

HOW NUCLEAR WEAPONS CHANGE THE DOCTRINE OF SELF-DEFENSE

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Motivated by the fact that the only guarantee against the risk of nuclear war is the complete disarmament of nuclear weapons and operating on the premise that nuclear weapons are illegal, this Note offers a modified interpretation of preventive self-defense as it pertains to the nuclear threat. This Note argues that the international community should evaluate Article 2(4) of the United Nations Charter in light of Article 51 of the Charter and in light of the illegality of nuclear weapons to allow certain states to take preventive action to stop nuclear proliferation, if they meet specific criteria.

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I. INTRODUCTION

Current non-proliferation treaties and norms lack sufficient legal justification for attacking nuclear facilities being built by states that would illegally develop nuclear weapons. States rely on the doctrine of self-defense to justify destroying those nuclear facilities, but the self-defense doctrine, as currently interpreted, does not permit such actions. Because “the complete elimination of nuclear weapons is the only guarantee against the threat of nuclear war”¹ and because nuclear weapons pose unmatched threats to humanity, the doctrine of self-defense as it relates to nuclear proliferation must be reinterpreted to address more adequately the threat of nuclear weapons and to encourage states to meet their non-proliferation and disarmament obligations.

International law, articulated in Article 51 of the United Nations Charter (“the Charter”), permits use of force for self-defense.² Article 51 provides an exception to the general prohibition on use of force found in Article 2(4) of the Charter, which prohibits force except when authorized by the Security Council.³ Therefore, absent Security Council authorization, self-defense is the only legally justified use of force under international law. However, international law recognizes and allows use of force in preemptive self-defense—sometimes also called anticipatory self-defense—when a threat is imminent.⁴

1. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 228 (July 8) [hereinafter ICJ Nuclear Opinion] (citing the U.N. General Assembly request for this advisory opinion).

2. See U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”).

3. See *id.* art. 2, ¶ 4 (“All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

4. See Guy B. Roberts, *The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction*, 27 DENV. J. INT’L L. & POL’Y 483, 505–06 (1999) (stating that the *Caroline* criteria of “instant, overwhelming, and leaving no choice of means, and no moment for deliberation” remain the standard for analyzing the right of self-defense).

Without Security Council authorization, it is illegal to use force against threats that are not imminent.

It is important to clearly distinguish between preemptive or anticipatory self-defense, which is generally accepted, and preventive self-defense, which is more controversial, and generally thought to be illegal.⁵ A preemptive strike is action taken in response to an imminent, already-materialized threat (e.g., if enemy troops are amassing along one's border).⁶ A preventive strike is action taken to eliminate potential military capability before the threat has actually materialized (e.g., a threatening state has developed the ability to enrich uranium to the level needed for use in nuclear weapons).⁷ Preventive strikes are illegal because they violate two major requirements of self-defense: imminence of the threat and necessity.⁸ If the threat is not imminent, there is still time to deliberate and potentially resolve a conflict peacefully, which is always preferable to resorting to violence. Moreover, when the threat is not imminent, it is very difficult to prove that the attack was actually a necessity.⁹ Given the strict limitation on legal use of force, states often try to characterize their forceful action as preemptive self-defense, even absent an imminent threat. However, preserving a clear distinction between preemptive and preventive self-defense is important for maintaining strict limits on the use of force. The Charter was largely devised to ensure peaceful order amongst nations, but the slow, sloppy expansion of the term "preemptive self-defense" to include preventive self-defense, unless carefully circumscribed, threatens international stability.

Nuclear weapons, however, create strong incentives for other states to use force before threats meet the traditional legal requirement of imminence.¹⁰ Once a state has a nuclear

5. *See id.* at 485 n.3 (describing the distinction between a "preventive strike" and a "preemptive strike").

6. *Id.*

7. *Id.*

8. *See* ANTHONY AUST, *HANDBOOK OF INTERNATIONAL LAW* 209–10 (2d ed. 2010) (describing, inter alia, the imminent and necessary requirements of lawful self-defense).

9. *See id.* at 210 ("The more imminent the attack, the more cogent will be the legal basis for the use of force.").

10. Though there is some discretion in its application, a threat is "imminent" if it is about to happen or expected to occur at any time. *Id.* at 210.

weapon, the threatened state's ability to use preemptive or preventive self-defense decreases drastically because the risk of a nuclear exchange has drastically increased. States often claim that destroying nuclear facilities is permissible as an act of preemptive self-defense. However, such acts are actually preventive self-defense because the threat is not yet imminent; therefore such self-defense would be illegal under current international law. Forgoing the imminence standard may be necessary to address threats from nuclear weapons while also preserving the general prohibition on the use of force when threats are non-nuclear.¹¹

Complicating the determination of whether a threat is imminent is the difficulty of distinguishing illegal nuclear activities from legal ones. Because the Nuclear Non-Proliferation Treaty (NPT) gives all states the right to peaceful nuclear technology, not all nuclear activities are illegal.¹² Nuclear technology has important uses in medicine, power generation, food production, and development. Much of the technology used for peaceful purposes is similar to the technology used for military purposes, making detection of illegal nuclear activities difficult once a state has peaceful nuclear facilities. Therefore, the non-proliferation regime must be fine-tuned to ferret out illegal nuclear technology, without stopping legal peaceful uses.

International law is inadequate to address the nuclear weapon threat in large part because preventive self-defense is generally considered illegal, and preemptive self-defense is only legal once it is too late—at least concerning nuclear weapons. The late Thomas M. Franck well understood that

11. See Mark L. Rockefeller, *The "Imminent Threat" Requirement for the Use of Preemptive Military Force: Is it Time for a Non-Temporal Standard?*, 33 *DENV. J. INT'L L. & POL'Y* 131, 140 (2004) (arguing that the modern diminished time gap between learning of an attack and feeling its impact requires a new standard); THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 4 (2002) (mentioning that with modern weaponry, current self-defense law "seems to require a state to await an actual attack on itself before instituting countermeasures").

12. See Treaty on the Non-Proliferation of Nuclear Weapons, art. IV, ¶ 1, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT] ("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 without discrimination and in conformity with Articles I and II of this Treaty.").

new weapon technology and delivery systems make parts of Article 51 of the Charter “obsolete.”¹³ Franck points out that Article 51 results in *reductio ad absurdum* in two ways—in requiring a state to wait until attacked to protect itself and in allowing each state to determine “for itself when to initiate the use of force in ‘anticipation’ of an attack”—so that nothing is left of Article 2(4) and Article 51.¹⁴ But, amending the Charter is very difficult.¹⁵ Therefore, to address both occurrences of *reductio ad absurdum*, the international community should reinterpret Article 2(4)’s application to nuclear proliferation in light of three things: first, the international legal obligations for all states to disarm; second, Article 51’s authorization to use force in self-defense; and third, the extremely grave threat posed by nuclear weapons.

Continued failure to address shortfalls of current non-proliferation law and the international prohibition on the use of force hurts the international legal regime in two ways. First, international law is undermined by international leaders who believe that unilateral military action is necessary and morally justified, regardless of its legality.¹⁶ Currently, heads of state use the inadequacy of international legal institutions to address the nuclear weapon threat as a justification for violating the international prohibition on the use of force. By structuring the law to accommodate the needs of state security, reinterpreting Article 2(4) would encourage greater respect for and adherence to international law because international law would no longer be seen as an impediment to protecting one’s nation from nuclear weapons.

Second, the international legal regime is hurt by states that violate their non-proliferation and disarmament obliga-

13. FRANCK, *supra* note 11, at 4.

14. *Id.*

15. See Yehuda Z. Blum, *Proposals for UN Security Council Reform*, 99 AM. J. INT’L L. 632, 648 (2005) (noting that the “infrequency” of amendments to the U.N. Charter is a result of the Charter’s “rigid” nature and “cumbersome” amendment procedure).

16. See David Sloss, *Forcible Arms Control: Preemptive Attacks on Nuclear Facilities*, 4 CHI. J. INT’L L. 39, 54 (2003) (“[W]here political leaders believe that unilateral military action is both necessary and morally justified, they will authorize the use of armed force regardless of whether it is legally prohibited.”).

tions under customary international law and the NPT.¹⁷ Though only a handful of states have nuclear weapons or are seeking to develop nuclear weapons, the actions of those states can seriously impact the effectiveness and perceived legitimacy of the non-proliferation regime. As Guy B. Roberts, senior legal advisor for the U.S. Southern Command, explains, “[o]ver time, if some countries are perceived to be able to violate with impunity their non-proliferation obligations, the credibility of the overall legal regime will erode.”¹⁸ The threat from nuclear weapons is too great to allow the non-proliferation regime to become obsolete. Even one more country with nuclear weapons greatly undermines international security. Greater enforcement of the NPT and customary international law would strengthen the non-proliferation regime and restore faith in international legal institutions.

This Note proposes reinterpreting Article 2(4)¹⁹ of the United Nations Charter in light of Article 51,²⁰ to provide states with legal justification for preventive self-defense strikes on nuclear facilities if the following criteria are met:

- (1) The nuclear activity must be in violation of international law;
- (2) The state acting in self-defense (“attacking state”) must be *specifically* threatened by the proliferating state;
- (3) The attacking state must be in compliance with its non-proliferation obligations, including good faith attempts to reduce its own nuclear stockpile; and

17. The NPT has 189 states parties. See *Status of the Treaty: Treaty on the Non-Proliferation of Nuclear Weapons*, UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS (Apr. 9, 2012, 4:30 PM), <http://disarmament.un.org/treaties/t/npt?OpenView> (listing the current parties to the NPT). The NPT’s three pillars are non-proliferation, disarmament, and peaceful use of nuclear technology. See generally NPT, *supra* note 12 (laying out the nonproliferation obligations of states parties).

18. Roberts, *supra* note 4, at 501.

19. U.N. Charter art. 2, ¶ 4 (“All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

20. *Id.* art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”).

- (4) The attacking state must have first presented its case to the U.N. Security Council, which then failed to act. This fourth prong is met when the Security Council is seized of the issue but fails to take a vote, or if a proposed resolution authorizing use of force receives nine of fifteen votes, regardless of whether any permanent member vetoes the resolution.²¹

Certainly, this proposal has its drawbacks because of the difficulty in detecting proliferation and in enforcing non-proliferation obligations. While imperfect, the proposal would be better than the status quo, and better than many of the suggested alternatives. This Note does not purport to be a panacea for everything wrong with international non-proliferation law, but may provide useful insights for anyone considering the legality of nuclear weapons and how to respond to the nuclear threat.

This Note begins with an explanation of current international law and then discusses its shortcomings in Section II. Section III outlines how nearly all states are obligated not to proliferate by at least one treaty, and how those that are not parties to such treaties are nonetheless bound under customary international law against proliferation. Section IV looks at other proposals that address self-defense and nuclear weapons. Section V presents this Author's proposal, evaluates its four criteria, and discusses deterrence and the difficulty of proving whether a country is proliferating. In Section VI, the proposed standard is applied to the only two previous military strikes on nuclear reactors, Osirak, Iraq and Al Kibar, Syria, and is then applied to a potential attack on Iranian nuclear facilities.

II. CURRENTLY, INTERNATIONAL LAW AND RELATED INSTITUTIONS ARE INADEQUATE TO ADDRESS THE THREAT FROM NUCLEAR WEAPONS

Under current international law, the U.N. Security Council has exclusive authority to determine whether use of force is permissible. The Security Council's authority comes from the U.N. Charter, which also governs the use of force and self-de-

21. Currently, Security Council decisions on procedural issues require only nine of fifteen votes in order to pass. Substantive issues require at least nine votes with all permanent members in favor. *Id.* art. 27.

fense for all countries through Article 2(4) and Article 51. Article 2(4) prohibits use of force, unless such force falls under the self-defense exception of Article 51.

The UN Charter continues to apply to nuclear issues, but is supported by a body of nuclear law and the watchful eyes of the International Atomic Energy Agency (IAEA).²² The IAEA is the organization tasked with verifying compliance with the NPT.²³ If the IAEA suspects that there is an NPT violation, the IAEA then reports to the Security Council, which can, in theory, compel compliance. Therefore, the Security Council ultimately has the responsibility for enforcing non-proliferation. Unfortunately, the Security Council does not always perform this task well.

A. *The United Nations Security Council Is Ineffective at Stopping Nuclear Proliferation*

The U.N. Security Council is ineffective at combating threats from nuclear weapons.²⁴ To date, the Security Council has never authorized the use of force solely in response to proliferation concerns.²⁵ The lack of action from the Security Council is likely due to its structure, where any permanent member can veto a Security Council resolution.²⁶ One permanent member can prevent any substantive resolution from passing, even if a majority of permanent and non-permanent members support the resolution. Frequently, a permanent member has close economic or political ties with the nation whose proliferation has raised international concerns, making

22. See NPT, *supra* note 12, art. 3, ¶ 1 (requiring that each non-nuclear weapon state party to the treaty accept safeguards negotiated with the IAEA).

23. See *id.* (providing that the safeguards accepted by non-nuclear-weapon states are “for the exclusive purpose of verification of the fulfillment” of obligations under the NPT).

24. See Roberts, *supra* note 4, at 484 (“Regrettably, the prevailing patterns of statecraft and the fundamental change of circumstances in the past fifty years have created a radically different world from the one of the Cold War, so that the current legal constructs so optimistically and idealistically enshrined in the 1945 U.N. Charter are unworkable. A new paradigm is essential if we are to successfully meet the challenge of the [weapons of mass destruction] threat.”).

25. Matthew Lund, *The Eighty Percent and Twenty Percent Solutions to Nuclear Proliferation*, 2009 BYU L. REV. 741, 757 (2009).

26. The five permanent members are the United States, Great Britain, Russia, China and France. U.N. Charter art. 23.

the permanent member hesitant to take action against the violator. Thus, the resolutions that actually pass tend to be watered down to “the lowest common denominator”²⁷ among the permanent members. The resolutions lack enforcement and true repercussions for states violating non-proliferation obligations.

Some examples of instances where the Security Council members pursued their own self-interest at the expense of the greater good follow. Prior to the Gulf War, France and Russia opposed Security Council resolutions calling Iraq into compliance with previous Security Council resolutions because such action would hurt France’s and Russia’s economic interests in the region.²⁸ In another example, China has until recently refused to implement the tough sanctions necessary to bring Iran to the bargaining table because China’s missile technology trade with Iran is lucrative.²⁹ Unfortunately, the post-World War II “euphoric internationalism” that led to the creation of the United Nations has not always supported the necessary concerted action even in the face of grave threats posed by nuclear proliferation.³⁰

The Security Council’s structural design also causes confusion about the state of international law. Members’ self-interested behavior has established inconsistent practice. For example, when Israel bombed Iraq’s nuclear reactor at Osirak in 1981, the Security Council unanimously condemned the attack in Resolution 487.³¹ However, when the United States

27. Lund, *supra* note 25, at 757.

28. See Kristen E. Eichensehr, Comment, *Targeting Tehran: Assessing the Lawfulness of Preemptive Strikes Against Nuclear Facilities*, 11 UCLA J. INT’L L. & FOREIGN AFF. 59, 81 (2006) (explaining France and Russia’s reticence to endorse Security Council resolutions against Iraq).

29. See Miles A. Pomper & Cole J. Harvey, *Beyond Missile Defense: Alternative Means to Address Iran’s Ballistic Missile Threat*, ARMS CONTROL TODAY, Oct. 2010, at 16, 18 (explaining that, despite recent reforms in China’s export laws, Chinese companies have continued assisting Iran with its ballistic missile program, compelling the U.S. government to issue sanctions against those companies). In spring 2010, the Security Council managed to pass tough sanctions on Iran. See *id.* at 19 (describing the passage of S.C. Res. 1929).

30. See Eichensehr, *supra* note 28, at 82 (“[E]uphoric internationalism . . . faded from memory in the Cold War and has not been recaptured for the purposes of concerted action [since]. . .”).

31. S.C. Res. 487, ¶ 1, U.N. Doc. S/RES/487 (June 19, 1981).

and United Kingdom bombed biological and chemical weapons facilities in Iraq in 1998, the Security Council remained silent.³² While some authors may see this silence as tacit approval of the use of preventive self-defense without a demonstration of the imminence of the threat,³³ such silence could be attributed to the self-interest of the United States and United Kingdom, both permanent members of the Security Council that have no incentives to condemn their own actions.

There is a general lack of faith in the Security Council's efficacy, as evidenced by Israel's bombing of the Al Kibar nuclear reactor site in Syria in 2007.³⁴ Israel did not even bring its intelligence about Syria's reactor to the IAEA or the Security Council.³⁵ Israel probably hoped to avoid starting a game of diplomatic ping-pong between Syria and the Security Council, like the back and forth between Iran and the Security Council regarding Iran's nuclear program. Israel presumably felt³⁶ that it was too vulnerable to wait for assertive, forceful action from the Security Council that was, empirically, not going to come.³⁷ The Security Council's reluctance (or inability) to act has eroded faith in the Security Council and international law. States use the Security Council's poor enforcement of non-proliferation law as an excuse to resort to the use of unilateral force.

32. Rockefeller, *supra* note 11, at 134–35.

33. *See id.* (arguing that the Security Council gave tacit approval for the preemptive strike).

34. *See* Lund, *supra* note 25, at 769 (“As can be seen by Israel’s raid . . . Israel continues to believe that the formal mechanisms of nuclear non-proliferation are not adequate protection.”).

35. *See* Leonard S. Spector & Avner Cohen, *Israel’s Airstrike on Syria’s Reactor: Implications for the Nonproliferation Regime*, ARMS CONTROL TODAY, July–Aug. 2008, at 15, 17 (stating that “the matter was not brought up for debate at the U.N. Security Council,” nor was information provided to the IAEA “in a timely matter”).

36. Israel has generally remained silent on the issue, leaving the international community to speculate as to its motivation. *See, e.g., id.* (noting a “pattern of silence” after the strike).

37. *See* Lund, *supra* note 25, at 757 (explaining that the Security Council has never authorized the use of force to address an issue solely concerning proliferation).

B. *The Current Doctrine of Preemptive Self-Defense Is Insufficient To Address the Unique Threat and Moral Indefensibility of Nuclear Weapons*

It is uncontroversial that Article 51 allows states to act in the name of self-defense in the event of an armed attack.³⁸ First explained in 1841, the *Caroline* standard sets out the criteria for justified self-defense.³⁹ Then-U.S. Secretary of State Daniel Webster explained that for self-defense to be legitimate the threat must be “instant, overwhelming, leaving no choice of means, and no moment for deliberation.” The defending state may use only the degree of force necessary to repel the threat, and none more.⁴⁰ Though this statement was made before the drafting and ratification of the Charter, the International Court of Justice (“ICJ” or “the Court”) has recognized the three criteria from the *Caroline* standard—namely, imminence, necessity, and proportionality⁴¹—as the required elements of self-defense under customary international law.⁴²

Though there is some discretion in application of the imminence requirement, a threat is “imminent” if it is about to happen or expected to occur at any time.⁴³ Unfortunately, the current definition of imminence is inadequate to address the threat from nuclear weapons because it cannot account for the nature of the nuclear threat. When one state is illegally developing nuclear weapons, requiring another state to wait until the illegal nuclear bomb is functional requires waiting until it is too late.⁴⁴ Given the hugely destructive potential of nuclear

38. See U.N. Charter art. 51.

39. Aust, *supra* note 8, at 209.

40. *Id.*

41. See Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT'L L. 513, 529 (2003) (summarizing the *Caroline* criteria).

42. See *id.* at 530 (explaining that the *Caroline* standard has become universally accepted and has been applied by the ICJ); see also Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 103 (June 27) [hereinafter ICJ Military Opinion] (listing imminence, necessity, and proportionality as relevant to the legality of self-defense); Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 183 (Nov. 6) (“[T]he criteria of necessity and proportionality must be observed if a measure is to be qualified as self-defence.”).

43. AUST, *supra* note 8, at 210.

44. See Sloss, *supra* note 16, at 53–54 (“[I]f a state waits until the threat of a nuclear attack is imminent, a preemptive attack against the adversary’s nuclear facilities is unlikely to be an attractive military option.”).

weapons, it has been argued that the production of highly enriched uranium or separated plutonium⁴⁵ by an adversary is a “significant threat” that justifies the defensive use of force before a threat is imminent.⁴⁶ Though some argue that the UN recognizes the legitimacy of destroying nuclear facilities in preventive self-defense⁴⁷ prior to the creation of a nuclear weapon, such acts have met with mixed responses from the international community. The mixed responses arise because plutonium production and uranium enrichment are not threats in and of themselves, and as indirect threats, they are not *imminently* threatening in the traditional sense.⁴⁸ For this reason, the traditional imminence requirement of self-defense must be relaxed to compensate for the unique threat posed by nuclear weapons,⁴⁹ and can be replaced with other limits on the use of preventive self-defense. These limits will be discussed further in Section V.

45. Both reprocessing spent nuclear fuel, which results in separated plutonium, and enriching uranium to high levels are processes considered to be beyond what is necessary for civilian purposes, and are often seen as indications that a country has military nuclear goals. See Peter Crail, *Iran to Boost 20%-Enriched Uranium Output*, ARMS CONTROL TODAY, July/Aug. 2011, at 25 (discussing concerns regarding Iran enriching uranium to 20% or higher, which could be for military purposes); see also Frank N. von Hippel, *South Korean Reprocessing: An Unnecessary Threat to the Nonproliferation Regime*, ARMS CONTROL TODAY, Mar. 2010, at 22 (explaining that other states are wary of Japan’s fuel reprocessing plant because it creates separated plutonium that could quickly be turned into a nuclear bomb).

46. See Sloss, *supra* note 16, at 54 (noting that commentators have proposed relaxing the imminence requirement under these circumstances); see also Rockefeller, *supra* note 11, at 140 (arguing that the traditional definition of imminence must be refined to take into account the nature of nuclear weapons).

47. See Roberts, *supra* note 4, at 513 (explaining interpretations of preemptive self-defense offered by Myres McDougal and Sir Humphrey Waldock, and concluding that “[w]hatever interpretation one may take, it is undisputed that the practice of most member states since the Charter was adopted has been to recognize acts of anticipatory self-defense as legitimate.”).

48. See Spector & Cohen, *supra* note 35, at 15 (questioning the intention of the international community in light of the “appear[ance] that the Syrian reactor did not pose an imminent threat to Israel . . .”).

49. Sloss, *supra* note 16, at 54; Rockefeller, *supra* note 11, at 139–40.

C. *The Inadequacy of International Legal Institutions To Address the Nuclear Weapon Threat Encourages States To Violate International Law by Proliferating and Using Force Unilaterally*

States, such as Israel,⁵⁰ currently abuse the preemptive self-defense doctrine, while others, such as North Korea and possibly Iran, are proliferating illegally. These two phenomena go hand-in-hand and both undermine international legal institutions. Unfortunately, many states are convinced that their national security interests can only be protected by resorting to unauthorized, unilateral force, which is a clear violation of the Charter.⁵¹ States are likely to conclude that preventive use of force is necessary to counter nuclear threats because the Security Council and the IAEA do not adequately address the security threat posed by nuclear proliferation.⁵² Because the IAEA is reliant on the Security Council for enforcement,⁵³ when the Security Council is not functioning as it is intended, the NPT is under-enforced⁵⁴ and states may feel compelled to take the law into their own hands.

The under-enforcement of laws decreases confidence in the law and perception of the law's validity, while it increases antagonism toward the law and thereby results in non-compliance with the "reason-offending rules."⁵⁵ An erosion of confidence in international law threatens to undo the peace and stability created by the Charter following World War II, and threatens the non-proliferation regime by creating more space

50. For example, Israel bombed the Syrian reactor without bringing the issue to the attention of the IAEA or the Security Council. Spector & Cohen, *supra* note 35, at 17.

51. See Daniel H. Joyner, *Jus Ad Bellum in the Age of WMD Proliferation*, 40 GEO. WASH. INT'L L. REV. 233, 246 (2008) ("[A] significant number of states now believe that their vital national security interests require them to act in a manner that is in breach of the laws governing international uses of force laid down in the U.N. Charter.").

52. See *id.* at 246–47 (arguing that states will increasingly reject "classic strategies" of nonproliferation as inadequate, and instead adopt policies of preemptive use of force).

53. Under the NPT, the role of the IAEA is limited to "verification of the fulfillment of [states'] obligations." NPT, *supra* note 12, art. III, ¶ 1.

54. See Roberts, *supra* note 4, at 501 ("[T]he lack of credible and effective response to non-compliance with countries' obligations under the NPT . . . stands out in any assessment . . .").

55. Joyner, *supra* note 51, at 247.

for illegal proliferation. Though the drafters of the Charter have been called “optimistic and idealistic,”⁵⁶ the values enshrined in the Charter—peaceful conflict resolution and collective action—should not be tossed aside; a reinterpretation of the Charter and Security Council procedures is essential to meet the challenges of nuclear proliferation.⁵⁷

Actions by North Korea, Syria, and Iraq all illustrate the IAEA’s and the Security Council’s inability to ensure that states use nuclear material only for peaceful purposes. North Korea shocked the world when it withdrew from the NPT, and then shook the Korean peninsula twice when it tested its first and second nuclear weapons.⁵⁸ Syria’s nearly completed secret reactor at Al Kibar undermined the world’s faith (or at least Israel’s) in the non-proliferation regime’s ability to detect illicit proliferation activities.⁵⁹ Likewise, Iraq had a secret illegal nuclear weapons program prior to the Gulf War,⁶⁰ despite Iraq’s good standing with the IAEA.⁶¹

The aforementioned cases are examples of both the failure to detect violations and failure to compel compliance. Even with improvements to enforcement mechanisms, detection will likely continue to be the weak link in the non-proliferation regime given the dual-use nature of much nuclear technology. But, as enforcement improves and faith is restored in international institutions, it is possible that countries will be more willing to share intelligence about potential proliferation violations; through international collaboration, detection

56. See Roberts, *supra* note 4, at 484 (“[T]he prevailing patterns of statecraft and the fundamental change of circumstances in the past fifty years have created a radically different world from the one of the Cold War, so that the current legal constructs so optimistically and idealistically enshrined in the 1945 U.N. Charter are unworkable.”).

57. See *id.* at 484–85 (arguing that a “new paradigm” that is “fully consistent with the purposes of the Charter” is necessary).

58. See Lisa Tabassi, *The Nuclear Test Ban: Lex Lata or de Lege Ferenda?*, 14 J. CONFLICT & SEC. L. 309, 310 (2009) (describing the DPRK’s nuclear tests and withdrawal from the NPT).

59. See Spector & Cohen, *supra* note 35, at 19 (noting Israel’s lack of faith in the IAEA).

60. See JOSEPH CIRINCIONE ET AL., *DEADLY ARSENALS: NUCLEAR, BIOLOGICAL, AND CHEMICAL THREATS* 329 (2d ed. 2005) (“[Iraq’s] nuclear program begun in the 1970s almost certainly ended in 1991.”).

61. See Spector & Cohen, *supra* note 35, at 16 (noting that at the time of the strike, Iraq was “an NPT signatory state in good standing”).

could significantly improve. However, unless states feel confident that sharing of intelligence will result in greater non-proliferation enforcement, states will not cooperate with one another. Any proposed solution must increase faith in the non-proliferation enforcement mechanisms, which is an aim of this Note's proposal, as explained in Section IV.

III. CUSTOMARY INTERNATIONAL LAW AND TREATIES CREATE LEGAL OBLIGATIONS ON STATES TO DISARM

Perhaps the most important analysis of international nuclear law comes from the ICJ Nuclear Opinion in 1996, which was written after the General Assembly asked the ICJ to issue an advisory opinion on the legality of nuclear weapons. Though many hoped the ICJ would clarify the issue, that did not happen. The Nuclear Opinion frustratingly goes on for pages without reaching a conclusion about the legality of nuclear weapons. Though the ICJ hesitated to say that the use or threat of use of nuclear weapons in itself is a violation of international law, the underlying tone of the opinion is that nuclear weapon use would violate many international obligations, such as the Geneva Conventions⁶² and environmental treaties.⁶³ The ICJ was unable to think of any instance where the use of nuclear weapons would be permissible, but also refused to say that such a situation would never occur.⁶⁴ The ICJ stopped short of finding nuclear weapon use illegal, despite the fact that the logic of the ICJ's arguments supported such a conclusion. The following section takes the ICJ's arguments to

62. See ICJ Nuclear Opinion, *supra* note 1, ¶¶ 74–87 (stating that humanitarian law, which prohibits both the use and threat to use certain types of weapons that have an indiscriminate effect on civilians and combatants, applies generally to nuclear weapons).

63. See *id.* ¶ 33 (“[W]hile the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict.”).

64. See *id.* ¶ 95 (“[T]he use of [nuclear] weapons . . . seems scarcely reconcilable with respect for [international humanitarian law]. Nevertheless, the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.”).

their logical conclusion—the conclusion that nuclear weapons are illegal whether or not a state is party to the NPT or other treaties—and will ultimately make a case for preventive self-defense to stop nuclear proliferation in light of the weapons' illegality.

A. *The Unique Immorality and Destructive Power of Nuclear Weapons Make the Weapons Themselves a Threat to Peace, in Violation of International Law*

To create a workable standard that allows preventive use of force within the scope of Article 2(4) and Article 51 of the Charter, it is paramount to limit the use of such force so that it aligns with the Charter's object and purpose of maintaining peace and security. The awesome destructive power of nuclear weapons creates the need to reinterpret the traditional self-defense doctrine to help rid the world of these weapons that "cause untold human suffering" and "damage to generations to come."⁶⁵

In large part, the illegality of nuclear weapons stems from the immorality of their use. The laws of war originated from moral beliefs about what was justified behavior during war-time.⁶⁶ It is a well-settled principle of the laws of war that the means of warfare must distinguish between civilian and military targets. The ICJ's Nuclear Opinion said that the use of nuclear weapons "seems scarcely reconcilable" with the customary international law requirement that war tactics not harm civilians and not result in unnecessary suffering to the combatants.⁶⁷ Whether or not there are specific laws prohibiting nuclear weapons use, the use of nuclear weapons is "mor-

65. ICJ Nuclear Opinion, *supra* note 1, ¶ 36 ("[I]t is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come.").

66. See DANIEL S. ZUPAN, *WAR, MORALITY, AND AUTONOMY: AN INVESTIGATION IN JUST WAR THEORY* 17 (2004) ("[I]t is undeniable that there has been a strong, persistent movement throughout human history to understand war in moral terms, make moral judgments about war, and impose restrictions in the name of justice upon the conduct of war.").

67. ICJ Nuclear Opinion, *supra* note 1, ¶ 95.

ally indefensible”⁶⁸ because of the threat nuclear weapons pose to all humanity.

Nuclear weapons are uniquely perilous. As President John F. Kennedy said, “Nuclear weapons are so destructive and ballistic missiles are so swift that any . . . sudden change in their deployment may well be regarded as a definite threat to peace.”⁶⁹ Moreover, nuclear weapons are unlike any other weapons. Professor David Sloss of Saint Louis University School of Law explains the impact of nuclear weapons on a country’s military capability:

Imagine a graph with a vertical axis that measures the potential threat a state poses to its adversaries, and a horizontal axis that measures various military capabilities. If the horizontal axis measured conventional weapons capabilities, the graph would show a line that sloped gently upward. A graph portraying biological and/or chemical weapons capabilities would have a similar appearance, except that the line would have a steeper slope, and the transition from zero weapons to one weapon would show a significant discontinuity. But if the graph depicted a state’s nuclear weapons capability, the transition from zero to one weapon would show a much greater discontinuity. In short, the acquisition of a single nuclear weapon by a state that previously possessed no such weapon constitutes a quantum leap in military capacity that is unlike any other single technological development.⁷⁰

68. R. Jeffrey Smith, *Retired Nuclear Warrior Sounds Alarm on Weapons*, WASH. POST, Dec. 4, 1996, at A01 (quoting Air Force Gen. George Lee Butler, formerly responsible for Air Force bombers carrying 2,800 warheads as commander in chief of the Strategic Air Command, who explains that the U.S. nuclear policy is “fundamentally irrational”).

69. President John F. Kennedy, Address to the American Public: The Soviet Threat to the Americans (Oct. 22, 1962), *quoted in Roberts, supra* note 4, at 483.

70. Sloss, *supra* note 16, at 44–45; *see also Roberts, supra* note 4, at 487–88 (“[Nuclear weapons are] a threat qualitatively different from conventional weapons because of [their] potential to do extreme damage, physical and psychological, with a single strike.”). While Sloss argues for a new legal regime of preventive self-defense against all types of weapons of mass destruction (WMDs), this Note argues just for preventive use of force regarding nuclear proliferation.

Sloss finds that the international community could conclude that the acquisition of a nuclear weapon by a state that previously did not have one is a threat to international peace and security, as defined by the Charter.⁷¹

B. *Nearly Every State Is Obligated Not To Proliferate
By At Least One Treaty*

The Nuclear Non-Proliferation Treaty is the cornerstone of the international non-proliferation and disarmament regime. The NPT clearly indicates that all states are ultimately required to disarm. By signing the NPT, all 189 states parties⁷² declared “their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament.”⁷³ The NPT’s requirement that state parties must disarm was reaffirmed at the May 2010 NPT Review Conference, when the nuclear weapons states restated in the final conference document their “unequivocal undertaking to accomplish . . . the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all States parties are committed under article VI of the Treaty.”⁷⁴

In addition to the NPT, there are numerous other international treaties that limit the acquisition, manufacture, possession, deployment, and testing of nuclear weapons.⁷⁵ These

71. Sloss, *supra* note 16, at 45.

72. Notably, Israel, India, Pakistan and North Korea are not parties to the NPT. See UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS, *supra* note 17 (listing parties to the NPT).

73. NPT, *supra* note 12, pmb1.

74. 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, May 3–28, 2010, *Final Document*, ¶ 79, U.N. Doc. NPT/CONF.2010/50 (Vol. I).

75. See ICJ Nuclear Opinion, *supra* note 1, ¶ 58 (“[A] number of specific treaties have been concluded in order to limit: (a) the acquisition, manufacture and possession of nuclear weapons (Peace Treaties of 10 February 1947; State Treaty for the Re-establishment of an Independent and Democratic Austria of 15 May 1955; Treaty of Tlatelolco of 14 February 1967 for the Prohibition of Nuclear Weapons in Latin America, and its Additional Protocols; Treaty of 1 July 1968 on the Non-Proliferation of Nuclear Weapons; Treaty of Rarotonga of 6 August 1985 on the Nuclear-Weapon-Free Zone of the South Pacific, and its Protocols; Treaty of 12 September 1990 on the Final Settlement with respect to Germany); (b) the deployment of nuclear weapons (Antarctic Treaty of 1 December 1959; Treaty of 27 January 1967 on Principles Governing the Activities of States in the Exploration and Use

treaties often also commit the parties to disarmament by language in their preambles. Moreover, the sheer number of these treaties and high number of state parties means that nearly every country is party to a treaty that eventually requires disarmament.

The Limited Test Ban Treaty, for example, limits testing of nuclear weapons and includes commitments to disarm. Its goal is “the speediest possible achievement of an agreement on general and complete disarmament . . . in accordance with the objectives of the United Nations.”⁷⁶ The Limited Test Ban Treaty has 126 states parties, including all nuclear states except France and North Korea.⁷⁷ It bans all nuclear tests within a state party’s jurisdiction, outer space, or under water, and any explosion where radioactive debris extends beyond the territorial limits of the state.⁷⁸ Underground tests are limited to the extent that radioactive debris would spread into other countries, but are not entirely banned.⁷⁹ The object and purpose and specific limitations on testing are more evidence about international illegality of nuclear weapon use, testing, and ownership.

of Outer Space, including the Moon and Other Celestial Bodies; Treaty of Tlatelolco of 14 February 1967 for the Prohibition of Nuclear Weapons in Latin America, and its Additional Protocols; Treaty of 11 February 1971 on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof; Treaty of Rarotonga of 6 August 1985 on the Nuclear-Weapon-Free Zone of the South Pacific, and its Protocols); and (c) the testing of nuclear weapons (Antarctic Treaty of 1 December 1959; Treaty of 5 August 1963 Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water; Treaty of 27 January 1967 of Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies; Treaty of Tlatelolco of 14 February 1967 for the Prohibition of Nuclear Weapons in Latin America, and its Additional Protocols; Treaty of Rarotonga of 6 August 1985 on the Nuclear-Weapon-Free Zone of the South Pacific, and its Protocols).”)

76. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water pmbl., Aug. 5, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 43 [hereinafter Limited Test Ban Treaty].

77. *Status of the Treaty: Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water*, UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS (Apr. 23, 2012, 3:20 PM), http://disarmament.un.org/treaties/t/test_ban.

78. Limited Test Ban Treaty, *supra* note 76, art. 1.

79. *Id.*

Nuclear weapons free zones (NWFZ) treaties also commit their states-party to disarm. A number of different regions have entered into NWFZ treaties. Taken together, these NWFZs cover large areas of the globe. For example, The Treaty of Tlatelolco, in force with thirty-three states-party, creates a NWFZ in Latin America and the Caribbean.⁸⁰ Tlatelolco's preamble states that, "militarily denuclearized zones are not an end in themselves but rather a means for achieving general and complete disarmament at a later stage."⁸¹ In the South Pacific, the Treaty of Rarotonga creates a NWFZ in force with thirteen parties. Its preamble states that "all countries have an obligation to make every effort to achieve the goal of eliminating nuclear weapons."⁸² Additionally, the Treaty of Bangkok, in force with ten parties, creates a NWFZ in Southeast Asia. Its parties are "[d]etermined to take concrete action which will contribute to the progress towards general and complete disarmament of nuclear weapons, and to the promotion of international peace and security."⁸³

Another important treaty is the Comprehensive Nuclear-Test-Ban Treaty (CTBT), which bans all types of nuclear tests. The preamble to the CTBT affirms "the purpose of attracting the adherence of all States to [the CTBT] and its objective to contribute effectively to the prevention of the proliferation of nuclear weapons in all its aspects, to the process of nuclear disarmament and therefore to the enhancement of international peace and security."⁸⁴ Though the CTBT has not yet entered into force, it has been signed by 182 states and ratified

80. Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean, Feb. 14, 1967, 22 U.S.T. 762, 634 U.N.T.S. 326 [hereinafter Treaty of Tlatelolco]; see also *Status of the Member States and Signatories of the Treaty of Tlatelolco*, OPANAL (Apr. 13, 2012, 5:29 PM), <http://www.opanal.org/opanal/Tlatelolco/P-Tlatelolco-i.htm> (listing the current states parties).

81. Treaty of Tlatelolco, *supra* note 80, pmb1.

82. South Pacific Nuclear Free Zone Treaty pmb1., Aug. 6, 1985, 1445 U.N.T.S. 177 [hereinafter Treaty of Rarotonga]; see also *South Pacific Nuclear Free Zone Treaty*, UNITED NATIONS TREATY COLLECTION (Apr. 13, 2012, 5:53 PM), <http://treaties.un.org/pages/showDetails.aspx?objid=08000002800cea40> (listing states parties to the treaty).

83. Treaty on the Southeast Asia Nuclear Weapon-Free Zone pmb1., Dec. 15, 1995, 1981 U.N.T.S. 129 [hereinafter Treaty of Bangkok].

84. Comprehensive Nuclear-Test-Ban Treaty pmb1., *opened for signature* Sept. 24, 1996, 35 I.L.M. 1439 [hereinafter CTBT].

by 154 states.⁸⁵ Under customary international law, once a country has signed a treaty, even if it has not yet ratified it, that country is prohibited from frustrating the object and purpose of that treaty.⁸⁶ Actions that would frustrate the object and purpose of the CTBT would include engaging in illegal proliferation activities and testing, or using or threatening to use nuclear weapons. Therefore, all 182 signatories, which include NPT nuclear weapons states France, China, Russia, the United States, and the United Kingdom, have reaffirmed their legal obligations to disarm and have expressed their belief that nuclear weapons undermine international peace and security.

Those treaties, and others, combine to create a very strong argument that nuclear weapons are universally illegal through treaties. The only countries not bound by any relevant treaties are North Korea, India, and Pakistan.⁸⁷ All other countries have bound themselves either never to have nuclear weapons or to take steps towards disarming the weapons they currently have. As for countries like North Korea, India, and Pakistan, customary international law against nuclear weapons fills any gaps between the treaties, a topic which is discussed in the next section.

However, nuclear weapons states, especially the United States, argue that the NPT imposes no hard deadline for nuclear disarmament⁸⁸ and that nuclear weapons are not illegal, despite the language of the NPT indicating otherwise. None-

85. See *Comprehensive Nuclear-Test-Ban Treaty*, UNITED NATIONS TREATY COLLECTION, (Apr. 13, 2012, 6:01 PM), http://treaties.un.org/pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=XXVI-4&chapter=26&lang=en#Participants (listing current signatories and parties to the Treaty).

86. Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331.

87. For an excellent, in-depth discussion of how numerous international treaties overlap and combine to create an international prohibition on nuclear testing, see Tabassi, *supra* note 58. While Tabassi focuses on proving the illegality of nuclear testing, many of the same treaties on which she relies and much of her reasoning apply equally as well to the argument that nuclear weapons themselves may be illegal, or at least that there is an international obligation for each state to disarm.

88. See *NPT Proposal Scrubbed of Disarmament Dates*, GLOBAL SECURITY NEWSWIRE, May 20, 2010, <http://www.nti.org/gsn/article/npt-proposal-scrubbed-of-disarmament-dates> (noting that a revised draft agreement “sets no new deadline” for disarmament negotiations).

theless, article 26 of the Vienna Convention on the Law of Treaties explains that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”⁸⁹ Article 26 means that even though the NPT has no disarmament deadline, the disarmament obligation still must be pursued in good faith—at most this means taking concrete action to disarm, and at least it means not proliferating further while discussing how to eventually disarm. The NPT, together with the other multitude of nuclear weapon-related treaties, creates an almost universal web of international treaty law that prohibits proliferation and acknowledges the evils of nuclear weapons.

C. *Customary International Law Obligates Even Non-Signatory States Neither To Use Nor Develop Nuclear Weapons.*

Customary international law is binding on all states, regardless of whether or not they are parties to specific treaties.⁹⁰ Customary international law develops over time and is proven with evidence of two elements: nearly uniform state practice and *opinio juris*, or the principle that states follow a certain practice because they feel a legal obligation to do so.⁹¹ Evidence of uniform state practice and *opinio juris* can be gleaned from a variety of sources, including treaties, diplomatic communiqués, actions of heads of state, U.N. General Assembly resolutions, and Security Council resolutions.⁹² These sources are evidence that customary international law prohibits nuclear weapons for all states, regardless of individual countries’ consent to specific arms control treaties.⁹³

First, state practice strongly indicates a prohibition against nuclear weapon use. Nuclear weapons have only been used

89. Vienna Convention on the Law of Treaties, *supra* note 86, art. 26.

90. See AUST, *supra* note 8, at 7 (explaining that state practice is binding on all states that have an interest and remain silent as a practice is developed. However, states that persistently object to the practice may not be bound by the customary international law).

91. See *id.* at 6–7 (describing the requirements for the development of a rule of customary international law).

92. See *id.* (listing, separately, sources of *opinio juris* and uniform state practice).

93. Some have gone so far as to say that the international norm against proliferation may even be *jus cogens*. See, e.g., Roberts, *supra* note 4, at 499 (“[The] overall norm of non-proliferation . . . is arguably *jus cogens*.”).

twice during times of conflict, at Hiroshima and Nagasaki. Every state's reticence to resort to nuclear weapons to resolve conflicts for the last sixty-five years is solid evidence that nuclear weapons are unusable and supports a finding of customary international law against nuclear weapon use.

Critics would argue that state practice actually condones nuclear weapons because a number of states have them, and absent the NPT, there are no limitations on who can have nuclear weapons. However, there is strong evidence of *opinio juris* against nuclear proliferation, regardless of whether the proliferator is a party to the NPT. NPT parties and non-parties alike both take care to keep their proliferation secret, indicating they hold a belief that proliferating is illegal. The examples of secret proliferation that serve as evidence of *opinio juris* against nuclear weapons acquisition abound. First, North Korea developed nuclear weapons technology in secret prior to its withdrawal from the NPT.⁹⁴ Even after withdrawing from the NPT, North Korea still keeps much of its nuclear weapons program secret.⁹⁵ Iraq, an NPT party, had a secret nuclear weapons program at Osirak. In another example, India developed nuclear weapons in secret and worked hard to camouflage its pre-testing preparations from U.S. satellites, despite not being bound by any formal treaty obligations preventing it from proliferating.⁹⁶ Similarly, Pakistan, another non-NPT signatory, stressed that it had the capability to go nuclear, but denied that it sought nuclear weapons prior to its first nuclear

94. See *Chronology of U.S.-North Korean Nuclear and Missile Diplomacy*, ARMS CONTROL ASSOCIATION (Apr. 23, 2012, 3:41 PM), <http://www.armscontrol.org/factsheets/dprkchron> (noting that the United States claimed North Korea admitted in 2002 to operating a secret nuclear weapons program, shortly before its withdrawal from the NPT in 2003); see also Rachel Weise, *North Korea Nuclear Timeline*, CENTER FOR AM. PROGRESS, Oct. 9, 2006, http://www.americanprogress.org/issues/2006/10/north_korea_timeline.html (providing a chronology of events related to North Korea's nuclear program).

95. See Peter Crail, *N. Korea Judged to Have More Enrichment Sites*, ARMS CONTROL TODAY, Mar. 2011, at 48-49 (discussing evidence of unannounced nuclear activity by North Korea).

96. See GEORGE PERKOVICH, *INDIA'S NUCLEAR BOMB: THE IMPACT ON GLOBAL PROLIFERATION* 1-2 (1999) (examining the precautions taken by India's nuclear weapons program).

tests.⁹⁷ Israel, to this day, does not admit that it has nuclear weapons though it is not party to the NPT.⁹⁸ Finally, Syria is still a party to the NPT despite its recent clandestine nuclear forays.⁹⁹ The covert nature of these states' proliferation is evidence of the illegality of their acts and of the *opinio juris* against proliferation, regardless of treaty obligations.¹⁰⁰

On the other hand, one could argue that despite the practice of secret proliferation there is no *opinio juris* against proliferation. The argument is that states proliferate in secret to protect their technology from foreign intelligence, to maintain secrecy and security at important military installations, or simply to aid in military bluffing—not because they believe nuclear weapons are illegal. Keeping nuclear military installations secret may also be motivated by a desire to avoid falling victim to a preventive strike against the nuclear installations. Therefore, proliferation of nuclear technologies can be evidence that there is no legal prohibition on nuclear weapons per se. Critics would conclude that there is no *opinio juris* against nuclear weapons if strategy is the reason for secrecy. Yet, these motivations for proliferating in secret—for security and to hide wrong-doing—are not mutually exclusive. A state may proliferate in secret because it knows proliferation is illegal *and* because the state wishes to avoid detection for security reasons. Moreover, a nuclear facility is not likely to be a military target *unless* it is used for illegal proliferation purposes.¹⁰¹

97. See R.V.R. Chandrasekhara Rao, *India, Pakistan Racing to be Last*, BULLETIN OF ATOMIC SCIENTISTS, Nov. 1987, at 32, 32 (discussing Pakistan's denial that it intended to "go nuclear").

98. See AVNER COHEN, *ISRAEL AND THE BOMB I* (1998) (describing Israel's "nuclear opacity," and the general assumption that Israel has nuclear weapons though such weapons have never been officially acknowledged).

99. See ANTHONY H. CORDESMAN, *ISRAEL AND SYRIA: THE MILITARY BALANCE AND PROSPECTS OF WAR* 211–12 (2008) (providing a chronology of Syria's nuclear program and international commitments).

100. *But see* ICJ Nuclear Opinion, *supra* note 1, ¶¶ 71–73 (explaining that while the Court did not find sufficient *opinio juris* to indicate nuclear weapons were illegal at the time of the opinion, there was "nascent" *opinio juris*, implying that such *opinio juris* would be forthcoming).

101. The right of all states to nuclear energy creates a strong stigma against destroying civilian nuclear programs. For example, states are hesitant to destroy Iran's nuclear facilities without proof that they are used to develop nuclear weapons, which is why the question of whether Iran's program is peaceful has been so hotly debated. See, e.g., GREG THIELMANN, ARMS CONTROL ASSOCIATION, *THE BREAKOUT OPTION: RAISING THE BAR FOR THE*

Thus, secret nuclear programs can be seen as evidence of customary international law. State practice overwhelmingly shows that states do *not* proliferate. Those states that do proliferate do so in secret, motivated by both the *opinio juris* against nuclear proliferation and the strategic decision to keep military developments confidential.

Deterrence complicates evaluating whether state practice condones or condemns nuclear weapons, because deterrence does not “use” nuclear weapons as bombs, but rather “uses” them as threats. Nine nuclear weapons states “use” the nuclear weapon threat as deterrence on a daily basis, and even extend their nuclear umbrellas to other nations who lack nuclear weapons. In the ICJ Nuclear Opinion, the issue of deterrence prevented the Court from finding nuclear weapons illegal in and of themselves because, if deterrence counts as “use,” the ICJ reasoned that state practice supported the legality of nuclear weapons.¹⁰² Nonetheless, the ICJ admits that if nuclear weapons are illegal, then it would be unlawful to threaten use of nuclear weapons.¹⁰³

The ICJ’s conclusion that deterrent use of nuclear weapons means there is no uniform state practice against nuclear weapons was incorrect. Only nine states use nuclear weapons as a deterrent at all. It is unclear how the practice of just nine states can be called evidence of uniform state practice when approximately 200 other states do not use such weapons in any capacity and chose to eschew developing nuclear weapons. True, the nine nuclear weapons states would argue that their continued practice of deterrence is the only relevant practice for defining state practice because they are the specially affected states. But, the non-nuclear weapons states have a valid point that all states are specially affected given the hugely destructive power of nuclear weapons. Moreover, the state practice of non-use of weapons for deterrence is much larger than the state practice of use; deterrence does not disprove the overwhelming state of practice of not “using” nuclear weapons.

SUPREME LEADER (2012), http://armscontrol.org/files/Iran_Brief_The_Breakout_Option.pdf (discussing the lack of support for a contemplated strike of Iranian nuclear facilities).

102. ICJ Nuclear Opinion, *supra* note 1, ¶ 67.

103. *Id.* ¶ 47.

Additionally, many General Assembly resolutions declaring that nuclear weapons are illegal are further evidence that customary international law prohibits nuclear weapons. In its Nuclear Weapons Opinion, the ICJ cited to the numerous resolutions issued by the General Assembly that recall the content of resolution 1653 (XVI),¹⁰⁴ entitled “Declaration of the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons.”¹⁰⁵ Resolution 1653 said:

that the use of weapons of mass destruction, causing unnecessary human suffering, was in the past prohibited, as being contrary to the laws of humanity and to the principles of international law, by international declarations and binding agreements, such as . . . the Conventions of The Hague Peace Conferences of 1899 and 1907, and the Geneva Protocol of 1925, to which the majority of nations are still parties¹⁰⁶

Resolution 1653 continues to say, “that the use of weapons of mass destruction, such as nuclear and thermo-nuclear weapons, is a direct negation of the high ideals and objectives which the United Nations has been established to achieve.”¹⁰⁷ The ICJ notes that a series of General Assembly resolutions, such as the series that began with Resolution 1653, can be evidence of a new rule of international law and *opinio juris*.¹⁰⁸ However, the ICJ finds that the practice of deterrence overcomes what it refers to as “nascent” *opinio juris* from the series of resolutions. The implication is that customary international law against nuclear weapons was developing, but had not yet

104. *See id.* ¶ 73 (describing how each year since the passage of U.N. General Assembly Resolution 1653 (XVI), the General Assembly has passed additional resolutions recalling the content of Res. 1653).

105. G.A. Res. 1653 (XVI), U.N. Doc. A/RES/1653 (Nov. 24, 1961).

106. *Id.* pmb1.

107. *Id.*

108. *See* ICJ Nuclear Opinion, *supra* note 1, ¶ 70 (“[A] series of [General Assembly] resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.”). Some General Assembly resolutions passed after the ICJ Nuclear Opinion condemn nuclear weapon use and call for nuclear disarmament. *See e.g.*, G.A. Res. 66/57, U.N. Doc. A/RES/66/57 (Dec. 13, 2011); G.A. Res. 65/80, U.N. Doc. A/RES/65/80 (Jan. 11, 2011); G.A. Res. 62/51, U.N. Doc. A/RES/62/51 (Jan. 15, 2008); G.A. Res. 61/97, U.N. Doc. A/RES/61/97 (Dec. 19, 2006); G.A. Res. 60/88, U.N. Doc. A/RES/60/88 (Jan. 11, 2006); G.A. Res. 59/102, U.N. Doc. A/RES/59/102 (Dec. 16, 2004).

reached a level of maturity where the ICJ could announce that nuclear weapons are indeed illegal.

While the ICJ in 1996 said that the “nascent” *opinio juris* prohibiting nuclear weapons was not enough to overcome the use of nuclear weapons as deterrence,¹⁰⁹ sixteen years after this opinion, that “nascent” *opinio juris* is now fully grown and legally binding. During the last sixteen years there have been notable developments in non-proliferation. To name just a few: both India and Pakistan began and maintained self-imposed nuclear testing moratoria;¹¹⁰ Libya renounced its nuclear weapons program and reaffirmed its commitment to the NPT;¹¹¹ and perhaps most importantly, the CTBT was opened for signature and now has 182 signatories.¹¹² There have also been nearly annual General Assembly resolutions since the ICJ opinion, condemning nuclear weapon use and nuclear weapons’ contribution to international instability and demanding progress towards nuclear disarmament.¹¹³ These resolutions give new weight to the nascent *opinio juris* mentioned by the ICJ in 1996. The developments in state practice since 1996, combined with additional *opinio juris* from the General Assembly resolutions, are solid evidence that the burgeoning customary international law against nuclear weapons in the 1996 ICJ Nuclear Opinion is now matured.

Furthermore, UN Security Council resolutions can also be evidence of customary international law. The Security Council has passed resolutions stressing the importance of adherence

109. See ICJ Nuclear Opinion, *supra* note 1, ¶ 73 (“The emergence . . . of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other.”).

110. Admittedly, neither India nor Pakistan admitted that their self-imposed moratoria were motivated by legal obligations to not test. Nonetheless, the action is still significant in evaluating state practice regarding nuclear testing, and does suggest that attitudes about nuclear testing have changed since 1996.

111. Paul Kerr, *Libya Vows to Dismantle WMD Program*, ARMS CONTROL TODAY, Jan./Feb. 2004.

112. See *supra* note 85 and accompanying text.

113. See *e.g.*, resolutions cited *supra* note 108108.

to the NPT.¹¹⁴ Resolution 984 says that “any aggression with the use of nuclear weapons would endanger international peace and security,”¹¹⁵ and “[u]rges all States, as provided for in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, to pursue negotiations in good faith on effective measures relating to nuclear disarmament and on a treaty on general and complete disarmament under strict and effective international control which remains a *universal goal*.”¹¹⁶ Some might argue that the Security Council resolution implies that nuclear weapons are not currently illegal, because if they were, then calling for a disarmament treaty would be redundant. However, a global disarmament treaty is necessary not because nuclear weapons are currently legal, but because the process of dismantling the world’s nuclear weapons will be slow and complex—requiring specific timelines, verification procedures, and capabilities to safely dispose of the fissile material—and must be carefully implemented and administered.

Because Resolution 984 was issued under Chapter VI of the Charter, and not Chapter VII, it is not binding; however, its unanimous adoption increases its influence.¹¹⁷ Moreover, combined with treaties, General Assembly resolutions, and state practice, article VI resolutions strengthen evidence that customary international law prohibits nuclear weapons—even as to states that are not party to such treaties.

The Security Council has passed resolutions under Chapter VII indicating that nuclear testing, a clear sign of nuclear proliferation, is a threat to international peace and security, even when the offending states are not party to the NPT or the

114. See e.g., S.C. Res. 984, U.N. Doc. S/RES/984 (Apr. 11, 1995); S.C. Res. 1887, U.N. Doc. S/RES/1887 (Sep. 24, 2009); S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

115. S.C. Res. 984, *supra* note 114, pmbl.

116. *Id.* ¶ 8 (emphasis added).

117. See AUST, *supra* note 8, at 195–96 (explaining the different types of resolutions the Security Council can pass); see also *Security Council Adopts Resolution Concerning Response to Nuclear Threat or Aggression Against Non-Nuclear States Parties to NPT*, FED. NEWS SERVICE, Apr. 12, 1995, <http://www.lexisnexis.com/lxacui2api/api/version1/getDocCui?lni=3SJ4-CJD0-000G-J002&csi=8104&hl=t&hv=t&hnsd=f&hns=7&hgn=t&oc=00240&perma=true> (stating that Resolution 984 was adopted unanimously).

CTBT (such as North Korea, Israel, Pakistan, and India).¹¹⁸ In 1992, the Security Council met with Heads of State and Government to discuss its role in the maintenance of international peace and security, after which, the President of the Security Council issued a statement that “[t]he proliferation of all weapons of mass destruction constitutes a threat to international peace and security.”¹¹⁹ Lisa Tabassi, the Chief of Legal Services at the Preparatory Commission for the CTBT Organization, infers from the above statement that “the Security Council will take action under Charter VII in respect of nuclear proliferation matters, whether or not the State concerned is a party to the NPT, as it has done in respect of the tests by India, Pakistan, and [North Korea].”¹²⁰ The Security Council’s Chapter VII condemnation of non-NPT members is evidence that nuclear proliferation is illegal regardless of whether one is party to the NPT.

Some may argue that the NPT creates distinct *lex specialis* regimes for nuclear haves and nuclear have-nots, and thus that normal customary international law does not apply to the NPT nuclear weapons states. Under this theory, the uniform practice of non-nuclear weapons states does not create customary legal obligations for the nuclear states, and the General Assembly resolutions are less persuasive evidence of customary international law if they are only backed by non-nuclear states. This argument is not without merit. However, the purpose of the *lex specialis* regime of the NPT is not to maintain the nuclear dichotomy forever, but to help create legal regimes for the nuclear weapons states and non-nuclear weapons states so that both can take effective steps towards disarmament.¹²¹ Thus, the NPT intended only to create a temporary *lex specialis*, and that *lex specialis* regime is becoming increasingly limited

118. See Tabassi, *supra* note 58, at 309–10 (noting that the Security Council passed S.C. Res. 1874 (2009), and S.C. Res. 1718 (2006) under Chapter VII of the Charter).

119. President of the Security Council, *Note by the President of the Security Council*, U.N. Doc. S/23500, at 4 (Jan. 31, 1992).

120. Tabassi, *supra* note 58, at 330.

121. See NPT, *supra* note 12, pmbl. (“Declaring [states parties’] intention to achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament.”).

with each new non-proliferation treaty, General Assembly resolution, and Security Council resolution.

In conclusion, there is customary international law against the use or threat of use of nuclear weapons, as well as an obligation to disarm. The evidence for the state practice and *opinio juris* is found in numerous General Assembly and Security Council resolutions, treaties, and actions of states, as well as in the underlying logic of the ICJ Nuclear Opinion. While the ICJ may not have found nuclear weapons illegal under customary international law in 1996, enough has changed and more evidence has come to light to finally make that conclusion.

IV. SUGGESTED ALTERNATIVES TO THE NON-PROLIFERATION PROBLEM ARE INADEQUATE

There are numerous suggestions of how to solve the problem of failed collective self-defense as it relates to non-proliferation. Of course, some are better than others. Yet, the vast majority of the proposed solutions to issues of NPT non-compliance ignore the fundamental unfairness of the NPT dichotomy between the “nuclear haves” and the “nuclear have-nots.”¹²² The nuclear have-nots argue that by dividing the world into those who have nuclear weapons and those who do not “and assigning different rights and obligations to the two, the NPT is designed to preserve the monopoly of the nuclear haves on nuclear-weaponry and the power and prestige that comes with it.”¹²³ This creates incentives for nuclear have-nots to seek entry into the nuclear club, in order to gain international parity. Additionally, illegal proliferators point to the injustice of this dichotomy as a justification for their illicit behavior. A good solution to the problem of nuclear proliferation will require the nuclear-haves to follow through on their obligations to disarm, and will work to support the role of international institutions. This section will assess a few of the more common recommendations to solve the current problems of international non-proliferation law but ultimately finds none of them satisfactory.

122. See Sepehr Shahshahani, Note, *Politics Under the Cover of Law: Can International Law Help Resolve the Iran Nuclear Crisis?*, 25 B.U. INT'L L. J. 369, 388 (2007) (noting the objection of non-nuclear states to the NPT's “divi[sion] of the world into nuclear haves and nuclear have-nots”).

123. *Id.*

A. The “Self-Help” Doctrine

The “self-help” doctrine is one in which when states feel threatened, their sovereignty allows them to take necessary steps to address that threat, regardless of whether the Security Council has authorized use of force. The self-help doctrine is based on the idea that countries have the inherent right to take action to defend their interests, which may be at risk even when a threat is not “imminent” in the traditional sense.

One variant of the self-help doctrine comes from Guy B. Roberts, senior legal advisor for the U.S. Southern Command. Roberts argues that:

[I]n any case where it has been determined that non-proliferation efforts have failed and a state has embarked on a program to acquire a WMD capability, any nation, unilaterally or preferably in conjunction with others, has the right to use force, as a legitimate form of self-help, to prevent WMD acquisition or to pre-empt the development and use of such weapons.¹²⁴

Roberts lists six criteria for determining when a state can use force in response to a weapons of mass destruction [WMD] threat: (1) if the proliferating country has been put on notice by U.N., NATO, or U.S. announcements; (2) if the threat is “concrete and persuasive” and backed by evidence; (3) if there is “force imperative” such that further delay would increase risks to civilians and security; (4) if the attack is carried out in accordance with the doctrine of proportionality;¹²⁵ (5) if there is a “reasonable chance that the proposed use of force will be successful”; and (6) if the forceful act is an act of last resort.¹²⁶

Another “self-help” proposal comes from Olumide K. Obayemi, a professor at East Bay Law School, who argues that superpowers should be able to use preemptive and preventive force when an injury or threat from a “failed state” is “actual or

124. Roberts, *supra* note 4, at 518.

125. Aust describes proportionality as well: “Countermeasures must be ‘commensurate with’ (proportionate to) the injury suffered, taking into account ‘the gravity of the wrongful act’ and ‘the rights in question’ (being those of both states) ([U.N. Charter] Article 51) If the countermeasures are excessive, the injured state will itself have committed an internationally wrongful act.” Aust, *supra* note 8, at 392.

126. Roberts, *supra* note 4, at 519–27.

imminent” and where the injury or threat is causally related to the state’s failure as a nation.¹²⁷ Obayemi’s proposal further requires that foreign intervention be a feasible solution to the problem.¹²⁸

The self-help proposals of Roberts and Obayemi are troubling. It is commendable that both emphasize the need to have evidence supporting the reality of the threat before using force. But, the proposals are vague about who must be persuaded with that evidence—it seems the only country that must be convinced of the threat is the acting country, not the international community. Roberts’ requirement that the forceful act be an act of last resort is important but is not enough to overcome the rest of its shortcomings.

Neither Obayemi nor Roberts limit their proposals to certain types of threat with clear bright lines. Even though Roberts tries to limit the use of preventive force to only threats from weapons of mass destruction (WMD), the conflation of nuclear weapons with their two weaker cousins, chemical and biological weapons, ignores the reality of the vast differences in the weapons’ capacity to destroy. Obayemi does not even limit his standard to just WMD threats, but presumably suggests that many threats from failed states are fair targets for preventive strikes.

Neither proposal requires the acting state to be in good standing with its international obligations, which furthers the hypocrisy of the current arms control regime. Both allow powerful countries to do what they feel is necessary to stop proliferation in “rogue” states but do not require the strong countries to take responsibility for their disarmament obligations from the NPT and customary international law. Moreover, the proposed standards create dangerous legal precedents in which any country can start taking the law into its own hands, encouraging many states to act outside of the law. As Franck points out, if one country claims such a right, it is only a short while before other countries start to claim the right.¹²⁹

127. Olumide K. Obayemi, *Legal Standards Governing Pre-Emptive Strikes and Forcible Measures of Anticipatory Self-Defense Under the U.N. Charter and General International Law*, 12 ANN. SURV. INT’L & COMP. L. 19, 24–25 (2006).

128. *Id.*

129. See Thomas M. Franck, *Preemption, Prevention and Anticipatory Self-Defense: New Law Regarding Recourse to Force?*, 27 HASTINGS INT’L & COMP. L. REV. 425, 429 (2004) (“It could be replied, of course, that there is nothing really

B. *Declaratory Policy from the Permanent Security Council
Members in Support of Preemptive Attacks
Against Nuclear Facilities*

Another proposal, advanced by Professor Sloss, argues that the five permanent Security Council members should declare a policy in support of preventive attacks on nuclear facilities in states that “have not previously produced a stockpile of weapons-grade nuclear material.”¹³⁰ Sloss’s proposal is commendable in that it does not conflate nuclear weapons with biological and chemical weapons. Additionally, by having a standing policy, Sloss seeks to avoid the politics that so often prevent the Security Council from taking action when need be. But, even the declaratory policy requires consensus by the five members on whether the offending state has convinced them that the nuclear activity is peaceful before a Chapter VII resolution authorizing force could be issued.¹³¹

Sloss does not address the hypocrisy of the arms control regime. Any country, even those not in good standing regarding their international non-proliferation obligations, such as Israel, would be permitted to use force under a subsequent Chapter VII resolution authorizing use of force. Moreover, Sloss’s proposal encourages states to race to produce a stockpile of weapons grade material before the standing policy is issued because presumably the standing policy would not ap-

new about even [the Bush doctrine’s] astounding claim [that only the U.S. government will determine whether a threat or a future threat is real]. Arguably, each government has always retained, in the background of its diplomacy, the big stick necessary to pursue its essential self-interest against any other government that is inferior to it militarily. That, however, is not necessarily the conclusion [the Bush] administration wants anyone to draw. The new doctrine is not meant to create a world in which every nation keeps a nuclear weapon in its bedside drawer—the way 80 million Americans are said to keep pistols—with a license to shoot anyone suspected of being unfriendly. It is very unlikely that Washington is eager to have its new doctrine adopted by New Delhi and Beijing, let alone Tehran and Pyongyang. Yet, inconveniently at such moments as this, law is all about the gander’s right to the goose’s sauce.”)

130. Sloss, *supra* note 16, at 40–41.

131. *See id.* at 55–56 (“If we [the Permanent Members] are unable to persuade a particular state to refrain from building . . . [military-use nuclear facilities], we will work together to obtain Security Council authorization for a preemptive attack against such a facility, unless that state can persuade us that the subject facility is not a threat to peace . . .”).

ply if the state had a stockpile prior to the resolution. In this way, Sloss's standard essentially legitimizes the nuclear weapons already acquired by India, Pakistan, Israel, and North Korea. Sloss ignores the fact that all of the risks associated with nuclear weapons—for example, the threats of accidental war, fissile material being sold on the black market, and nuclear weapons falling into the wrong hands—are just as grave in newly nuclear states as they are in older nuclear states.¹³²

Moreover, it is impossible to imagine that the declaratory policy would lead to actual Chapter VII resolutions authorizing anticipatory force because the permanent members are not likely to agree over whether a nuclear program is peaceful or not. This Note's proposal therefore does not require the consensus of the permanent Security Council members, nor does it allow current nuclear states to maintain their arsenals indefinitely by requiring all states to take good faith actions to meet their nuclear disarmament and non-proliferation obligations.

C. *Interpret Current Charter Language To Limit Preemptive Self-Defense Except in Very Grave Scenarios*

There are a variety of proposals to address the shortcomings of the preemptive self-defense doctrine that involve interpreting the current Charter language in novel ways to deal with the extreme threat of nuclear weapons. Two such proposals are examined in greater detail below. The first is from Professor Anthony D'Amato of Northwestern Law. The second is from Kristin Eichensehr, in her Yale Law student note.

D'Amato argues that there are four criteria that legalize a preemptive strike within the current language of article 2(4) and article 51 the Charter.¹³³ D'Amato does not seek to change Charter language to expand the doctrine of self-defense, but he does argue that narrow exceptions for preemptive self-defense against nuclear weapons exist. D'Amato's cri-

132. See Graham Allison, *Nuclear Terrorism: How Serious a Threat to Russia?*, RUSSIA IN GLOBAL AFFAIRS, Sept./Oct. 2004, available at http://belfercenter.ksg.harvard.edu/publication/660/nuclear_terrorism.html (explaining the vulnerability of nuclear weapons material and plans in former Soviet Union countries).

133. Anthony D'Amato, *Israel's Air Strike Against the Osiraq Reactor: A Retrospective*, 10 TEMP. INT'L & COMP. L.J. 259, 263 (1996).

teria for authorizing preventive self-defense are that: (1) similar to what is argued in this Note, the target must be nuclear; (2) the target state must be an unstable rogue state that is “likely to use its nuclear weapons for international blackmail and aggrandizement;” (3) the preemptive strike can only be on the nuclear target and must minimize the loss of life; and (4) “the international community must be *de facto* disabled from carrying out the strike itself.”¹³⁴

D’Amato’s first and third criteria of limiting strikes to nuclear targets and limiting the loss of life match criteria included in this Note’s proposal. Those criteria constrain cases in which preventive strikes can be used and also ensure that proportionality is observed. However, the second and fourth criteria are problematic. It is unclear who may determine who is a “rogue” state, as required by the second criterion, as opposed to a state developing peaceful nuclear technology. Even rogue states have a right to peaceful nuclear technology under the NPT. D’Amato does not address how states’ rights to peaceful nuclear technology factors into his criteria. Nor does D’Amato define who determines when the international community is “disabled” in his fourth criterion. He simply states that when “the international community *for whatever reason* does not take action” then a state is authorized to act as a proxy for the international community using limited force.¹³⁵ If the international community does not act because it thinks it unwise, then it makes little sense to permit a lone state to determine that such action is prudent. Moreover, the fact that D’Amato places no limits on who can act as the proxy illustrates that D’Amato is ignoring the underlying inequity of the non-proliferation regime. Under D’Amato’s solution, even Israel, Pakistan, India, or North Korea would be permitted to use force to stop other proliferators so long as his four criteria were met—in essence, rewarding the *de facto* nuclear states for going nuclear early in the game.

A second preemptive self-defense proposal comes from Eichensehr, who makes a more nuanced argument than D’Amato about the criteria that justify a preemptive strike on nuclear installations within the current legal framework of the

134. *Id.*

135. *Id.* (emphasis added).

Charter.¹³⁶ In addition to the textual limits of Article 51, Eichensehr lists five factors to assess the legality of preventive self-defense: (1) whether the attack protected the status quo and maintained the balance of power;¹³⁷ (2) whether the attack could have feasibly removed the threat;¹³⁸ (3) whether the attacking state carefully considered why the attack is unilateral and what the consequences would be for the power of the regime in the target state;¹³⁹ (4) whether the environmental effects and harm to civilians were minimized;¹⁴⁰ and (5) whether the attack created good legal precedent.¹⁴¹

Eichensehr is headed in the right direction with her criteria, but it is not clear that the criteria only apply to nuclear threats. Additionally, Eichensehr's criteria do not address the hypocrisy of the non-proliferation regime. Surprisingly, Eichensehr's criteria actually sanction the division between the nuclear haves and have-nots by only permitting use of force to maintain the current balance of power, instead of suggesting that something may be inequitable about the non-proliferation regime. Given Eichensehr's focus on the risk posed by terrorist acquisition of a dirty bomb,¹⁴² Eichensehr should be concerned with limiting all fissile material, not just that coming from rogue states.

Furthermore, it is not clear how Eichensehr's criteria about the balance of power, consequences for the legal regime in the attacked state, and the creation of bad legal precedent make preemptive attacks legal or illegal. Many of Eichensehr's proposed elements are not legal requirements, but are instead political considerations. Failure to win over the population of a country or hurting relationships with one's allies do not affect whether something is legal. Similarly, a law, even if it creates bad precedent, is still the law. Eichensehr's political considerations are important in determining what the law *should* be regarding nuclear proliferation, but do not clarify what

136. See Eichensehr, *supra* note 28, at 82–92 (laying out the criteria for the lawfulness of preemptive strikes).

137. *Id.* at 83–84.

138. *Id.* at 84–85.

139. *Id.* at 87.

140. *Id.* at 88–89.

141. *Id.* at 90–92.

142. See *id.* at 60 (“Iran could deliver nuclear material to terrorists for use in a nuclear weapon or a ‘dirty bomb’”).

would or would not be legal. The proposal below addresses the shortcomings in Eichensehr's proposal.

V. A NEW INTERPRETATION OF SELF-DEFENSE ADDRESSES
MANY OF THE PROBLEMS WITH THE CURRENT
NON-PROLIFERATION REGIME

To address the threat of nuclear weapons and to maintain the legitimacy of the world's international legal institutions, a new interpretation of self-defense is necessary. As mentioned before, the likelihood of reaching consensus to amend the Charter is very low.¹⁴³ Even if amending the Charter was not incredibly difficult, an amendment is not necessary to solve many of the current problems in the non-proliferation regime. Thus, it is prudent to reinterpret Article 2(4) in light of Article 51 and the threat of nuclear weapons to allow certain states to take preventive action to stop nuclear proliferation. The ICJ has opined that the Article 2(4) prohibition on the use of force "is to be considered in light of other relevant provisions of the Charter. In Article 51, the Charter recognizes the inherent right of individual or collective self-defence if an armed attack occurs."¹⁴⁴ The use of force in Article 2(4) should also be considered in light of the object and purpose of the Charter: the promotion of international peace and stability.

Because the U.N. Charter is a treaty, the Vienna Convention on the Law of Treaties guides its interpretation.¹⁴⁵ To reinterpret Article 2(4) in light of Article 51, one starts with the rules of treaty interpretation, found in part in Articles 31 and 32 of the Vienna Convention.¹⁴⁶ Article 31(1) states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."¹⁴⁷ The Charter's object and purpose include the maintenance of "international peace and security"¹⁴⁸ and "the pre-

143. See *supra* note 15 and accompanying text.

144. ICJ Nuclear Opinion, *supra* note 1, ¶ 38.

145. See Vienna Convention on the Law of Treaties, *supra* note 86 arts. 1–2 (providing that the Convention applies to "treaties between States" and defining "treaty" and several types of "states").

146. *Id.* arts. 31–33; see also *id.* art. 31, ¶ 2 (stating that the preamble is part of the context that helps determine the meaning of a treaty provision).

147. *Id.* art. 31, ¶ 1.

148. U.N. Charter pmbl.

vention and removal of threats to the peace.”¹⁴⁹ General Assembly and Security Council resolutions make clear that nuclear proliferation constitutes a threat to peace.¹⁵⁰ Thus, allowing states to invoke principles of preventive self-defense to enforce international non-proliferation obligations would support the Charter’s purpose.

The four requirements proposed in this Note provide the necessary framework to cabin such preventive self-defense strikes and ensure that they do not violate the U.N. Charter in other ways. First, the threat must be nuclear activity in violation international law. Preventive self-defense should be limited to nuclear threats; nuclear weapons change the calculus of self-defense because waiting until a nuclear attack is “imminent” requires waiting until it is too late. The nuclear activity must violate international law, because all states are entitled to peaceful nuclear technology under the NPT. Simply because a state is an adversary does not necessarily mean that its nuclear program is illegal. Moreover, nuclear weapons have been universally condemned, and their elimination is crucial for preserving peace and stability as required by the Charter.

Second, the attacking state must be in good standing with its non-proliferation obligations, including good faith attempts to reduce its nuclear arsenals, if it has any. All states are obligated by treaty or by customary international law to refrain from proliferating and to takes steps towards disarming. States that fail to meet their international arms control obligations should not be allowed to use preventive force to stop others from violating arms control laws.

Third, the state acting in self-defense must be *specifically* threatened by the proliferating state. There must exist a state of war or heightened tensions between the threatened state and the illegally proliferating state. The attacking state must actually be threatened in order to invoke self-defense. A non-threatened state cannot justify attacking a proliferating state by merely claiming to be defending a third country.

Finally, the Security Council must have been seized of the issue but failed to act. Being seized but failing to act is defined as when a proposed resolution authorizing the use of force against a nuclear facility gets at least nine out of fifteen votes

149. *Id.* art. 1, ¶ 1.

150. *See supra* notes 105–15 and accompanying text.

even if a permanent member vetoes it, or when the Security Council is seized of the matter but does not take a vote on the resolution within a reasonable time. In such cases, the specifically threatened state can then invoke the right of preventive self-defense under Article 51 and Article 2(4), assuming the other elements of the proposed standard are met. The criteria are explained in greater detail below.

Allowing more leeway in regards to preventing nuclear proliferation will increase adherence to international law and increase faith in the ability of international institutions to adequately address the nuclear weapon threat. The standard offers incentives for the world's superpowers, which are nuclear weapons states, to comply with their non-proliferation obligations if they wish to retain the right to use preventive self-defense to stop the acquisition of nuclear weapons by "rogue" states. Like any self-defense proposal, this Note's proposal does have some weaknesses, which will be addressed below. At the very least, the four prongs of this proposal correspond to four of the largest problems in self-defense and non-proliferation law, address the weaknesses in the aforementioned alternatives, and provide a solid foundation for combating the threat of nuclear weapons.

A. *The Proposed Standard Limits Preventive Self-Defense to Only Nuclear Weapons Threats.*

The U.N. Charter was drafted to decrease unilateral use of force and increase international peace and security. The proposed standard expands the area of legal use of force, which is why it would only be applicable to stop nuclear proliferation, which poses special threats to international peace and security. Preventive self-defense should not be made permissible against any and every advancement in military technology—states have no legal obligations to maintain weak armies, but they do have legal obligations to disarm and forgo nuclear weapons.

Certainly, there is a risk that states will try to expand this new right of preventive self-defense by analogy, arguing that various military technologies pose as much of a threat to humankind as nuclear weapons. Despite that risk, limiting preventive defense to just nuclear weapons creates a clear bright

line of what is a legal target and what is not, easing the application of the law.¹⁵¹

The rationale is that nuclear weapons are in a class entirely their own—from the international consensus about the importance of non-proliferation to the weapons' destructive capacity and moral indefensibility. The first distinction between nuclear weapons and all other weapons is the clear international consensus that nuclear proliferation is a serious threat to international peace and security.¹⁵² Second, while international condemnation arguably exists for other weapons,¹⁵³ none of those weapons are as deadly or destructive.¹⁵⁴ Recall Sloss's graph depicting the huge increase in military capacity that one nuclear weapon provides compared to conventional, biological, or chemical weapons.¹⁵⁵ Biological and chemical weapons cannot hold the world hostage like nuclear weapons can; the pathogens in biological weapons tend to die in explosions and so cannot be placed on long-range missiles¹⁵⁶ and chemical elements are rendered useless by effective preparation of troops with protective masks, clothing and training.¹⁵⁷ Chemical and biological weapons also have much

151. Recognizing that I cannot predict the future of military technology, I do not claim that there will never be another weapon analogous to nuclear weapons, where the preventive use of force might also be justified. However, no such weapon exists today.

152. See *supra* Part III.

153. See e.g., Stephen D. Goose et al., *Banning Landmines and Beyond*, in *BANNING LANDMINES: DISARMAMENT, CITIZEN DIPLOMACY, AND HUMAN SECURITY* 1, 1 (Jody Williams et al. eds., 2008) ("For the first time in history, a weapon [landmines] in widespread use for decades had been comprehensively banned."); RICHARD M. PRICE, *THE CHEMICAL WEAPONS TABOO* 1 (1997) ("[W]hether in press reports and scholarly discussions or at the level of public attitudes, it is generally taken as a given that there is something particularly illegitimate about chemical weapons which makes them a special problem."); JEANNE GUILLEMIN, *BIOLOGICAL WEAPONS: FROM THE INVENTION OF STATE-SPONSORED PROGRAMS TO CONTEMPORARY BIOTERRORISM* 5–6 (2005) (describing how biological weapons were developed and deployed despite political opposition and numerous formal mechanisms to prevent their use, including the Geneva Protocol).

154. See Sloss, *supra* note 16, at 44–45 (describing the threat posed by even a single nuclear weapon, compared to other types of weaponry).

155. *Id.*

156. See Cirincione, *supra* note 60, at 59 ("Most [biological weapon agents] cannot withstand the heat or blast of an explosion.")

157. See GUILLEMIN, *supra* note 153, at 4 ("An important aspect of chemical weapons, one that diminished their battlefield value, was that simple individ-

fewer casualties than nuclear weapons; for example, the anthrax attacks on Washington, D.C., only killed five people and injured seventeen.¹⁵⁸ These attacks were nonetheless called “the worst biological attacks in U.S. history.”¹⁵⁹ While the sarin gas attacks on the Tokyo subways killed twelve and injured more than 5,000,¹⁶⁰ that is still very small compared to the number that would die if a nuclear weapon exploded in the same location. In terms of mortalities per bombshell, no extant weapon even comes close to comparing to the nuclear bomb.

B. *A Country That Is Not Complying in Good Faith with Its Non-Proliferation and Disarmament Obligations Is Estopped from Using Preventive Force Against Other Proliferators*

As mentioned above, the distinction between the nuclear-haves and have-nots seriously undermines the non-proliferation regime.¹⁶¹ Iran frequently protests that the United States tolerates, even supports, Israel’s nuclear weapon program while it decries all Iranian nuclear ambitions.¹⁶² Similarly, the United States recently made a nuclear fuel deal with India, which many have seen as condoning India’s de facto status as a nuclear weapons state.¹⁶³ Thus, in order to restore faith in the non-proliferation regime and specifically the NPT, nuclear weapons states must take concrete actions towards disarmament, as required by both the NPT and customary interna-

ual defenses [such as masks and clothing] against their use could be invented.”).

158. *Amerithrax or Anthrax Investigation*, FEDERAL BUREAU OF INVESTIGATION (Feb. 29, 2012, 2:00 PM), <http://www.fbi.gov/about-us/history/famous-cases/anthrax-amerithrax/amerithrax-investigation>.

159. *Id.*

160. Yasuharu Tokuda, *Chemical Terrorism: Sarin Nerve Gas and Other Toxic Nerve Agents*, in GLOBAL TERRORISM ISSUES AND DEVELOPMENTS 213, 218 (Rene A. Larche ed., 2008).

161. See Shahshahani, *supra* note 122, at 388 (articulating the objection of non-nuclear states to the “discriminatory” structure of the NPT).

162. *Id.* at 376.

163. Benjamin Wastler, Note, *Having Its Yellowcake and Eating It Too: How the NSG Waiver for India Threatens to Undermine the Nuclear Nonproliferation Regime*, 33 B.C. INT’L & COMP. L. REV. 201, 217 (2010) (arguing that the nuclear deal with India made by the Nuclear Suppliers Group, of which the U.S. is a member, creates a “double standard” that undermines the NPT).

tional law. Both nuclear weapons states and non-nuclear weapons states that are not in compliance with their non-proliferation obligations should therefore be estopped from claiming the right of preventive self-defense against other countries' nuclear facilities.

A variety of factors should be considered to determine if a state is working in good faith to meet its obligations. For a number of states, merely being party to the NPT is insufficient. But if, for example, Israel, India, Pakistan, or North Korea were to join the NPT, that would be a very significant act demonstrating a change in their proliferation behavior and suggesting renewed commitment to arms control. However, nuclear weapons states already party to the NPT, such as the United States, need to do more to demonstrate a commitment to disarmament. Senate ratification of the New START agreement, which cuts both America's and Russia's strategic nuclear missile launchers by half, was a step in the right direction.¹⁶⁴ CTBT ratification or a no-first use policy could be the next steps for the United States. Finally, entering serious negotiations on a universal disarmament treaty would be an unequivocal demonstration of the United States' good faith commitment to disarmament. For non-nuclear weapons states, factors demonstrating good faith can include being party to the Additional Protocol;¹⁶⁵ cooperating with the IAEA; being a member, or actively negotiating for NWFZs; participating in negotiations for a fissile material cut-off treaty or general disarmament treaty, and the like.

Estopping states in non-compliance with their international obligations to disarm creates incentives for states to take domestic action to reduce the risk of nuclear proliferation. It is much easier to control one's own domestic policy than to use force to control another's. Nuclear weapons are danger-

164. Treaty on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, U.S.-Russ., Apr. 8, 2010, S. TREATY DOC. NO. 111-05 (2010); see also Peter Baker, *Senate Passes Arms Control Treaty with Russia*, 71-26, N.Y. TIMES, Dec. 22, 2010, <http://www.nytimes.com/2010/12/23/world/europe/23treaty.html> (noting that the U.S. Senate ratified the treaty in December 2010).

165. The Additional Protocol is an agreement designed to close a loophole in the NPT that states can enter into with the IAEA. It allows the IAEA to conduct snap inspections of suspected weapons sites. The Additional Protocol is discussed in *infra* text accompanying notes 192-96.

ous whether they are in nuclear silos in North Dakota or in underground facilities in Iran. The same is true for weapons-grade nuclear material. The more fissile material in existence, the more likely that terrorists and rogue regimes could purchase it on the black market. The consequences of terrorist acquisition of the bomb would not only “irreversibly” weaken the non-proliferation regime,¹⁶⁶ but it could also be the death knell for millions of people. Thus, to truly address the threats from nuclear weapons, all states need to start reducing their own nuclear stockpiles and better securing all nuclear facilities.

Additionally, this criterion helps to resolve the hypocrisy that undermines the non-proliferation regime. Good faith non-proliferation and disarmament efforts from the nuclear weapons states will encourage rogue states to reconsider their nuclear ambitions. While convincing North Korea to give up nuclear weapons will no doubt require a lot of time and resources regardless of other countries’ movements towards disarmament, it is possible that Iran could be talked down from its nuclear stance if it felt that Israel was pressured to reduce its arsenal. At the very least, if the nuclear weapons states were in compliance with their international obligations, the defensive finger-pointing of countries like Iran and North Korea would lose much of its force.

C. *Only a Specifically Threatened State Can Use Preventive Force To Counter Proliferation*

Preventive self-defense can only be claimed by a *specifically* threatened state.¹⁶⁷ A state is considered specifically threatened when it has heightened tensions with a proliferating country or when there is internationally acknowledged hostility, whether or not threats of nuclear weapon use have been made explicit. For example, the constant threats from Iran against Israel (and arguably, vice versa) mean that Israel meets the specifically-threatened requirement. Following the June 2010 Security Council sanctions against Iran, Iranian President Mahmoud Ahmadinejad threatened Israel, stating

166. See Lund, *supra* note 25, at 746 (“The non-proliferation system will indeed be irreversibly weakened if terrorists obtain [a nuclear] bomb.”).

167. While it would be ideal to limit this criterion to just apply to states that are at war with each other, instances of declared war are very rare.

that “the Zionist regime will not survive. It is doomed.”¹⁶⁸ Thus, assuming Israel met the other requirements of the standard, Israel would be justified in destroying Iranian nuclear facilities in the name of preventive self-defense. Unlike Israel, the United States would be hard-pressed to prove that it was specifically threatened by Iran, especially because Iran does not have a missile that could reach U.S. territory.¹⁶⁹ South Korea is another example of a specifically threatened state because of North Korea’s unending belligerence towards the state. South Korea would have been legally permitted to bomb North Korea’s nuclear reactor early in North Korea’s nuclear development stages.

One could argue that the specific threat requirement is moot because nuclear weapons are so dangerous that any state could claim that it is specifically threatened by almost any instance of proliferation.¹⁷⁰ While that is true of nuclear weapons in general, for the purposes of this criterion, one will only consider how the proliferating state acts towards another state. The criterion is not satisfied by the threat nuclear weapons pose to all.

Though the proposed standard requires the acting state to be specifically threatened, this criterion does not alter the traditional doctrine of collective self-defense. According to the ICJ, in order for one state to act in the name of “collective self-defence” to protect another state, the state being defended must request the assistance of the protector state.¹⁷¹ The protector state cannot simply assert the right of collective self-defense and march uninvited to the rescue. If the threatened state cannot act, then it must find another state

168. D’Arcy Doran, *Iran’s Ahmadinejad says Israel is ‘Doomed’*, AGENCE FRANCE PRESS, June 11, 2010, available at http://www.google.com/hosted_news/afp/article/ALeqM5h1LMZk1NR1pZx7WqWhOasKdE23RA.

169. See *Worldwide Ballistic Missile Inventories*, ARMS CONTROL ASSOCIATION (Feb. 19, 2012, 2:00PM), <http://www.armscontrol.org/factsheets/missiles> (“China and Russia are the only two states that are not U.S. allies that have a proven capability to launch ballistic missiles from their territories that can strike the continental United States.”).

170. See *supra* Part III(a).

171. ICJ Military Opinion, *supra* note 42, ¶¶ 165–66 (considering whether the United States had received explicit requests for assistance, and thereby assuming that the United States could not assert the right of collective self-defense as justification for the use of force against Nicaragua when the states that the United States was “protecting” had not requested U.S. assistance).

that can, which will encourage international collaboration and cooperation. Generally the states that will be able to successfully bomb a nuclear installation are already nuclear weapons states; thus, they will likely be estopped from acting in the name of collective self-defense if they are not meeting their disarmament obligations in good faith.

Admittedly, the new standard is not perfect, but it is better than the current system where states feel compelled to act in defiance of international law. Moreover, alternative proposals tend to focus on the threat from the proliferating state but rarely assess the legal characteristics of the attacking state. This Note instead looks at both the attackee and the attacker in developing criteria for the preventive use of force against nuclear weapons.

Additionally, the proposed standard requires bringing proliferation concerns to the Security Council before acting, which will provide a forum for the “threatened” state and the international community to determine just how “threatened” the complaining state truly is. Such public fora will indicate to the proliferating state the seriousness of the consequences of their actions, and may compel them to the negotiating table before strikes occur. Diplomatic pressure empirically has effectively persuaded states to give up their military nuclear technology.¹⁷² If diplomacy does not work, the Security Council will already be seized of the matter. Hopefully, the Security Council will start taking responsibility for international peace and security so that forceful action is taken under Chapter VII authority instead of collective or unilateral self-defense.

172. For example, Brazil, Kazakhstan, Ukraine and South Africa all had nuclear weapons but were convinced through diplomatic pressures to cede their weapons. Canada, Australia, Argentina, Belarus, Italy, Sweden and Switzerland are other examples of countries capable of producing nuclear weapons that decided against it. See Tariq Rauf, *The Non-Proliferation Regime: Successes*, in CURBING THE SPREAD OF NUCLEAR WEAPONS: AN INFORMAL PANEL DISCUSSION ON THE OCCASION OF THE 20TH ANNIVERSARY OF THE VIENNA INTERNATIONAL CENTRE 11, 14 (1999), http://www.iaea.org/newscenter/focus/npt/curbing_spread_nuclear_weapons.pdf (listing states that have either “rolled back” or decided not to pursue nuclear weapons programs).

D. *Continuing To Work Through the Security Council Strengthens the Council and International Law*

Requiring all would-be users of preventive force to go through the Security Council is valuable because it slows down hasty actions and ensures that states honor the rule of law. Traditionally, acts of self-defense are not brought to the Security Council *ex ante* because, as the *Caroline* standard describes, justified self-defense lacks any time for deliberation.¹⁷³ But because there is no traditional imminence requirement under the proposed standard of preventive self-defense, the issue must go through the Security Council.

To prevent the Security Council's failure to act once a threat is brought to its attention, this Note borrows an idea from Thomas M. Franck.¹⁷⁴ When the Security Council issues a binding Chapter VII resolution, such as Resolution 1929 demanding Iran suspend enrichment activities,¹⁷⁵ the Security Council should also resolve what behaviors would be considered a material breach of the resolution and the repercussions.¹⁷⁶ Such a resolution could potentially authorize the use of force to stop the breach. This binding resolution would be passed under normal procedures with standard veto rules. The resolution would include a provision that the Security Council can determine that there has been a material breach through a procedural resolution, which only requires nine votes out of fifteen to pass.¹⁷⁷ A procedural vote is not subject to veto.¹⁷⁸ Franck explains that under this procedure, "a per-

173. See AUST, *supra* note 8, at 209 (stating that lawful self-defense requires that a threat be "instant" and leave "no moment for deliberation").

174. Thomas M. Franck, Editorial Comment, *Inspections and their Enforcement: A Modest Proposal*, 96 AM. J. INT'L L. 899 (2002).

175. S.C. Res. 1929, U.N. Doc. S/RES/1929 (June 9, 2010).

176. See Franck, *supra* note 174, at 899–900 ("The only way . . . is to authorize the Security Council to determine whether a material breach has occurred . . .").

177. See *id.* at 900 (stating that framing the determination of material breach as a procedural matter is desirable because it removes the possibility of a veto by a permanent member that would exist if the determination were deemed a substantive matter).

178. See *id.* ("[S]uch a veto-less vote is authorized by the Charter in Article 27(2). This provision states that '[d]ecisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members' without the veto. By virtue of the 'San Francisco Declaration' of the permanent members, agreed in 1945 concurrently with the endorsement of the U.N.

manent member could exercise its veto when the control regime was being designed, but not when it was being implemented or enforced.”¹⁷⁹ Using this procedure, the Security Council might be more capable of tackling the tough political problems that currently it is loath to undertake. If the Security Council used this procedure, the international community could avoid instances where “a country attempts to auto-interpret prior Council resolutions as a license for war or numerous instances where the Council’s bark has lacked bite.”¹⁸⁰

In the event the Security Council does not act with such foresight (as it often does not¹⁸¹), there is another option. The proposed standard would permit use of preventive self-defense if a Security Council resolution authorizing use of force receives a least nine votes, even if a permanent member vetoes it, or if the Security Council is seized of the matter but fails to vote on the resolution. If the Security Council decides to implement tough sanctions, then such a resolution cannot be considered as failing to take a vote on the matter. At least nine Security Council members must then explicitly vote in favor of use of force in order to overcome the presumed disapproval of use of force implicit in the authorization of sanctions. This would allow the attacking state to take action when it felt it was necessary, and would encourage the Security Council to “facilitate responsible collegial enforcement of Chapter VII mandates” in order to avoid being circumvented.¹⁸² Foresight by the Security Council would reduce the need for states to act in the name of preventive self-defense and would strengthen faith in the non-proliferation regime.

Furthermore, by bringing the issue to the Security Council, the acting state would be under pressure to substantiate its

Charter, the decision whether a matter is procedural or not is to be taken by the Council in a vote that does not require permanent-member unanimity.”).

179. *Id.*

180. José E. Alvarez, Remarks, *U.S. Policies Towards and In the U.N. Security Council*, 15 *ILSA J. INT’L & COMP. L.* 319, 321 (2009).

181. See e.g., Franck, *supra* note 174, at 899 (noting that Security Council resolutions regarding both the first Gulf War and Kosovo neither “create[d] automaticity of designated consequences” nor defined “who would determine whether there had been noncompliance sufficient to trigger consequences”).

182. *Id.* at 900.

claim with solid evidence before it can resort to force. The Security Council procedural rules ensure that if an issue is discussed in Council, a vote will happen with only the motion from the introducing member.¹⁸³ The process of vetting through the Security Council ensures that all targets are actually engaged in illicit nuclear activities and strengthens the Security Council by providing an opportunity to address proliferation problems before states take action into their own hands.¹⁸⁴ Bringing an issue to the Security Council guarantees that the issue receives international attention, and gives the international community a chance to make its opinions known and apply diplomatic pressure to solve the problem. If the attacking state ignores the Security Council's recommendations then there will be political backlash to bring the attacking state in line with accepted norms.¹⁸⁵ While a legal standard that relies on politics to deal with violations is imperfect, it is still an improvement on the status quo, where states act unilaterally without presenting any evidence to justify their actions.

The permanent members of the Security Council will have new incentives to use collective action and avoid political stalemates because the five permanent member states are all nuclear weapons states under the NPT. Therefore, the permanent members will be unable to invoke the right of preventive self-defense against nuclear proliferation unless they take affirmative steps towards disarmament. The only other option for stopping proliferation threats will be the use of collective action, which is always preferable to unilateral action.

The Security Council will also be encouraged to overcome political self-interest because it has a collective interest in preventing unilateral use of force and avoiding the embarrass-

183. See Provisional Rules of Procedure of the Security Council, Rule 34, U.N. Doc. S/96/Rev.7 (Dec. 21, 1982) ("It shall not be necessary for any motion or draft resolution proposed by a representative on the Security Council to be seconded before being put to a vote.").

184. This in contrast to Israel's bombing of Syria's Al Kibar reactor, where Israel did not even bring a complaint to the Security Council before taking unilateral action. See Spector & Cohen, *supra* note 35, at 16–17 (stating that Israel neither requested an IAEA investigation nor raised the issue before the Security Council).

185. See Lund, *supra* note 25, at 759–66 (arguing that "informal methods" including bilateral and multilateral diplomacy effectively account for twenty percent of the solution to proliferation, filling in the gaps left by formal mechanisms).

ment of being circumvented for its inadequacy. The Security Council would be more inclined to take firmer, non-forceful actions—such as tough sanctions—even against its economic partners, to prevent a state from claiming the right of preventive self-defense to attack a nuclear facility. For example, Russia or China would approve sanctions on Iran more quickly if they thought that failure to do so would result in a justified use of preventive force against Iran's nuclear installations by a third state.¹⁸⁶ In the long run, this standard will decrease the use of preventive self-defense because the Security Council would address proliferation issues earlier rather than later. Diplomacy can and has worked to convince states to forgo nuclear weapons, but it requires commitment from the international community.¹⁸⁷

1. *The Proposed Standard Strengthens the International Legal Regime*

One of the biggest criticisms of international law, particularly nuclear non-proliferation law, is the lack of enforcement.¹⁸⁸ The proposed standard addresses that criticism by

186. See Elizabeth Weingarten, *The Iran-START Connection*, THE ATLANTIC, Nov. 22, 2010, <http://www.theatlantic.com/politics/archive/2010/11/the-iran-start-connection/66908/> (“Russia has both economic and geopolitical incentives for maintaining a positive relationship with Iran.”). A similar conclusion can be made regarding China, which would explain why Chinese companies continue to aid Iran's ballistic missile program despite U.N. sanctions. See Pomper & Harvey, *supra* note 29, at 18 (noting that Chinese companies continue to assist Iran due to lax enforcement of export controls).

187. See Weise, *supra* note 94 (demonstrating that North Korea was amenable to diplomatic solutions to its proliferation efforts until the tone of the US administration changed from one of diplomacy to hostility); see also HELEN E. PURKITT & STEPHEN F. BURGESS, *SOUTH AFRICA'S WEAPONS OF MASS DESTRUCTION* 119 (2005) (explaining that South Africa's decision to roll back its nuclear program was based on a confluence of events, including pressure from Western states to join the NPT); *Chronology of Libya's Disarmament and Relations with the United States*, ARMS CONTROL ASSOCIATION (Mar. 1, 2012, 1:30 PM), <http://www.armscontrol.org/factsheets/LibyaChronology> (explaining that though officials within the Bush administration claimed military operations and military interdiction of nuclear-related components were responsible for Libya's decision to end its nuclear program, “outside experts argue that years of sanctions and diplomatic efforts were more important”); Rauf, *supra* note 172, at 14 (describing the circumstances under which several states abandoned or decided not to pursue nuclear programs).

188. See Blake Klein, Note, “Bad Cop” Diplomacy & Preemption: An Analysis of *International Law and Politics Governing Weapons Proliferation*, 14 DUKE J. COMP.

strengthening the enforcement mechanisms of the non-proliferation regime, which would foster greater faith in and adherence to international law.

Critics may argue that allowing self-defense in the name of the NPT will undermine the NPT because the NPT already outlines procedures for dispute resolution.¹⁸⁹ The IAEA Statute indicates that when the IAEA detects violations of the NPT, it will report the matter to the Security Council, “as the organ bearing the main responsibility for the maintenance of international peace and security.”¹⁹⁰ Yet, the new standard does not *require* going to the IAEA with national intelligence about undeclared nuclear weapons programs. This Note’s proposal will encourage the Security Council to actively enforce the NPT, increasing Security Council enforcement of the NPT. More enforcement will, in turn, increase faith in the IAEA and Security Council as non-proliferation institutions. States will feel more comfortable going to the IAEA with their proliferation concerns once they believe that the IAEA and Security Council will actually take action.

The new standard will also increase the IAEA’s ability to conduct thorough inspections of nuclear facilities by encouraging states to join the Additional Protocol. The IAEA statute only requires IAEA inspections at nuclear sites that had been declared by the host country.¹⁹¹ However, this created a loophole where a nation could simply not declare a nuclear site and thus avoid inspection.¹⁹² To address this problem, the IAEA and NPT states party developed the Additional Protocol,

& INT’L L. 389, 395 (2004) (“[T]he key problem that has always accompanied the NPT regime [is] the lack of an enforcement mechanism.”); *see also* Lund, *supra* note 25, at 748 (“The containment of nuclear weapons for the most part is a success story, but fears of proliferation still exist, and nations are not completely willing to rely on the NPT.”).

189. *See* NPT, *supra* note 12, art. III, ¶ 1 (requiring each state party to the NPT to enter into safeguard agreements with the IAEA to monitor civilian application of nuclear technology and material); *see also* Statute of the International Atomic Energy Agency art. III(B), ¶ 4, Oct. 26, 1956, 8 U.S.T. 1093, 276 U.N.T.S. 3 [hereinafter IAEA Statute] (requiring the IAEA to submit reports to the Security Council).

190. IAEA Statute, *supra* note 189, art. III(B), ¶ 4.

191. *See* Lund, *supra* note 25, at 750 (“The original Agency statute required nations to declare their nuclear sites . . . and then allow limited inspections to the declared sites.”).

192. *Id.* at 750–51.

which allows the IAEA to determine if a state has undeclared facilities and permits weapons inspectors to conduct inspections with almost no notice.¹⁹³ Non-proliferation experts agree that the Additional Protocol is a crucial element of nuclear safeguards.¹⁹⁴ However, the Additional Protocol has not been ratified by all nations, so its effectiveness remains limited.¹⁹⁵ The proposed standard encourages states to sign onto the Additional Protocol because states party would be safer from preventive attacks than states that did not ratify. The international community would have little reason to suspect that states party to the Additional Protocol were engaged in illicit nuclear activity. Any suspicions could be verified with snap inspections. The international community would not tolerate preventive attacks on states that were subject to such inspections. Additionally, ratification of the Additional Protocol is important for protecting states' right to civilian nuclear technology while ensuring that said technology is only used for peaceful purposes.

Another weakness of the NPT is the ease with which states can withdraw from it.¹⁹⁶ Thus, a non-nuclear weapons state party to the NPT could develop civilian nuclear technology and produce a legal stockpile of weapons-grade nuclear material under the IAEA safeguards, withdraw from the NPT, and then use its once-peaceful nuclear technology to manufacture nuclear weapons.¹⁹⁷ For example, when North Korea no longer saw the value in being party to the NPT, it withdrew and quickly turned its once-legal nuclear activities into illicit proliferation.¹⁹⁸ With the knowledge and enrichment level

193. *Id.*

194. *See Israel's Airstrike on Syria's Nuclear Reactor: Preventive War and the Non-proliferation Regime*, UNITED STATES INSTITUTE OF PEACE (July 14, 2008), http://www.usip.org/files/israel_syria.mp3 (Statement of David Albright, President, Inst. for Sci. & Int'l Sec.) ("It's been clear to the IAEA, and others who pay attention, that if you don't have the Additional Protocol in force . . . the traditional safeguards just don't work to fight undeclared nuclear activities, if the state takes even minimal steps to hide those [activities].").

195. *Id.*

196. *See* NPT, *supra* note 12, art. X, ¶ 1 (providing that a state only need give notice three months before withdrawal from the NPT).

197. Sloss, *supra* note 16, at 40.

198. JOEL S. WIT ET AL., GOING CRITICAL: THE FIRST NORTH KOREAN NUCLEAR CRISIS 21 (2004) (describing how North Korea issued an ominous statement about its need to take "countermeasures of self-defense to safe-

North Korea attained while a member of the NPT, it was only a few short years after withdrawing from the NPT that North Korea was able to test its first nuclear weapon.¹⁹⁹ The proposed standard would deter states from withdrawing from the NPT because they would then be vulnerable to unilateral attack, even if the Security Council were gridlocked.

2. *Addressing the Issue of Timing*

As with the traditional imminence standard, the time allotted for the Security Council to address a proliferation concern before a state can determine that the Security Council “has failed to act” will vary depending on the situation. The threatened state and the Security Council should consider how close the proliferating country is to introducing radioactive material into the nuclear facilities, whether the IAEA has had sufficient time to conduct (or attempt to conduct) inspections at any suspicious facilities, and whether the belligerent actions of the proliferating state indicate an attack is forthcoming. If the Security Council issues sanctions, the threatened state should wait for a sufficient time to see how the sanctions impact the proliferating state’s nuclear developments.

Unfortunately for the imminence requirement, it is better to bomb nuclear facilities earlier rather than later in order to comply with the self-defense standard of proportionality,²⁰⁰

guard [its] sovereignty and supreme national interests” in response to a request from the IAEA to inspect North Korean nuclear facilities, invoking the criteria for withdrawal from the NPT); *see also* Weise, *supra* note 94 (providing a chronology of North Korea’s activities related to its nuclear weapons program).

199. *See* Weise, *supra* note 94 (stating that North Korea withdrew from the NPT in 2003); *see also* David E. Sanger, *North Koreans Say They Tested Nuclear Device*, N.Y. TIMES, Oct. 9, 2006, <http://www.nytimes.com/2006/10/09/world/asia/09korea.html> (stating that North Korea announced it had detonated its first nuclear device in 2006).

200. *See* ICJ Nuclear Opinion, *supra* note 1, ¶¶ 40–43 (accepting that the requirement that self-defense be proportional applies to nuclear weapons); *see also* Sloss, *supra* note 16, at 44 (By attacking [a reactor or processing plant] before the facility is operational, a well-executed attack could deal a significant technological setback to a state’s nuclear weapons program without causing substantial radiological contamination.”). *But see* Eichensehr, *supra* note 28, at 90 (“A preemptive strike against nuclear facilities would further endanger public order by undermining the criteria by which uses of force are evaluated – necessity, immediacy, and proportionality.”).

with environmental obligations,²⁰¹ and with the Geneva Conventions. Self-defense is only justified when employing the smallest amount of force possible to repel the threat, and there are compelling environmental, health, and humanitarian reasons to bomb before nuclear material is introduced into a facility.²⁰² It is “difficult, if not impossible,” to destroy a nuclear facility that is already processing uranium or plutonium without releasing dangerous amounts of radiation into the surrounding areas.²⁰³ The radiation causes cancer and other health problems for civilians, as well as lasting environmental damage. Attacking before fissile material is introduced into the facility would reduce the harms of destroying a nuclear facility and would be a significant technological setback for the proliferating country.²⁰⁴ To comply with international obligations, a preventive strike on a nuclear facility should cause as little spread of radioactive material as possible—meaning, the bombing ought to occur before radioactive material is introduced into the facility.²⁰⁵

Second, bombing a nuclear facility before it begins producing highly-enriched uranium or weapons-grade plutonium reduces the risk that fissile material has already been smuggled out of the facility. There is a large black-market for weapons-grade fissile material, in large part because the most difficult part of creating a nuclear weapon is obtaining the core²⁰⁶—

201. See Eichensehr, *supra* note 28, at 89 (“A further factor that must be weighed when considering a preemptive strike on nuclear facilities is the environmental damage such a strike would engender.”); see also ICJ Nuclear Opinion, *supra* note 1, ¶ 30 (“States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives.”).

202. Sloss, *supra* note 16, at 44.

203. *Id.*

204. *Id.*

205. See Eichensehr, *supra* note 28, at 88–89 (“Depending on the stage of development of the reactor, namely whether it is operational or not and whether nuclear material has been introduced into the site, bombing a reactor has the potential to cause nuclear fallout that would be released into the atmosphere.”).

206. See Allison, *supra* note 132 (“National security experts agree that the most likely way terrorists will obtain a nuclear bomb will involve not theft or purchase of a fully operational device, but purchase of fissile material from which they construct their own.”).

the rest of bomb building technology is no longer a secret.²⁰⁷ Even if terrorists lack the sophistication to build a nuclear weapon, evidence indicates that terrorists are seeking radioactive materials to manufacture a “dirty bomb,” through which radioactive material can be spread over a large area using conventional explosives.²⁰⁸ A dirty bomb is small enough to be easily concealed and the resulting spread of radiological materials causes significant health problems, even among victims who were outside of the radius of the initial explosion.²⁰⁹ Dirty bombs result in massive economic losses in the area surrounding an explosion because it is unsafe to be within the vicinity.²¹⁰ Moreover, they are relatively easy to manufacture if one has access to the fissile material, which is why stopping the production of fissile material before it begins is so important.

The decision of when to bomb a nuclear facility will require a balancing of two factors: (1) the reduced environmental and health hazards of bombing before the introduction of radioactive material into the facility (proportionality), and (2) the increased certainty of a country’s intent to use its nuclear facility for illegal proliferation (necessity). Factors that will help an acting state and the international community in deciding whether the right balance was struck between the two considerations will include, inter alia, the following: (1) whether the potential target state kept its decision to build a nuclear facility secret (suggesting illegality); (2) whether the target state is a member in good standing of the NPT and/or the Additional Protocol; (3) evidence of whether the targeted facility is designed for civilian or nuclear use;²¹¹ (4) whether the targeted state is alienated from the international community; (5) how much time remains until the facility starts processing

207. See *id.* (“[R]ecent revelations about A.Q. Khan’s nuclear network demonstrated that complete bomb designs are now available for sale on the black market.”).

208. See Rockefeller, *supra* note 11, at 136 (“As of January 2004, experts unequivocally stated that terrorist groups possess the will to use [a dirty bomb] and that they are ‘doing everything they can’ to acquire the materials.”).

209. *Id.*

210. *Id.*

211. See Spector & Cohen, *supra* note 35, at 15 (explaining that the CIA concluded from intelligence that the design of Syria’s Al Kibar facility was unsuitable for energy production or nuclear research, strongly suggesting Syria’s intent to enrich plutonium for nuclear weapons).

radioactive material; (6) whether the attacking state has time to gather more intelligence but elects not to do so; and/or (7) whether the facility is located near civilian populations, sensitive natural environments, or water sources. The proposed standard is *not* meant to justify destroying a nuclear facility immediately following the election of a bellicose leader or even in the wake of a military coup. The proposed standard does not condone bombing a site near the beginning of its construction, before it is possible to ascertain what is being built. In those instances, some states may be tempted to bomb first and ask questions later. But allowing attacks when the threat is that nebulous would create a dangerous legal precedent, where any state pursuing its legal right to peaceful nuclear energy may become the victim of preventive use of force.

Unfortunately, given the potential for a wide variance in the above factors, it is impossible to develop a hard and fast rule for balancing the need to bomb early with the desire to have sufficient evidence about the intentions of the targeted country. Considering the above factors, the best time to destroy a nuclear facility, as both a legal and policy matter, is a few months before the introduction of radioactive material. At this point in time, it would be possible to have strong evidence about the nature of the facility, and the strike would not risk spreading radioactive material in the surrounding area.

It is worrisome that the proposed standard could create perverse incentives for states to quicken the pace of building nuclear facilities and to introduce radioactive material as soon as possible to protect them from being bombed. However, a state that is seeking nuclear weapons is probably already trying to get nuclear weapons as fast as possible anyway. The timing element of the proposed standard may not change the behavior of a state that was already determined to go nuclear. That is why the factors are to be balanced. In rare instances it may be justified to strike a nuclear facility after the introduction of radiological material, depending on the specific situation. Additionally, the appeal of the proposed standard is that it encourages *all* states to get rid of their nuclear weapons and may help convince pugnacious states that having a nuclear weapon costs too much.

E. *Nuclear Deterrence Does Not Eliminate the Need To Strike Nuclear Facilities in Self-Defense*

Some might argue that deterrence removes the need for preventive strikes against nuclear facilities because deterrence removes the risk of nuclear weapon use.²¹² For example, presume that Iran knows that Israel has the second-strike capabilities to retaliate if Iran used a nuclear weapon against Israel. If this is true, then Iran will be deterred by Israel's capability to render a devastating response. Israel thus has no need to preventively attack Iran's nuclear facilities. However, there are three main reasons why deterrence is insufficient to counter the threat from new nuclear weapons.

First, deterrence assumes rational actor theory,²¹³ where the leader of each state rationally analyzes the risks inherent in initiating a nuclear attack and acts accordingly to save the lives of his/her citizens. But, given the reality of today's threats and the past actions of state leaders, it is clear that states do not always behave rationally. Leaders may be driven by pride, spite, or hubris to act in ways that seem rational to them, but that are suicidal for their countries. Fidel Castro's behavior during the Cuban Missile Crisis illustrates this point. Castro pushed John F. Kennedy and Nikita Khrushchev close to the brink of nuclear war because he wanted the Soviet nuclear weapons to remain in Cuba, despite the fact that Cuba would have been one of the first targets had a war started.²¹⁴ Clearly, Castro's cost-benefit analysis was not rational. Betting on a leader's sanity or rationality is a risky business, especially when the subject of the bet is Mahmoud Ahmadinejad, Kim Jong Un, or Osama bin Laden's successors.

212. See ROGER W. BARNETT, *ASYMMETRICAL WARFARE: TODAY'S CHALLENGE TO U.S. MILITARY POWER* 35 (2003) ("[A] strategic defensive posture [i.e. reliance on nuclear deterrence] depresses interest and preparation for preemptive or preventive attack.").

213. See *id.* at 4 (noting that one situation in which deterrence fails is when "[an] attack was irrational—no rational actor would have calculated that it would have succeeded").

214. See JAMES G. BLIGHT, *THE SHATTERED CRYSTAL BALL: FEAR AND LEARNING IN THE CUBAN MISSILE CRISIS* 21–22 (1990) ("To this day, Castro remains bitter about his treatment by both superpowers and is evidently unrepentant about his efforts to defend what he took to be his right of national sovereignty, even at the possible cost of provoking a war.").

Second, lack of information and miscalculations can cause deterrence to fail. One state may assume that its adversary does not have second-strike capabilities and may launch an attack, only to discover after millions have died that this assumption was wrong. The lack-of-information problem is especially acute in nuclear deterrence because of the shroud of secrecy around most states' nuclear programs. When both sides are guessing about how many weapons the other side has, the potential for miscalculation is greatly increased.

Third, deterrence is insufficient to address nuclear threats because it assumes that a nuclear weapon will be traceable to whoever launched it. This is not always the case.²¹⁵ It may be difficult to tell with certainty which country is responsible for a missile fired from a nuclear submarine.²¹⁶ There may be difficulty in tracing nuclear material to its original source, although technology is getting better at determining the original source of radiological materials.²¹⁷ Non-state actors further complicate the problem of determining the location of an adversary.²¹⁸ If a terrorist group detonated a dirty bomb, it could be very difficult to attribute that action to a state in order to justify retaliating with nuclear weapons.²¹⁹ Terrorists

215. See e-mail from Peter Crail, Non-Proliferation Analyst, Arms Control Assoc., to author (Dec. 1, 2010, 3:50 PM EST) (on file with author) (explaining that while a missile's launch location can be determined with a high degree of certainty, there may still be some uncertainty in tracing nuclear material to its original producer).

216. See *id.* (explaining that a nuclear submarine is unlikely to remain in the location from which it launches a missile).

217. See *id.* (noting that while such methods are not 100% accurate, they can "get within a high enough degree of certainty by process of elimination").

218. See Joyner, *supra* note 51, at 245 ("[T]he emergence of sophisticated non-state actors . . . [has changed] the rules on where states must look to predict and manage threats, as well as the effectiveness of classical doctrines such as deterrence and containment for managing these threats.").

219. The Draft Articles on State Responsibility indicate that a state can be held internationally responsible for a terrorist organization's actions if: that group is acting on the instructions of the government; the terrorist organization is "exercising elements of the governmental authority in the absence or default of the official authorities"; the group becomes the new government of a state; or "the State acknowledges and adopts the conduct in question as its own." Draft Articles on Responsibility of States for Internationally Wrongful Acts arts. 8–11 [hereinafter Draft Articles on State Responsibility], *in* Rep. of the Int'l Law Comm'n, 53d sess., Apr. 23–June 1, July 2–Aug. 10, 2001, U.N. Doc. A/56/10, GAOR, 53d Sess., Supp. No. 10, at 43 (2001).

cannot be deterred with nuclear weapons, because deterrence only works if the one being deterred believes the threat is credible. Terrorists can move from state to state, making it incredible, unrealistic, illegal and cruel for the attacked state to respond by killing a huge civilian population with a nuclear device.²²⁰ Deterrence simply does not work against mobile and dispersed international non-state actor networks.²²¹

F. *Problems of Proof Related to Preventive Use of Force
Do Not Invalidate Its Necessity*

A common criticism of preventive and, to a lesser degree, preemptive use of force is the problem of proof. Before acting in preventive self-defense, a state must have sufficient evidence that a threat exists. The further a threat is from materializing, the harder it is to objectively prove to the international community that the threat is credible or even forthcoming.²²² Empirically, it is hard to prove that a state is violating its NPT and IAEA obligations.²²³ It is even more difficult to prove that once a state acquires fissile material it intends to make a nuclear weapon. It is more difficult still to prove that the proliferating state intends *to use* its nuclear weapons.

The difficulty of proof is not only a problem for this proposal, but is a recurrent problem in the status quo and in other suggested alternatives. At some point the international

Thus, in some instances it might be difficult to attribute the acts of the terrorist to a state for the purposes of international responsibility, and responding to an attack with nuclear force could be met with international condemnation.

220. See Joyner, *supra* note 51, at 245 (citing Daniel B. Poneman, *A New Bargain*, in *ATOMS FOR PEACE: A FUTURE AFTER FIFTY YEARS?*, 177, 179–180 (Joseph F. Pilat ed., 2007) (“[T]errorists do not often leave return addresses.”)).

221. *Id.*

222. See Eichensehr, *supra* note 28, at 65–66 (“[L]ack of certainty regarding a state’s intentions becomes increasingly problematic the further one moves away from the commencement of an armed attack.”).

223. Currently, there is a contentious debate over the state of Iran’s nuclear program. At the time when Israel bombed Iraq’s reactor, there was limited intelligence about whether Iraq’s program was peaceful or not. It was not until years later that experts developed a clear picture of Iraq’s pre-Gulf War nuclear weapons program. See David Albright & Mark Hibbs, *Iraq’s Shop-Till-You-Drop Nuclear Program*, *BULLETIN OF THE ATOMIC SCIENTISTS*, Apr. 1992, at 27 (providing information on the nature and history of Iraq’s nuclear weapons program).

community simply decides that there is sufficient proof to justify the use of force, but there does not appear to be a clear standard.²²⁴ However, the ICJ has said that, “[p]ossession of nuclear weapons may indeed justify an inference of preparedness to use them.”²²⁵ It follows that preparation to make a nuclear weapon can also justify an inference of preparedness to use them.

Though this Note does not attempt to set a specific level of proof required for use of force, the proposed standard at least ensures that the Security Council is seized of an issue. This requirement creates an international forum for discussion of whether there is sufficient proof to justify forceful action. The difficulty in proving intent highlights the importance of all states agreeing to the Additional Protocol so that the IAEA can do the invasive inspections necessary to ensure all states’ nuclear facilities are only for peaceful purposes.

VI. APPLICATION OF THE RULE

Only twice has one state bombed another state’s nuclear facilities in the name of preventive self-defense. Israel was the attacking state in both cases. Both events shed light on the international law regarding such attacks and provide lenses through which to examine the proposed standard.

A. *Osirak, Iraq*

Operation Opera, the name for the Israeli plan to bomb a nuclear reactor at Osirak, Iraq, was executed on June 7, 1981.²²⁶ Israeli jets flew through Saudi Arabian airspace to reach their target, which they successfully destroyed.²²⁷ The international community overwhelmingly condemned Israel’s action as a violation of international law. The Security Council unanimously passed Resolution 487, stating that it was “[d]eeply concerned about the danger to international peace and security created by the premeditated Israeli air attack . . . which could at any time explode the situation in the area, with grave conse-

224. The “burden of proof” for international forceful actions is a topic for another paper. Little scholarly research exists on this topic outside of international criminal law jurisprudence.

225. ICJ Nuclear Opinion, *supra* note 1, ¶ 48.

226. Lund, *supra* note 25, at 769.

227. *Id.*

quences for the vital interests of all States.”²²⁸ It was not until IAEA inspections in 1991 that the IAEA confirmed that Israel’s suspicions about Iraq’s nuclear ambitions were correct.²²⁹

Israel attempted to reduce casualties by only destroying the reactor, attacking on a quiet Sunday afternoon with few people present, immediately leaving the airspace following the attack, and bombing before the introduction of fissile material into the reactor.²³⁰ Israel’s attempts to reduce the spread of radioactive material and keep casualties at a minimum are commendable, but the attack still would be illegal under the proposed standard.

To evaluate the legality of Israel’s action against the proposed standard, one starts with the question of whether the nuclear activity violated international law. Iraq was party to the NPT as a non-nuclear weapons state, and thus had agreed not to pursue nuclear weapons.²³¹ Therefore, Iraq’s nuclear weapon program was a violation of international law. Israel met the second criterion as well. In 1981, “there exist[ed] a state of war between Israel and Iraq.”²³² Iraq did not recognize the state of Israel, and considered itself at war with Israel.²³³ Israel was a specifically threatened state for the purposes of the proposed standard.

Israel, however, did not bring the issue to the Security Council before carrying out its attack, violating an element of

228. S.C. Res. 487, *supra* note 31, pmb; *see also* Rockefeller, *supra* note 11, at 134 (“The U.N. Security Council unanimously condemned the attack . . .”).

229. *See* Lund, *supra* note 25, at 769 (“Following the Gulf War in 1991, IAEA inspections revealed that Israel had been right.”).

230. *See* Eichensehr, *supra* note 28, at 73, 76 (noting the presence of the first three criteria, and stating that “Israel bombed the Osiraq reactor one month before it was to become operational . . . Israel defended the timing of its action by claiming that it attacked at the last time when bombing the reactor would not have caused release of nuclear radiation that could have endangered civilians in Baghdad.”).

231. *See* NPT, *supra* note 12, arts. I–II (laying out the general nonproliferation obligations of states parties to the NPT); *see also* UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS, *supra* note 17 (noting that Iraq was a party to the NPT).

232. Roberts, *supra* note 4, at 530.

233. *Id.*

the proposed standard.²³⁴ Perhaps most importantly, Israel is not a good-faith player in the international non-proliferation regime and thus would be disqualified from legally attacking Iraq's nuclear sites. Israel has nuclear weapons, is not party to the NPT, and refuses to let IAEA inspectors into its nuclear facility at Dimona, where it is suspected of having produced approximately 200 nuclear warheads.²³⁵ Though both the NPT and IAEA agreements are treaty-based obligations that Israel has refused to join, Israel is nonetheless in violation of the customary international law against nuclear proliferation by refusing to acknowledge its nuclear weapons programs and declining to be part of the international discussions on disarmament and non-proliferation. Thus, Israel would be estopped from claiming the right of preventive self-defense to attack Iraq when it is in violation of non-proliferation law itself.

In conclusion, Israel's bombing of Osirak would be illegal under the proposed standard. Though Iraq was illegally proliferating and Israel was specifically threatened by Iraqi proliferation, Israel failed to bring the issue to the Security Council. Moreover, Israel is not in good standing with its international non-proliferation obligations.

B. *Al Kibar, Syria*

On September 6, 2007, Israel bombed another nuclear facility in the Middle East, this time at the Al Kibar site in Syria.²³⁶ Though neither Israel nor Syria has confirmed details of the attack, satellite images indicate that the bombing successfully destroyed the complex.²³⁷ Syrian authorities subsequently cleaned up all rubble quickly and quietly.²³⁸

234. See Spector & Cohen, *supra* note 35, at 17 (“[T]he matter [of Iraq’s activities at Osirak] was not brought up for debate at the U.N. Security Council.”).

235. *Australian FM Urges Nuclear Inspections in Israel*, Global Security Newswire, Dec. 14, 2010, available at <http://www.nti.org/gsn/article/australian-fm-urges-nuclear-inspections-in-israel>.

236. Spector & Cohen, *supra* note 35, at 15.

237. See Lund, *supra* note 25, at 769 (“Pre- and post-strike satellite photos made available to the press indicated that multiple buildings had been destroyed.”).

238. See Spector & Cohen, *supra* note 35, at 16–17 (noting Syria’s efforts to remove evidence from the reactor site after the strike).

Again, Israel observed rules about proportionate self-defense by only bombing at night to reduce casualties and leaving Syrian airspace immediately after the site was destroyed. The necessity of the attack was later confirmed when the IAEA found traces of synthetic uranium at the site, “an almost sure sign of nuclear activity”²³⁹ and a violation of Syria’s obligations as a non-nuclear weapons state party to the NPT.

What is surprising about this attack was the silence from the international community, especially the silence from the Arab world.²⁴⁰ Shortly after Israel bombed Al Kibar, Syria complained to the Security Council. The Security Council said and did nothing, although the IAEA condemned the action.²⁴¹ Mohamed ElBaradei, then Director-General of the IAEA, issued a statement admonishing Israel (and the United States) for not coming to the IAEA with intelligence about Syria’s nuclear program.

It is difficult to glean meaning from the silence following this attack. Some argue that the silence is a form of tacit approval of preventive use of force. Others argue that the silence “can hardly be said to provide Israel or any other state with a green light for attacking threatening nuclear installations in Iran.”²⁴² Some have surmised that the foreign governments “may have reserved comment because of the lack of information after the attack.”²⁴³ But the international silence continued even after the U.S. Central Intelligence Agency (CIA) gave an extensive briefing on April 24, 2008, making a strong case that the site was a nuclear reactor and explaining that both the United States and Israel were involved in analyzing the threat.²⁴⁴

Again, Israel’s action fails to pass muster under the proposed standard because of Israel’s illegal nuclear weapons program and failure to bring the issue before the Security Coun-

239. Lund, *supra* note 25, at 770.

240. See Spector & Cohen, *supra* note 35, at 17 (comparing the silence following the Al Kibar bombing to the international outcry following the Osirak bombing).

241. Lund, *supra* note 25, at 770.

242. Spector & Cohen, *supra* note 35, at 20.

243. *Id.* at 15.

244. *Id.* at 15, 17. While the U.S. clearly had intelligence on the Syrian reactor, it is generally accepted that the U.S. did not take part, at least physically, in the bombing at Al Kibar.

cil. However, Israel did meet the first two criteria: (1) Syria was building a military nuclear reactor in violation of international law and (2) Israel has a strong argument that it would be specifically threatened by a Syrian nuclear weapon, given Syria's propensity to support the terrorist group, Hezbollah, which routinely attacks Israel²⁴⁵ and that Israel and Syria have been described as "long time . . . adversaries."²⁴⁶

C. *Looking Forward: Iran*

Iran's nuclear program is the subject of heated debate in the international community right now. Talk of preventive strikes on Iran by either Israel or the United States is difficult to ignore. It is thus helpful to apply the proposed standard to the situation in Iran to assess the legality of potential strikes.

First, Iran is a signatory of the NPT and has signed but not ratified the Additional Protocol.²⁴⁷ There is good reason to suspect that Iran is violating its NPT commitment to forgo military use of nuclear technology. For one thing, the Iranian nuclear program remained a secret for eighteen years until a dissident group told authorities about its existence.²⁴⁸ Additionally, the IAEA has reported that Iran received plans for nuclear centrifuges from the A.Q. Khan network, a highly profitable black-market proliferation ring.²⁴⁹ Iran continually refuses to cooperate with IAEA inspectors.²⁵⁰

The Security Council has issued repeated resolutions stating that Iran is violating its international obligations to cooperate with the IAEA.²⁵¹ Thus, a specifically threatened state

245. See EITAN AZANI, *HEZBOLLAH: THE STORY OF THE PARTY OF GOD: FROM REVOLUTION TO INSTITUTIONALIZATION 177-82* (2009) (explaining Syria's previous involvement in Hezbollah terrorist attacks in Lebanon).

246. UNITED STATES INSTITUTE OF PEACE, *supra* note 194 (Statement of Daryl G. Kimball, Executive Director, Arms Control Assoc.).

247. See *Arms Control and Proliferation Profile: Iran*, ARMS CONTROL ASSOCIATION (Mar. 5, 2012, 4:48 PM), http://www.armscontrol.org/factsheets/iran_profile (listing Iran's status in several international arms control regimes).

248. Eichensehr, *supra* note 28, at 67.

249. *Id.* at 67-68.

250. See Peter Crail, *IAEA, Iran Clash on Inspections Report*, ARMS CONTROL TODAY, Oct. 2010, at 38 (explaining that Iran banned certain inspectors from the country and refused to fully answer many of the IAEA's questions).

251. See S.C. Res. 1929, *supra* note 175, pmb. ("Noting with serious concern that . . . Iran has not established full and sustained suspension of all enrichment-related and reprocessing activities and heavy water-related

could say that the issue has been brought to the Security Council, which has arguably failed to take adequate action.²⁵² But, Resolution 1929 implements tough sanctions and explicitly does not authorize the use of force,²⁵³ meaning that the Security Council *has acted* and found use of force to be unwise. The specifically threatened country could bring another resolution to the Security Council requesting an authorization for force. If the resolution receives at least nine votes, or if the Security Council was seized of the issue but failed to vote on a resolution, then the state could then proceed with a preventive strike against Iran. However, if the resolution received less than nine votes, such a strike would be illegal.

As for the specific threat requirement, Israel has a strong case that it would be specifically threatened by an Iranian nuclear weapon given Iran's statements about "the Zionist regime" being "doomed."²⁵⁴ However, Israel would have to join the NPT or make other good faith efforts to reduce its nuclear arsenal before being allowed to take such action.

The United States would have a harder time making the case that it is specifically threatened by an Iranian bomb, especially given the relatively short range of Iran's ballistic missiles.²⁵⁵ No doubt, the United States could claim that it was

projects as set out in resolutions 1696 (2006), 1737 (2006), 1747 (2007) and 1803 (2008) nor resumed its cooperation with the IAEA under the Additional Protocol, nor cooperated with the IAEA in connection with the remaining issues of concern, which need to be clarified to exclude the possibility of military dimensions of Iran's nuclear programme, nor taken the other steps required by the IAEA Board of Governors, nor complied with the provisions of Security Council resolutions 1696 (2006), 1737 (2006), 1747 (2007) and 1803 (2008) and which are essential to build confidence, and *deploring* Iran's refusal to take these steps").

252. The debate about the effectiveness of sanctions is on-going and unresolved. While it is relevant for the issue of determining whether Security Council action has been effective or adequate, it is not something addressed in this Note. For an in depth analysis about the successes and shortcoming of sanctions, see generally GARY CLYDE HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED* (3d ed. 2007).

253. See S.C. Res. 1929, *supra* note 175, pmbl. ("Stressing that nothing in this resolution compels States to take measures or actions exceeding the scope of this resolution, including the use of force or the threat of force").

254. Doran, *supra* note 168.

255. Iran's missile range is estimated to be about 2,000 km or 1,200 miles at best. See *Worldwide Ballistic Missile Inventories*, ARMS CONTROL ASSOCIATION

acting in the interests of its allies, such as Israel or Eastern Europe, within range of Iranian missiles, but as the ICJ has said, those other states must request assistance from the United States before the United States can claim a right to act under “collective self-defense.”²⁵⁶ Additionally, the United States would have to make good on some of its non-proliferation obligations, such as ratifying the CTBT or expanding the cuts beyond those required by new START, before it could take unilateral preventive action against Iran.

Therefore, depending on the attacking state, it is possible, but not likely, that bombing Iranian nuclear facilities would be legal under the proposed standard. However, it is very important to note that just because the action may be legal, that does not make it prudent.²⁵⁷

(Feb. 29, 2012, 2:30 PM), <http://www.armscontrol.org/factsheets/missiles> (listing the estimated ranges of various countries' missiles).

256. See *supra* note 171 and accompanying text (describing the ICJ Military Opinion's treatment of collective self-defense).

257. Political considerations will be important in all decisions of whether to unilaterally attack nuclear facilities, whether in Iran or in other countries. This paper is only focused on the legal implication of such actions. However, several political considerations are relevant. First, Iran's nuclear sites are geographically dispersed, and some are buried underground and reinforced. Eichensehr, *supra* note 28, at 86. The sites are likely well-guarded by anti-aircraft artillery, as they are at Natanz. See *UN Inspectors Will Not Examine Iranian Nuclear Plants*, TIMES OF ISRAEL, Feb. 21, 2012, available at <http://www.timesofisrael.com/un-inspectors-will-not-visit-iranian-nuclear-sites/> (featuring a picture of the anti-aircraft artillery at Natanz). Second, the United States is already struggling with a multi-front war. The extra resources needed to deal with Iran's nuclear facilities would be costly—financially, militarily and politically. See Eichensehr, *supra* note 28, at 85 (“The attacking state would need a frank *ex ante* assessment not just of its military capability but also of its finances, political and popular will, and allied support.”); see also Spector & Cohen, *supra* note 35, at 20 (“[T]here is a huge difference between the ability (especially for Israel) to conduct a successful strike against a single, ground-level reactor in nearby Syria and the ability to destroy a dozen or so major nuclear weapons-relevant components of a much larger nuclear program in distant Iran, including Iran's underground, heavily shielded enrichment facility at Natanz. These are two radically different military missions.”). Third, bombing Iran could cause a spike in oil prices. See Eichensehr, *supra* note 28, at 86 (noting that Iran is in a position to take actions in response to an attack that would raise oil prices). Finally, such an attack could encourage the Iranian people to rally around Ahmadinejad, strengthening the recently weakened regime, to the detriment of U.S. and Israeli interests in the region. See THIELMANN, *supra* note 101 (observing that a strike might indirectly weaken the Green Movement).

If nuclear weapons states, specifically the United States and Israel, took concrete steps towards disarmament, Iran may decide it does not need nuclear weapons, especially because disarmament actions by the United States and Israel could be very influential in swaying popular opinion away from Ahmadinejad and his nuclear ambitions. This demonstrates the benefit of this Note's proposal—the possibility that undertaking the actions required to attack will actually end the need for preventive self-defense.

VII. CONCLUSION

Nuclear weapons are the most destructive man-made force on the planet. Numerous treaties exist limiting their use, and customary international law prohibits such weapons. All states have a legal obligation to forgo proliferation and disarm their current nuclear arsenals. Unfortunately, the enforcement mechanisms of the NPT, IAEA, and Security Council are ineffective.

The interpretation of the Charter must change to allow use of force in very limited circumstances to enforce the legal prohibition against nuclear weapons. Numerous Security Council and General Assembly resolutions have indicated that proliferation of nuclear weapons poses a threat to international peace and security, the very peace and security the Charter was created to preserve. Thus, Article 2(4) of the Charter, which prohibits use of force that is inconsistent with the purposes of the Charter, and Article 51, which guarantees the right of self-defense, should be read to allow limited use of force to prevent nuclear proliferation as being consistent with the purposes of the Charter. This Note's criteria to limit the use of force are as follows: (1) the threatening activity must be nuclear activity in violation of international law; (2) the attacking state must be specifically threatened by the proliferating state; (3) the attacking state must be making good faith efforts towards disarmament and/or be in good standing regarding its non-proliferation obligations; and (4) the Security Council resolution authorizing use of force must receive at least nine

Thus, despite the potential legality of bombing Iranian nuclear facilities, such action is not prudent. This author instead suggests that the international community continue with diplomacy, employing both carrots and sticks.

out of fifteen votes, or the Security Council must have failed to vote even once it is seized of the issue. Ideally, the Security Council would start employing Franck's suggestion by acting with foresight to define what constitutes a material breach and who is authorized to address such a breach. But even if that does not happen, so long as the acting state meets the other requirements and receives at least nine votes, its use of preventive self-defense is justified.

Allowing such actions will not only increase compliance with international law, but will restore faith in the ability of international institutions to address the nuclear threat. The proposed standard will encourage the Security Council's permanent members to place their political interests on the backburner and to instead focus on the greater good. The standard will encourage more states to sign onto the Additional Protocol and take concrete steps toward nuclear disarmament.

Remembering that "the complete elimination of nuclear weapons is the only guarantee against the threat of nuclear war,"²⁵⁸ and the only guarantee against terrorists acquiring nuclear weapons or fissile material, this Note offers a legal standard that is in touch with the reality of states' security concerns and does not eschew the optimism written into the Charter over 65 years ago in San Francisco.

258. ICJ Nuclear Opinion, *supra* note 1, pmb1.