

Introduction to "The Iran Nuclear Dispute – A New Approach"

by Eric A. Brill

Iran rarely sees eye to eye with the United States, the UN Security Council or the International Atomic Energy Agency. But all agree on this: On certain conditions, the IAEA may "refer" Iran's nuclear "file" to the Security Council for enforcement. They disagree strongly on whether the conditions have been satisfied. The IAEA referred Iran's nuclear file to the Security Council in 2006, finding Iran in "non-compliance" based solely on disclosure violations prior to November 2003. The Security Council has responded enthusiastically, adopting five increasingly punitive resolutions (the *Iran Resolutions*).

One assumes that something is written, somewhere, authorizing the Security Council to enforce Iran's Safeguards Agreement. In fact, nothing but baseless assumptions, wishes and imagination support this belief. There is no such thing as a "referral" process under which the Security Council has authority to enforce Iran's Safeguards Agreement. Iran is just as mistaken as its adversaries to believe there is.

The IAEA is authorized – sometimes required – to report certain matters to the Security Council. But the purpose of those reports is not to enable the Security Council to enforce Iran's Safeguards Agreement. It is to notify the Security Council that reasons exist (in the IAEA's view) to consider whether Iran's nuclear program is a "threat to the peace, breach of the peace, or act of aggression" under Article 39 of Chapter VII of the UN Charter (a *Peace Threat*). The Security Council may take many strong measures under Articles 40 and 41, even military action under Article 42 – but only if the Security Council first determines that Iran's nuclear program is a Peace Threat.

Despite the US' strong urging, Russia and China have refused to let the Security Council do this. They have been so cautious that neither "Article 39" nor any of its threshold phrases – "threat to the peace," "breach of the peace" or "act of aggression" – appears anywhere in the Iran Resolutions. Even its key single words are conspicuously absent: One searches in vain through many thousands of words for a single appearance of "threat" or "breach" or "aggression." The United States was denied the "green light" it had claimed in 2003, when it argued that the Peace Threat determination in Resolution 1441, adopted four months earlier, authorized the US to attack Iraq without explicit permission from the Security Council.

Russia and China probably believed they could accomplish two objectives by approving the Iran Resolutions: dole out tough remedies when pressed by the United States, yet prevent another US "end run" to war by refusing to agree that Iran's nuclear program is a Peace Threat. In their effort to rein in the United States, however, they invalidated even the carefully limited resolutions they approved. Chapter VII authorizes the Security Council to intervene in a country's affairs only when it determines that a Peace Threat exists, not otherwise.

Very few people would take Iran's word for any of this. But most would accept an authoritative ruling issued by a distinguished international panel of jurists. Iran's Safeguards Agreement authorizes it to request binding arbitration of disputes, even if the IAEA has "referred" Iran to the Security Council. The arbitrators are likely to rule in Iran's favor on most or all questions Iran might present. Iran never has been charged with violating the Nuclear Non-Proliferation Treaty, and the IAEA never has charged that Iran's nuclear program has been in "non-compliance" at any time since 2003. The IAEA simply misrepresents to the Security Council that Iran is "required" to take various "confidence building measures" that it nevertheless acknowledges are "voluntary," and the Security Council purports to transform these voluntary measures into iron-fisted Security Council demands by exercising "referral" authority it does not possess.

Iran's predictable arbitration victory would replace its ineffective protests with an authoritative confirmation that Iran is being asked to perform obligations that do not exist, to accept restrictions that no one has a right to impose. A favorable ruling would not be enough, however – it could even increase the risk of war by highlighting the apparent impotence of the IAEA and the Security Council. The United States might cast itself as the world's last defense against a nuclear-armed Iran. Many observers would still wonder whether Iran is developing nuclear weapons because it refuses to observe the Additional Protocol and revised Code 3.1. Though Iran voluntarily did so for several years without receiving the anticipated benefits, it probably would achieve better results after its position has been bolstered by an independent validation of its nuclear rights.

Iran's position is likely to deteriorate if it instead continues its stubborn passivity, enabling the United States to shape world-power public opinion. Seven in 10 Americans believe Iran already has nuclear weapons. Six in 10 agree that the US should bomb Iran if diplomacy and sanctions do not persuade it to give up its nuclear program – 25% would bomb today. Left unchallenged, the United States is unlikely to change direction. Pressure is building for military action, and may become irresistible once most Americans conclude – as inevitably they will – that "sanctions have not worked." An arbitration ruling in Iran's favor would create a promising opportunity to resolve this too-long-running dispute.