

# Would a Military Strike Against Iran Be Legal?

 [realclearpolitics.com/articles/2012/03/04/would\\_a\\_military\\_strike\\_against\\_iran\\_be\\_legal.html](http://realclearpolitics.com/articles/2012/03/04/would_a_military_strike_against_iran_be_legal.html)

---

By **Peter Berkowitz** - March 4, 2012

Despite increased diplomatic maneuvering by the United States and intensified international economic sanctions, the U.N. International Atomic Energy Agency's most recent report concludes that the Islamic Republic of Iran is accelerating production of enriched uranium used in nuclear weapons, concealing the uranium it has enriched, and generally stonewalling IAEA investigations of its nuclear program.

Such conduct places Iran in flagrant violation of its obligations under international law. But it will fall to the elected leaders in Israel and the United States and not to the lawyers in those countries -- or for that matter at the United Nations -- to determine whether to launch a military strike on Iran's nuclear facilities.

Nonetheless, the justice of such a strike is bound up with its lawfulness, and liberal democracies are dedicated to both. So in confronting the fateful decision -- both striking and not striking are fraught with peril -- U.S. and Israeli leaders (and the citizens to whom they are accountable) must decide whether, under international law, they would be acting within their rights, were they to conclude that diplomacy and economic sanctions had run their course, to use military force to destroy or substantially set back Iran's nuclear weapons program.

Since the advent of the modern nation-state system 500 years ago, it has been recognized that states have a right and an obligation to protect their citizens from aggression.

The charter of the United Nations affirms member states' obligation to refrain "from the threat or use of force against the territorial integrity or political independence of any state" and, while envisaging a vigorous role for the Security Council in managing the use of force, also affirms states' "inherent" right of self-defense.

States need not absorb a blow before they resort to military action. When threats are imminent, customary international law recognizes a right of anticipatory self-defense, though of course its scope is disputed.

Authority can be found for both a narrower and broader reading of imminence. In the "Caroline affair" of 1842, U.S. Secretary of State Daniel Webster, advancing the most stringent interpretation of imminence to make the case against the destruction by the British in 1837 of an American steamer, argued that states which have claimed a right to strike first must be able to "show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."

But as Yale historian John Lewis Gaddis shows in “Surprise, Security and the American Experience,” the United States has been claiming the right to use force against emerging threats since 1818, when John Quincy Adams, President James Monroe’s secretary of state, formulated the doctrine to justify Gen. Andrew Jackson’s raids into Spanish Florida. Long after Webster settled the Caroline affair amicably, Presidents Theodore Roosevelt, William Howard Taft, and Woodrow Wilson all argued that the United States had a right to use force against failed or rogue states whose conduct endangered international order, and all ordered American troops into action on that ground.

In immediate response to al-Qaeda’s Sept. 11 surprise attack, but also in view of the steadily increasing threat posed by the proliferation of weapons of mass destruction, the Bush administration’s 2002 “National Security Strategy of the United States” argued for a broader reading. It maintained that the use of preventive force would sometimes be necessary because of “the inability to deter a potential attacker, the immediacy of today’s threats, and the magnitude of potential harm that could be caused by our adversaries’ choice of weapons.” The failure of coalition forces to find weapons of mass destruction in Iraq after the American-led 2003 invasion does not affect the logic of the argument, even as it underscores the dependence of strategic judgments on sound intelligence.

In a September 2011 speech at Harvard Law School, John Brennan, the Obama administration’s top counterterrorism adviser, effectively embraced the Bush administration’s broader interpretation by calling for “a more flexible understanding of ‘imminence.’ ” To be sure, Brennan was discussing terrorist organizations. But the logic of his contention that the understanding of an “ ‘imminent’ attack should be broadened in light of the modern-day capabilities, techniques, and technological innovations” applies equally to rogue states.

The Islamic Republic of Iran is a rogue state. Since its establishment in 1979, it has used violence to expand the domain of Shia Islam throughout the Middle East. It has funded and armed Hezbollah in southern Lebanon and Hamas in the Gaza Strip and West Bank, both of which are terrorist organizations that target Israeli civilian populations, are at war with Israel, and are sworn to Israel's destruction. And Iranian President Mahmoud Ahmadinejad has repeatedly and openly called for Israel's destruction, including in international forums.

Already equipped with missiles capable of striking targets throughout the Arab world and Europe, Iran is developing a long-range ballistic missile capable of reaching the eastern seaboard of the continental United States. Repeated U.N. Security Council resolutions, diplomacy, and tightened economic sanctions have failed to deter Iran while buying it precious time to make progress in producing nuclear weapons and reach the point beyond which a military strike will be unable to stop its program.

Because even a single nuclear weapon can inflict horrific damage and deal a small state like Israel a crippling blow, because of the variety of quick and covert ways Iran and its terrorist proxies have for delivering such a weapon, and because their brand of radical Islam undercuts the assumptions on which our cold war models of deterrence rest, Israel's right of self-defense extends to preventing Iran from acquiring nuclear weapons.

Under international law, the right of self-defense encompasses a right to assist others to defend themselves. Israel's vulnerability to surprise and devastating attack by a nuclear-armed Iran and its terrorist partners permits the United States, whose capacities to search out and destroy Iran's nuclear facilities considerably exceed those of Israel, to also lawfully use force to prevent Iran from acquiring nuclear weapons.

Sunni Arab Gulf monarchies would welcome American military action against what they too regard as an imminent threat. A nuclear-armed Iran would severely limit America's ability to operate in support of its Arab allies in the region, which would enable Iran to aggressively pursue its goal of removing Gulf state Arab rulers whom it regards as heretics and infidels.

Furthermore, the United States' decades-old position is that acquisition by a rogue state of nuclear weapons poses a grave threat to the international order -- including the global economy, freedom of trade and the seas, and core global public goods -- and thereby endangers America's vital national security interests. A nuclear Iran could hold hostage the entire Persian Gulf region, which accounts for approximately two-thirds of world crude oil reserves and one-third of natural gas reserves, inflicting ruinous damage on the global economy.

Finally, a nuclear armed Iran would quickly generate a poly-nuclear Middle East, as Arab Gulf states rushed to purchase their own nuclear devices. Given the weak command and control structures of the governments on both sides of the Gulf, the dispersion of nuclear weapons in the region would greatly heighten the risk of their accidental or rash use by states. And given the presence in all of the Gulf state regimes of Islamist elements, a poly-nuclear region would greatly increase the likelihood of nuclear weapons or materials finding their way into the hands of ruthless terrorists.

Many of these considerations separately, and certainly taken together, furnish legal justification, grounded in the right of anticipatory self-defense, for Israel or the United States to strike Iran's nuclear facilities.

However, not everything that is lawful is prudent and wise.

Both countries face complex calculations, beginning with whether diplomacy or sanctions have failed. Israel must particularly take into account the possibility that in response to a military strike, Iran from the east, Hamas from the south, and Hezbollah from the north will launch thousands of missiles at the civilian population in the greater Tel Aviv area. The United States, whose secretary of state in December 2011 stated that Iran was on a path to producing a nuclear weapon within a year and whose president has repeatedly insisted that his administration is committed to preventing Iran from acquiring nuclear weapons, faces significant domestic exigencies, including the weariness of the president's base with war in the Middle East

Having the law on their side as they grapple with the momentous decision is for both countries -- the leaders and the people -- a strategic and political asset.

*Peter Berkowitz is a senior fellow at the Hoover Institution, Stanford University. His writings are posted at [www.PeterBerkowitz.com](http://www.PeterBerkowitz.com) and you can follow him on Twitter @BerkowitzPeter.*