

No More Unlawful War: The Case Against a US Attack on Iran

Written by Mary Ellen O'Connell

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MARY ELLEN O'CONNELL, AUG 4 2008

If America learns nothing else from the misadventure in Iraq, it should learn the high price of unlawful war.

President Bush, who led the U.S. into Iraq, with Prime Minister Tony Blair close by his side, did so on grounds that turned out to be false. Britain's willingness to go along no doubt helped convince the United States Congress to approve the invasion by a very wide margin—after all, the British had a reputation for complying more closely with international law in such questions than the U.S. If even the British had stayed out, the Congress might, at the least, have thought harder about the administration's arguments.

Now, in an eerie atmosphere of déjà vue, we are hearing the drumbeat for war once again—this time against Iran. Only now we hear virtually nothing about the legal right to go to war. This is particularly odd since the law against attacking Iran is even clearer than the law against invading Iraq.

There are at two unbeatable legal obstacles against going to war with Iran on the basis the American administration seems to be contemplating. First, Iran's alleged interference in Iraq and Afghanistan is not enough to justify the use of force in self-defense on the territory of Iran. And secondly, even if it were, it would be Iraq and Afghanistan's right of self-defense, not that of the United States. A U.S. attack on Iran would lack even the fig leaf of legality that American, British and Australian government lawyers tried to place over the Iraq invasion.

Under United Nations Charter Article 51, states have a right of individual and collective self-defense against a significant armed attack, if the use of force is necessary and proportional to the attack.

The International Court of Justice clarified in the 1986 *Nicaragua Case* and the 2005 *Congo Case* that it is not just any attack that triggers the right of self-defense. The attack must amount to a significant use of force such that a counter-attack on the territory of the attacker would be justified. The court said that supplying weapons—which is the main U.S. allegation against Iran—did not amount to an armed attack, and mere frontier incidents could not give rise to the right to use force in self-defense.

Moreover, any response to a significant attack must be defensive in nature. The victim of an initial attack may respond in self-defense if there are ongoing attacks or, at the least, if it has clear and convincing evidence that more attacks are imminent.

The U.S. says Iran is supplying weapons and other support to insurgents fighting Americans in both Iraq and Afghanistan. Attacks in either country, however, *even* on Americans, are still attacks against those countries. Iraq and Afghanistan are the states with the legal basis to respond to such wrongs.

If Iran's activities ever trigger Iraq or Afghanistan's right of self-defense, it will be Prime Minister Maliki and President Karzai who decide on war with Iran. Given the good relations both men have with Iran, there is little likelihood they will want forceful action against it.

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But President Bush may be talking up Iran's role not because of links to American deaths but because Congress authorized wars in Iraq and Afghanistan, not Iran. If the existing authorizations can be stretched to Iran, the administration may be thinking, the President would have the authority under the Constitution to bomb Iranian nuclear research sites.

Maybe. He certainly has no authority under international law to do so. Iranian interference elsewhere does not give the U.S. such a right. Moreover, there is no right to use force except in self-defense to an armed attack or with Security Council authorization. Clearly the Council will not be authorizing an attack on Iran. The Security Council made it very clear in a unanimous vote in 1981 after Israel bombed Iraq's nuclear reactor site at Osirik that such uses of force violate the United Nations Charter.

Even if the development of nuclear weapons were a lawful trigger to armed self-defense, bombing would have little or no effect on the research program but would, in all likelihood, result in widespread civilian casualties and terrible destruction.

In order to degrade Iran's nuclear program, the U.S. would have to bomb heavily populated areas all over the country. Killing and destroying in such a pointless exercise would clearly violate the restraints of necessity and proportionality in the use of armed force.

And needless to say, any use of a nuclear bomb against Iran would be a war crime of the first order.

Some may argue that the international legal regime on self-defense is too restrictive, that it does not give the "good guys" enough options to defend themselves against states with leaders like Iran's President Mahmoud Ahmadinejad.

But the "good guys" should use diplomacy, turning to armed self-defense only in situations involving a significant armed attack. Diplomacy, not force, is a proven strategy that works to end nuclear weapons programs. South Africa gave up nuclear weapons and transformed itself into a nation that respects international law and human rights. Ukraine also gave up nuclear weapons. Libya went from pariah to normal international citizen almost overnight when it ended its nuclear weapons program. Negotiating with North Korea is yielding results.

This is also what international law teaches. Ignoring this law and its wisdom got the U.S. and U.K. into Iraq in the first place. It led to the failure to stop the looting after the invasion as required by the 1907 Hague Conventions. Ignoring international law led to the failure to treat the detainees at Abu Ghraib in compliance with the Geneva Conventions. It led to the unlawful and secret removal of detainees to CIA black sites and Guantanamo Bay and to the use of torture and other harsh interrogation methods. These violations have left the United States at a place where respected political theorists are writing of "the post-American world".

By complying with international law, by using diplomacy and other peaceful means rather than engaging in the unlawful use of force, the U.S. would go a long way toward recovering its lost standing in the world. More importantly, it will go a long way toward achieving what American power should always aim at: peace, prosperity, the promotion of human dignity, and the protection of the natural environment.

Mary Ellen O'Connell holds the Robert and Marion Short Chair in Law and is a fellow of the Kroc Institute for Peace Studies at the University of Notre Dame. She has published widely on international law, especially the law on the use of force and the peaceful settlement of disputes. This comment draws from *The Power and Purpose of International Law* (Oxford University Press 2008) and *The Ban on the Bomb—and Bombing: Iran, the U.S., and the International Law of Self-Defense*, 57 *Syracuse Law Review* 497 (with Maria Alevras-Chen 2007).

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