

The Preemption of Nuclear Weapons

Tim Bakken

NO LEGAL DOCTRINE allows any nation to use force against an adversary that is developing nuclear weapons. The question for the international community is whether this prohibition has increased the risk of war. The United Nations Charter allows a nation to use force only if defending against an armed attack, regardless of the attack's destructive potential.¹ Yet, the danger inherent in Iran's or North Korea's possession of nuclear weapons probably exceeds the risks associated with an armed attack by a nation with only conventional weapons, the greatest threat when the UN Charter was adopted in 1945. Under an expansive reading of the charter, a nation might use force to resist an adversary's *imminent* attack instead of having to wait until being attacked, but neither the charter nor any traditional provision in international law would allow the use of force against any nation planning or supporting a more distant nuclear attack, regardless of the nuclear attack's potential destructiveness and certainty.

As an alternative, a doctrine of *nuclear preemption* could authorize force based on the danger a nation presents rather than on how soon that nation might attack. The new doctrine would recognize that nations involved in nuclear weapons development and the commission of grave crimes (aggression, crimes against humanity, genocide, or war crimes) are more dangerous than nations with conventional weapons planning imminent attacks or conducting attacks. Different from the murky concepts of *preemption*, *prevention*, and *anticipatory self-defense*, nuclear preemption would clarify under what circumstance, beyond self-defense, a nation can use force. It would provide a means to deter unstable leaders who intend to use nuclear weapons or transfer them to terrorists as soon as they possess them. A nuclear preemption doctrine would also cut down, paradoxically, on the number of instances in which force is used, for in the absence of such doctrine, countries have decided for themselves when it was right to use force—and they have not always done so legally. A clearly stated doctrine would not allow aggressive countries to manipulate the gray areas of current doctrines.

Modern Dangers and Traditional Law

When the UN Charter was adopted in 1945, only the United States possessed nuclear weapons. In 1953, the Soviet Union and the United States introduced thermonuclear weapons, hydrogen bombs, thus increasing significantly the devastation each nation could inflict. In 1957, they introduced intercontinental ballistic missiles. Self-defense under the charter—that is, a nation can use force to defend itself once an attack is imminent or has begun—perhaps still had relevance. A missile launched by either the Soviet Union or the United States might not reach its target for 18 to 30 minutes—enough time to begin a nuclear counterattack.² In assessing the legality of nuclear weapons use,

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Tim Bakken is currently a professor of law at the United States Military Academy, West Point, New York. He has practiced law in New York City, been a homicide prosecutor in Brooklyn, and taught at several universities, including Ural State Law Academy in Russia. Mr. Bakken has also trained judges and prosecutors in Bosnia and Herzegovina and established a law department at the National Military Academy of Afghanistan. He has been a research scholar at New York Law School, visiting scholar at the Columbia University School of Law, and visiting fellow at the Australian National University College of Law.

the UN's International Court of Justice issued an advisory opinion in 1996 indicating that a nation might be justified in using nuclear weapons in order to save itself.³ The court's decision seemed to ratify the Cold War doctrine of mutually assured destruction. A nation facing a devastating nuclear attack would be justified in responding with a defensive nuclear strike of its own before the adversary's first nuclear missile hit its target. Of course, the victim nation had to be able to launch before its adversary's missiles struck home.

In 1998, the usefulness of self-defense eroded when Pakistan announced it possessed nuclear weapons. With missile technology acquired from China and North Korea, Pakistan and India (which already possessed nuclear weapons), because of their close geographic proximity, were then capable of attacking each other—perhaps inflicting a first and decisive blow—before the other nation could respond with defensive force. If a nation has no ability to use defensive force prior to being destroyed, then a nation has no effective means to deter an aggressor, and thus self-defense—do not defend unless attacked or facing an imminent attack—provides no protection.

In effect, international law and the UN Charter have adopted self-defense principles that, while applicable in domestic situations where two persons might be fist-fighting, are probably inapplicable to conflicts involving nuclear weapons.⁴ Often, domestic law requires that a victim retreat before using defensive deadly force.⁵ It always requires an imminent threat before a victim may use force.⁶ Although not required to do so, a nation could retreat once attacked with conventional weapons and later counterattack or seek assistance from the Security Council. However, if attacked by nearby nuclear missiles, a nation has no avenue of retreat and no ability to use defensive force prior to the impact of the missiles. For example, Iran's Shahab-3 missile can probably travel the 1,000 miles from Tehran to Tel Aviv in under 10 minutes.⁷ Israel would have no means to retreat or counterattack prior to impact, and the devastation—blast, heat, and radiation damage—would severely limit or prevent defensive responses after impact.

After sustaining a nuclear attack, Israel's defensive options would be limited further by the domestic⁸ and international⁹ principle that any response

must be necessary and proportional. That principle permits a defender to use only the minimum force necessary to repel an attack. An attack on an adversary's city would be unnecessary to defend against nuclear missiles hidden in silos and caves in the desert. An attack on civilians is inherently illegal. If Iran launched one nuclear missile and then *surrendered*, Israel would have no justification to use any force against Iran because Israel would not face any imminent threat. Under no circumstances would Israel, with a population of 7 million, have any ability to use conventional weapons to invade or occupy Iran, with a population of 70 million.

Under the self-defense doctrine, Israel has no legal right to use force to respond to Iran's development of nuclear weapons. If Iran develops and uses or transfers nuclear weapons to terrorists, Israel has few practical options. It could increase its stock of 100 to 200 nuclear weapons, but even with that arsenal it has been unable to deter Iran from building nuclear weapons and supporting terrorism against Israel for over 20 years.¹⁰ In theory, Israel could request that the Security Council authorize force against Iran prior to Iran's acquisition of nuclear weapons. The gesture would be futile, however, because at least two permanent council members would veto any action. China provides missile technology to Iran in exchange for oil. Russia provides Iran with nuclear technology and missiles, including the advanced TOR-M1 system, designed to attack fixed and rotary aircraft, which Israel would depend on heavily in any conflict with Iran.

Nations and Leaders Who Cannot Be Deterred

The international community should consider that the leaders of some nations cannot be deterred from using the weapons they possess or, in the modern era, from transferring nuclear weapons to terrorists. Iran has engaged in over two decades of state-sponsored terrorism, which continues today as its nuclear development approaches top speed. In its 2006 "Country Reports on Terrorism," the U.S. State Department concluded that Iran remains the most active state sponsor of terrorism and is involved with terrorist groups or activities in Iraq, Israel, Lebanon, and Syria.¹¹ It is alleged that currently Iran runs suicide terrorist units.¹² Most believe that in 1983, Iran supported the suicide bombings of the American

Embassy, the Marines' headquarters, and the French army barracks in Beirut, leaving 174 dead and 175 wounded. Throughout the 1980s, Iran attacked commercial shipping in the Persian Gulf and organized the taking of Western hostages. In the 1990s, it bombed a Jewish cultural organization and the Israeli Embassy in Argentina; bombed the United States military barracks in Saudi Arabia; and assassinated its own former prime minister, Shapur Bhaktiar, in France. In 2002, it shipped 50 tons of explosives to Yasser Arafat's Fatah movement. Through 2006, it provided Hezbollah with up to 13,000 short-range missiles to launch indiscriminately toward Israel's civilian population. At one time or another, Iran has supported Hezbollah, Islamic Jihad, Al-Aksa Martyrs, Palestinian Islamic Jihad, Al-Qaeda, the Kurdistan Workers' Party, and Hamas.¹³

Iran is a party to the Treaty on the Non-Proliferation of Nuclear Weapons, under which nonnuclear nations pledge not to develop nuclear weapons and the first five nuclear-weapon states (United States, Russia, China, France, and the United Kingdom) promise to work toward the elimination of their nuclear weapons. But Iran has violated its treaty obligations by concealing its nuclear program for 20 years from the International Atomic Energy Agency, the UN organization charged with ensuring that nuclear technology is only used peacefully.

In 2002, Iranian dissidents exposed the existence of a large, secret uranium-enrichment facility at

Natanz. Thought to represent the final of three stages of Iran's enrichment program, this facility has a capacity to operate up to 50,000 gas centrifuges (necessary for enrichment) and produce uranium for either commercial applications or nuclear weapons.¹⁴ In its western desert, at Arak, Iran is building and seeking international support for a heavy-water nuclear reactor capable of producing plutonium.¹⁵ A heavy-water reactor uses water containing a higher-than-normal proportion of deuterium oxide, which is better than light-water, or ordinary water, at slowing neutrons so as to convert natural uranium into more powerful plutonium. A light-water reactor would be sufficient to allow Iran to attain its publicly stated goal of producing radioactive isotopes for use in medical treatments. Additionally, Israeli spies have claimed that in the summer of 2006 Iran tested a trigger device for a nuclear bomb.¹⁶

Iran's nuclear weapons program and ambitions are difficult to deter because no one knows what its preeminent values are. Perhaps its president, Mahmoud Ahmadinejad, was speaking only for domestic audiences or only to gain a deterrent advantage in the Middle East when he claimed in 2005 that "Israel must be wiped off the map."¹⁷ Given that Israel presents no strategic danger to Iran, Ahmadinejad's threats appear irrational because their main basis seems to lie only in Iran's religious antipathy toward Israel. Deterrence requires that nations have similar values and reason



REUTERS, Raheb Homavandi

The Natanz uranium enrichment facility, south of Tehran, 30 March 2005. Iranian President Mohammad Khatami took a group of journalists deep underground into the heart of the nuclear plant. Washington wants Iran to dismantle the formerly clandestine plant.

similarly when confronting the same situation. How can it work with Iran, whose motivation is either unknown or irrational?

It is probable that Iran, given its religious values, simply reasons differently than the West. Among all nations, only Iran has simultaneously denounced Israel, developed nuclear weapons, and sponsored terrorism—all under a government controlled by religious leaders.¹⁸ As such, it would be extremely dangerous to ignore Iran's apparently reckless and irrational nuclear weapons development and its threats and promises to destroy Israel. Iran's behavior might be perfectly consistent with developing and using nuclear weapons or transferring them to terrorists.

Yet, even these circumstances would probably not be a basis under the UN Charter for Israel to use defensive force. In 1986, the International Court of Justice heard a complaint by Nicaragua alleging that the United States unlawfully supported anti-communist groups in Nicaragua.¹⁹ The court rejected the U.S. claim that the anti-communist groups' actions were part of its defense of El Salvador, which faced attacks from rebels sponsored by Nicaragua. The court concluded that under Article 51 of the Charter, the Nicaraguan rebels' actions did not amount to an armed attack, a prerequisite for self-defense. The court found that self-defense is triggered only when an adversary nation's proxy forces are acting like the adversary's army, a high bar that Iran's proxy terrorist groups probably have not surmounted.

If Iran transfers nuclear weapons or radiological material to terrorists, Israel would probably have no legal basis under current international law on which to attack Iran. First, Israel could not justify using self-defense because it would not face an imminent attack from Iran. Second, Iran's transfer of weapons or material to terrorists might not constitute an armed attack on Israel tantamount to the action of a national army. Third, Israel would have no basis to conclude that its use of force against Iran would prevent terrorists from using the nuclear weapons they possessed; therefore, an Israeli attack on Iran would be unnecessary and thus illegal.

Preempting Nuclear Weapons

The only way to prevent certain nations from using nuclear weapons might be to prevent them from developing the weapons. The use of force

against those nations could be based on the danger they present rather than on imminent attack. The concept of danger as a second legal justification for the use of force recognizes that the world community should not bear the risk of catastrophe that could arise if terrorist nations or individuals acquire nuclear weapons. To illustrate, it would seem absurd that a nation could not act against violent revolutionaries. Assume that the revolutionaries had not yet begun a direct attack on the capital city and governmental leaders. But, they announced on television that the government had no right to exist, and they were close to producing bombs that could destroy the governmental apparatus. In the meantime, they conducted and supported assassinations, kidnappings, wars between the government and foreign terrorists, and bombings of civilians based on the civilians' religion, race, ethnicity, or nationality.

Under domestic law, the state could use deadly force to apprehend the revolutionaries and could prosecute and imprison them for killing civilians, possessing bomb-making materials, and conspiring to destroy the government. The International Criminal Court would be authorized to prosecute the revolutionaries for crimes against humanity, genocide, and war crimes.²⁰ Now assume that these disgruntled citizens comprise the leadership of another nation. Iran possesses all the characteristics of the revolutionaries, but with nuclear weapons and a military force of over 500,000, it would be immeasurably more dangerous.²¹ However, under a traditional reading of international law, Israel would have no apparent right to use force against Iran.

Evolving principles in international law might provide an additional justification for nations to use force. Beginning with the international military tribunal in Nuremberg in 1945 and including the current international criminal tribunal (Rwanda,²²

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Dr. Abdul Qadeer Khan, standing in an access tunnel inside the Chagai Hills nuclear test site prior to an underground Pakistani nuclear test, 28 May 1998.

A.Q. Khan, the “father of Pakistan’s nuclear bomb,” led his country’s clandestine program to acquire nuclear weapons in the 1970s and 80s. Khan claims that Pakistan’s bomb was the result of Pakistani science and hard work, but it is alleged that he stole a centrifuge design and other sensitive plans from a Western company he worked for in the Netherlands, and that he was liberally aided by Chinese nuclear scientists in the design of Pakistan’s bomb. In 2003, Khan was implicated as the head of an international network responsible for supplying nuclear weapons designs and technology to North Korea, Libya, and Iran. In late 2003, he was summoned to Islamabad for a “debriefing,” after which it was announced that he had confessed to his role in exporting nuclear weapons technology. Khan appeared on Pakistani national television in February 2004 to confirm his confession, and in the process denied that his government had been complicit in the network. Pakistani President Pervez Musharraf pardoned Khan, who had become a national and regional hero, the next day. Whether or not Khan was working at the behest of the Pakistani Government remains something of an open question. Musharraf has refused to allow any other nation to talk to Khan, whom he recently released from house arrest.

Yugoslavia,²³ and Sierra Leone²⁴) and the International Criminal Court,²⁵ the world has condemned, beyond all others, four grave crimes: aggression, crimes against humanity, genocide, and war crimes. Respective examples include planning or starting a war, widespread killing of civilians, destroying religious or ethnic groups, and fighting outside the laws of war. Were Iran an individual before an inter-

national criminal court, it would probably be guilty of every grave crime, except possibly aggression.

Grave crimes indicate extreme danger, and they presage, contribute to, or cause wars and mass killings that are motivated by racial, ethnic, and religious enmity. In Germany, Yugoslavia, and Rwanda, grave crimes fueled World War II, ethnic cleansing, and civil war, respectively. Although the international community took little action to confront the situations in Rwanda and Darfur, which have thus far accounted for approximately 1,000,000 killings, the UN did create international tribunals to prosecute individuals for committing grave crimes in the former Yugoslavia, Rwanda, and Sierra Leone.²⁶ Under theories of joint liability—in essence, a subset of conspiracy—those tribunals have extended criminal liability to individuals who planned or assisted in the crimes, even if they did not personally commit them.

The same principles can be used to attach responsibility to nations. Recognized mainly in English-speaking common-law countries, conspiracy is an agreement between two people to commit a crime. In some jurisdictions, an element of conspiracy is the commission of an act that furthers the agreement, such as buying a weapon to support a robbery. The purchase of the weapon indicates a relatively clear intent to commit the robbery and marks the moment when the crime of conspiracy has been committed. In common-law countries, conspiracy alone is a crime, even if the conspirators never attempt or complete the robbery. In the international criminal tribunals, an agreement (a conspiracy in common-law countries) to commit a grave crime is not a crime. But in 1999, in a departure from domestic law in continental Europe, the Appeals Chamber for the International Criminal Court for the former Yugoslavia (Prosecutor v. Tadic) reasoned that the illicit agreement to commit a war crime connects planning and action and is thus the basis for *joint liability*, that is, liability for the crimes committed by a fellow plotter.²⁷

The reasoning behind joint liability is that an agreement emboldens plotters and provides a powerful psychological impetus and logistical framework to enable them to commit more or greater crimes than if each plotter acted alone. To properly punish, or better, to deter organized groups from planning grave crimes, the appeals chamber in the Tadic case concluded that any individual member

of an agreement is liable for all grave crimes and all foreseeable crimes. Joint liability provides a legal basis to hold high-ranking military and civilian leaders individually liable for directing or ordering grave crimes without ever personally committing them.

Individual liability is a basis for state responsibility. In fact, the appeals chamber in the Tadic case concluded that Yugoslavia was responsible for the actions of Bosnian Serbs in Kosovo because its support went “beyond the mere financing and equipping of such forces” and “involved planning and supervision of military operations.”²⁸ In addition to Tadic and others, the international criminal tribunal for Yugoslavia indicted Slobodan Milosevic, the former president of Serbia and Yugoslavia, for crimes against humanity, genocide, and war crimes. (Milosevic’s trial was nearly complete when he died in 2006.) Milosevic had advocated one state for all Serbs and directed that weapons be provided to Serbs who were fighting non-Serbs inside the former Yugoslavia.

To stop the Serbian attacks, NATO bombed military targets in Kosovo and civil-infrastructure targets, such as bridges, power stations, and factories, throughout Yugoslavia. As Milosevic did with non-Serbs in Yugoslavia, Iran’s president concluded in 2005 that “we will soon witness its [Israel’s] disappearance and destruction.”²⁹ Similarly ominous, Iran’s constitution directs that the Army of the Islamic Republic and the nation’s Revolutionary Guards (a parallel army) are responsible “not only for safeguarding the frontiers, but also for a religious mission, which is Holy War (jihad) along the way of God, and the struggle to extend the supremacy of God’s law in the world.”³⁰

Like the international criminal tribunals created to prosecute individuals, the need for a nuclear preemption doctrine arises because nations possessing or developing nuclear weapons commit, plan, or promote grave crimes. Nuclear preemption would be authorized against a nation when it is—

- Producing or importing highly enriched uranium (U-235) or plutonium for use in nuclear weapons.
- Planning or conspiring to commit aggression, crimes against humanity, genocide, or war crimes against a state.
- Providing material support toward the commission of such crimes.

The elements of a nuclear preemption doctrine would be contingent on present danger, not on the self-defense concept of an imminent attack. An evaluation of present danger can be made by considering sustained support for activities that result in aggression, crimes against humanity, genocide, or war crimes—essentially, sustained support for terrorist activity—so long as the activities continue to the present time. In the last 50 years or so, every instance of grave crime has resulted in war or mass death—literally tens of millions of killings: Nazi Germany’s aggression and World War II; Cambodia’s killing fields; North Korea’s starvation of its citizens; Yugoslavia’s ethnic wars; Rwanda’s civil war; and the conflict in Darfur.

A nuclear preemption doctrine would allow an additional moral and legal justification for the use of force, but one that would actually reduce the total number of instances when force is employed. Having been used often in policy debates but never precisely defined, the vague, broad concepts of *preemption*, *prevention*, and *anticipatory self-defense* have led to arbitrary justifications for the use of force when the danger might not be extreme. Acts justifying forcible nuclear preemption should be few because few nations commit or support grave crimes. Fewer nations, perhaps only Iran, both support grave crimes and also possess or develop nuclear weapons.

Nuclear preemption’s jurisdictional and substantive components would be grounded within international law, perhaps more so than concepts of universal jurisdiction and humanitarian intervention, theories used respectively to justify international criminal prosecutions and limitations on national sovereignty. Preemption jurisdiction includes two components: the right of nations to act on behalf of their allies; and a substantive ground for the use of force. That any state can use force legitimately on behalf of another nation is consistent with the concept

The elements of a nuclear preemption doctrine would be contingent on present danger, not on the self-defense concept of an imminent attack.

Nuclear preemption recognizes the use of self-defense to confront an imminent threat and prohibits what have been termed preemptive, preventive, and anticipatory self-defense actions.

of collective self-defense contained in Article 51 of the UN Charter. Jurisdiction based on specific grave offenses is routinely found in international criminal tribunals.

Nuclear preemption would be similar to humanitarian intervention, a concept already validated by the UN. Both would authorize the use of force outside self-defense and are triggered by the existence or possibility of grave crimes. Humanitarian intervention has evolved into the concept of *the responsibility to protect*, which is a proposal to provide legal authorization to the UN Security Council to intervene within a nation's borders—essentially with military force.³¹ Military intervention would be authorized when state action causes a “large scale loss of life,” according to Canada's International Development Research Centre, a leading advocate of the responsibility-to-protect concept.³² Recognizing that the Security Council took no action in Rwanda, Bosnia, and Darfur, among other places, the Centre argues that if the Security Council does not act, “states may not rule out other means to meet the gravity and urgency” of crises.³³

The responsibility-to-protect/humanitarian intervention concept is broader than nuclear preemption and would authorize the use of force in many more instances. Nuclear preemption would occur less frequently because it is limited to circumstances where states *intentionally* commit or support grave crimes against other states. Nuclear preemption is also bound by the condition of nuclear weapons production. In contrast, the responsibility-to-protect concept would permit military intervention when a state only *neglects* to act or has an *inability* to prevent a large loss of life. With negligence as a condition, the responsibility-to-protect concept would authorize military force within states where the government was simply incompetent. Moreover, the commission of a grave crime, which is specifically defined within international law and essential to nuclear preemption, is not a requirement of the responsibility-to-protect concept.

Most importantly, the responsibility-to-protect concept would authorize military intervention in circumstances where the threat to international peace is significantly less than it is in circumstances allowing for nuclear preemption. Humanitarian tragedies within states are grievous events. But humanitarian tragedies, even grave crimes within borders, have less potential to affect international peace than cross-border attacks. Humanitarian intervention might be a valid doctrine, but nuclear preemption, given the danger it confronts, has a more compelling practical rationale and is more firmly rooted in international law.

Limiting Force to the Greatest Danger

Nuclear preemption is justified as a means to confront the great danger presented by nations that simultaneously commit or promote grave crimes and develop or possess nuclear weapons. Nuclear preemption is not as broad as, but is consistent with, modern doctrines in international law: universal jurisdiction over grave crimes; joint liability to hold national and military leaders responsible; and humanitarian intervention and limitations on state sovereignty to prevent large losses of life. Nuclear preemption recognizes the use of self-defense to confront an imminent threat and prohibits what have been termed *preemptive, preventive, and anticipatory self-defense* actions.

In a sense, nuclear preemption is not really *preemption*, as that term has been used in policy debates. The *preemption doctrine* emanating from the U.S. invasion of Iraq was based on predictions about what Iraq would do in the future if it acquired nuclear weapons. In contrast, the doctrine of nuclear preemption would be based on present circumstances: nuclear weapons development and the commission of a grave crime. The conditions authorizing nuclear preemption would indicate great danger sometime in the future, but the indication of danger is not an element of nuclear preemption. Danger is the philosophical basis for the use of force. **MR**

NOTES

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