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Sanctions, Countermeasures, and the Iranian Nuclear Issue

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ABSTRACT

The international community's response to Iran's nuclear development program highlights the sometimes complex legal relationship between the UN system of collective security and the rights of states to take unilateral countermeasures under the law of state responsibility. It also raises a number of important questions about (a) the discretion afforded to states in the interpretation and implementation of Security Council resolutions, (b) the availability of countermeasures for the violation of multilateral obligations, and (c) the exclusivity of the Chapter VII framework for collective security.

This Article argues that, while the Security Council's Iran sanctions resolutions do not grant discretionary authority to states to broaden the scope of the measures, states retain their rights under the law of state responsibility to take unilateral countermeasures in response to wrongful acts. Under the law of state responsibility, multilateral treaties like the Nuclear Non-Proliferation Treaty (NPT) are best understood as integrated agreements, such that in the event of non-compliance each State Party is entitled to treat itself as an "injured State" for the purposes of determining the availability of countermeasures. Moreover, quite apart from the question of whether the NPT is

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an integrated agreement, there is a substantial body of state practice supporting the right of states to take collective countermeasures in response to violations of multilateral obligations. The case for this entitlement is at its strongest where, as in the situation with Iran, the wrongful conduct has been determined by an international body with responsibility for monitoring and verifying compliance with the obligations in question. In such instances, the use of countermeasures in response to violations—far from undermining the international order—may serve to promote respect for the international rule of law.

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I. INTRODUCTION

For the past seven years, the international community has been unable to resolve concerns raised by Iran's program of nuclear development. Throughout this period, Iran has maintained that its development of nuclear technology is purely for civilian use and, therefore, permitted under the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), which guarantees the "inalienable right" of all States Parties to develop, research, and produce nuclear energy for peaceful purposes.[1] As part of its NPT obligations,[2] however, Iran is also party to a comprehensive Safeguards Agreement with the International Atomic Energy Agency (IAEA),[3] the international body that monitors nuclear activity and supervises compliance with safeguards obligations under the NPT.[4] Under the Agreement, Iran is obligated to ensure the transparency of its nuclear program and allow for independent verification that nuclear materials are not being diverted to military applications.[5] Iran, however, has not been

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1. 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.

2. *See id.* art. III(1) (requiring states party to negotiate and conclude a safeguards agreement with the International Atomic Energy Agency "for the exclusive purpose of verification of the fulfilment [sic] of its obligations assumed under this Treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices").

3. Agreement Between Iran and the International Atomic Energy Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, June 19, 1973, *reprinted in* Int'l Atomic Energy Agency [IAEA], *The Text of the Agreement and the Agency for the Application of Safeguards In Connection with the Treaty on the Non-Proliferation of Nuclear Weapons*, at 2, IAEA Doc. INFCIRC/214 (Dec. 13, 1974) [hereinafter Iran Safeguards Agreement].

4. *See* Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 1, art. III(1) (noting that all states party will accept safeguards under the International Atomic Energy Agency's safeguards system).

5. Iran Safeguards Agreement, *supra* note 3, arts. 7(a)–(b), 31, 32.

transparent about its nuclear program, and the IAEA has been unable to confirm the peaceful character of Iran's nuclear activities.[6] As a result, international concern about Iran's nuclear aspirations has not abated.

Since the first revelations of Iran's nuclear development program in 2002, various steps have been taken as part of an international effort to confirm Iran's assertions of peaceful intentions and to persuade Iran to halt all of its nuclear development activity until an independent verification has been made. In particular, there have been intensified inspections of Iran's facilities by the IAEA and repeated multilateral negotiations offering Iran economic and trade incentives to suspend enrichment activity.[7] Further, the issue has been referred to the United Nations Security Council, and targeted sanctions have been imposed against Iran under Chapter VII of the UN Charter.[8] To date, none of these efforts have succeeded in either confirming the peaceful character of Iran's nuclear program or persuading Iran to halt further development. Indeed, Iran remains

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6. *See* IAEA, *Implementation of the NPT Safeguards Agreement and Relevant Provisions of Security Council Resolutions 1737 (2006), 1747 (2007), 1803 (2008) and 1835 (2008) in the Islamic Republic of Iran: Report of the Director General*, paras. 17–24, IAEA Doc. GOV/2009/35 (June 5, 2009) [hereinafter *IAEA Director General June 2009 Report*].

> Contrary to the request of the Board of Governors and the requirements of the Security Council, Iran has neither implemented the Additional Protocol nor cooperated with the Agency in connection with the remaining issues which give rise to concerns and which need to be clarified to exclude the possibility of military dimensions to Iran's nuclear programme.

Id.; IAEA, *Implementation of the NPT Safeguards Agreement and Relevant Provisions of Security Council Resolutions 1737 (2006), 1747 (2007), 1803 (2008) and 1835 (2008) in the Islamic Republic of Iran: Report of the Director General*, paras. 15–23, IAEA Doc. GOV/2009/8 (Feb. 19, 2009) [hereinafter *IAEA Director General February 2009 Report*] ("Unless Iran implements the above transparency measures and the Additional Protocol, as required by the Security Council, the Agency will not be in a position to provide credible assurance about the absence of undeclared nuclear material and activities in Iran.").

7. Indeed, as this Article goes to press, the international community is once again negotiating with Iran about its nuclear program, seeking to persuade Iran to abandon its nuclear ambitions in exchange for economic and trade incentives. *See* Marc Champion & Jay Solomon, *Iran Agrees to Transfer Uranium Abroad*, WALL ST. J., Oct. 2, 2009, at A1 (describing the results of this first round of new negotiations, the most important of which was an agreement by Iran "to transfer the bulk of its known nuclear fuel to other countries to enrich it"). Whether these talks will prove any more fruitful than the failed 2003 negotiations remains to be seen. See *infra* Part II for a discussion of failed attempts to deal with Iran's nuclear ambitions between 2002 and 2006.

8. *See*, *e.g.*, S.C. Res. 1803, ¶¶ 3, 5, 7–11, U.N. Doc. S/RES/1803 (Mar. 3, 2008) (imposing further sanctions against Iran for its lack of cooperation with the IAEA and refusal to suspend its enrichment and reprocessing activities).

in breach of the Security Council's decisions and its obligations under the NPT.[9]

In addition to these multilateral efforts, the United States and certain European states have taken unilateral measures against Iran in response to its continued non-compliance with its NPT obligations. In some cases, these measures have been in the nature of retorsions (i.e., unfriendly yet otherwise legal acts meant to signal disapproval of Iran's recalcitrance).[10] In other cases, the measures go beyond mere expressions of disapproval and involve the suspension of the performance of international legal obligations otherwise owed to Iran.[11] Over the past year, particularly in response to the September 25, 2009 revelation of yet another previously undisclosed uranium enrichment facility in (Qom) Iran,[12] news reports have indicated that these states are considering the adoption of still further non-forcible unilateral measures against Iran—perhaps based upon a new, broader interpretation of existing Security Council resolutions—possibly as countermeasures outside of the UN Chapter VII framework.[13] Recent reports have suggested that, in the face of

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9. *IAEA Director General June 2009 Report*, *supra* note 6, paras. 17–23 (outlining various violations of the NPT Safeguards Agreement by Iran and its refusal to comply with the relevant provisions of the applicable Security Council resolutions); *IAEA Director General February 2009 Report*, *supra* note 6, paras. 15–22 (noting Iran's failure to comply with its obligations under the NPT Safeguards Agreement as well as its noncompliance with the relevant Security Council resolutions).

10. *See, e.g.*, Executive Order 12959, 60 Fed. Reg. 24757 (May 9, 1995) (Banning U.S. trade and investment in Iran and banning the import of Iranian goods into the United States); *see also* Notice of March 8, 1996, 61 Fed. Reg. 9897; Notice of March 5, 1997, 62 Fed. Reg. 10409; Notice of March 4, 1998, 63 Fed. Reg. 11099; Notice of March 10, 1999, 64 Fed. Reg. 12239; Notice of March 13, 2000, 65 Fed. Reg. 13683; Notice of March 13, 2001, 66 Fed. Reg. 15013; Notice of March 13, 2002, 67 Fed. Reg. 1153; Notice of March 12, 2003, 68 Fed. Reg. 12563; Notice of March 10, 2004, 69 Fed. Reg. 12051; Notice of March 10, 2005, 70 Fed. Reg. 12581; Notice of March 13, 2006, 71 Fed. Reg. 13241; Notice of March 8, 2007, 72 Fed. Reg. 10883; Notice of March 11, 2008, 73 Fed. Reg. 13727; Notice of March 11, 2009,74 Fed. Reg 10999 (each Notice serving as an annual renewal of the ban pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) and the National Emergencies Act (50 U.S.C. 1622(d)). Further examples of U.S. action against Iran which while in the nature of restrictions do not violate international legal obligations owed by the United States to Iran may be found in U.S. GEN'L ACCOUNTING OFFICE, IRAN SANCTIONS: IMPACT IS UNCLEAR AND SHOULD BE EVALUATED, GAO-08-58 (Dec. 2007).

11. *See*, *e.g.*, *EU Imposes New Sanctions on Iran*, BBC NEWS, June 23, 2008, http://news.bbc.co.uk/2/hi/middle_east/7469283.stm (reporting actions taken by the European Union to freeze the assets of Bank Melli, Iran's largest bank); *see also infra* text accompanying notes 58–60 (discussing the Common Position and subsequent regulations adopted by the European Union on restrictive measures against Iran). With respect to the United States, see, e.g., *infra* note 64.

12. Jonathan Weisman, Siobhan Gorman & Jay Solomon, *West Raps Iran Nuclear Site*, WALL ST. J., Sept. 26, 2009, at A1.

13. *See*, *e.g.*, Daniel Dombey & James Blitz, *US and EU Plan Iran Sanctions*, FIN. TIMES, Oct. 13, 2008, at 10 (reporting that the U.S. and allies are discussing targeted sanctions against Iran's energy and financial sectors); Joe Lauria, Jay

continued deadlock in the Security Council,[14] the United States and its European allies are considering ways to bring further pressure to bear on Iran in the event that the Security Council fails to do so.[15]

The circumstances described highlight the sometimes complex legal relationship between the UN system of collective security and the rights of states to take countermeasures under the law of state responsibility. They also raise a number of important questions about (a) the discretion afforded to Member States in the interpretation and implementation of Security Council resolutions; (b) the availability of countermeasures for the violation of multilateral obligations; and (c) the exclusivity of the Chapter VII framework for collective security. In the first place, one must ask to what extent states enjoy discretion in the interpretation and implementation of the Council's sanctions resolutions, particularly where the interpretation under consideration would provide a legal justification for an otherwise wrongful act. Second, with respect to the question of countermeasures, one must ask whether a breach of a multilateral agreement like the NPT can serve as a justification for the other States Parties to take countermeasures against the responsible state. If the answer is that they may, then the question arises whether a breach of a multilateral agreement can serve that function, even in situations in which the Security Council has taken action under Chapter VII to compel compliance from the non-performing state.

The purpose of this Article is to discuss some of the legal issues raised by the international community's ongoing efforts to find a peaceful way to change Iranian behavior and bring the country back into compliance with its non-proliferation obligations. Part II begins by examining the legal aspects of Iran's nuclear development program, tracking the IAEA's and the Security Council's determinations on Iranian non-compliance with its NPT safeguards obligations. Part II addresses the current UN sanctions regime and examines the manner in which those resolutions should be

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Solomon & Farnaz Fassihi, *U.S., Allies Seek New Ways to Sanction Iran*, WALL ST. J., Sept. 30, 2009, at A6 ("The Obama administration and its Western allies are looking at new ways to constrict Iran's energy, transportation and financial sectors in the wake of last week's revelation that Tehran had secretly developed a second nuclear-fuel facility."); Barak Ravid, *U.S. Briefs Israel on New Iran Nuke Sanctions*, HAARETZ (Isr.), Aug. 3, 2009, http://www.haaretz.com/hasen/spages/1104208.html (reporting that the U.S. is in talks with Israel about the possibility of intensifying sanctions against Iran by "aim[ing] to significantly curb Tehran's ability to import refined petroleum products").

14. *See, e.g.,* Geoff Dyer, Daniel Dombey & Charles Clover, *China Hostile to Iran Sanctions*, FIN. TIMES, Sept. 25, 2009, at 6 (describing Chinese hostility to further Iran sanctions).

15. Indeed, the European Union had already adopted a number of unilateral non-forcible measures against Iranian interests without express Security Council authorization.

interpreted and implemented. Part IV considers the general availability of countermeasures for the violation of multilateral obligations such as the NPT obligations. Finally, Part V takes up the issue of whether countermeasures might be foreclosed, either as a consequence of the structure of the NPT–IAEA system or because the Security Council has become seized of the situation under Chapter VII of the UN Charter.

II. LEGAL ASPECTS OF IRAN'S NUCLEAR DEVELOPMENT PROGRAM

A. *The Disclosure of Iran's Nuclear Program and Iranian Non-Compliance with its NPT Transparency Obligations (2002-2005)*

Although Article IV of the NPT establishes the "inalienable right" of all States Parties to develop, research, and produce nuclear energy for peaceful purposes, the NPT also requires each non-nuclear-weapon State Party to accept safeguards as set forth in a safeguards agreement with the IAEA.[16] Each NPT safeguards

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16. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 1, arts. III(1), IV(4). The concept of "safeguards" pre-dates the NPT. Under the 1957 Statute of the IAEA, states agreed to accept safeguards as a *quid pro quo* for IAEA assistance on civilian nuclear projects to ensure that the materials and equipment used in those projects were not diverted to use in nuclear weapons programs. Statute of the International Atomic Energy Agency arts. III(A)(5), XI(F)(4), Oct. 26, 1956, 8 U.S.T. 1093, 276 U.N.T.S. 3. The Statute assigned the IAEA a dual mission: to promote the development of atomic energy and to help ensure "that assistance provided by it or at its request or under its supervision or control is not used in such a way as to further any military purpose." *Id.* art. II. In order for the Agency to carry out its mission, the IAEA Statute authorizes the Agency to "apply safeguards" to nuclear materials in conjunction with Agency projects, or otherwise at the request of one or more States. *Id.* art. III(A)(5).

> Pursuant to Article II of its Statute the Agency has the task of seeking 'to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world.' Inasmuch as the technology of nuclear energy for peaceful purposes is closely coupled with that for the production of materials for nuclear weapons, the same Article of the Statute provides that the Agency 'shall ensure, so far as it is able, that assistance provided by it or at its request or under its supervision or control is not used in such a way as to further any military purpose.'

Id. IAEA, *The Agency's Safeguards System (1965, As Provisionally Extended in 1966 and 1968)*, para. 1, IAEA Doc. INFCIRC/66/Rev.2 (Sept. 16, 1968). Although Article III(1) of the NPT refers to "the Agency's safeguards system," this was not intended to mandate the application of the pre-NPT safeguards system in NPT States. Rather, "a new system of safeguards, parallel to the existing one, had to be devised in order to establish uniform rules applicable to the States Party to the NPT . . . ." 2 MOHAMED I. SHAKER, THE NUCLEAR NON-PROLIFERATION TREATY: ORIGIN AND IMPLEMENTATION, 1959–1979, 679 (1980). Thus, there are two IAEA safeguards systems: the one that pre-existed the NPT and a second which has developed under the terms of the NPT.

agreement requires a state to accept IAEA safeguards on all source or special fissionable material in all peaceful nuclear activities within the territory of the state, under its jurisdiction, or carried out under its control anywhere.[17] Safeguards agreements further require that states establish and maintain a system to account for and control all nuclear material subject to safeguards for the purpose of verifying compliance with the safeguards obligations.[18] In addition, under the Statute of the IAEA—to which all States Party to the NPT are also parties—the IAEA Board of Governors is authorized to make findings of non-compliance with respect to safeguards obligations and to direct the non-complying state to remedy the breach.[19]

In 2002, an Iranian dissident group raised public concern about Iran's compliance with its NPT safeguards obligations by exposing the existence of a uranium enrichment site at Natanz and the construction of a heavy water plant at Arak—both of which, once operational, would be capable of producing weapons-grade plutonium.[20] While neither of these facilities violated Iran's commitment not to make or acquire nuclear weapons, neither of them had been declared by Iran to the IAEA as required under its NPT Safeguards Agreement.[21] The subsequent discovery by IAEA inspectors in 2002 and 2003 of additional undeclared nuclear activities, including uranium enrichment and plutonium separation efforts,[22] led IAEA Director General Mohamed El Baradei to conclude

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17. IAEA, *The Structure and Content of Agreements Between the Agency and States Required in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons,* art. 1, IAEA Doc. Circular INFCIRC/153 (Corrected) (June 1972) [hereinafter Model NPT Safeguards Agreement]. *Accord* Iran Safeguards Agreement, *supra* note 3, art. 1 (mirroring the language of the first paragraph of the Model NPT Safeguards Agreement).

18. Model NPT Safeguards Agreement, *supra* note 17, art. 7. *Accord* Iran Safeguards Agreement, *supra* note 3, art. 7 (closely tracking the language of the seventh paragraph of the Model NPT Safeguards Agreement).

19. Statute of the International Atomic Energy Agency, *supra* note 16, art. XII.

20. Alireza Jafarzadeh, U.S. Representative Office, Nat'l Council of Resistance of Iran, New Information on Top Secret Projects of the Iranian Regime's Nuclear Program (Aug. 14, 2002), http://www.iranwatch.org/privateviews/NCRI/perspex-ncri-topsecretprojects-081402.htm. Shortly thereafter, Gholam Reza Aghazadeh, the President of the Atomic Energy Organization of Iran at the time, confirmed that Iran had decided to embark upon a long-term nuclear program. Gholam Reza Aghazadeh, Vice-President, Islamic Republic of Iran, and President, Atomic Energy Org. of Iran, Statement at the 46th General Conference of the International Atomic Energy Agency (Sept. 16, 2002), http://www.iaea.org/About/Policy/GC/GC46/iran.pdf.

21. *See* Iran Safeguards Agreement, *supra* note 3, arts. 7, 32, 34–38, 42–48 (providing for the establishment of safeguards for accounting for nuclear material, establishing necessary capabilities of Iran's nuclear accounting system, requiring-with exceptions-for Iran to report to the IAEA upon coming into possession of certain kinds of nuclear material and requiring Iran to provide the IAEA with design information for its existing nuclear facilities).

22. *See* IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran: Resolution Adopted by the Board on 12 September 2003*, pmbl., paras.

in 2003 that "it is clear that Iran has failed in a number of instances over an extended period of time to meet its obligations under its Safeguards Agreement."[23]

At about the time that Director General El Baradei was publishing his conclusions on Iran's noncompliance with its Safeguard Agreement (and by implication Article III of the NPT), Iran announced that, in connection with multilateral talks with France, Germany, and the United Kingdom, it would suspend its uranium enrichment activities and sign an Additional Protocol to its Safeguards Agreement, granting the IAEA greater inspection authority over Iran's facilities.[24] Iran further undertook to abide by

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a, h, IAEA Doc. GOV/2003/69 (Sept. 12, 2003) (noting with concern Iran's extensive actions with respect to its nuclear program); IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran: Report of the Director General*, paras. 40–43, IAEA Doc. GOV/2003/63 (Aug. 26, 2003) (reporting previously unknown Iranian actions related to laser and centrifuge uranium enrichment); IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran: Report of the Director General*, paras. 25–26, 32, IAEA Doc. GOV/2003/40 (June 6, 2003) (reporting IAEA discoveries of previously undeclared nuclear activities by Iran).

23. IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran: Report of the Director General*, para. 47, IAEA Doc. GOV/2003/75 (Nov. 10, 2003). *See also* IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran: Resolution Adopted by the Board on 26 November 2003*, pmbl., para. f, IAEA Doc. GOV/2003/81, § f (Nov. 26, 2003) (noting that Iran has failed to meet its obligations under the Safeguards Agreement repeatedly over an extended period of time).

24. IAEA, Statement by the Iranian Government and visiting EU Foreign Ministers, para. 2(a), (b)(ii) (Oct. 23, 2003), http://www.iaea.org/NewsCenter/Focus/IaeaIran/statement_iran21102003.shtml; *see also* Staff Report, IAEA, Iran Signs Additional Protocol on Nuclear Safeguards; Signing Ceremony Takes Place at IAEA (Dec. 18, 2003), http://www.iaea.org/NewsCenter/News/2003/iranap20031218.html [hereinafter IAEA Staff Report] (reporting that Iran signed the Additional Protocol to the NPT, which provides for an "expanded declaration of [Iran's] nuclear activities and grants the Agency broader rights of access to sites in the country"). In February 1992, the Board of Governors affirmed that the scope of obligations under NPT safeguards agreements was not limited to nuclear material declared by a state but included any nuclear material subject to safeguards that should have been declared. *See* J. Jennekens, R. Parsick & A. von Baeckmann, *Strengthening the International Safeguards System*, IAEA BULL., Jan. 1992, at 6, 6–7 (1992) (stating that all nuclear material—declared and undeclared—is subject to the IAEA Safeguards). However, although the IAEA has the legal authority to verify possible undeclared activities, its ability to discover such activities is limited under the terms of the Model NPT Safeguards Agreement. Accordingly, between June 1995 and June 1996, the IAEA Secretariat, in consultation with Member States, developed a draft model protocol for conferring the necessary complementary legal authority on the Agency to discover undeclared activities. *See* Richard Hooper, *The System of Strengthened Safeguards*, IAEA BULL., Dec. 1997, at 26, 26 (reviewing the history of the Model Additional Protocol to safeguards agreements). On May 15, 1997 the Board approved the Model Additional Protocol. *See* IAEA, *Model Protocol Additional to the Agreements Between State(s) and the International Atomic Energy Agency for the Application of Safeguards*, IAEA Doc. INFCIRC/540 (Corrected) (Sept. 1997) (setting forth new measures designed to facilitate the implementation of the safeguards). The Model Additional Protocol is the standard for individual additional protocols concluded

the terms of the Additional Protocol prior to ratification by the Iranian Parliament.[25] In the course of events, however, the Iranian Parliament never ratified the Additional Protocol, and despite Iran's commitment to abide by its terms prior to ratification, the IAEA Director General continued to report difficulties with its inspection efforts due to a lack of Iranian transparency.[26] In August 2005, following the election of President Mahmoud Ahmadinejad, Iran announced that it would resume uranium enrichment and cease abiding by the terms of the Additional Protocol.[27]

B. *Reference to the Security Council (2006)*

Iran's resumption of enrichment activities in 2005 and suspension of adherence to the Additional Protocol caused significant alarm in the international community and ultimately led to the decision of the IAEA Board of Governors to refer the matter of "Iran's many failures and breaches of its obligations to comply with its NPT Safeguards Agreement"[28] to the UN Security Council on February 4, 2006.[29] Following the IAEA's referral, the Security Council issued a Presidential Statement on March 29, 2006, calling upon Iran to re-suspend uranium enrichment and ratify and implement the Additional Protocol.[30] Iran, however, did not take these steps. As a result, on July 31, 2006, the Security Council adopted Resolution 1696, acting under Article 40 of Chapter VII of the UN Charter, giving Iran a formal deadline of August 31, 2006, to take the required

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with States, such as the Additional Protocol signed by Iran in 2003. *Id.* (foreword to the Model Additional Protocol).

25. *See* IAEA, Statement by the Iranian Government and visiting EU Foreign Ministers, *supra* note 24, para. 2(b)(i) (announcing that the Iranian government will comply with the Additional Protocol in advance of its ratification); IAEA Staff Report, *supra* note 24.

26. *See, e.g.*, IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran: Report of the Director General*, paras. 74–76, IAEA Doc. GOV/2004/11 (Feb.24, 2004) (noting with concern Iran's failure to disclose its involvement with P-2 centrifuges).

27. IAEA, *Communication Dated 1 August 2005 Received from the Permanent Mission of the Islamic Republic of Iran to the Agency*, at 5, IAEA Doc. INFCIRC/648 (AUG. 1, 2005).

28. IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran: Resolution Adopted by the Board on 24 September 2005*, para. 1, IAEA Doc. GOV/2005/77 (Sept. 24, 2005).

29. IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran: Resolution Adopted by the Board on 4 February 2006*, para. 2, IAEA Doc. GOV/2006/14 (Feb. 4, 2006).

30. The President of the Security Council, *Statement by the President of the Security Council*, ¶ 5, *delivered to the Security Council*, U.N. Doc. S/PRST/2006/15 (Mar. 29, 2006).

steps or face further Security Council action, including possible sanctions.[31] Again, Iran did not comply.

III. THE SECURITY COUNCIL'S SANCTIONS RESOLUTIONS (2006-2009)

Following Iran's refusal to comply with the measures indicated in Resolution 1696, the UN Security Council subsequently adopted three sanctions resolutions against Iran, acting pursuant to Article 41 of Chapter VII of the UN Charter.[32] The resolutions adopt a classic carrot and stick approach: On the one hand, the resolutions require Iran to suspend its uranium enrichment-related and reprocessing activities and to resume its cooperation with the IAEA under the Additional Protocol; on the other hand, the resolutions impose sanctions designed "to constrain Iran's development of sensitive technologies in support of its nuclear and missile programmes."[33] So long as Iran does not take the required steps with regard to its nuclear program, the sanctions are to remain in place.[34] However, in the event that Iran complies with the requirements detailed in the resolutions, the Security Council indicated that the sanctions will be lifted.[35] To date, Iran has not complied with the Security Council's resolutions.[36]

The resolutions adopted thus far by the Security Council with respect to Iran's nuclear program impose so-called "targeted sanctions" on Iran, aimed at particular types of transactions and

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31. S.C. Res. 1696, ¶ 7, U.N. Doc. S/RES/1696 (July 31, 2006).

32. S.C. Res. 1803, *supra* note 8; S.C. Res. 1747, U.N. Doc. S/RES/1747 (Mar. 24, 2007); S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 27, 2006). On September 27, 2008, the Security Council adopted a further resolution on Iran's nuclear activities, Resolution 1835. S.C. Res. 1835, ¶¶ 3–4, U.N. Doc. S/RES/1835 (Sept. 27, 2008). This new resolution, however, does not contain any operative provisions. It simply reaffirms the Council's commitment to its prior resolutions and Iran's need to comply therewith. *Id.*

33. This language appears in all three of the Council's sanctions resolutions: S.C. Res. 1803, *supra* note 8, pmbl., ¶ 11; S.C. Res. 1747, *supra* note 32, pmbl., ¶ 7; S.C. Res. 1737, *supra* note 32, pmbl., ¶ 8.

34. *See* S.C. Res. 1803, *supra* note 8, ¶ 19(c) (providing that if Iran does not comply with the resolution, the Security Council will "adopt further appropriate measures under Article 41 of Chapter VII of the Charter of the United Nations to persuade Iran to comply with this resolution and the requirements of the IAEA"); S.C. Res. 1747, *supra* note 32, ¶13(c) (using the same language); S.C. Res. 1737, *supra* note 32, ¶ 24(c) (using the same language).

35. S.C. Res. 1803, *supra* note 8, ¶ 19; S.C. Res. 1747, *supra* note 32, ¶ 13; S.C. Res. 1737, *supra* note 32, ¶ 24.

36. *See IAEA Director General June 2009 Report*, *supra* note 6, paras. 21–22 (outlining various violations of the NPT Safeguards Agreement and relevant provisions of the above Security Council resolutions); *IAEA Director General February 2009 Report*, *supra* note 6, paras. 21–22 (describing continued Iranian non-compliance with both the NPT Safeguards Agreement and the relevant Security Council resolutions).

specifically designated persons and entities connected with Iran's nuclear program.[37] Although news reports indicate that the United States has sought to have the Council adopt a more comprehensive ban on transactions with Iran, there has been little support for such an approach within the Council, at least in part because commercial entities based in a number of the Council's permanent Member States have significant interests in Iran that those states do not wish to see disturbed.[38] As a result, the resolutions do not go so far as to prohibit all commercial and financial transactions with Iran. Instead, the resolutions seek to prohibit those transactions which will inure to the benefit of Iran's nuclear program.[39]

In broad brush, Resolutions 1737 and 1747 ban trade with Iran in designated materials, equipment, goods, and technology that could contribute to Iran's uranium enrichment or heavy-water reprocessing activities;[40] require states to freeze the assets of designated entities

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37. On the evolution of the use of targeted or "smart" sanctions in UN collective security practice generally, see for example, Simon Chesterman & Beatrice Pouligny, *Are Sanctions Meant to Work—The Politics of Creating and Implementing Sanctions through the United Nations*, 9 GLOBAL GOVERNANCE 503, 504–10 (2003) (discussing the design, implementation and termination of U.N. sanctions); Margaret P. Doxey, *Sanctions Through the Looking Glass—The Spectrum of Goals and Achievements*, 55 INT'L J. 207, 207–10, 219–23 (2000) (giving historical perspective on the use of U.N. sanctions).

38. *See, e.g.*, Christopher Boian, *Kremlin Dilemma as Split with US on Iran Widens*, AGENCE FRANCE PRESSE, Apr. 23, 2006 (reporting that Russia is weighing the costs and benefits of resisting desired U.S. measures against Iran); Coulm Lynch, *Europeans Yield on Iran Sanctions; Concession at U.N. Aimed at Securing Curbs on Nuclear Trade*, WASH. POST, Dec. 21, 2006, at A24 (reporting that the United States, Europe, and Russia disagree on an approach to addressing Iran's nuclear ambitions); *China, Russia Concerned About UN Extending Iran Sanctions*, DOW JONES INT'L NEWS, Mar. 9, 2007 (reporting disagreements between Russia, China and the United States about financial sanctions against companies doing business in Iran).

39. *See, e.g.*, S.C. Res. 1737, *supra* note 32, ¶ 6 (providing that member states shall prevent the provision to Iran of "financial assistance, investment, brokering or other services, and the transfer of financial resources or services *related to the supply, sale, transfer, manufacture or use of the prohibited items, materials, equipment, goods and technology*") (emphasis added).

40. *Id.* ¶¶ 3–6. The specific technology in which trade is banned is identified in documents produced by the IAEA. IAEA, *Communications Received from Certain Member States Regarding Guidelines for the Export of Nuclear Material, Equipment and Technology*, IAEA Doc. INFCIRC/254/Rev.8/Part 1 (Mar. 20, 2006), *reprinted in* Letter, Security Council, Letter Dated 13 October 2006 from the Permanent Representative of France to the United Nations Addressed to the President of the Security Council, Annex, U.N. Doc. S/2006/814 (Oct. 13, 2006); IAEA, *Communications Received from Certain Member States Regarding Guidelines for Transfers of Nuclear-Related Dual-Use Equipment, Materials, Software and Related Technology*, IAEA Doc. INFCIRC/254/Rev.7/Part 2 (Mar. 20, 2006), *reprinted in* Letter, Security Council, Letter Dated 13 October 2006 from the Permanent Representative of France to the United Nations Addressed to the President of the Security Council, Annex, U.N. Doc. S/2006/814 (Oct. 13, 2006). These documents are incorporated by reference into Resolution 1737.

and persons related to Iran's nuclear program;[41] and require states to report on international travel by named Iranians.[42] Resolution 1803 bans sales of dual-use items to Iran;[43] bans international travel by certain named Iranians;[44] and adds persons and entities to the list of those designated for asset-freezing under Resolutions 1737 and 1747.[45] All of these restrictions are cast as "decisions" of the Security Council within the meaning of Article 25 of the Charter and thus create legally binding obligations on the Member States. In the event of a conflict between the obligations created by the decisions contained in these resolutions and obligations arising under any other international agreement, the obligations created pursuant to the resolutions must prevail.[46]

A. *The Iran Sanctions Framework*

The Iran sanctions resolutions establish a special committee (Committee) of the Security Council to support implementation,[47] a customary step in UN sanctions practice. All Member States are obligated to submit a report to the Committee, identifying the steps that they have taken to implement the Council's decisions.[48] In addition, the Council has delegated to the Committee the power to:

(a) designate additional materials, equipment, goods, and technology in which trade with Iran should be banned;[49]

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41. S.C. Res. 1747, *supra* note 32, ¶ 4, Annex I; S.C. Res. 1737, *supra* note 32, ¶ 12, Annex.

42. S.C. Res. 1737, *supra* note 32, ¶ 10.

43. S.C. Res. 1803, *supra* note 8, ¶ 8.

44. *Id.* ¶ 5, Annex II.

45. *Id.* ¶ 7, Annex I, III.

46. U.N. Charter art. 103. Whether Article 103 acts to trump obligations arising out of customary international law is a matter of some dispute. *Cf.* ZAIM M. NECATIGIL, THE CYPRUS QUESTION AND THE TURKISH POSITION IN INTERNATIONAL LAW 127–29 (2d ed. 1993) (arguing that, contrary to the positions of the Greek Cypriot and Greek governments, a conflict of treaty obligations involving a U.N. Charter provision does not necessarily invalidate the contradictory treaty statute, but merely raises a question of priority). Textually, Article 103 only refers to other treaty obligations. Moreover, there may be limitations on the obligatory character of Security Council resolutions where those resolutions conflict with peremptory norms of international law. *See, e.g.*, Alexander Orakhelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, 16 EUR. J. INT'L L. 59, 79 (2005) (arguing that U.N. Security Council resolutions should be interpreted not to conflict with general international law, particular treaties, or *jus cogens*). That issue does not arise in this context.

47. S.C. Res. 1737, *supra* note 32, ¶ 18.

48. *Id.* ¶ 19. Compliance with this requirement has not been very good. As of the end of 2008, two years after the adoption of the first sanctions under Resolution 1737, less than 50% of Member States had submitted the required reports.

49. *Id.* ¶ 3(d).

(b) exempt specific transactions from prohibition on the ground that they will "clearly not contribute" to Iran's nuclear program;[50]

(c) designate additional persons about whose travel States are required to keep the Committee informed;[51] and

(d) designate additional persons and entities whose assets are to be frozen.[52]

The Iran sanctions resolutions thus reserve to the Security Council and the Committee the authority to add designations to the lists of persons and entities to which the Council's sanctions are to apply. No margin of appreciation or discretion has been left to Member States by the Council to "self-designate" additional persons and entities for inclusion in the Council's sanctions regime. Because the resolutions leave the power to expand the scope of the sanctions in the hands of the Council and the Committee, states are not legally able to rely upon those resolutions and the Charter (particularly Articles 25 and 103) to shield themselves from any legal consequences which additional measures may have.[53] What this means, in effect, is that if states wish to take measures against Iranian interests beyond those provided by the Security Council resolutions, the legal justification for those measures must come from a source other than the resolutions.

This conclusion has an important practical consequence. If states must rely upon a legal basis other than the Council's resolutions to justify taking additional measures against Iran, they will need to do so under the law of state responsibility in the form of countermeasures. Under the law of state responsibility, the justification for countermeasures continues for only as long as the original wrongful conduct persists and reparations have been made; once those conditions have been met, the countermeasures must terminate.[54] As discussed below,[55] the most likely basis for

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50. *Id.* ¶ 9.

51. *Id.* ¶ 10.

52. *Id.* ¶ 12.

53. *See* U.N. Charter art. 25 (requiring Member States to accept and carry out the decisions of the Security Council); *id.* art. 103 (requiring that in the event of a conflict between obligations of a Member State under the U.N. Charter and under any other international agreement, the obligations of the Charter shall prevail).

54. *See* Gabčíkovo-Nagymaros Project (Hung.-Slovk.), 1997 I.C.J. 7, 56–57 (Sept. 25) (holding a party's countermeasure unlawful because it was disproportionate); *Report of the International Law Commission to the General Assembly*, 56 U.N. GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/10 (2001), *reprinted in* [2001] 2 Y.B. Int'l L. Comm'n pt. 2 at 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1 [hereinafter *Draft Articles on State Responsibility*] (providing that "countermeasures may not be taken, and if already taken must be suspended without undue delay if:(a) the internationally wrongful act has ceased"). It is also worth noting that countermeasures may in

countermeasures against Iran would be its non-compliance with its safeguards obligations under the NPT. However, the obligations imposed upon Iran by the Security Council resolutions are not coterminous with its NPT obligations. Under the NPT and its Safeguards Agreement, Iran has specific obligations of disclosure and transparency that arise out of those agreements.[56] In contrast, the Security Council resolutions, although premised upon Iran's failure to carry out its NPT-based obligations and requiring Iran to bring its conduct into conformity with those obligations, impose more extensive obligations, such as additionally requiring Iran to abide by the terms of the IAEA's Additional Protocol.[57] Because the obligations created under the NPT are not the same as those created by the Council's resolutions, it is conceivable that Iran might come into compliance with its NPT-based obligations but still not be in compliance with the obligations imposed by the Security Council resolutions. As a result, whether states are entitled to base additional measures on a broad reading of the resolutions or must turn to the rules of state responsibility may have important legal significance for the permitted duration of such measures.

In this regard, the Common Position adopted by the European Union on restrictive measures against Iran is particularly interesting.[58] In that instrument, and in the subsequent EC Regulation,[59] the European Union broadly has asserted the authority to freeze the assets of persons and entities not designated in any of the Security Council resolutions or by the Committee "in order to

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principle continue even after the (initial) internationally wrongful act has ceased because the responsible state has not fulfilled its secondary obligations of reparation-in effect, a new internationally wrongful act. *Id.* art. 49, cmt. 8, at 128. However, and importantly, the continuation of countermeasures in such circumstances may require a re-adjustment or re-evaluation the countermeasures originally imposed, as the two wrongful acts (the initial violation and the non compliance with the secondary obligation of reparation) are not the same, and as such, issues of proportionality may arise. *See infra* text accompanying notes 105–08 (discussing the proportionality limits that international legal doctrine has placed on countermeasures).

55. *See infra* Part IV (discussing the availability of unilateral countermeasures for violations of the NPT-related obligations).

56. *See generally* Iran Safeguards Agreement, *supra* note 3, art. 8(a).

> In order to ensure the effective implementation of safeguards under this Agreement, the Government of Iran shall, in accordance with the provisions set out in Part II of this Agreement, provide the Agency with information concerning nuclear material subject to safeguards under this Agreement and the features of facilities relevant to safeguarding such material.

Id.

57. S.C. Res. 1737, *supra* note 32, ¶¶ 1, 2, 8.

58. Council Common Position (EC) No. 2007/140/CFSP of 27 Feb. 2007, art 3, 2007 O. J. (L 61) 49.

59. Council Regulation 423/2007, pmbl., para. 6, art 7(2), 2007 O.J. (L 103) 1, 1, 4 (EC).

fulfil the objectives of UNSCR 1737 . . . [by] using the same criteria as those applied by the Security Council or the Committee to identify the persons or entities concerned."[60] It is unclear whether, in taking this position, the European Union is advancing the view that if it acts in line with the overall purpose of the Council resolutions, it may therefore rely upon those resolutions and the Charter to justify its actions. If so, it is a poor argument. As shown above, the Security Council resolutions simply do not afford Member States the discretion to act on the Council's (or Committee's) behalf and make additional designations of persons or entities for inclusion in the sanctions regime.[61] If states wish to take measures against Iranian interests beyond those provided by the Security Council resolutions, they must either have the Council or the Committee make a new designation—for which, incidentally, there are no expressed "criteria" in the resolutions—or find a legal justification for those measures in a source other than the resolutions. Indeed, this seems to be the position taken by the United States.[62] In its submission to the Committee in May 2008 in connection with Resolution 1803, the United States encouraged other states to "take actions complementary to those explicitly required by UNSCR 1803 to achieve the international community's ultimate objective: inducing a change in the Iranian regime's nuclear decision-making and strategic behaviour."[63] The U.S. call for "complementary" measures suggests rather clearly that, on the U.S. view, such measures might only be taken upon an independent legal basis, not by virtue of states claiming the right to make additional designations in lieu of the Council or the Committee.[64]

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60. Council Common Position (EC) No. 2007/140/CFSP of 27 Feb. 2007, pmbl., para. 10, 2007 O.J. (L 61) 49, 50 (EC). The EU has used this rationale to justify freezing the assets of Bank Melli, an Iranian bank, on the grounds that it is "providing or attempting to provide financial support for companies which are involved in or procure goods for Iran's nuclear and missile programmes." Council Common Position (EC) No. 2008/652/CFSP of 7 August 2008 amending Common Position 2007/140/CFSP, Annex II, § B(4), 2008 O.J. (L 163) 43, 68.

61. *See supra* text accompanying notes 47–53.

62. *See* Letter, Security Council, Letter dated May 2, 2008 from Alejandro Wolff, Deputy Permanent Representative of the United States of America to the United Nations, to the Chairman of the Security Council Committee, Annex, at 2, U.N. Doc. S/AC.50/2008/34 (May 13, 2008).

63. *Id.*

64. Executive Order 13382 allows the President to freeze the assets of persons engaged in proliferation of weapons of mass destruction and members of their support networks under the authority granted by the National Emergencies Act and the International Emergency Economic Powers Act. National Emergency Economic Powers Act, 3 U.S.C § 301 (West 2009); National Emergencies Act, 50 U.S.C.S. §§ 1601–1651 (LexisNexis 2009); International Emergency Economic Powers Act, 50 U.S.C.S. §§ 1701–1707 (LexisNexis 2009). *See* Exec. Order No. 13,382, 70 Fed. Reg. 38,567 (June 28, 2005). Over fifty individuals and entities have had assets frozen under Executive Order 13382 (authorizing measures to be taken against the property of "Mass

There is, however, one possible proviso to this analysis. As drafted and adopted, the resolutions contain a lacuna. Certain language in Resolution 1737 appears to give states independent discretion to determine whether transfers of funds to *non-designated entities* should nonetheless be prohibited because they may serve to benefit a designated person or entity. Depending upon how one reads Resolution 1737, it could confer upon states a wide-ranging, self-assessed power to adopt additional measures against Iran under the legal aegis of the Security Council current resolutions.

B. *The Scope of State Discretion in the Interpretation and Implementation of Resolution 1737*

Paragraph 12 of Resolution 1737 provides in pertinent part that the Security Council

> *decides further* that all States shall ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any persons or entities within their territories, to or for the benefit of these persons and entities [designated in the Annex to this Resolution]. [65]

Destruction Proliferators and Their Supporters"). *See* KENNETH KATZMAN, IRAN SANCTIONS ACT 17–19 (Cong. Research Serv., CRS Report for Congress Order Code RS20871, July 9, 2009) (listing the individuals and entities whose assets have been frozen). Many of these individuals and entities are not designated for sanction under the Security Council's sanctions resolutions. *See, e.g.*, Patricia McNerney, Acting Assistant Sec'y for Int'l Secur. & Nonproliferation, U.S. Dep't of State, Jeffrey Feltman, Principal Deputy Assistant Sec'y for Near E. Affairs, U.S. Dep't of State, & Adam Szubin, Dir., Office of Foreign Assets Control, U.S. Treasury Dept., U.S. Dep't of State, Briefing on a Treasury Designation Under Executive Order 13382 (Sept. 10, 2008), http://2001-2009.state.gov/t/isn/rls/rm/109472.htm (discussing the freezing of assets of IRISL, Iran's national maritime carrier). Consequently, the legal justification for these asset freezes cannot rely upon the Council's mandate. As the US Government seems to acknowledge, legal justification must be found elsewhere, such as in the law of countermeasures.

65. The full text of paragraph 12 reads:

> *Decides* that all States shall freeze the funds, other financial assets and economic resources which are on their territories at the date of adoption of this resolution or at any time thereafter, that are owned or controlled by the persons or entities designated in the Annex, as well as those of additional persons or entities designated by the Security Council or by the Committee as being engaged in, directly associated with or providing support for Iran's proliferation sensitive nuclear activities or the development of nuclear weapon deliver systems, or by persons or entities acting on their behalf or at their direction, or by entities owned or controlled by them, including through illicit means, and that the measures in this paragraph shall cease to apply in respect of such persons or entities if, and at such time as, the Security Council or the Committee removes them from the Annex, and *decides further* that all States shall ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any persons or

The phrase "available . . . to or for the benefit of" is ambiguous. The text does not indicate how directly or indirectly available to or for the benefit of a designated person or entity a transfer of funds must be to come within the scope of prohibition. On a narrow reading, only transactions that are for the direct benefit of a designated person or entity would come within the prohibited scope. On a broader view, however, the language of paragraph 12 might be read to prohibit transactions that *indirectly* make funds available to or for the benefit of designated persons or entities. Such a broad interpretation could have wide-ranging implications. Given the hand-in-glove relationship between the entities involved in the Iranian nuclear program and the Government of Iran, any transfer of funds which could be said to benefit the Government of Iran, such as transactions with Iran's many state-owned enterprises, might also be said to inure to the benefit of the Iranian nuclear program.[66] Under a broad reading of

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> entities within their territories, to or for the benefit of these persons and entities.

S.C. Res. 1737, *supra* note 32, ¶ 12.

66. There is little doubt that the structure and character of the Iranian nuclear program is such that a transfer of funds to the Government of Iran would have the effect of supporting and benefiting Iran's nuclear efforts. The Iranian nuclear program is a state-run activity, funded and controlled by the Government of Iran. In many cases, the relationship between the Government of Iran and the persons and entities engaged in Iran's nuclear development program is so close as to be essentially indistinguishable. For example, the Atomic Energy Organization of Iran—an entity designated in Resolution 1737—is in charge of the overarching coordination of Iran's nuclear program. *See, e.g.*, David Albright, *An Iranian Bomb*, BULL.ATOM. SCIENTISTS, July-Aug. 1995, at 21, 21 (stating that "most reports" put AEOI in charge of the nuclear program). Not only is the AEOI an Iranian governmental entity, but its president for twelve years (until July 2009), Gholam Reza Aghazadeh, also served as the Vice-President of Iran. Siavosh Ghazi, *Iran Atomic Chief Aghazadeh Resigns*, AGENCE FRANCE PRESSE, July 16, 2009, http://www.google.com/hostednews/afp/article/ALeqM5jq5J8JGyLnup98ptZZmre2pPV64A (reporting on Aghazadeh's resignation and mentioning his role as Vice President). The new president of the AEOI, Ali Akbar Salehi, is an appointee of the President of Iran and serves at his pleasure. *See* Samuel Ciszuk, *Nuclear Chief Replaced by Presidential Ally in Iran*, IHS GLOBAL INSIGHT DAILY ANALYSIS, July 17, 2009 (reporting that Salehi's appointment will allow the President's "grip on Iran's nuclear policies [to] tighten"). Similarly, Defense Industries Organization—another entity designated in Resolution 1737—is responsible for the production of materials and supply of technical services in support of Iran's missile and nuclear programs. The Defense Industries Organization is owned and controlled by the Iranian Ministry of Defense. *See* S.C. Res. 1737, *supra* note 32, Annex (listing entities involved in the nuclear program). *See also* Islamic Republic of Iran, Defense Industries Organization, http://www.diomil.ir/en/home.aspx (last visited Nov. 11, 2009) (stating that the entity is "completely state-owned"). Thus, while a transfer of funds to the Government of Iran as such would not directly transfer funds to a designated person or entity under Resolutions 1737, 1747, or 1803, in light of the structure and relation of those entities to the Government of Iran such a transfer would have the clear effect of making those funds available to and for the benefit of the organizations involved in Iran's nuclear program and designated by the Council's resolutions.

paragraph 12, these transactions might be argued as coming within the prohibited scope.

1. The Interpretation of Security Council Resolutions

Resolving the interpretive issue raised by the ambiguity in paragraph 12 raises an important issue about the way in which resolutions of the Security Council should be interpreted. Unlike the situation with respect to treaties,[67] international law has not developed rules of interpretation for instruments of intergovernmental organizations such as the Council's resolutions.[68] Although Security Council resolutions have the capacity to affect legal relationships, they are not treaties.[69] Nevertheless, there would seem to be no reason why the goal of the interpretive exercise should be different whether one is interpreting a treaty or a resolution, even though, as we shall see, the modalities may be different. That goal, as suggested by the Vienna Convention on the Law of Treaties, is to give effect to the textually expressed intentions of the parties, taking into account the surrounding circumstances—including the context and the object and purpose of the expression.[70]

Much may seem relatively uncontroversial; however, recently there has been a suggestion, drawing upon considerable theoretical endeavor, that the differences between treaties and resolutions might

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67. The rules on the interpretation of treaties are generally the same under both customary international law and the Vienna Convention on the Law of Treaties. *See*, *e.g.,* Territorial Dispute (Libya v. Chad), 1994 I.C.J. Rep. 6, 21–22 (Feb. 3).

68. There is a growing body of scholarship on the issue. *See*, *e.g.*, Jochen A. Frowein, *Unilateral Interpretation of Security Council Resolutions—a Threat to Collective Security?, in* VÖLKERRECHT – MENSCHENRECHTE – VERFASSUNGSFRAGEN DEUTSCHLANDS UND EUROPAS: AUSGEWÄHLTE SCHRIFTEN 147, 148–49 (Jochen A. Frowein et al. eds., 2004) (discussing the differences between interpreting resolutions and treaties); Maarten Bos, *The Interpretation of Decisions of International Organizations*, 28 NETH. INT'L L. REV. 1, 11–13 (1981) (discussing how resolutions, unlike treaties, may be invoked by states not involved in their drafting, and thus require a different interpretive approach); Michael Byers, *The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq*, 13 EUR. J. INT'L L. 21, 26–27 (2003) (discussing contrasting methods of interpretation, and the lack of clear interpretive rules for resolutions); Efthymios Papastavridis, *Interpretation of Security Council Resolutions Under Chapter VII in the Aftermath of the Iraq Crisis*, 56 INT'L & COMP. L.Q. 83, 104 (2007) (discussing interpretive methods applied to resolutions); Michael C. Wood, *The Interpretation of Security Council Resolutions*, 2 MAX PLANCK Y.B. U.N. L. 73, 74 (1998) (discussing the lack of agreed upon interpretive rules for resolutions).

69. *Cf.* Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960–1989 (Part Eight)*, 67 BRIT. Y.B. INT'L L. 1, 29 (1996) (discussing the difference between resolutions and treaties).

70. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331. *See* Frowein, *supra* note 68, at 149; Wood, *supra* note 68, at 74–75 (discussing the more policy-driven approach to interpreting resolutions when contrasted with the preferred approach to interpreting treaties).

reasonably justify a novel approach to the interpretive project. Under this new "hermeneutic paradigm,"

> there should always be consideration not only of what that instrument [the Council's resolution] purported *in concreto*, but also, more generally, of how can the Resolution in hand be construed better, so as the fundamental purpose of peace maintenance is always accomplished, on the basis, of course, of the "corporate will" of the Council. Hence, there should always be a dialogue between the subjective and objective components, in order to synthesize in better light the ultimate purpose. To paraphrase Dworkin in this regard, "constructive interpretation" is a matter of imposing purpose on a Resolution in order to make of it the best possible example of the form or genre to which is taken to belong, namely of a Security Council Resolution under Chapter VII of the Charter.[71]

Respectfully, this formulation seems to go too far. While it is one thing to insist that the interpretation of a Security Council resolution should recognize that within the Charter system the Council bears primary responsibility for the maintenance of international peace and security (i.e., recognizing the legal context within which Council resolutions are adopted), it is another thing altogether to suggest that the interpreter (whoever that might be) may "impose" a meaning upon the resolution in order to ensure that the Council has discharged that responsibility in the manner which the interpreter believes to be the "best" way possible (however that might be determined). It is not clear what justification there would be for embracing such a radical approach beyond the assertion that such constructive interpretation would serve certain normative ends that are otherwise not met by the processes of political agreement. The attribution of teleological coherence and aspiration to the formulation and adoption of the Council's resolutions finds little support in the muddy realties of international relations or in the business of the Security Council in particular.[72] Like other organs of the United Nations, and the international system generally, the annals of the Council's work unfortunately are filled with far fewer examples of the "best" than they are with examples of the "possible" and the "not possible."[73] Michael Wood, who spent many years working in the Council on behalf of the British Foreign & Commonwealth Office, has observed the following about the way in which the Council operates:

> In an ideal world, each resolution would be internally consistent, consistent with earlier Council action on the same matter, and

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71. Papastavridis, *supra* note 68, at 104 (citing RONALD DWORKIN, LAW'S EMPIRE 52 (1986)).

72. *Cf.* JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN 303–09 (1994) (critiquing Dworkin on coherence grounds).

73. *Cf.* SYDNEY D. BAILEY & SAM DAWS, THE PROCEDURE OF THE UN SECURITY COUNCIL 226–27 (3d ed. 1998) (noting that "the problem in the Council for four and a half decades had not been to prevent great power domination but to bring about great power agreement," thus limiting the range of possible resolutions).

> consistent with Council action on other matters. Each resolution would be concise, and avoid superfluous or repetitive material. Consistency and conciseness are elements of clarity, but the latter also requires, more generally, the precise and unambiguous use of language. It is, of course, only possible to use clear language when the policy is clear.
>
> [Security Council resolutions] are frequently not clear, simple, concise or unambiguous. They are often drafted by non-lawyers, in haste, under considerable political pressure, and with a view to securing unanimity within the Council. This latter point is significant since it often leads to deliberate ambiguity and the addition of superfluous material (presumably thought at the time to be harmless).[74]

These observations should give us substantial pause before embracing a widely cast interpretive model that seems to place text and intent in a secondary position to the interpreter's conception of an undefined "best."[75]

But perhaps it is precisely the failings of the political process within the Council that justify a departure from ordinary interpretative principles. In the absence of political consensus in the Council capable of producing effective action and thereby maintaining international peace and security, might not it be warranted—or even necessary—to set aside old attachments to interpretive notions of text and intent and embrace a principle of muscularly effective interpretation? We have been down this road before. Particularly in the aftermath of the efforts to justify the 2003 invasion of Iraq on the basis of expansive interpretations of Security Council Resolutions 687 and 1441,[76] we should view with suspicion interpretative techniques that would purport to give final position to assertions of the effective achievement of fundamental purpose. Whether such approaches may be appropriate in other contexts, such as judicial decision-making, is beyond the scope of this Article; however, unlike the concerns that

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74. Wood, *supra* note 68, at 82. On the mechanics of the Security Council's work and the process of preparing and adopting resolutions, see generally BAILEY & DAWS, *supra* note 73 (describing the procedures of the Security Council).

75. Papastavridis does not acknowledge that intent is likely to be subsumed by his broad acceptance of a principle of "constructive" interpretation. Indeed, when all is said and done, his proposal is that the goal of interpretation should be to discern the "(inter)subjective" intent of the members of the Council (collectively). Papastavridis, *supra* note 68, at 105, 112. But that proposal seems critically at odds with his broad acceptance of a "constructive" theory of interpretation. As Schwarzenberger warned, with respect to interpretive reliance on purpose, "the functional method is apt to degenerate into legislation in disguise." 1 GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 517 (3d ed. 1957). Were one to adopt the proposed approach of "constructive interpretation," it seems that the disguise might be dispensed with altogether.

76. *See*, *e.g.*, Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607, 611–14 (2003) (outlining the justifications given at the time for the 2003 invasion of Iraq); Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 178 (2004) (discussing the various rationales given for the 2003 U.S. invasion of Iraq).

may be present with respect to the judicial interpretation[77] of documents like national constitutions or multilateral conventions, and which may suggest a justification for applying an interpretive principle of effectiveness,[78] such is not the case with Security Council resolutions. Only rarely will the meaning of the Council's resolutions come before an international or national tribunal, and rarer still will be the occasions when a tribunal will have jurisdiction to determine whether a State's implementation of a resolution comports with its legal meaning. Most often the implementation of the Council's resolutions will be judged by the states to whom it is addressed and by the Council itself, although it would be overly optimistic to posit the Council as an effective arbiter of the interpretation of its own resolutions.[79] As a result, the interpretation of the Council's resolutions are most likely to be self-judged and disputes about interpretation resolved as much through political as legal means. In practice then, regardless of theoretical considerations about the imposition of an overarching *telos* in the interpretative enterprise, international law (and lawyers) should hesitate in the formulation of

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77. Dworkin's thesis in *Law's Empire*, of course, was concerned with the *judicial* process of interpretation. *See generally* RONALD DWORKIN, LAW'S EMPIRE 410 (1986) (noting that "law is an interpretative concept" and that judges play a very important role in that interpretation).

78. In many ways, the hermeneutic of constructive interpretation echoes certain formulations of the principle of effectiveness sometimes relied upon in the interpretation of treaties. In its broadest sense, the principle of effectiveness—*ut res magis valeat quam pereat (that the thing may have effect rather than be destroyed)*—serves as an adjunct to the teleological approach to treaty interpretation and is formulated as favoring the interpretation that would most effectively fulfill the object and purpose of a provision or a treaty. As it appears to have been proposed for application to Security Council resolutions in the passage above, the object and purpose of the maintenance of international peace and security has been elevated to the level of *grundnorm*, "always to be accomplished" by the interpretive exercise. Even in the law of treaties, however, the principle of effectiveness cannot claim such pride of place. As the International Court has admonished on various occasions: "The principle of . . . effectiveness, cannot justify the Court in attributing to the provisions . . . a meaning which . . . would be contrary to their letter and spirit." Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase), 1950 I.C.J. 221, 229 (July 18). *See* Minority Schools in Albania, 1935 P.C.I.J. (ser. A/B) No. 64, at 20–22 (Apr. 6) (interpreting a provision "both according to its letter and spirit"); Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.), 1929 P.C.I.J. (ser. A) No. 22, at 13 (Aug. 19) (stating the importance of interpreting terms to enable "the clauses themselves to have appropriate effects"). Indeed, when the International Law Commission considered and ultimately decided against expressly including the principle of effectiveness in the Vienna Convention on the Law of Treaties, the Commission observed that insofar as the principle of effectiveness in fact reflects a general rule of interpretation, it is embodied the provisions of Article 27, which require "that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in the context of the treaty and in the light of its object and purpose." *Draft Articles on the Law of Treaties with Commentaries* art. 27(1), [1966] 2 Y.B. Int'l L. Comm'n 217, U.N. Doc. A/CN.4/SER.A/1966/Add.1.

79. *Cf.* Wood, *supra* note 68 at 78 (stating that the Security Council "is not a judicial organ").

doctrine that seems likely to justify self-serving "constructive interpretations" of the political choices that the Council has made in adopting a resolution phrased in a particular manner.[80]

An alternative approach to the interpretation of the Council's resolutions may be found by reference to a principle of restrictive interpretation. Jochen A. Frowein, for example, has argued that it may be reasonable to conclude that, as a starting point, a Security Council resolution, like a treaty, should be interpreted in good faith in accordance with the ordinary meaning of its terms in their context and in light of its object and purpose; nevertheless, because resolutions of the Security Council, unlike treaties, enact duties for all Member States without their direct participation, Frowein also recognizes that ambiguities in resolutions should be interpreted narrowly and against limitations on the sovereignty of the targeted State.[81] Whatever one may think of the elevation of state sovereignty to the position of trump, a cautious approach can be commended on purely interpretive grounds. Given the process of decision-making in the Security Council, the text of a resolution will reflect an often finely balanced political agreement among at least the five permanent members.[82] A conservative approach to the resolution of ambiguities safeguards the interpretative exercise from reading into the text of the resolution what negotiation and drafting have failed to provide.[83] Moreover, given the usually self-assessed character of the interpretation of the Council's resolutions, a restrictive approach may serve to place constraints on aggressive unilateral interpretation or at least remove broad and malleable supporting principles (on the international legal plane) from the consideration of the legitimacy of such interpretations.

So what are the modalities for interpreting the Council's resolutions? One might start with the *Namibia* case, in which the International Court of Justice stressed four wide-ranging points of reference to be taken into account in determining the character of the Council's resolutions: "the terms of the resolution to be interpreted,

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80. Moreover, unlike the judge who cannot choose the cases which comes before his or her court, the Council passes a great many resolutions and routinely notes in these resolutions that it "remains seized of the matter," indicating that it may return to pass additional resolutions on the matter as it empowered to do so under the Charter. U.N. Charter art. 24. To apply expansive interpretative principles as a legal justification for circumventing the Council's political process of decision-making on matters of collective security is a recipe for mischief and worse.

81. Frowein, *supra* note 68, at 149.

82. *Cf.* BAILEY & DAWS, *supra* note 73, 137–41, 227–39 (describing the power held by the permanent members of the Security Council and the influence of their veto power).

83. *Cf.* Mavrommatis Palestine Concessions (U.K. v. Greece), 1924 P.C.I.J. (ser. A) No. 3, at 19 (Aug. 30) (choosing to adopt the narrower meaning to a term when there are two equally legitimate interpretations).

the discussions leading to it, the Charter provisions invoked and, in general, all the circumstances that might assist in determining the legal consequences of the resolution of the Security Council."[84] Wood's analysis echoes this broad approach to the evidence relevant to the interpretive effort, suggesting that in addition to the text of the resolution itself, there is a need,

> when interpreting SCRs, to have particular regard to the background, both the overall political background and the background of related Council action; and . . . to understand the role of the Council under the Charter of the United Nations, as well as its working methods and the way SCRs are drafted.[85]

Taken together with the default presumption of restrictive interpretation, these conceptions of the process by which the Council's resolutions should be interpreted suggest an approach that eschews the formal hierarchy of sources found in Articles 31 and 32 of the Vienna Convention and instead recognizes that while the best evidence of intended meaning is likely to be found in the words used by the parties in their instrument, extrinsic evidence may be necessary to clarify the meaning of that text.

2. Resolving the Ambiguities in Resolution 1737

How might these considerations apply to the language of paragraph 12 of Resolution 1737? On the one hand, both the language used and the absence of any definition of key terms (e.g., "for the benefit of") seem to indicate that paragraph 12 has been drafted so as to allow implementing states a degree of discretion to determine when transactions which do not involve the transfer of funds directly to designated persons or entities nevertheless may be prohibited pursuant to the Council's authority.[86] In addition, the Council's resolutions indicate expressly in the Preamble that the purpose of the sanctions is "to constrain Iran's development of sensitive technologies in support of its nuclear and missile programmes."[87] Certainly a grant of discretion to Member States to interpret and apply paragraph 12 broadly would be consistent with the achievement of this overall aim. On the other hand, however,

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84. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 53 (June 21).

85 Wood, *supra* note 68, at 74.

86. *See* S.C. Res. 1737, *supra* note 32, ¶ 12 ("*[D]ecides further* that all States shall ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any persons or entities within their territories, to or for the benefit of these persons and entities.").

87. This language appears in all three of the Council's sanctions resolutions: S.C. Res. 1803, *supra* note 8, pmbl., ¶ 11; S.C. Res. 1747, *supra* note 32, pmbl., ¶ 7; S.C. Res. 1737, *supra* note 32, pmbl., ¶ 8.

statements of object and purpose in the perambulatory provisions of a resolution must be viewed with some caution and understood in the context of the actual operative parts of the resolution in which they are made. Statements made in the perambulatory clauses of Security Council resolutions are often the "dumping ground for proposals that are not acceptable in the operative paragraphs."[88]

Indeed, when the purpose of the sanctions is taken in the context of the operative provisions of Resolutions 1737, 1747, and 1803, it becomes clear, as noted above, that these are targeted sanctions—addressed to specific types of transactions and specific persons and entities.[89] Notwithstanding broad perambulatory statements of purpose, the Council has not decided to impose a comprehensive economic embargo on dealings with Iran.[90] Both the Iranian Government and (non-designated) Iranian persons and entities remain free to conduct business (except in a limited class of transactions), and other states and their persons and entities remain free to do business with Iran and its nationals.[91] As a result, to interpret paragraph 12 as granting states discretion to prohibit broadly any commercial or financial dealings with Iran or its state-owned entities because such dealings may ultimately inure to the benefit of Iran's nuclear program would undercut the Council's agreement to impose only sanctions of a limited scope. Furthermore, if a broad interpretation was correct and any transactions with Iran or its state-owned entities should be seen as coming within the scope of paragraph 12's prohibition, it would have the effect of placing any state that does business with Iran or its state-owned entities in the position of being in breach of the Council's resolutions. Clearly this is

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88. Wood, *supra* note 68, at 86–87.

89. *See* S.C. Res. 1803, *supra* note 8, ¶ 7, Annex (specifying that new entities have been added to the list from the previous resolution); S.C. Res. 1747, *supra* note 32, ¶ 4, Annex (noting that new entities have been added to the previous resolution's list); S.C. Res. 1737, *supra* note 32, ¶¶ 3–5, Annex (specifically listing prohibited actions and listing persons and entities).

90. *See* S.C. Res. 1803, *supra* note 8, ¶ 9 (calling upon states to "exercise vigilance" when entering into financial agreements with Iran, but not banning them from doing so outright); S.C. Res. 1747, *supra* note 32, ¶ 10 (welcoming the commitment to the "development of relations and cooperation with Iran"); S.C. Res. 1737, *supra* note 32, ¶¶ 13–16, 21 (placing limitations on the actions to be taken against Iran, and welcoming the commitment to the "development of relations and cooperation with Iran.").

91. Prior to the vote in the Security Council adopting Resolution 1737, the Russian representative stated:

> It is crucial that the restrictions being introduced on cooperation with Iran apply to those areas that are the cause of the IAEA's concern. In that regard, we firmly believe that cooperation with Iran in areas and using resources that are not restricted by the draft resolution shall not be subject to the draft resolution's restrictions.

U.N. SCOR, 61st Sess., 5612th mtg. at 2, U.N. Doc. S/PV.5612 (Dec. 23, 2006).

not what the members of the Council intended when they adopted Resolutions 1737, 1747, and 1803;[92] nor is it what they expressed.[93]

Whether the imposition of a more stringent UN sanctions regime may have been (or would be) a more effective way to effect a change in Iranian conduct is an open question. As a matter of legal interpretation, however, the question is beside the point. In interpreting these resolutions, the question is not "what would have been prudent for the Security Council to have decided?" but "what did the Council decide?" On that basis, the meaning of the resolutions seems relatively clear: It is for the Security Council itself or the Committee to make determinations as to which persons and entities the Council's sanctions will apply. While paragraph 12 leaves some room for discretion by states, that discretion is narrow and must be understood within the overall limited structure of the Council's sanctions regime. Accordingly, in so far as individual states, whether acting alone or in concert, believe that non-forcible measures should be taken against Iran in addition to those provided for by the Council, the legal justification for those measures must be found outside of the Council's authorization.

IV. THE AVAILABILITY OF UNILATERAL COUNTERMEASURES FOR VIOLATIONS OF THE NPT

The limited scope of the Security Council's sanctions resolutions does not mean that additional reactive measures against Iran by states acting individually or in concert are foreclosed. Iran's non-compliance with its NPT obligations has its own effects under the law of state responsibility. In general, non-compliance with existing international legal obligations is an internationally wrongful act and provides grounds for other states to invoke the non-complying state's international responsibility.[94] The difficult question that arises in the case of non-compliance with multilateral obligations, however, is whether, and under what circumstances, the response to non-compliance may include the use of unilateral countermeasures. Ancillary to that question is whether the encouragement of a supervisory mechanism, like the IAEA, together with action by the

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92. *See generally id.* (showing the discussion that occurred amongst the members of the Security Council prior to the adopt of one of the Security Council resolutions pertaining to Iran's nuclear program).

93. *See* sources cited *supra* note 90 (each noting that there is no outright ban on states having economic dealings with Iran).

94. G.A. Res. 56/83, Annex, ch. II, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/Res/56/83 (Dec. 12, 2001) (defining countermeasures arising from internationally wrongful acts).

Security Council, preempts the use of unilateral security measures in any case. These issues are addressed below.[95]

A. *The Nature of Countermeasures and Their Legal Limits*

It is by now a commonplace observation that in a decentralized legal system, such as exists in the international community, mechanisms for the enforcement of international legal norms are at a premium, particularly in light of the general prohibition on the use of force.[96] In the absence of a centralized enforcement authority or a universal mechanism for dispute resolution, countermeasures fill, albeit imperfectly, a legal lacuna and provide a tool of "self-help" for encouraging compliance with international law.[97]

For the sake of clarity, countermeasures may be defined as non-forcible measures, unilateral in character, taken in response to an internationally wrongful act that has previously been committed by the state against whom the countermeasures are addressed and that, under normal circumstances, would themselves be unlawful as

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95. To be clear, the countermeasures under consideration in this article are those imposed directly against Iran, such as the freezing of the assets of Iranian nationals. *See supra* text accompanying notes 37, 39, 41 (describing the Security Council resolutions that allow the freezing of the assets of certain Iranian nationals). Not considered here are measures taken against the nationals of third States with indirect effect on Iran, such as the "sanctions" authorized under the US Iran Sanctions Act (ISA). 50 U.S.C.S. §§ 1701–1707 (empowering the President to sanction foreign entities and persons that make an "investment" of more than $20 million in one year in Iran's energy sector or that sell to Iran weapons of mass destruction (WMD) technology or "destabilizing numbers and types" of advanced conventional weapons). The measures available under the ISA are not countermeasures under the law of state responsibility as they are directed not against the responsible state itself but third States. *See Draft Articles on State Responsibility*, *supra* note 54, art. 49(1) (noting that "an injured State may only take countermeasures against a State which is responsible for an internationally wrongful act"); *id.* art. 49(2) ("Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures *towards the responsible State*.") (emphasis added). While the international legality of sanctions such as those authorized by the ISA may be doubted, full consideration of that question is beyond the scope of this article. *See*, *e.g.,* Vaughan Lowe*, US Extraterritorial Jurisdiction: The Helms Burton and D'Amato Acts*, 46 INT'L & COMP. L.Q. 378, 379–83 (1997) (discussing the targeted use by the U.S. of sanctions against certain states to "increase the economic isolation of the targeted countries"). *But see* Jeffrey A. Meyer, *Second Thoughts on Secondary Sanctions*, 30 U. PA. J. INT'L L. 905 (2009) (arguing "that a wide range of secondary sanctions measures are permissible if tailored to regulate exclusively on 'terrinational' grounds-on the combined basis of territorial and nationality jurisdiction").

96. *See generally* Gerald Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 MOD. L. REV. 1 (1956) (discussing the difficulties inherent in enforcing international law).

97. *See* Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 220–22 (Sept. 25) (recognizing "entitlement to take countermeasures").

infringing the rules of international law.[98] Although the term "countermeasures" is of relatively recent coinage,[99] the practice of states that comes within its rubric is ancient, tracing its roots back to the practice of forcible "reprisals" and other unilateral actions by states seeking to enforce rights in their relations with other states.[100] In its earlier incarnation, such unilateral actions were justified by both the need of a wronged state to reestablish the balance of its relations with the wrongdoing (responsible) state and by a perceived moral right to punish the responsible state's delict.[101] More recently, however, the justification of punishment for the wrong has fallen out of favor.[102] Punishment is no longer seen as an acceptable aim for countermeasures.[103] Instead, the justification for countermeasures is seen as predominantly instrumental: to procure cessation of and reparation for the original internationally wrongful act.[104]

Instrumental effectiveness, however, is not a conclusive consideration in the modern law of countermeasures. An effective countermeasure is not necessarily a legally permissible countermeasure. Because the conditions giving rise to countermeasures are generally self-assessed—meaning that the state taking countermeasures will determine for itself whether the conditions justifying countermeasures exist in law and fact—and are thereby susceptible to abuse, international legal doctrine has developed to place limits on the range of countermeasures which are permissible in international law.[105] Thus, for example, countermeasures must be proportionate or "commensurate with the injury suffered,"[106] and certain obligations may not be impaired by

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98. *See id.* (listing the conditions under which "an injured State" may take countermeasures). *Draft Articles on State Responsibility*, *supra* note 54, art. 49 (explaining when countermeasures are appropriate). On the position of States not coming within the scope of the ILC Articles' conception of "injured State," see *infra* Part IV.C for a discussion of countermeasures by states not suffering direct injury.

99. *See* Air Services Agreement of 27 March 1946 (U.S. v. Fr.), 18 R. Int'l Arb. Awards 417, 443 (Perm. Ct. Arb. 1980) (discussing "the principle of the legitimacy of 'counter-measures' and the limits on those measures in the light either of the existence of a machinery of negotiations or of a mechanism of arbitration or judicial settlement").

100. *See generally* Michael Akehurst, *Reprisals by Third States*, 44 BRIT. Y.B. INT'L L. 1 (1970) (discussing the possible justifications of reprisals by third states).

101. *See id.* at 2 (quoting authority suggesting that any state, in reaction to a severe violation of international law, can punish the wrong-doing state).

102. *See Draft Articles on State Responsibility*, *supra* note 54, art. 49, cmt. 1 (stating that countermeasures are not a form of punishment).

103. *Id.*

104. *Id.* pt. 3, ch. II, cmt. 6, art. 49, cmt. 1.

105. *Id.* pt. 3, ch. II, cmt. 2; *see* Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 56–57 (Sept. 25) (listing conditions under which a countermeasure can be lawful).

106. *Draft Articles on State Responsibility*, *supra* note 54, art. 51; Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 56–57 (Sept. 25); Responsibility of Germany for Damage Caused in the Portuguese Colonies in the South of Africa (Port. v. Germ.), 2 R. Int'l Arb. Awards 1013, 1028 (1928); Air Services Agreement of 27

countermeasures under any circumstances.[107] In addition, countermeasures must, as far as is possible, be reversible: once the justifying wrongful act has ceased and reparations have been made, the countermeasures must cease, and the legal relations between the involved states must return to the *status quo ante*.[108]

B. *Countermeasures and the Concept of the "Injured State"*

The recognition of countermeasures in international law is controversial. In the International Law Commission (ILC) debates leading to the adoption of the Articles on State Responsibility in 2001, there was disagreement as to whether the use of countermeasures should be recognized in any form.[109] Nevertheless, the final ILC Articles clearly sanction the use of countermeasures by what the Articles define as "an injured State."[110] The Articles equivocate, however, with respect to whether or not countermeasures may be taken by a state that has not suffered a direct injury as a result of the prior breach: although the Articles do not expressly prohibit the use of countermeasures by such states, they do not expressly condone them either.[111] In the situation under consideration here, therefore, an initial question must be raised: Do breaches of the NPT give rise to a right in the other parties to that treaty to consider themselves as "injured States" such that they may clearly resort to countermeasures in order to encourage compliance, or do breaches of the NPT cause a

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March 1946 (U.S. v. Fr.), 18 R. Int'l Arb. Awards 417, 444–45 (Perm. Ct. Arb. 1980). *See generally* Thomas Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715 (2008) (providing a more general discussion of the requirement of proportionality in countermeasures under international law).

107. *Draft Articles on State Responsibility*, *supra* note 54, art. 50.

108. *Id.* art. 49(3), art. 49, cmt. 9; *see* Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 56–57 (Sept. 25) (listing reversibility as an additional requirement that a countermeasure must meet).

109. With respect to the debates, James Crawford, the special rapporteur for the final stages of the ILC's effort, observed: "Concerns [regarding the provisions on countermeasures] were expressed at various levels. The most fundamental related to the very principle of including countermeasures in the text, either at all or in the context of the implementation of State responsibility." JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 48 (2002). Many of the general arguments put forward against the recognition of countermeasures are addressed in Yoshiro Matsui, *Countermeasures in the International Legal Order*, 37 JAPANESE ANNUAL OF INT'L L. 1, 6–8 (1994).

110. *Draft Articles on State Responsibility, supra* note 54, art. 49.

111. *See id.* art. 54.

> This chapter does not prejudice the right of any State . . . to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

more generalized injury, such that countermeasures are not expressly sanctioned by the Articles? The answer would seem to lie in Articles 42 and 48 of the Articles on State Responsibility and ultimately in the character of the NPT itself.[112]

1. States Parties as "Injured States" under the NPT

Article 42 sets out three situations in which a state is entitled to treat itself as being an "injured State" such that the full panoply of rights of recourse, including countermeasures, are expressly available to it.[113] It is the third category, delimited in Article 42(b)(ii), into which a breach of the NPT may most obviously be placed. Article 42(b)(ii) provides that a state may treat itself as an "injured State" where the obligation breached is owed either to a group of states of which the "injured State" is a part or to the international community as a whole, *and* the breach "is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation."[114] Article 42(b)(ii) thus echoes the language of Article 60(2)(c) of the Vienna Convention on the Law of Treaties, linking the definition of the "injured State" with the concept of interdependent obligations.[115] Unlike Article 60, however, the establishment of an injury under Article 42(b)(ii) does not involve the concept of "materiality," nor does

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112. *See id.* art. 42 (describing the situations in which an "injured state" may invoke another state's responsibility); *id.* art. 48 (describing the rights of states other than the injured state to invoke the responsibilities of the injuring state).

113. The first is where the obligation breached was owed to that state individually—such as in the case of a bilateral treaty between two states, or a multilateral treaty which has the character of being a "bundle of bilateral agreements," such as, for example, the Vienna Convention on Diplomatic Relations. *Id.* art. 42(a). *See also id.* art. 42, cmt. 6 (defining "individually" as used in art. 42(a) to "indicate[] that in the circumstances, performance of the obligation was owed to that State"); *id.* art. 42, cmt. 8 (adding that 42(a) includes obligations under a multilateral treaty to any one state in particular). The second situation arises where the obligation breached is owed to a group of states or the international community as a whole, and the breach is of such a character so as to "specially affect" the state or states seeking to invoke responsibility. *Id.* art. 42(b)(i). In this category, the ILC Comments tell us, come cases in which wrongful conduct under a multilateral treaty, such as the Law of the Sea Convention, has particular impact on one or several of the states party to the treaty, such as, for example, the case in which a coastal state suffers damage from unlawful pollution. All States Party to the Convention have an interest in seeing that the provisions on pollution are followed, but the state with pollution on its beaches or in its fishing grounds is specially affected by the breach. *Id.* art. 42, cmts. 11–12.

114. *Id.* art. 42(b).

115. *See* Linos-Alexander Sicilianos, *The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility*, 13 EUR. J. INT'L L. 1127, 1134–35 (2002) (explaining how Article 42 came to closely mirror the language of the Vienna Convention).

it lead to the suspension or termination of the treaty.[116] Instead, an "injured State" under Article 42(b)(ii) may insist that the responsible state perform its obligations under the treaty and, further, may seek to encourage that performance through the use of countermeasures.[117]

By way of identifying the types of obligations under contemplation in Article 42(b)(ii), the ILC Comments indicate that such legal arrangements will include disarmament treaties, nuclear free zone treaties, "or any other treaty where each party's performance is effectively conditioned upon and requires the performance of each of the others."[118] The ILC Comments thus give strength to the conclusion that a violation of the NPT, as a treaty akin to a disarmament treaty or a nuclear free zone treaty,[119] should be considered as putting each other party to the NPT in the position of an "injured State" and therefore in a position to adopt countermeasures within the terms of the Articles.[120] Before adopting that conclusion here, however, one should also consider Article 48, which addresses the invocation of responsibility by states that do not qualify as "injured States" under Article 42—and thus do not have express sanction under the Articles for the use of countermeasures.[121]

Under Article 48(1), a state not otherwise coming within the definition of an "injured State" under Article 42 may nevertheless invoke the responsibility of another state in two situations: "(a) [if] the obligation breached is owed to a group of States . . . , and is established for the protection of a collective interest of the group; or (b) [if] the obligation breached is owed to the international community as a whole."[122] On its face, subparagraph (a) of Article 48(1) raises some question about whether the NPT might come within such a description, having been "established for the protection of a

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116. *See* Special Rapporteur, *Third Report on State Responsibility: Addendum*, ¶¶ 324–25, *delivered to the International Law Commission*, U.N. Doc. A/CN.4/507/Add.3 (July 18, 2000) (arguing that the Vienna Convention should be applied to issues of suspension, while the Draft Articles should be applied to countermeasures); ELISABETH ZOLLER, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES 89 (1984) (explaining the difference between suspension, termination, and nonperformance of treaties).

117. *See* Karl Zemanek, *The Unilateral Enforcement of International Obligations*, 47 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 32, 34 (1987) (F.R.G.) (arguing that countermeasures are necessary because simple retaliatory suspension of a treaty by an injured state generally will not ensure future performance by the injuring state).

118. *Draft Articles on State Responsibility*, *supra* note 54, art. 42, cmt. 13.

119. Indeed, the IAEA in its Handbook on Nuclear Law characterizes nuclear free zone treaties as "regional non-proliferation treaties." CARLTON STOLBER ET AL., INTERNATIONAL ATOMIC ENERGY AGENCY, HANDBOOK ON NUCLEAR LAW 122 (2003), *available at* http://www-pub.iaea.org/MTCD/publications/PDF/Pub1160_web.pdf.

120. *Draft Articles on State Responsibility*, *supra* note 54, art. 42, cmt. 13.

121. *Id.* art. 48(1).

122. *Id.*

collective interest of the group," namely, the group of 187 States Party to the NPT.[123] The official comments to Article 48 do not help to clarify the issue and actually serve to raise some confusion as to the scope of Article 48(1)(a) as compared to Article 42(b)(ii).[124] Comment 7 to Article 48 observes that obligations coming within the scope of collective obligations under Article 48 may include treaties for the protection of the environment, treaties for the protection of human rights, or "regional nuclear free zone treaties."[125] Recall, of course, that in the commentary to Article 42(b)(ii), defining when a state may invoke the rights of an "injured State," the comments indicate specifically that the breach of a nuclear free zone treaty may be considered as giving rise to "injury" by all states that are party to the treaty.[126] This tension is unacknowledged in the Comments and, thus, once must consider the typology of a breach of the NPT from first principles.

2. The Character of the NPT

The object and purpose of the NPT and the structure of the obligations created under the non-proliferation regime provide the best indication of whether a breach should be considered to give rise to an injury in each State Party within the meaning of Article 42(b)(ii).[127] The NPT was crafted as a kind of a "grand bargain" between Nuclear-Weapon States (NWS) and Non-Nuclear Weapon States (NNWS),[128] resting upon the shared interests of NWS and NNWS in preventing the proliferation of nuclear weapons and the promise of the availability of peaceful nuclear applications in NNWS.[129] The main provisions of the NPT concerned with non-

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123. *See id.* (stating that a state other than the injured state can invoke responsibility when "the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group.").

124. *Compare id.* art. 42, cmt. 13 (listing disarmament treaties and nuclear free zone treaties as agreements within the scope of article 48) *with id.* art. 48, cmt. 7 (stating that obligations within the scope of Article 48 include "regional nuclear free zone treaties").

125. *Id.*

126. *Id.* art. 42, cmt. 13.

127. *See generally* Joost Pauwelyn, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?*, 14 EUR. J. INT'L L. 907 (2003) (discussing the distinction between multilateral obligations of a bilateral type, which secure individual state interests similar to a contract, and collective obligations, which pursue a common goal beyond individual state interests).

128. Article IX(3) of the NPT defines "nuclear-weapon State" as "one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to January 1, 1967." Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 1, art. XI(3). Presumably all other States fall into the category "non-nuclear weapon States," which, although used throughout the Treaty, is never defined.

129. George Bunn, *Horizontal Proliferation of Nuclear Weapons*, *in* NUCLEAR PROLIFERATION: PROSPECTS FOR CONTROL 34, 36 (Bennett Boskey & Mason Willrich

proliferation are Articles I, II, and III. Under Article I, NWS undertake not to transfer nuclear weapons or other nuclear explosive devices or control over them to anyone whatsoever.[130] NWS also undertake not to assist any NNWS to acquire nuclear weapons or explosives.[131] Article II contains a complementary undertaking by NNWS neither to develop, manufacture, or acquire nuclear weapons or nuclear explosive devices, nor to seek or receive assistance to do so.[132] Article III(1) contains an undertaking by NNWS to accept IAEA safeguards for the purpose of verifying the fulfillment of their obligation under the NPT not to divert nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices.[133] Under

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eds., 1970). For contemporary accounts of the history of negotiations leading to the NPT, see generally Edwin Brown Firmage, *The Treaty on the Non-Proliferation of Nuclear Weapons*, 63 AM. J. INT'L L. 711 (1969) (providing a contemporary history of the NPT); Dai Poeliu, *Treaty on the Non-Proliferation of Nuclear Weapons with Special Reference to Canada's Position*, 6 CAN. Y.B. INT'L L. 226 (1968) (providing a contemporary history of the NPT from a Canadian perspective); Mason Willrich, *The Treaty on Non-Proliferation of Nuclear Weapons: Nuclear Technology Confronts World Politics*, 77 YALE L.J. 1447 (1968) (providing a contemporary history of the NPT).

130. Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.

Treaty on the Non-Proliferation of Treaties, *supra* note 1, art. I.

131. *Id.*

132. Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.

Id. art. II.

133. Each Non-nuclear-weapon State Party to the Treaty undertakes to accept safeguards, as set forth in an agreement to be negotiated and concluded with the International Atomic Energy Agency in accordance with the Statute of the International Atomic Energy Agency and the Agency's safeguards system, for the exclusive purpose of verification of the fulfilment [sic] of its obligations assumed under this Treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices. Procedures for the safeguards required by this Article shall be followed with respect to source or special fissionable material whether it is being produced, processed or used in any principal nuclear facility or is outside any such facility. The safeguards required by this Article shall be applied on all source or special fissionable material in all peaceful nuclear

Article III(4), NNWS undertake to conclude safeguards agreements with the IAEA to meet the requirements of Article III.[134]

Articles IV and V address peaceful applications of nuclear technology. Article IV guarantees the "inalienable right" of all parties to exploit peaceful uses of nuclear energy and the right "to participate in the fullest possible exchange of equipment, materials, and scientific and technological information."[135] In addition, Article VI(2) describes a general undertaking to "cooperate in contributing" to peaceful nuclear development, "especially in the territories of nonnuclear-weapon States Party to the Treaty, with due consideration for the needs of the developing areas of the world."[136] Article V creates an obligation and procedure for sharing any potential benefits from peaceful applications of nuclear explosions.[137]

> activities within the territory of such State, under its jurisdiction, or carried out under its control anywhere.

Id. 21 U.S.T. at 487–88, 729 U.N.T.S. at 172.

134. Non-nuclear-weapon States Party to the Treaty shall conclude agreements with the International Atomic Energy Agency to meet the requirements of this Article either individually or together with other States in accordance with the Statute of the International Atomic Energy Agency. Negotiation of such agreements shall commence within 180 days from the original entry into force of this Treaty.

Id. art. III(4).

135. These rights are expressly qualified by the requirement that such activities be conducted "in conformity with" Articles I and II (pertaining to non-transfer and non-acquisition of nuclear explosives): "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." *Id*. art. IV(1).

136. All the Parties to the Treaty undertake to facilitate, and have the right to participate in. the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy. Parties to the Treaty in a position to do so shall also cooperate in contributing alone or together with other States or international organizations to the further development of the applications of nuclear energy for peaceful purposes, especially in the territories of non-nuclear-weapon States Party to the Treaty, with due consideration for the needs of the developing areas of the world.

Id. art V(2).

137. Each Party to the Treaty undertakes to take appropriate measures to ensure that, in accordance with this Treaty, under appropriate international observation and through appropriate international procedures, potential benefits from any peaceful applications of nuclear explosions will be made available to non-nuclear-weapon States Party to the Treaty on a non-discriminatory basis and that the charge to such Parties for the explosive devices used will be as low as possible and exclude any charge for research and development. Non-nuclear weapon States Party to the Treaty shall be able to obtain such benefits, pursuant to a special international agreement or agreements, through

Finally, Article VI contains an undertaking by the parties to pursue nuclear arms control negotiations "in good faith."[138]

The NPT thus seeks to strike a balance between nuclear "haves" and "have-nots" by, on the one hand, prohibiting the proliferation of nuclear weapons and militarized nuclear technology (Articles I and II) and, on the other, both guaranteeing the right of states to use nuclear technology peacefully (Article IV) and providing a system for sharing peaceful technology among States Parties (Article V). Because peaceful and military uses of nuclear energy derive from similar technology, however, a key to the successful maintenance of this balance is that there is a system of safeguards on peaceful nuclear activities in NNWS to verify that nuclear materials used in such activities are not diverted to use in weapons (Article III).[139] "The safeguards system is central to the basic bargain of the international regime in which other countries are assisted in their peaceful nuclear energy needs in return for their accepting the intrusion of safeguards and inspection."[140]

A security regime like that established under the NPT depends upon the shared belief among the parties that the value which they place on cooperation is shared by the other parties. The NPT depends upon a system of verifiable non-proliferation in order to foster and maintain this cooperation.[141] "Safeguards are a technical means of

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> an appropriate international body with adequate representation of non-nuclear-weapon States. Negotiations on this subject shall commence as soon as possible after the Treaty enters into force. Non-nuclear-weapon States Party to the Treaty so desiring may also obtain such benefits pursuant to bilateral agreements.

Id. art. V.

138. "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control." *Id.* art VI.

139. This principle is set out in Iran's Safeguards Agreement with the IAEA: "The objective of the safeguards procedures . . . is the timely detection of diversion of significant quantities of nuclear material from peaceful nuclear activities to the manufacture of nuclear weapons or of other nuclear explosive devices or for purposes unknown, and deterrence of such diversion by the risk of early detection." Iran Safeguards Agreement, *supra* note 3, art. 28. This language is common to all of the Agency's NPT safeguard agreements. *See* Model NPT Safeguards Agreement, *supra* note 17, para. 28 ("The Agreement should provide that the objective of safeguards is the timely detection of diversion of significant quantities of nuclear material from peaceful nuclear activities to the manufacture of nuclear weapons"). *See also*, *e.g.*, IAEA, *The Agency's Safeguards System (1965, As Provisionally Extended in 1966 and 1968)*, *supra* note 16, para. 1 (establishing the purpose of the IAEA's safeguard system: to promote the peaceful use of atomic energy while preventing military use of atomic materials).

140. Joseph S. Nye, *Maintaining the Non-Proliferation Regime*, 35 INT'L ORG. 15, 17 (1981).

141. *See* Roger K. Smith, *Explaining the Non-Proliferation Regime: Anomalies for Contemporary International Relations Theory*, 41 INT'L ORG. 253, 260 (1987)

assuring a political end."[142] Because the agreement is underpinned by a collective belief among the parties that cooperative action is more valuable than "the individualistic pursuit of security,"[143] it is essential that each state possess not only the right to demand performance from all other States Party but also the right to take measures to "ensure compliance" with the Treaty's provisions.[144] Cooperation will not endure for long if states believe that they are no longer able to rely upon the system established to verify compliance with the NPT's commitments or if one or more states is able to defect from the performance of those commitments.[145] This is the essence of an integrated agreement. Where one state proliferates or where one state's proliferation status is in question, the benefits of the regime are lost for all vis-à-vis the proliferating or non-transparent state and called into question with respect to all others. Each State Party thus has a direct interest in performance by every other State Party, of not only non-proliferation obligations but also safeguards obligations.[146] Only if there is compliance by all will the terms of the bargain be kept and the conditions of cooperation continue.[147] In terms of the law of state responsibility, then, the NPT is the quintessence of an agreement that, if breached by one party, gives rise to an injury in each other party thereto.

C. *Countermeasures by States Not Suffering Direct Injury – An Arguendo Characterization of the NPT*

Although there is good reason to conclude that non-compliance with NPT obligations should be treated as giving rise to an "injury" in each State Party within the terms of Article 42, it is useful to also consider the consequences of the alternative conclusion: whether a

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(arguing that a successful security regime requires that all states believe that the other parties also value security cooperation) (citing Robert Jervis, *Security Regimes, in* INTERNATIONAL REGIMES 173, 178 (Stephen D. Kasner ed., 1983)).

142. Jan Priest, *IAEA Safeguards and the NPT: Examining Interconnections*, IAEA BULL., Mar. 1995, at 2, 10. *See* Paul C. Szasz, *Sanctions and International Nuclear Controls*, 11 CONN. L. REV. 545, 558 (1979) ("Sophisticated safeguards are essential to a system that is to control peaceful nuclear activities.").

143. Smith, *supra* note 141, at 260 (quoting Robert Jervis, *supra* note 141, at 176–78).

144. *See id.* (arguing that cooperation cannot occur if states fear non-compliance from other states).

145. *See id.* (arguing that cooperation cannot be achieved if states are "confronted by a defector with strong anti-status quo ambitions").

146. *See* GUIDO DEN DEKKER, THE LAW OF ARMS CONTROL: INTERNATIONAL SUPERVISION AND ENFORCEMENT 351 (2001) (stating that with respect to arms treaties, every state has an interest in performance by every other state).

147. *See* Smith, *supra* note 141, at 260 (arguing that cooperation cannot occur if states fear non-compliance from other states).

non-directly injured state may also take countermeasures against the wrongdoing state.

Article 54, which concerns responses that may be taken by states other than the injured state—in other words, states coming under Article 48—is deliberately ambiguous with regard to the use of countermeasures by states that have not suffered a direct (i.e., Article 42) injury. Article 54 provides that:

> This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1 to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

The ambiguity of Article 54 arises from the use of the term "lawful measures." Some commentators, generally those opposed to the use of countermeasures by states that have not suffered a direct injury, have taken the view that "lawful measures" should be interpreted to mean that non-directly-injured states may only take measures which are lawful *per se* (i.e. acts of retorsion, and not countermeasures).[148] The better view, however, as Sicilianos has shown, is that countermeasures by Article 48 states are neither sanctioned nor prohibited by the Articles.[149] As the *travaux preparatoires* demonstrate, the particular phrasing of Article 54 reflects the fact that the ILC could not reach a consensus on countermeasures by Article 48 states, one way or the other.[150] The matter was simply too contentious. Consequently, the ILC Comments indicate that the Commission decided not to advance a position *de lege ferenda*, but instead to leave the issue for resolution through the further development of state practice.[151] The ILC took this position despite

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148. *See, e.g.*, Dennis Alland, *Countermeasures of General Interest*, 13 EUR. J. INT'L L. 1221, 1232–33 (2002) (arguing that Chapter II has prejudiced the right of Article 48 states to take "lawful measures" because countermeasures, unlike acts of retorsion, are inherently wrongful, and can only become lawful when justified by certain conditions).

149. Summarizing the argument, Sicilianos notes

> that acts of retorsion were explicitly excluded from the scope of application of the Articles on State Responsibility; that permitting retorsions and devoting a specific provision to the purpose is pointless, since they are in any case permitted; that countermeasures too are 'lawful measures,' given that their wrongfulness is precluded by Article 22—and by customary law—to the extent that they are taken in accordance with the procedural and material conditions codified essentially in Articles 49–53; and, finally, that Article 54 is an integral part of the chapter on countermeasures.

Sicilianos, *supra* note 115, at 1143.

150. *See Draft Articles on State Responsibility*, *supra* note 54, art. 54, cmt. 6 (explaining that the current law on countermeasures in the collective interest is unsettled).

151. *Id.* art. 54, cmt. 6.

acknowledging the presence of examples in state practice supporting the recognition of a right for non-directly injured states to take so-called "solidarity" or "collective" countermeasures against a responsible state.[152] The ILC concluded, however, that this state practice was too "embryonic" to establish a customary rule.[153] Again, the matter was simply too controversial. Recent scholarship, however, has shown that the ILC commentaries seem not to appreciate adequately the extent of state practice on the issue.[154]

A principle reason for the ambivalence within the ILC about the use of countermeasures by non-directly injured states was the concern that a conferral of rights under Article 48 could be used to justify politically motivated acts and could unleash what has been referred to as "'a sort of international vigilantism,' with States being wrongly accused of crimes and subjected to damaging measures without good cause."[155] The same concerns apply to countermeasures taken by directly injured states of course, but as the class of states which may have legal justification to take countermeasures expands, so does the possibility that a state might be subjected to countermeasures based upon a spurious legal claim.[156]

Such concerns of misuse are largely ameliorated, however, where the wrong against which countermeasures are taken is one which has been declared by a specialized agency with the responsibility for assessing compliance with the obligation under consideration. With respect to compliance with the NPT, the IAEA thoroughly fills this role.[157] The safeguards system created by the NPT includes an extensive set of procedures that are designed not only to prevent and detect instances of breach of the Treaty's substantive obligations,[158]

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152. *See id.* art. 54, cmt. 3 (describing the actions taken by states in response to breaches in obligations to third-parties).

153. *Id.* pt. 3, ch. 2, cmt. 8.

154. Martin Dawidowicz, *Public Law Enforcement Without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and Their Relationship to the UN Security Council*, 77 BRIT. Y.B. INT'L L. 333, 417 (2007).

155. D. N. Hutchinson, *Solidarity and Breaches of Multilateral Treaties*, 59 BRIT. Y.B. INT'L L. 151, 202 (1988) (quoting Bruno Simma, *International Crimes: Inquiry and Countermeasures*, *in* INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY 283, 299 (Joseph H. Weiler et al. eds., 1989)).

156. *See* Jonathan I. Charney, *Third State Remedies in International Law*, 10 MICH. J. INT'L L. 57, 101 (1989) (noting that "a substantial expansion of international law remedies to give third States a significant role. . . . might erode, rather than enhance, obedience to the rule of law").

157. *See* Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 1, art. III (stating that the signatories must accept safeguards set forth by the IAEA which verify the fulfillment of the obligations created under the treaty).

158. *See* Model NPT Safeguards Agreement, *supra* note 17, art. 1 (describing a model system of safeguards "on all source or special fissionable material in all peaceful nuclear activities . . . for the exclusive purpose of verifying that such material is not diverted to nuclear weapons or other nuclear explosive devices.").

but also to provide a mechanism for the determination of violations.[159] Moreover, violations of the NPT's safeguards obligations are ascertained through a process which is transparent and allows the state being assessed the opportunity to be heard and to participate in the assessment process.[160] When the IAEA concludes that a breach of NPT safeguards obligations has occurred, it does so upon the basis of reports provided by the Director General to the IAEA Board of Governors in which the reasons for that conclusion are provided to the non-complying state and the factual predicate is made clear.[161] Thus, the conclusion that there has been non-compliance with NPT obligations is not based upon the opinion of one state or an *ad hoc* group of similarly inclined states but rather the determination of the IAEA, the agency specifically designated to

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159. For a review of the safeguard process from both a practical and legal perspective, see Adolf von Baeckmann, *The Treaty on the Non-Proliferation of Nuclear Weapons*, *in* VERIFICATION OF CURRENT DISARMAMENT AND ARMS LIMITATION AGREEMENTS: WAYS, MEANS AND PRACTICES 167 (Serge Sur ed., 1991).

160. *See id.* at 174–75 (describing the process by which violations are ascertained and the opportunities of the state to participate in this process). Under the NPT safeguards agreement, the IAEA is obliged to report formally to the state at specified intervals (usually after each inspection) on the activities carried out at each facility and their results, including any discrepancies found and whether they have been resolved. *See* Model NPT Safeguards Agreement, *supra* note 17, art. 90(a) (stating that the Agency will inform the state of the results of any inspection). *Accord* Iran Safeguards Agreement, *supra* note 3, art. 90(a) (noting that "the Agency shall inform the Government of Iran of: (a) The results of inspections, at intervals to be specified in the Subsidiary Arrangements"). In addition, the IAEA also provides a statement on conclusions drawn from its verification activities for each facility over time. Model NPT Safeguards Agreement, *supra* note 17, art. 90(b). *Accord* Iran Safeguards Agreement, *supra* note 3, art. 90(b).

> The Agency shall inform the Government of Iran of . . . (b) The conclusions it has drawn from its verification activities in Iran, in particular by means of statements in respect of each material balance area, which shall be made as soon as possible after a physical inventory has been taken and verified by the Agency and a material balance has been struck.

Id.

161. Statute of the International Atomic Energy Agency, *supra* note 16, art. XII(C). As the Director of the Agency's Legal Division observed:

> The legal basis is designed to obviate political factors which otherwise might operate within the Agency to delay the establishment of conclusions about inspection activities. Inspections and the analysis of inspection results are designed as technical professional operations using objective criteria wherever possible, and a finding by an inspector of non-compliance with an agreement would be the end-result of this technical process. An inspector who concludes that there has been a non-compliance – or that he is unable to verify that there has been no diversion – has no discretion whether he will take the matter further: he is obliged to report it to the Director General who, in turn, has no option but to transmit the report to the Board of Governors.

L.W. Herron, *A Lawyer's View of Safeguards and Non-Proliferation*, IAEA BULL., Sept. 1982, at 32, 37.

monitor compliance with safeguards obligations.[162] Indeed, when the IAEA Board of Governors reaches its conclusion that a violation has occurred, no member may veto that conclusion.[163]

Consequently, countermeasures taken as a consequence of NPT non-compliance do not raise the same concerns of abusive charges as might be possible in situations in which states are left to self-judge the wrongfulness of the acts against which countermeasures are directed. Indeed, where a multilateral agency like the IAEA has come to a determination of non-compliance with an international obligation, the use of countermeasures may serve to strengthen and reinforce the authority of the agency's conclusions, while at the same time contributing to the breaching party's willingness to comply with its obligations.

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The law of countermeasures with respect to non-directly injured states continues to develop. While considerable academic literature has accumulated on the normative worth of this type of countermeasure,[164] the ILC has taken the practical position of leaving it to state practice to guide the law's development in this area.[165] In these circumstances, states are free to act, but such action is not likely to be without occasional controversy or questions of legality. Undoubtedly, however, the arguments in favor of countermeasures by non-directly injured states are stronger where the international wrong giving rise to countermeasures has been confirmed by a specialized multilateral organization.[166] Moreover, from the point of view of states considering the imposition of countermeasures, the point may be well taken that where the law is

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162. *See* Herron, *supra* note 161, at 37 (stating that it is objective inspectors who determine whether there has been non-compliance, and that they must report their findings).

163. *See* IAEA, *Provisional Rules of Procedure of the IAEA Board of Governors*, R. 35–37, IAEA Doc. GOV/INF/500/Rev. 1 (Feb. 23, 1989) (stating that each governor on the board shall have one vote and that all decisions shall be made by either a two-thirds majority vote or a simple majority vote depending on purpose of the vote).

164. *See*, *e.g.*, Akehurst, *supra* note 100, at 18 (noting that every state is permitted to prosecute individuals who break the rules of international law and that "[t]he exercise of this jurisdiction may be justified on the grounds that every State has a legal interest in the universal maintenance of rules prohibiting or regulating the use of force" and implying that it can "be argued that the same legal interest justifies every State in taking reprisals against States which commit similar crimes"); Dawidowicz, *supra* note 154, at 408–18 (arguing that "there is a presumption of legality attached to the generally uniform conduct" of States that takes countermeasures).

165. *See Draft Articles on State Responsibility*, *supra* note 54, art. 54, cmt. 6 (noting the ILC's choice to leave "the resolution of the matter to the further development of international law").

166. *See* Dawidowicz, *supra* note 154, at 350 (noting the difficulties for potential sanctioning states in authoritatively assessing whether a violation of international law has occurred).

uncertain and the rules are not fixed, the international community's assessment of the lawfulness of those countermeasures is likely to reflect political realities more than doctrinal niceties. Thus, when reinforcing a norm-creating trend in an uncertain area (such as countermeasures by Article 48 states), it is undoubtedly advantageous if the state action under scrutiny is seen as corresponding with the achievement of a generally held substantive aim of the international community. In that respect, preventing the unchecked development of nuclear technology in Iran and reinforcing the process of verification of non-proliferation commitments without the use of force would appear to satisfy the political, as well as legal, requirements needed to advance a resolution of the uncertainty left by Article 54 with respect to the use of countermeasures by "non-injured" states.

D. *Summary*

The foregoing analysis demonstrates that because of the character of the NPT, non-compliance with the safeguards obligations created thereunder should permit each other State Party to treat itself as an "injured State" under Article 42. As an "injured State," each State Party is, in principle, permitted to avail itself of the full range of responses admitted in the law of state responsibility, including countermeasures.[167] Further, even assuming for the sake of argument that non-compliance with the safeguards obligations of the NPT does not lead to the characterization of each State Party as an injured state, the foregoing analysis further suggests that where a multilateral agency like the IAEA has come to a determination of non-compliance with an international obligation, the use of countermeasures may still be available under the developing law of state responsibility related to so-called third-party or general interest countermeasures. Part IV will now consider whether, notwithstanding these conclusions, the particularities of the NPT regime and the UN system of collective security nevertheless require the conclusion that countermeasures are prohibited.

V. TREATY-BASED LIMITATIONS ON COUNTERMEASURES

The rules of state responsibility, such as those governing the use of countermeasures, are secondary rules of international law and accordingly give way in the face of contrary primary obligations. *Lex*

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167. *Draft Articles on State Responsibility*, *supra* note 54, art. 42, cmt. 3.

specialis derogat legi generali.[168] Article 55 of the Articles on State Responsibility highlights the residual character of the law of state responsibility by providing that the articles do not apply "where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law."[169] The NPT–IAEA system includes an elaborate set of rules that are designed to detect instances of breach of the Treaty's substantive obligations. It must be asked, therefore, whether the presence of such a supervisory mechanism, including a specialized supervising organization like the IAEA, restricts the possible use of countermeasures by the States Party to the Treaty. Secondarily, it must be asked whether the UN Security Council's activities with respect to Iran's nuclear efforts serve to preempt unilateral countermeasures by Member States in response to Iran's non-compliance with the NPT.

A. *The NPT and the Concept of "Self-Contained" Regimes*

In the *Iran Hostages* case,[170] the International Court of Justice referred to the concept of "self-contained" regimes as denoting situations in which a regime of international law precludes recourse to mechanisms of enforcement outside of the regime itself.[171] Self-contained regimes represent an exception to the general principle of the residual applicability of the law of state responsibility. As such, self-contained systems cannot lightly be assumed. Indeed, except for the Court's determination in the *Iran Hostages* case, finding that the Vienna Convention on Consular Relations was such a self-contained regime, the Court has not found any other regimes to come within this category.[172] Academic commentators have suggested occasionally other candidates for inclusion within the rubric, such as the Treaty of the European Union,[173] but this only tends to reinforce the view that self-contained regimes are truly rare.

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168. *See id.* art. 55 (describing the doctrine of *lex specialis* and stating that it applies to the Articles on State Responsibility).

169. *Id.*

170. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24).

171. *See generally* Bruno Simma, *Self-Contained Regimes*, 16 NETH. Y.B. INT'L L. 111 (1985) (discussing the origins of the concept in the *Iran Hostages* case, its adoption in the Riphagen Reports to the ILC and giving several examples of self-contained regimes); Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 EUR. J. INT'L L. 483 (2006) (arguing that "a fallback on general international law, including resort to countermeasures, may be justified on normative grounds").

172. *See* Simma & Pulkowski, *supra* note 171, at 21–25 (providing an overview of cases where the court has declined to find a self-contained regime).

173. *Id.* at 21–23.

The central question in any inquiry as to the self-contained character of a treaty regime is whether the treaty text either expressly or by necessary implication restricts the possible use of extra-treaty enforcement mechanisms such as countermeasures.[174] As a review of the NPT and the related NPT safeguards system shows, the non-proliferation regime cannot be characterized in this way.

1. The Absence of Treaty-Based Enforcement of NPT Obligations

Although the NPT contains numerous undertakings by the States Party, it includes no mechanism for the enforcement of the obligations created under the Treaty. Thus, it cannot be said that the NPT by its terms precludes recourse to mechanisms of enforcement outside of the treaty itself—indeed, the absence of treaty-based enforcement mechanisms suggests rather that the parties have intended to rely for enforcement upon general principles of international law.[175] The non-proliferation regime may be viewed more broadly, however, as including not only the obligations created under the NPT but also those based in the IAEA safeguards system. Indeed, the conclusion that Iran has breached the NPT is based upon the idea that by failing to abide by its obligations under its NPT Safeguards Agreement with the IAEA, Iran has concomitantly failed to abide by its obligations under Article III(1) of the NPT. The question thus becomes whether the supervisory mechanisms of the IAEA framework, which are incorporated into Iran's NPT Safeguard Agreement, serve to create a treaty-based mechanism for violations of Article III(1) and thereby preclude recourse to general international law.

Common with other NPT safeguards agreements, Iran's IAEA Safeguards Agreement contains no provisions with respect to the enforcement of the obligations created.[176] NPT safeguards agreements, however, are not created in a vacuum. Article III(1) specifically notes that the safeguards agreements required under that

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174. *See* ANDRE DE HOUGH, OBLIGATIONS *ERGA OMNES* AND INTERNATIONAL CRIMES 251–52 (1996) (discussing restrictions on countermeasures due to a self-contained régime).

175. *See* Hans Blix, *Building Confidence*, IAEA BULL., Sept. 1984, at 3, 4 (responding to the question "what sanctions do exist in the event of breaches?"). Hans Blix was Director General of the IAEA from 1981 to 1997. United Nations, Biography of Dr. Hans Blix, http://www.un.org/Depts/unmovic/ExecChair/ExeChBi.htm (last visited Nov. 10, 2009). *See* D.M. Edwards, *International Legal Aspects of Safeguards and the Non-Proliferation of Nuclear Weapons*, 33 INT'L & COMP. L.Q. 1, 14 (1984) (discussing possible sanctions for breach of the NPT). D.M. Edwards was Director of IAEA Legal Services from 1977 to 1979. *Id.*

176. *See* Iran Safeguards Agreement, *supra* note 3 (not mentioning enforcement for violations of the agreement anywhere in the agreement).

section shall "be negotiated and concluded with the International Atomic Energy Agency in accordance with the Statute of the International Atomic Energy Agency."[177] Even so, the IAEA Statute provides only minimal procedures for addressing non-compliance. As set out in Article XII of the IAEA Statute, cases of non-compliance with nuclear safeguards agreements are to be reported in the first instance by the IAEA Director General to the IAEA Board of Governors.[178] Upon receipt of a report of non-compliance, the Board of Governors is required to call upon the non-complying state to remedy the non-compliance and "report the non-compliance to all members and to the Security Council and General Assembly of the United Nations."[179]

In the event of failure of the non-complying state to take fully corrective action within a reasonable time, the Board of Governors may take one or both of the following measures: (1) direct the IAEA to curtail or suspend any assistance being provided by the Agency, and call for the return of any materials and equipment made available to the non-complying state; and (2) suspend the non-complying state from the exercise of the privileges and rights of membership.[180] The IAEA Statute does not provide for the imposition of any other sanctions by the Board of Governors.

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177. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 1, art. III(1).

178. Statute of the International Atomic Energy Agency, *supra* note 16, art. XII(C) ("The inspectors shall report any non-compliance to the Director General who shall thereupon transmit the report to the Board of Governors.").

179. *Id.*

180. *Id.* As Goldbat notes, the "sanctions" provided for by Article XII of the IAEA Statute are very unlikely to deter a non-complying State:

> The IAEA provides very little direct assistance to States—and certainly not for their nuclear power programmes. As regards possible curtailment of assistance provided by States, such a decision may be adopted by the Board, but it is not unambiguously mandatory under the IAEA Statute as are decisions of the United Nations Security Council. Even if all the deliveries of nuclear items were actually cut off to penalize the offending State, that State might not feel significantly disadvantaged in a world where no country is exclusively dependent on nuclear power and where nuclear supply exceeds demand. Withdrawal of materials and equipment already supplied is not a realistic measure, because it would require voluntary cooperation of the State being penalized—which is unlikely. Moreover, return of nuclear supplies may be both exceedingly expensive and dangerous, and the supplier may be unwilling to take them back. Suspension of IAEA membership would involve the following: withdrawing the right to receive agency assistance, which as explained above, is not an important sanction; barring access to information possessed by the Agency, which is available to non-members as well; and exclusion from Agency meetings, which cannot be particularly hurtful.

Jozef Goldblat, *The Nuclear Non-Proliferation Regime: Assessment and Prospects*, *in* 256 RECEUIL DES COURS, COLLECTED COURSES 9, 43–44 (Academie de Droit International de la Haye ed., 1995).

Although the IAEA Statute includes some provisions for addressing breaches of NPT safeguards agreements, it is difficult to interpret those provisions to mean that the NPT impliedly includes a limitation on the rights of States Parties to respond to breaches of the NPT through the use of countermeasures.[181] As a matter of text and structure, neither the NPT nor the Statute of the IAEA gives the organs of the IAEA exclusive rights to respond to violations of the NPT.[182] To the contrary, it seems that the non-proliferation system has rather been designed to allow for the "detect[ion] of possible breaches of commitments with such promptness that other States would have time to mobilize the means of inducing respect for the non-proliferation pledge."[183] While it is true that the final assessment of compliance with safeguards obligations made by the IAEA Board of Governors, as the supervising body for the NPT's safeguards agreements, should be considered legally binding on all States Parties (and bar them from maintaining individually that no violation has taken place), it does not follow from this that the NPT–IAEA process defines the scope of actions that may be taken by each State Party individually in reaction to the Board of Governors' assessment.

B. *The Relationship between Security Council Action under Chapter VII and Unilateral Countermeasures*

During the ILC's debates on the role of countermeasures in the law of state responsibility, Allain Pellet put forward the view that in the event that the Security Council decided to impose sanctions in response to an internationally wrongful act, the right of individual states to take unilateral countermeasures would terminate.[184] Pellet

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181. *See* DEN DEKKER, *supra* note 146, at 349 (stating that arms control treaties are not self-contained and therefore do no limit sanctions otherwise available to States Party).

182. *See id.* at 347 (noting that no arms control treaties provide a supervising organization the exclusive right of responding to a violation).

183. Blix, *supra* note 175, at 3.

184. *Summary Records of the Meetings of the 44th Session*, [1992] 1 Y.B. Int'l L. Comm'n 144, U.N. Doc. A/CN.4/SER.A/1992 ("If the Security Council had decided on measures within the meaning of Articles 41 and 42, States were no longer free to decide as they wished on countermeasures of their own."). Others have offered similar arguments. *See*, *e.g.*, Domingo Acevedo, *The US Measures Against Argentina Resulting from the Malvinas Conflict*, 78 AM. J. INT'L L. 323, 343–44 (1984).

> Second, economic coercion attempted by one or more states with the intention of forcing another state to adopt a particular course of action against its will—and interest—if not justified by the principle of individual or collective self defense, or by special treaty provisions and then authorized by a competent organ such as the Security Council or the contracting parties of the GATT, should be regarded prima facie as impermissible under international law.

based his argument on an analogy to Article 51 of the Charter, which stipulates that the right of self-defense in response to an armed attack shall not be impaired until the Security Council has taken measures necessary to maintain international peace and security.[185] So too should it be with countermeasures, Pellet argued, where the Security Council has adopted measures pursuant to Articles 41 and 42.[186] If Pellet's view is accepted, then recourse to countermeasures against Iran would be preempted by the sanctions regime adopted by the Security Council in Resolutions 1737, 1747, and 1803.

There are reasons to doubt the soundness of Pellet's argument. In the first place, the analogy to Article 51 and the use of force seems inapt. Article 51 is a unique article, addressing an exception to the Charter's otherwise total prohibition on the use of force in Article 2(4).[187] By contrast, there is no corresponding prohibition in the Charter on the rights of Member States to take countermeasures under general international law and no corresponding limitation on the rights of Member States to continue taking countermeasures once the Security Council has acted. Reference to Article 51, therefore, is something of a non-sequitur, dealing with the framework for the use of force (which has no textual parallel with respect to the use of countermeasures).

Secondly, nothing in the Charter's structure or terms suggests that there is an *implied* limitation on the rights of Member States to take lawful countermeasures where the Security Council has acted. Neither the Charter taken as a whole nor those provisions addressed to the role of the Security Council in particular suggest that the Security Council's exercise of its Chapter VII powers additionally acts to displace the application of the law of state responsibility.[188]

Robert Ago, *Obligations* Erga Omnes *and the International Community*, *in* INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY, *supra* note 155, at 237, 238–39 ("It is not all States, but rather the international community that is envisaged as the possible bearer of a right of reaction to this particularly serious form of internationally wrongful act."); Bernhard Graefrath, *International Crimes—A Specific Regime of International Responsibility of States and Its Legal Consequences*, *in* INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY, *supra* note 155, at 161, 167 (arguing that "sanctions of States not directly affected by the crime depend on a decision of the Security Council"); K. Sachariew, *State Responsibility for Multilateral Treaty Violations: Identifying the 'Injured State' and Its Legal Status*, 35 NETH. INT'L L. REV. 273, 283–84 (1988) (arguing that "the application of countermeasures is re-bilateralized at the enforcement stage").

185. U.N. Charter art. 51; *Summary Records of the Meetings of the 44th Session*, *supra* note 184, at 143–45 (noting Pellet's argument).

186. *Summary Records of the Meetings of the 44th Session*, *supra* note 184, at 143–44.

187. *See* LINOS-ALEXANDER SICILIANOS, *LES REACTIONS DECENTRALISEES A L'ILLICITE: DES CONTRE-MESURES A LA LEGITIME DEFENSE* (1990) (Fr.).

188. Karel Wellens, *The UN Security Council and New Threats to the Peace: Back to the Future*, 8 J. CONFLICT & SECURITY L. 15, 50 (2003) (citing Giorgio Gaja,

Implied limitations on the rights of states under the Charter, such as Pellet proposed, should be viewed with the keenest scrutiny lest "textual implication" be allowed to mask simple policy preferences. Long ago, in the *Certain Expenses of the United Nations* advisory opinion, the International Court of Justice cautioned against reading into the Charter provisions unsupported by the text:

> These purposes [of the Charter] are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited. Save as they have entrusted the Organization with the attainment of these common ends, the Member States retain their freedom of action.[189]

Moreover, Pellet's argument is not supported by state practice. As Martin Davidowicz's recent study has shown, there is a now substantial body of state practice accepting the imposition of countermeasures in situations either where the Security Council has become seized of a matter but not decided to impose sanctions under Article 41 or where the Security Council has decided to impose a regime of sanctions but the state's countermeasures go beyond what the Council has authorized:

- 1950: countermeasures by the United States against China and North Korea in response to the invasion of South Korea; adopted even though the Security Council had become seized of the matter and decided not to impose sanctions.[190]
- 1982: countermeasures against Argentina by Australia, Canada, New Zealand, and EC Member States in response to the invasion of the Falklands/Malvinas islands; adopted even though the Security Council had become seized of the matter and decided not to impose sanctions.[191]
- 1986: countermeasures by the United States against South Africa in response to apartheid regime; scope of US countermeasures exceeded the scope of sanctions already imposed by the Council.[192]
- 1983: countermeasures by Finland, France, Germany, Spain, and Switzerland against the Soviet Union in response to the downing of Korean Airlines Flight 007;

Réflexions sur le rôle du Conseil de Sécurité dans le nouvel ordre mondial. A propos des rapports entre maintien de la paix et crimes internationaux des Etats, 98 REV. GEN. DE DROIT INT'L PUBLIC 297, 298 (1993) (Fr.)).

189. Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151, 168 (July 20).

190. *See* Dawidowicz, *supra* note 154, at 351.

191. *Id*. at 368–70.

192. *Id*. at 376–78.

adopted while the Security Council was in the process of considering the matter and despite Soviet veto.[193]

- 1996: countermeasures by Ethiopia, Kenya, Rwanda, Tanzania, Uganda, Zaire, and Zambia against Burundi in response to political repression; adopted despite a decision by the Security Council not to impose sanctions.[194]
- 1997: countermeasures by the United States against Sudan in response to grave violations of human rights; scope of US countermeasures exceeded the scope of sanctions already imposed by the Council.[195]
- 1998: countermeasures by EC Member States against Yugoslavia in response to grave violations of human rights; scope of EC countermeasures exceeded the scope of sanctions already imposed by the Council.[196]

To this list might be added the recent example of Japan's imposition of a variety of countermeasures against North Korea in 2006, following North Korea's test launch of missiles in the Sea of Japan.[197] Those countermeasures were imposed prior to the Security Council's decision to adopt limited sanctions against North Korea on July 15, 2006,[198] and Japan maintained those measures and increased their strength even after the Council had acted.[199] No protest was raised with respect to this practice.

While the foregoing suggests strongly that there is no incompatibility in either doctrine or state practice with the resort to countermeasures even in situations in which the Council is seized of the matter, this general freedom to take countermeasures is subject to an important caveat. Undoubtedly, the Security Council, in the exercise of its Chapter VII powers in a particular situation, has the power to take decisions prohibiting or limiting the imposition of

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193. *Id.* at 374–75.

194. *Id.* at 389–90.

195. *Id.* at 391.

196. *Id.* at 393.

197. *See* Press Release, Embassy of Japan, Chief Cabinet Secretary's Statement 2nd Statement after the Launch (July 5, 2006), http://www.us.emb-japan.go.jp/english/html/pressreleases/2006/CCS2.htm (noting the Government of Japan's decision to "to take stringent measures in response" to recent missile tests by North Korea). I am grateful to Antonios Tzanakopoulos for bringing this example to my attention.

198. *See* Sec. Res. 1695, ¶¶ 3–4, U.N. Doc. S/RES/1695 (July 15, 2006) (requiring Member States to "prevent missile and missile-related items, materials, goods and technology being transferred to DPRK's missile or WMD programmes" and "prevent the procurement of missiles or missile related-items, materials, goods and technology from the DPRK, and the transfer of any financial resources in relation to DPRK's missile or WMD programmes").

199. Mari Yamaguchi, *Japan Ramps up Sanctions Against NKorea for Rocket*, ABC NEWS, Apr. 10, 2009, http://abcnews.go.com/International/wireStory?id=7304233.

countermeasures by Member States where, for instance, the Council determines that unilateral countermeasures would be a hindrance to collective efforts.[200] That, however, is not the situation here, as the resolutions under consideration impose no such prohibition or limitation.

VI. CONCLUSION

The concerns raised by Iran's nuclear program and its unwillingness to comply with its non-proliferation obligations remain at the time of this writing. As the international community considers what additional steps may be taken to persuade Iran to alter its conduct, the issue of non-forcible coercive measures has been raised. Under the circumstances, the possibility of states taking non-forcible countermeasures against Iran raises a number of important questions and concerns implicating the legal relationship between the UN system of collective security and the rights of states to take unilateral measures under the law of state responsibility, the discretion afforded to Member States in the interpretation and implementation of Security Council resolutions, the availability of countermeasures for the violation of multilateral obligations, and the exclusivity of the Chapter VII framework for collective security.

Applying the foregoing analysis, it seems that states have little discretionary authority to interpret the provisions authorizing sanctions in the Security Council's resolutions with respect to Iran. Nevertheless, even in the absence of Security Council authorization, states retain their rights under the law of state responsibility to take measures in response to wrongful acts. Viewed through the lens of the ILC's Articles on State Responsibility, the character of the NPT entitles each State Party to treat itself as an "injured State" for the purposes of determining its rights with respect to a responsible state. Under the ILC's Articles, countermeasures are an accepted means of response by an "injured State."

Moreover, even if we assume for the purposes of argument that the NPT ought not be characterized so as to place each State Party in the position of an "injured State" according to the ILC's conception, each State Party should still be entitled to resort to countermeasures in accordance with the emerging state practice suggesting the crystallization of a recognition of the right of states to take collective countermeasures. This entitlement is at its strongest where, as in

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200. *See* Gaetano Arangio-Ruiz, *Article 39 of the ILC First-Reading Draft Articles on State Responsibility*, 83 RIVISTA DI DIRITTO INTERNAZIONALE 747, 763 n.29 (2000) (Italy) (noting the "Security Council's tendency to act as legislator or judge" in actions by Member States).

the case of Iran, the internationally wrongful conduct has been determined by an international body with responsibility for monitoring and verifying compliance with the obligations in question. In such instances, the use of countermeasures in response to violations—far from undermining the international order—may serve to promote respect for the international rule of law. As Giorgio Gaja has noted: "Were States not even allowed to adopt countermeasures . . . one would probably have to conclude that law rather protects the infringement of those [community] interests."[201]

201. Giorgio Gaja, *Obligations* Erga Omnes*, International Crimes and* Jus Cogens*: A Tentative Analysis of Three Related Concepts*, *in* INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY, *supra* note 155, at 151, 155–56.