Ends

Under the theory described above, the United States might take advantage of a legally sufficient justification to use military force (i.e., conventional armed attacks or armistice violations) to accomplish greater ends (i.e., the destruction of nuclear weapons development facilities not directly related to those attacks and violations). Two precedents support this practice. In 1989, the United States invaded Panama in response to armed attacks by the Panamanian Defense Forces, but accomplished the greater end of ousting General Manuel Noriega and restoring democracy.¹¹⁹ Similarly, when the United States and a multinational coalition invaded Iraq, they justified the action on grounds that Iraq violated the terms of a 1991 cease fire, but hoped to accomplish the greater aims of removing Saddam Hussein and preventing Iraq from deploying weapons of mass destruction. Although these actions have found many critics, they have established a principle that cannot be overlooked or easily dismissed.

*486 A. Invasion of Panama

In 1989, Manuel Noriega created a crisis in Panama.¹²⁰ He was engaged in international narcotics trafficking.¹²¹ He had nullified an election that would have put opposition presidential candidate Guillermo Endara in control of the country.¹²² Noriega had imprisoned an American citizen, Kurt Muse, who had established a clandestine radio network in Panama on behalf of the CIA.¹²³ And Noriega had made numerous hostile statements regarding the United States which raised doubts about the security of the Panama Canal and the safety of the 35,000 American citizens in Panama.¹²⁴

¹¹⁹ *United States v. Noriega*, 117 F.3d 1206, 1210 (11th Cir. 1997) (citing *United States v. Noriega*, 746 F. Supp. 1506, 1511 (S.D. Fla. 1990)), cert. denied, 523 U.S. 1060 (1998).

¹²⁰ *Noriega*, 117 F.3d at 1210.

¹²¹ See *id.* at 1209 (affirming subsequent narcotics convictions), cert. denied, 523 U.S. 1060 (1998).

¹²² See Woodward, *supra* note 4, at 84.

¹²³ *Id.* at 91.

¹²⁴ See *id.* at 187.

In response to these events, the United States decided to use military force to capture Noriega, release Muse, and restore democracy in Panama.¹²⁵ But how could the United States do that under the U.N. Charter? The Security Council was not going to authorize the use of military force, and Article 51 does not permit one country to attack another just because the latter is selling drugs, becoming undemocratic, or making aggressive comments. The answer was that the United States waited until an actual armed attack occurred. In December of 1989, Noriega's security personnel foolishly killed a U.S. service member and abused several others.¹²⁶ These incidents, President George H.W. Bush asserted, justified "deployment of U.S. Forces [as] an exercise of the right of self-defense recognized in Article 51 of the United Nations charter,"¹²⁷ and the United States promptly invaded Panama.

This event establishes a precedent for employing a right to use military force in response to an armed attack to accomplish greater ends. The attacks on U.S. personnel were deplorable, but of course they were not really the reason that the United States used force in Panama. They had nothing to do with Noriega's narcotics trafficking or election nullification. But the attacks nonetheless made the military action possible under Article 51.

The invasion of Panama, like many military actions taken by the *487 United States, was opposed by many other nations. Most significantly, by a narrow margin, the General Assembly passed a resolution condemning the Panama invasion.¹²⁸ Some international law scholars also agreed with the condemnation.¹²⁹ This history weakens the strength of the Panama precedent, but it certainly would not prevent the United States from citing the invasion in support of a military action against Iran or North Korea in response to an armed attack. General Assembly resolutions have no force

¹²⁵ Noriega, 117 F.3d at 1210.

¹²⁶ See *id.* at 156-58.

¹²⁷ H. R. Doc. No. 101-127, at 1 (2d Sess. 1990) (letter from President Bush to House Speaker Thomas Foley on Dec. 21, 1989).

¹²⁸ See G.A. Res. 44/240, P 1, U.N. Doc. A/RES/44/240 (Dec. 29, 1989).

¹²⁹ Compare Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 Colum. J. Transnat'l L. 293, 305-06 (1991) (agreeing with the General Assembly), with Abraham D. Sofaer, *The Legality of the United States Action in Panama*, 29 Colum. J. Transnat'l L. 281, 284 (1991) (concluding that "the U.S. actions were necessary, proportionate and lawful").

of law.¹³⁰ At most they have persuasive value, and in this case, the persuasive value is lessened because the United Kingdom, France, West Germany, Belgium, the Netherlands, Italy, Japan, Turkey, Israel, Canada, Australia, New Zealand and other democracies voted against the General Assembly resolution.¹³¹ In addition, France and the United Kingdom both joined the United States in vetoing a Security Council resolution that would have condemned the Panama invasion.¹³² The views of these countries (and the views of the United States) should carry great weight in determining the meaning of the U.N. Charter.

The legal reasoning that supports the United States' approach in Panama, and might support a strike on nuclear weapons development facilities, is easily stated: Article 51 recognizes that a nation may act in self-defense in response to an armed attack. Nothing in Article 51 says that the triggering armed attack must be the one and only, or even the most important, reason that a nation decides to use military force. Indeed, many nations would not use military force in response to an armed attack unless many factors besides the occurrence of the armed attack suggested that military force would be a good idea. South Korea, for example, does not attack North Korea every time North Korea lands frogmen on its beaches. Thus, the United States could respond in collective self-defense on many occasions, but for policy reasons it may choose to act only when it sees an additional need for using military force.

Opponents may feel a temptation to criticize this position as overly ***488** literal, focusing only on the language of Article 51. But opponents should remember that they are also relying on a literal reading of Article 51 when they assert that the U.N. Charter does not permit military action taken in anticipatory self-defense. If opponents say that an actual "armed attack" is necessary based on the text, they invite the response that an actual "armed attack" is sufficient based on the text (at least provided that other restrictions are satisfied, as discussed below).

B. Iraq War of 2003

¹³⁰ See *Flores v. Southern Peru Cooper Corp.*, 343 F.3d 140, 165 (2d Cir. 2003) ("General Assembly resolutions and declarations do not have the power to bind member States because the member States specifically denied the General Assembly that power after extensively considering the issue ...").

¹³¹ See Paul Lewis, *After Noriega: United Nations; Deal Is Reached at U.N. on Panama Seat as Invasion Is Condemned*, N.Y. Times, Dec. 30, 1989, § 1, at 6.

¹³² See S.C. Draft Res., PP 1-3, U.N. Doc. S/21048 (Dec. 22, 1989).

The war in Iraq in 2003 was similar in terms of its specific legal justification and the greater ends that it strived to achieve. The United States and its many allies around the world were concerned that Saddam Hussein was developing weapons of mass destruction.¹³³ They felt that military force was necessary to prevent Saddam Hussein from threatening them with nuclear or biological devices.¹³⁴ So they invaded the country and quickly ousted Hussein from power.¹³⁵

The United States and its allies clearly believed that they were taking a preemptive action to prevent the development of nuclear or biological weapons. But they did not justify the legality of the military mission on these grounds. Instead, they found a sufficient alternative: In 1991, the Security Council had authorized the use of military force against Iraq after Iraq invaded Kuwait.¹³⁶ Following Iraq's defeat and ouster from Kuwait, Iraq and the allies did not make peace.¹³⁷ Instead, they signed a cease fire agreement, under terms approved by the Security Council, which brought the immediate fighting to a close.¹³⁸ Over the following years, the Security Council determined that Iraq repeatedly violated the terms of the cease fire agreement by shooting at American planes and denying access to weapons inspectors.¹³⁹ The United States and the United Kingdom therefore asserted that this material breach by Iraq discharged their obligations under the cease-fire agreement and allowed the allied forces to recommence fighting under the original 1991 Security Council authorization.¹⁴⁰ But this *489 was just a legal justification; the motivating reason for attacking Iraq was

¹³³ Williamson Murray & Robert H. Scales, Jr., *The Iraq War: A Military History* 15-44 (2003) (discussing the origins of war).

¹³⁴ See *id.* at 42.

¹³⁵ See *id.* at 233.

¹³⁶ S.C. Res. 678, P 2, U.N. Doc. S/RES/678 (Nov. 29, 1990).

¹³⁷ S.C. Res. 687, P 1, U.N. Doc. S/RES/687 (Apr. 3, 1991).

¹³⁸ *Id.*

¹³⁹ S.C. Res. 1441, U.N. Doc. S/RES/1441 (Nov. 8, 2002).

¹⁴⁰ See Lord Goldsmith, Attorney General, *Legal Basis for Use of Force Against Iraq* (Mar. 17, 2003) (stating the formal argument used jointly by the United States and the United Kingdom), available at <http://www.number-10.gov.uk/output/page3287.asp>. A recently disclosed document revealed that Lord Goldsmith had advised Prime Minister Blair that he was "of the opinion that the safest legal course would be to secure the adoption of a further resolution to authorise the use of force" but that he did "accept that a reasonable case can be made that resolution 1441 is capable in principle of reviving the authorization in 678 without a further resolution." See Memorandum Entitled "Iraq: Resolution 1441," from Attorney General Lord Goldsmith to Prime Minister Tony Blair PP 27-28 (Mar. 7, 2003), available at <http://www.guardian.co.uk/Iraq/Story/0,2763,1472459,00.html>.

to eliminate the threat of weapons of mass destruction and to remove Saddam Hussein from power.

One factor especially notable about this incident is that the United States and the United Kingdom did not act in a disingenuous manner. They made quite clear to the world that they had a specific legal justification for using force but that they wanted to use the force to accomplish a greater end. If the United States sought to conduct a military strike on Iran or North Korea's nuclear weapons development facilities, it should act in the same manner. The United States could explain candidly that conventional attacks justified the military force, but that the goal of using force was to accomplish the greater end of destroying nuclear weapons.

VI. Likely Objections To Striking Nuclear Weapons Development Facilities In Response To Conventional Armed Attack

Two objections likely would arise if the United States attempted to justify an armed attack on a rogue nation's nuclear weapons development facilities on grounds that the rogue nation had committed a conventional armed attack or cease fire violation similar to the ones described above. The first objection might focus on the details of the armed attack or armistice violation, with opponents arguing that for one reason or another, the incident cannot serve as a predicate for the United States to use military force. The second objection might be that an attack on nuclear weapons development facilities is an impermissibly disproportionate or unnecessary military response to an armed attack or armistice violation.

A. The Predicate for Using Military Force is Insufficient

If the United States decides to strike Iran or North Korea's nuclear weapons development facilities, the United States will have to identify a specific armed attack (or alternatively in the case of North Korea a specific material violation of the armistice agreement) that justifies the use of military force. Whatever incident the United States cites, the United States can expect the U.N. and many other observers to question critically whether the incident actually justifies the use of military force under ***490** Article 51. Depending on the circumstances, opponents of the United States might raise some or all of the following seven arguments, all of which have arisen in past disputes over the use of force:

- (1) the alleged incident did not actually occur;¹⁴¹

¹⁴¹ See Nicaragua, 1986 I.C.J. at 119-21 (concluding that the United States could not use military force in collective self-defense in response to alleged cross-border incursions by Nicaragua because Honduras and Costa Rica had not explained the

(2) the United States cannot prove who was responsible for the incident;¹⁴²

(3) the incident did not cause grave harm;¹⁴³

(4) the incident was not attributable to the government of North Korea or Iran, but instead to independent terrorists or other non-governmental actors;¹⁴⁴

(5) the United States ally allegedly injured by the incident (e.g., South Korea, Iraq, or Israel) did not ask the United States to use military force in collective self-defense;¹⁴⁵

(6) the incident, even if it harmed citizens or property of the United States ally, was not really an armed attack on the territory of the ally;¹⁴⁶
or

(7) the rogue nation itself was not committing an armed attack, but instead was itself acting in self-defense.¹⁴⁷

facts of those incursions).

¹⁴² See *Oil Platforms*, 2003 I.C.J. at 189 (holding that the United States did not prove that Iran was responsible for an attack on an oil tanker).

¹⁴³ *Id.* at 191-92 (concluding that an attack on a oil tanker did not cause grave harm); *Nicaragua*, 1986 I.C.J. at 119 (concluding that Nicaragua's shipment of arms to rebels in El Salvador did not justify the United States' use of force because the shipments had not occurred on a "scale of any significance").

¹⁴⁴ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 194 (July 9) [hereinafter *Advisory Opinion*] (concluding that Israel could not use force against terrorist organization because "Article 51 of the Charter... recognizes the existence of an inherent right of self-defence [only] in the case of armed attack by one State against another State.").

¹⁴⁵ See *Nicaragua*, 1986 I.C.J. at 120 (holding that the United States could not use force in collective self-defense of Costa Rica in part because "Costa Rica made no accusation of an armed attack" but instead had emphasized its neutrality).

¹⁴⁶ See *Oil Platforms*, 2003 I.C.J. at 191 (concluding that an attack on a U.S.-flagged oil tanker was not "in itself to be equated with an attack on that State).

¹⁴⁷ For example, in March 2007, Iran captured a group of British sailors somewhere near the border of Iranian and Iraqi waters. When Prime Minister Blair ominously threatened to carry Britain's response into a "different phrase" if Iran did not release them (perhaps implying that Britain would use military force), Iran responded that the British sailors had crossed into its territory and that it was lawfully defending its borders. See Alan Cowel, *Blair Pushes Iran for Release of Captive Service Members*, N.Y. Times, Mar. 28, 2007, at A10.

***491** For example, consider the report from the New York Times (described above) that in August 2006 artillery shells were fired from Iran into remote villages in the Kurdish part of Iraq, killing two persons and injuring four others.¹⁴⁸ If the United States had invoked this incident as a basis for exercising military force under Article 51, think of the questions that critics immediately and properly would raise about the incident: Did the incident really happen as described in the newspaper account? Is the death of two persons and the injury of four others a “grave harm” to Iraq? Was the Iranian government responsible or did some non-governmentally affiliated terrorists--perhaps from Iran or perhaps from somewhere else--fire the shells? Is the United States’ proof of who was responsible sufficient? Has Iraq asked the United States to respond with military force against Iran? Was Iran perhaps not attacking Iraq, but instead responding in self-defense to attacks emanating from the Kurdish region? T h e United States must anticipate difficult questions like these and take them seriously before commencing any military action. Although Article 51 preserves the right of individual and collective self-defense, the United States cannot launch a military strike based only on incomplete information in a newspaper article. Clearly the United States would have to investigate the incident thoroughly and discover all of the available circumstances. Depending on the true facts, the United States very well may have to postpone a military strike on a nuclear weapons development facility until an incident occurs which the United States legitimately may describe as an armed attack or material armistice violation. But probably it would not have to wait very long; the list of recent events shows that Iran and North Korea constantly are taking new aggressive actions.

B. Destroying Nuclear Weapons Development Facilities Would Violate Requirements of Necessity and Proportionality

Even if the United States could show that a conventional armed attack or armistice violation gave the United States a justification for using military force, critics still might argue that a military strike on a rogue nation’s nuclear weapons development facilities would violate principles of “proportionality” and “necessity.” Article 51 does not say anything about these requirements, but the International Court of Justice has held that they apply to uses of force in self-defense.¹⁴⁹ And experience shows that ***492**

¹⁴⁸ See supra note 82 and accompanying text.

¹⁴⁹ See *Nicaragua*, 1986 I.C.J. at 103 (saying that “whether the response to the [armed] attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence”).

charges of violating these requirements often arise when a nation argues that it has used military force in self-defense.

The International Court of Justice briefly addressed proportionality and necessity in the Nicaragua and Oil Platforms cases and its Advisory Opinion concerning Israel's construction of a wall partly in the West Bank. In Nicaragua, without much explanation, the court concluded that the United States' "mining of the Nicaraguan ports and the attacks on ports, oil installations, etc." did not satisfy the requirement of proportionality.¹⁵⁰ The court further said that the United States had violated the requirement of necessity because "it was possible to eliminate the main danger to the Salvadorian Government without the United States embarking on activities in and against Nicaragua."¹⁵¹

In the Oil Platforms case, the court similarly held that the United States' use of force violated the requirement of proportionality, given the small scale of the damage caused by an alleged armed attack by Iran in comparison to the large scale of the United States' response.¹⁵² The court also ruled that the United States' action failed to satisfy the requirement of necessity because the United States had not shown a need to address the situation with force; in the words of the court, "there [was] no evidence that the United States complained to Iran of the military activities of the platforms."¹⁵³

In the Advisory Opinion, the International Court of Justice said that the doctrine of necessity prevents a nation from using force unless the force is "the only way for the state to safeguard an essential interest against a grave and imminent peril."¹⁵⁴ The court objected to Israel's building of a wall in the West Bank to prevent the penetration of terrorists into areas inhabited by Israeli citizens because the court was "not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as a justification for the construction."¹⁵⁵

¹⁵⁰ Id. at 122.

¹⁵¹ Id.

¹⁵² See Oil Platforms, 2003 I.C.J. at 198-99.

¹⁵³ Id. at 198.

¹⁵⁴ Advisory Opinion, 2004 I.C.J. at 195 (quoting Article 25 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts).

¹⁵⁵ Id.

The precedents make clear that the International Court of Justice insists on compliance with the requirements of proportionality and necessity. But the court's explanations are simply too brief to reveal the *493 exact nature of these requirements. Consequently, as Oscar Schachter has put it, "indeterminacy results from the key standards of necessity and proportionality, concepts that leave ample room for diverse opinions in particular cases."¹⁵⁶

In light of these principles, consider first whether destruction of nuclear weapons development facilities would violate the requirement of proportionality. Proportionality is violated when a nation using military force in self-defense overreacts and causes a greatly uneven amount of damage. Some observers thought that Israel's use of force in response to Hezbollah attacks in the summer of 2006 was an example. U.N. Secretary General Kofi Annan, for example, recognized that Israel had a right to act in self-defense, but he sharply criticized the Israeli response of destroying bridges and other infrastructure as being disproportionate.¹⁵⁷

Two factual questions would determine whether the United States' destruction of nuclear weapons development facilities would satisfy the requirement of proportionality. The first is the extent of the armed attack by Iran or North Korea. A larger attack clearly would justify a larger response. The second is whether the United States could destroy the nuclear weapons development facilities with only a minimum of loss of life or injury and a minimum of collateral damage to non-military targets.¹⁵⁸ If a few well-placed missiles or bombs would destroy the facilities (as was the case when Israel destroyed Iraq's Osirak reactor), the United States also would have a stronger argument in terms of proportionality.

These factual questions do not currently have answers, but some predictions are possible. Given the relentless aggression by Iran and North Korea, the United States probably would not have to wait long before one of its allies suffered a major armed attack warranting a fairly large response. In addition, given the ever-increasing accuracy of U.S. weapons,

¹⁵⁶ Oscar Schachter, *International Law in Theory and Practice* 141 (1991).

¹⁵⁷ See William Safire, *Proportionality*, *N.Y. Times*, Aug. 13, 2006, § 6, at 20 (summarizing the views of Kofi Annan and others.)

¹⁵⁸ For example, if South Korea acted in a proportionate manner when it killed 20 North Koreans by striking a torpedo boat in self-defense, see *supra* text accompanying note 96, it stands to reason that South Korea would not act disproportionately if it attacked a more important military target (i.e. nuclear weapons development facilities) at a lesser loss of life.

the United States probably could limit collateral damage, provided that the rogue nations did not disperse or hide their nuclear weapons production facilities too well. (If Iran or North Korea did successfully conceal their facilities, then the issue probably would not arise because the United States would not attempt a futile military action.)

***494** What about the requirement of necessity? Based on what the International Court of Justice has said, the question seems to be whether a military action taken by a nation in self-defense is necessary to prevent--in the words of the court in Nicaragua--the “main danger” facing that nation.¹⁵⁹ The United States most likely would argue that, regardless of what armed attack Iran or North Korea committed, the main danger that the United States and its allies face from these countries stems from their nuclear weapons development facilities. The facilities are the “peril” against which the United States would feel a need to act.

Two factual questions would be whether the threat is “imminent” and whether military force is the “only [way] . . . to safeguard” the United States against this threat, in the words of the Advisory Opinion.¹⁶⁰ The answer to these questions depends on whether diplomacy, sanctions, and other measures short of force could eliminate this danger and also on how advanced the nuclear weapons development program had become. While these questions remain unresolved, the outlook surely is pessimistic. If force becomes the only way to eliminate the threat, and the United States or its allies suffer an armed attack justifying the use of force in self-defense, then the doctrine of necessity would not pose an obstacle.

Critics might respond that this argument misunderstands the requirement of necessity. They might say that the necessity of military action taken in self-defense by a nation must be assessed in light of the immediate threat posed by the armed attack on that nation, not on more general threats. So if Iran fires mortars into the Kurdish region of Iraq, Iraq and its allies could respond to the minimal threat posed by mortar attacks, but not by Iran’s nuclear weapons development facilities.

This counter-argument warrants three responses. First, the counter-argument is not consistent with precedent. In the Panama and Iraq invasions, as discussed above, the United States military’s actions sought to accomplish ends beyond eliminating the threats posed by the incidents that triggered a right to act in self-defense. And the language in the

¹⁵⁹ Nicaragua, 1986 I.C.J. at 365.

¹⁶⁰ Advisory Opinion, 2004 I.C.J. at 195.

Nicaragua case stands against it. Destroying the “main danger” posed by an enemy is necessary, the International Court of Justice reasoned in Nicaragua, although destroying other, lesser military targets may not be necessary.¹⁶¹

Second, Article 51 concerns the future, not the past. The article is not a license to respond in retaliation; instead, the article recognizes an inherent right to respond in self-defense. Once mortars have landed, they pose no further threat. But they show that the enemy who fired them has commenced an armed conflict. For this reason, the victim and its allies should have the right to use military force in response so long as the force is proportional and necessary for overcoming the “main danger” against them.

Finally, the counter-argument would lead to absurd results. It would suggest that a nation could never destroy nuclear weapons development facilities until it suffered an actual nuclear weapon attack—even if the nation suffered non-nuclear armed attacks that would justify using force in self-defense under Article 51. But as the White House correctly argues in the NSS 2002, waiting until an atomic explosion has occurred is clearly waiting too long.

In sum, the U.N. Charter may prohibit military strikes in anticipatory self-defense when no armed attack has occurred. But it does not prohibit striking back in a proportional manner against the “main danger” after the actual armed attack has occurred. If the U.N. Charter did contain a restriction of this kind, then certainly the United States and its allies could not adhere to it in its present form.

Conclusion

This article has presented a theory for how the United States might justify military strikes aimed at destroying a rogue nation’s nuclear weapons facilities under the U.N. Charter. The United States would not have to rely on a controversial interpretation of Article 51 that would permit actions in self-defense even if an armed attack has not already occurred. The basis for this position is simply stated: Nations like Iran and North Korea constantly are engaging in actual armed attacks and other aggression that by themselves justify the use of military force. The United States might cite one of these armed attacks as a ground for using military force and, in using that force, could destroy nuclear weapons development facilities. Indeed, although I think that the chances that the United States

¹⁶¹ Nicaragua, 1986 I.C.J. at 365.

actually will use preemptive force are slim, I predict that if the United States ever does strike Iran or North Korea, it will advance in one form or another the arguments presented in this paper.¹⁶²

***496** But this essay has claimed only that the United States could advance a legal justification for attacking a rogue nation's nuclear weapons facilities. It has not suggested that the United States should take this action. The United States has other options, including sanctions and diplomacy, which may promote the cause of peace better. However dangerous allowing Iran or North Korea to acquire nuclear weapons may be, the alternative of starting a war with these countries might be worse. But Iran, North Korea and other so-called rogue nations still should rethink whether they should continue to engage in armed attacks on United States allies when those attacks expose them to a military response under Article 51.

¹⁶² See U.N. Charter art. 51. Where would the United States make this legal argument? Article 51 requires a nation that uses military force in self-defense to inform the Security Council. If the United States uses force against Iran or North Korea, I predict that the United States at a minimum would send a communication to the Security Council saying that it acted under Article 51 in collective self-defense in response to an armed attack. A preemptive strike under any circumstances would be very controversial. Attempting to justify an attack on grounds of anticipatory self-defense rather than collective self-defense in response to a conventional attack would simply increase the controversy.