The Role of International Law and Politics in Resolving Iran's Nuclear Non-Proliferation case

A Thesis Submitted for the Degree of Doctor of Philosophy

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Abstract

The international conflict over Iran's nuclear programme continued for more than two decades before a negotiated settlement was finally reached. This thesis will explain why Iran has proved so resistant to compromise by analysing separate but related factors. Firstly, it will examine the historical roots of today's nuclear co-operation and non-proliferation regime. It will argue that this regime has serious weaknesses and that a better alternative had been available but was rejected in the immediate post-war period. Secondly, it will look at the origins of Iran's hostility to America and Israel, which emerged from a separate dispute with Britain, and which was indirectly related to the political decisions that were taken at the end of the World War II. Thirdly, it will analyse the reaction of international community to Iran's nuclear programme and the rights of states to take unilateral countermeasures under the law of state responsibility. Finally, it will examine the negotiations that have been held between 2002 and 2015 which led to the agreement called the JCPOA. The more general aim of the thesis is to suggest that in conflicts between states which involve their core interests, international law plays a largely instrumental role in helping those states to achieve their political objectives.

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List of Abbreviations

ACDA- Arms Control and Disarmament Agency

AEOI- Atomic Energy Organization of Iran

AIOC- Anglo-Iranian Oil Company

ARSIWA- Article on Responsibility of States for Internationally Wrongful Acts

CIA- Central Intelligence Agency

DARIO- Draft articles on the Responsibility of International Organizations

DPRK- Democratic People's Republic of Korea

EC- European Council

EU- European Union

HEU- Highly Enriched Uranium

IAEA- International Atomic Energy Agency

ICJ- International Court of Justice

ICCPR- International Covenant on Civil and Political Rights

ICESCR- International Covenant on Economic, Social and Cultural Rights

ILC- International Law Commission

IMF- International Monetary Fund

IRGC- Iranian Revolutionary Guards Corps

JCPOA- Joint Comprehensive Plan of Action

JPA- Joint Plan of Action

KT- Kilotonne

LEU- low Enriched Uranium

MKO- Mujahedin-e Khalq Organization

MWe- Mega Watt (electrical)

MWt- Mega Watts (thermal)

NAM- Non-Aligned Movemen

NCRI- National Council of Resistance of Iran

NDRC- National Defense Research Committee

NNWS- Non Nuclear Weapon State

NNSA- National Nuclear Security Administration

NPT- Treaty on the Non-Proliferation of Nuclear Weapons

NRDC- Natural Resources Defense Council (US)

NSG- Nuclear Suppliers Group

NWS- Nuclear Weapon State

OFAC- Office of Foreign Assets Control

OSRD- Office of Scientific Research and Development

OTA- Office of Technology Assessment

PMD- Possible Military Dimensions

PNAC- Project for a New American Century

PSI- Proliferation Security Initiative

Pu- Plutonium

PWG- Procurement Working Group

ROK- South Korean

SDN- Specially Designated Nationals and Blocked Persons List

SIS- Secret Intelligence Service (UK)

SWIFT- Society for Worldwide Interbank Financial Telecommunication

SWU- Separative Work Unit

TEC- Treaty Establishing the European Community

TFEU- Treaty on the Functioning of the European Union

TRR- Tehran Research Reactor

U- Uranium

UF- Uranium Hexafluoride

UK- The United Kingdom

UN- United Nations

US- The United States of America

WMD- Weapons of Mass Destruction

WWI- World War One

WWII- World War Two

WTO- World Trade Organisation

WMD- Weapons of Mass Destruction

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Dedication

To innocent people who paid the price of politically motivated decisions, those who lost their life in Japan over an atomic bomb, and those who are suffering from nuclear-related sanction in Iran.

Wish for a day that the voice of law drowned out the voice of politics.

Introduction

International law is a very important instrument in advancing peace and resolving international conflicts. It can bring about the international rule of law which adds to security and stability of the world. It can also provides legal certainty in resolving international conflicts. Using the international law as an apparatus for protecting and achieving political interests and preserving ideological stances in solving international legal conflicts undermines the international law. It also raises doubts regarding its vigor in resolving international conflicts. Hence it is important to explore to what extent international law is applied through the legal doctrines and legitimate and formal processes to resolve conflicts and how can its role in resolving conflicts be enhanced.

The issue gains more importance when it comes to applying international law to nuclear proliferation issues. How these issues are resolved can affect the international security and the international law has not been strengthened for resolving these conflicts. As this thesis will argue, the role of international law in the current disputes can be enhanced. It could become a factor affecting the actions of all parties involved with nuclear proliferation issues – the states seeking to establish a nuclear capability, their potential suppliers and those states which would seek to prevent such an outcome. It is argued that international law should have a larger role to play in the drafting and monitoring of treaties, especially those dealing with disarmament such as the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), and in the operations of institutions such as the United Nations (UN) Security Council and the International Atomic Energy Agency (IAEA).

The current situation regarding nuclear non-proliferation would appear to be fragile, with regular reported or actual occurrences of non-compliance by states such as India, Pakistan, Iran, Iraq and North Korea. Each instance of non-compliance with the regime by any single state could potentially result in the collapse of the whole system. This is especially alarming considering the potentially huge destructive forces that could be unleashed if nuclear

weapons were ever to be used. This suggests that the current international security situation is very precarious, especially as commentators and some politicians in countries with a nuclear capability have talked about making changes to international law to permit pre-emptive strikes, even involving nuclear weapons, to ensure that other nations comply with the terms of the NPT.[1] While the UN, through its UN Charter Chapter VII powers has sought to ease tensions and resolve disputes, this approach can be regarded as heavy-handed, and may have made some states reluctant to negotiate dispute resolutions using this mechanism or other channels.

Considering the shortcomings of the international law in resolving nuclear proliferation issues, this thesis carefully analyzes how the international law has been used in resolving such conflicts, what the implications have been and what can be enhanced. To do so, it specifically focuses on the role of international law in resolving Iran's nuclear issue.

Research Question, Hypothesis and Perspectives

The overarching question that this thesis poses is: what is the role of international law in resolving nuclear non-proliferation issues. It is primarily concerned with the significance, influence and application of international law in disputes regarding nuclear non-proliferation.

The thesis puts forward the hypothesis that international law in nuclear non-proliferation issues is primarily an instrument used by states to advance their political and ideological interests, rather than as real law. The Iran nuclear issue will be used as a case study in this research to support this opinion. To respond to the overarching question and prove or disprove the hypothesis, the thesis studies the influence and impact of international law on the ongoing international political and diplomatic controversy surrounding the nuclear industry in Iran.

In this thesis the current disagreements regarding Iran's nuclear programme are examined from the perspectives of the law regarding non-proliferation, the

[1] Richard Falk, David Krieger (eds), *At the Nuclear Precipice*. *Catastrophe or transformation*? (Palgrave Macmillan, New York 2008); George H. Hampsch, *Preventing Nuclear Genocide: Essays on Peace and War* (Peter Lang, New York 1988)

interpretation of treaties in a general sense and the interpretation of the NPT in particular, laws governing international bodies such as the UN Security Council and matters relating to the international responsibilities of states. In addition, the thesis analyses how matters relating to Iran are dealt with by the IAEA and the UN Security Council.

This ties in with many questions regarding the organization of the UN Security Council. It has been criticized for lacking transparency in its deliberations and for being unrepresentative of the wider international community and for lacking effective mechanisms to enforce its decisions. Its use of sanctions is considered especially ineffective as a means to achieving changes in policy and position in targeted states. [2] The potentially damaging social and humanitarian consequences of enforcing sanctions in places such as Iraq, Haiti and the former Yugoslavia [3] have attracted much criticism from the international community. However this aspect of sanctions is outside the scope of this thesis.

Methodology of the Research

As mentioned in the previous section, the principal aim of this thesis is to examine the significance, influence and application of international law in disputes regarding nuclear non-proliferation. This focus provides the basis for the direction and scope of each of the sections of the research, and gives coherence to the thesis as a whole. The research uses a mixed methods approach, in which historical analysis, doctrinal approach (using both primary and secondary sources) and a case study contribute to a greater understanding of the central theme.

The thesis starts with a historical analysis of the issues that are central to the nuclear non-proliferation disputes examined in this research. The historical analysis in this thesis is of value in that it can inform a more penetrative and empirically led investigation into issues which may be, from the contemporary

[2] Thomas J. Biersteker, Sue E. Eckert and, Marcos Tourinho, *Targeted Sanctions; the Impacts and Effectiveness of United Nations Action* (Cambridge University Press, Cambridge 2016) 12

[3] See, Monika Heupel, Michael Zürn, *Protecting the Individual from International Authority; Human Rights in International Organization* (Cambridge University Press, Cambridge 2017)

perspective, obscured by assumptions and widely-held beliefs. This is particularly relevant when considering the legal issues that politicians and scientists had to manage at the start of the nuclear era. This research intends to use a method that Hall coined as the "particular past" and focus on investigating interrelated historical events at the start of nuclear era to explore the factors that explain the outcomes related to nuclear agreements on what Hall defines as the "particular past". [4]

Historical analysis should also provide insights into the reasons behind changes in the regulatory and monitoring regime used to control states' nuclear activities, as well as detailing those changes and their repercussions. The basis of the historical analysis is a study of documents published since 1945 dealing with nuclear development issues. These texts have been sourced from a wide range of academic disciplines, including law, political science, policy studies and history. In addition, government policy documents, actual legislation, political speeches and press releases, literature produced by non-governmental organizations, newspaper and magazine articles, and proposals and statements by different agencies and bodies concerned with the peaceful use of nuclear power have been consulted. The historical analysis has two main functions; to construct a comprehensive narrative of changes in the international safeguarding regimes since 1945, and to enable key themes determining international control over different nations' nuclear activities to become apparent.

The case study aspect of this research is informed and complemented by the historical review. This method will illustrate the ways in which political and legal factors have impacted on Iran's nuclear activities and led to the present situation of dispute and mutual mistrust. The case study method is used in this research to allow for assessing a wide variety of sources that relate the

[4] Peter A. Hall, 'Aligning Ontology and Methodology in Comparative Research', in J. Mahoney, D. Rueschemeyer (eds) *Comparative Historical Analysis in the Social Sciences* (Cambridge University Press, Cambridge 2003) 387

core of the research topic [5] such as the Iran nuclear programme and its implications for international law.

Iran has been chosen as the focus of the case study as it illustrates systemic weaknesses in the way international bodies monitor and safeguard nuclear development issues, and their inability to enforce their own strictures. These factors severely damage the credibility and standing of the NPT regime and question its ability to prevent sates from acquiring a nuclear weapons capability. The case of Iran has also shown how different states and organisations; the United States and its allies, the P1+5,[6] the IAEA, and the UN Security Council, are likely to respond to future nuclear proliferation issues. The thesis will also draw attention to the principal means of enforcement the UN Security Council and the 'West' use against Iran in response to Iranian non-compliance with the terms of the NPT.

The analyses undertaken in this research, and consequently many of the arguments and assumptions stemming from it, are determined by an essentially doctrinal approach.[7] As argued by Hutchinson, "still necessarily forms the basis of most, if not all, legal research project."[8]

This approach has been undertaken to investigate into the way IAEA statutes, the Iran Agreement Safeguards and especially the NPT have been used as the bases for framing disputes concerning Iran's nuclear activities. In other words, "doctrinal legal research has been take place in ensuing that" the thesis's analysis "are technically sound from a legal perspective."[9]

In addition, the approach is used to examine how the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) have

[5] William Putman, Jennifer Albright, *Legal Research, Analysis, and Writing* (4th edn, Cengage Learning, Boston 2017) 3
[6] P5+1 refers to China, France, Russia, the United Kingdom, and the United States, plus Germany.
[7] See generally, Robert J. Beck, Anthony Clark Arend, and Robert D. Vander Lugt, *International Rules; Approaches from International Law and International Relations* (Oxford University Press, New York 1996) 56-94
[8] Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins, Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge, New York 2017) 10
[9] Dawn Watkins, Mandy Burton, *Research Methods in Law* (2nd edn, Routledge, New York 2017) iv

provided the basis for Western enforcement countermeasures against Iran, a state deemed to be acting wrongfully. Finally the approach allows purposeful examination of the endorsement of the Joint Comprehensive Plan of Action (JCPOA) by the UN Security Council in Resolution 2231 (2015). These analyses make use of primary and secondary data sources.

The principal primary source used in this research is the NPT combined with official documentation produced by the UN, the IAEA, the Nuclear Suppliers Group (NSG), the Missile Control Regime, different international treaties and accords regarding nuclear and missile proliferation, speeches and statements including press releases from politicians, diplomats and commentators and representatives of defence, intelligence and foreign policy agencies have been used.

In order to understand how official documents might be affected by biases, the context of production and the intended readership of official documents are significant factors that need to be taken into consideration when attempting their analysis.[10] An example of this is the way in which submissions to the IAEA by the Permanent Mission of the Islamic Republic of Iran were directed not just to the agency, but were also intended for the attention of states with an interest or involvement in the negotiation process, or which had concerns about the development Iran's nuclear activities. The Iranian declarations often contained information relating to strategic policy; setting out and justifying Iran's position with regard to the negotiating process and the wider issue of its nuclear activities. Secondary sources, including a literature search of the most recent texts dealing with the current Iran nuclear situation have been used extensively to inform the legal arguments put forward in the research and to allow clearer understanding of the current disputes centered around Iran's nuclear activities.

The research has made use of initial sources that evaluated the nature of the international community's responses to Iran's nuclear program.[11] Secondary

[10] Mike McConville, Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, Edinburgh 2012) 186-188

[11] The research has been inspired by the work of authors such as Daniel Joyner, who has questioned the legality of the international community's responses to Iran under the terms of

legal material, in addition to sources from areas such as history, politics and economics have been part of the integrative approach taken to allow the analysis of this complex and multi-faceted phenomenon.

This research has made extensive use of online resources. Use of electronic media allows access to a broad range of primary sources, enabling a more complete and comprehensive assessment of Iran's situation to emerge. This has been particularly important in establishing a clear time-line of events affecting the current Iran nuclear crisis, where sources such as reliable media reports have made it possible to realise a more accurate chronology of events. The use of online sources also reflects the contemporary aspect of the research subject. It is a current and developing issue, and much relevant literature is available only online.

The use of an extensive range of secondary sources for the purposes of this research has enabled the theoretical constructs, research methodologies and ideologies that have been widely used in the analysis of Iran's relationships with the wider international community since the revolution of 1979 to be identified. This has informed a clearer analysis of areas of strength, gaps in information and disagreements in interpretations regarding the research topic. Secondary sources have also provided insights into domestic politics and foreign policy in Iran since 1979. It has been possible to examine the different ways in which Iran's subjective and inter-subjective identities have developed in relation to the international community and in particular those countries involved in the nuclear dispute. Equally, the review of available secondary sources has shown how different countries and agencies conceive of Iran's nuclear activities and how these have informed the stance taken in regard to

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NPT and IAEA treaty law; Daniel H. Joyner, *Iran's Nuclear Program and International Law; From Confrontation to Accord* (Oxford University press, New York 2016); Daniel H. Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (Oxford University Press, New York 2009); Daniel H. Joyner, 'The Security Council as a Legal Hegemon' (2012) 43 *Georgetown Journal of International Law* 225; Daniel H. Joyner, Marco Roscini, *Non-Proliferation Law as a Special Regime: A Contribution to Fragmentation Theory in International Law* (Cambridge University Press, Cambridge 2012). Further legal issues have been raised by Jansen Calamita and Pierre-Emmanuel Dupont who have examined the availability of countermeasures for violation of NPT obligations; N. Jansen Calamita, 'Sanctions, Countermeasures, and the Iranian Nuclear Issue' (2009) 42 (5) *Vanderbilt Journal of Transnational Law* 1393; Pierre-Emmanuel Dupont, 'Countermeasures and Collective Security: The Case of the EU Sanctions Against Iran' (2012) 17(3) *Journal of Conflict & Security Law* 301

Iran and its nuclear programme. In addition, the literature search has facilitated a better understanding of the domestic trends and developments which have informed the internal political dynamics of Iran, and which have consequently impacted on Iran's attitude towards foreign governments and international agreements.

Limitations of the Research

It must be acknowledged that there are limitations to the design and scope of this research. It uses essentially a single case research paradigm, and from this seeks to draw conclusions regarding the application of coercive diplomacy in cases of international conflict in a general sense. Additional case studies would have widened the scope of the research and made its conclusions potentially more robust and trustworthy. This, however, does not diminish the value of the case study that is the central focus of this research since a single case study can be useful in testing multiple observations.

Although the single case study approach can be criticized for its inherent limitations and lack of generalizability, it has been argued that the merits of the approach depend more on which case is being studied, and the depth and effectiveness of the investigation. Consequently, single case study designs that feature multiple intra-case observations are regarded as less prone to inferential limitations. Similarly, the choice of a single case study design is appropriate for an investigation of Iran's nuclear activities and disputes with the international community. Iran is the most sanctioned country in the 21st century. It has become the focal point for much legal and diplomatic argument and action, and as such is worth special attention. Additionally, the way Iran has been treated and is regarded by the international community both draws from and informs the way similar or related international disputes are managed.

A further potential limitation to this research is that it uses publicly available documents to shed light on a highly sensitive issue which affects national and international security as well as political and legal considerations. It is unlikely that the information available in the public domain will provide a complete

picture of all aspects of the issue. It is therefore possible that the information used in this research may not wholly represent what is actually happening. Over time, as documentation becomes declassified and events allow an improved understanding of their own provenance, it should be possible to understand with greater certainty what the real situation actually was and is. This could necessitate updating the findings of this research.

The use of interviews would have greatly benefitted this research, and would potentially have allowed information to be obtained regarding the decision-making process and security perceptions of key players in the area, especially if interviews could have been arranged with some of the leading political figures closely involved with the case. However, it is unlikely that leading political or diplomatic figures would deviate from their official public line in a research interview, particularly when discussing a highly sensitive area such as nuclear policy and strategy. The importance and sensitivity of these issues inside Iran also made it very difficult for the researcher to gain access to elite politicians and officials. The researcher repeatedly attempted to contact Iranian diplomats such as Ali Araghchi, the Deputy for Legal and International Affairs of the Ministry of Foreign Affairs of Iran, and one of the nuclear negotiators in the JCPOA. However, requests for interviews were either refused or ignored. Nevertheless, the researcher spent extensive time in Iran, discussing issues related to this thesis with academics, religious scholars, business leaders, political figures and political activists. This provided a broader understanding of how the Iranian public regards these matters, which has been an important insight when compiling this document.

The changes to the Proposal Plan, made as a result of the comprehensive agreement between the parties involved in the dispute in 2015 also presented difficulties to the researcher. At the outset of the research, when Iran was under sanctions from the UN Security Council and also experiencing European Union (EU) countermeasures, the research attempted to suggest a solution that would deal with Iran's nuclear issue within the usual structures of discourse of the international community. The researcher sought to suggest a solution that would leave Iran with control of some parts of the nuclear fuel

cycle, but no reprocessing capability. In return for ceding some control over its nuclear activities, Iran would receive technical assistance, possibly form countries such as Russia, Turkey or Brazil. However, the creation of JCPOA, which provided a solution somewhat similar to the one suggested above, superseded the proposed solution. Hence, when the agreement was signed it was done so in an atmosphere of uncertainty as to whether such an agreement would remain effective and would be adhered to by all parties, or whether it would be ignored by the international community as happened with the Turkey-Brazil declaration with Iran on 2010. Due to this fact, most of the thesis plan has had to be changed, resulting in less time to conduct the research.

Structure of the Research

The first chapter of the thesis will examine the origins and development of the legal and regulatory frameworks that determine disputes regarding nuclear capability. It will contend that the battle for political and military dominance in the immediate post-war era effectively forestalled the development of a legal and regulatory regime that could control different states' civil and military nuclear programmes. Although there had been extensive discussions about instigating a system of international regulation and control in 1944 and 1945, the outcome proved a combination of ineffective international control under the aegis of the IAEA and the NPT, a non-proliferation treaty that lacked clear direction. It is argued in this thesis that the legal difficulties regarding international regulation and control which confronted politicians and scientists at the start of the nuclear era have never been adequately addressed.

Recently, the inherent flaws in the system of international law and regulation in this area have been evident in the case of Iran. The causes of the present hostility between Iran and the west will be examined in the second chapter of the thesis, and it will be argued that the current state of relations stems from the emergence of Iranian nationalism and Britain's desire to maintain de facto colonial control over Iran at a time of global decolonization and cold war enmity, as detailed above. It will further argue that the overthrow of the National Front government led by Muhammad Mossadegh in a coup aided by

the American Central Intelligence Agency (CIA), and the support of United States and its allies for the regime of Shah Mohammad-Reza Pahlavi provide the context for the current acrimonious relationships between the Islamic Republic of Iran and the west.

The third chapter will examine disputes concerning the nuclear industry in Iran dating back over a ten-year period in the light of the political and legal context outlined in the first two chapters. The legal positions of each side will be analysed and evaluated, with a view to establishing the main problems with the current non-proliferation regime. It will examine whether the current international safeguard regimes can deal with situations such as that of Iran, where there is a lack of clear evidence that a state is engaging in nuclear weapons activities.

The fourth chapter will examine the legality of the international community's response, especially that of the EU, towards Iranian non-compliance with nuclear non-proliferation obligations. The purpose of this chapter is to examine the availability of the restrictive measures arising from non-compliance with NPT obligations, by referring to the International Law Commission (ILC) Articles on State Responsibility. To achieve clarification of the lawfulness of restrictive measures, it is vital to examine limitations through considering, inter alia, the existence or otherwise of an internationally wrongful act, the concept of an injured party, and finally proportionately.[12]

The fifth chapter will examine the agreement that has the potential to be the final stage in Iran's nuclear history; the July 2015 Joint Comprehensive Plan of Action, agreed between Iran and P5+1 countries. This agreement was reached in order to prevent Iran from obtaining nuclear weapons. In return for restrictions on Iran's nuclear activities, it was agreed that sanctions imposed on Iran by the UN, the EU and the USA should be lifted. This chapter is intended to look at the distinct characteristics of the JCPOA from a legal perspective. It will be argued that from an international law perspective some matters raised regarding the JCPOA may be legitimate cause for concern.

[12] A comprehensive analysis of every countermeasure condition is not necessarily required here, hence the conditions that have been analysed has been inspired from Dupont, *supra* note 11

The complex framework of the JCPOA, and capacity and ability of the accord to settle disputes over Iran's nuclear issue will be examined. This chapter discusses how solutions under the JCPOA can be implemented decisively, and also discusses how some certain arguments, misgivings, and concerns were brought up in the international discourse which regarding, the JCPOA were a reasonable solution from the international law perspectives.

The final part of the thesis will examine the influence of international law on the historical events outlined in the thesis. This has been central to much literature and debate concerning international relations.[13] Following the ideas of Hastedt and Kay (1991),[14] it is argued that most states accept and conform to international law most of the time. However, when under pressure from international bodies or domestic exigencies, they may react by asserting their sovereignty by acting with disregard for accepted practice and derogating from international agreements. However, international political forums and judicial institutions such as the International Court of Justice remain available to parties involved in disputes. This can lead to the situation, as happened after the nationalization of the Anglo-Iranian Oil Company's assets, in which a state can simultaneously violate the terms of international agreements while seeking to advance their case through recourse to international legal bodies.

[13] Sven B. Gareis, Johannes Varwick, *The United Nations: An Introduction* (Palgrave, Hampshire 2005) 43-60; Martin Griffiths, Fifty Key Thinkers in International Relations (Routledge, New York 1999); Inis L. Claude, Power and International Relations (Random House USA Inc, New York 1988)

[14] Glenn P. Hastedt, Knickrehm M. Kay, *Dimensions of World Politics* (Harpercollins College, London 1991) 142

Chapter One

The Failure of International Control of Nuclear Weapons

1.1 Introduction

In order to manufacture fuel rods for utilisation in nuclear weapons or in power generating stations, it is necessary to mine and refine uranium ore to produce yellowcake. This in turn needs to be converted into uranium hexafluoride gas, which is then processed for the purpose of increasing the levels of the fissile isotope U-235.

This activity becomes controversial only when the gas is enriched to a greater extent than that required to commence a chain reaction within a light-water reactor. This occurs when it comprises over 4 percent U-235. In order to manufacture a uranium bomb similar to those of the 1940s era, it is necessary to use approximately 15kg of uranium enriched to 90 percent. When a fuel rod is considered spent, it can be reprocessed chemically in order to supply P-239, which is a fissionable plutonium isotope. This can be amalgamated with uranium in order to produce a mixed-oxide fuel used for light-water reactors. This can also be used for atomic weapons.[15]

The fact that this fuel cycle is inherently dual use has bedeviled efforts to construct a framework of rules to control it. This chapter will focus on a historical description of how the non-proliferation regime came to be agreed, and whether the agreed regime was capable of confronting the threats of Cold War. It will examine the structure of relationships between the superpowers in the early 1960s and the actions they took in preparation for significant negotiations regarding the basic provisions of a nuclear non-proliferation agreement. The USA and the USSR eventually reached an accord in 1966.

[15] For a full description of the nuclear fuel cycle see IAEA, Nuclear Fuel Cycle Information System: A Directory of Nuclear Fuel Cycle Facilities, IAEA-TECDOC-1613 (IAEA, Vienna 2009); Kessler Guenter, *Proliferation-proof Uranium/Plutonium and Thorium/Uranium Fuel Cycles: Safeguards and Non-Proliferation* (2nd edn, KIT Scientific Publishing, Karlsruhe 2017) 15-25. The atomic bomb dropped on Hiroshima and Nagasaki used, respectively, U235 and P239.

This was followed by a period of cooperation in which the two superpowers oversaw the processes leading to the NPT being accepted by international institutions, prior to its being finalized by Washington and Moscow. This chapter will also detail and analyse efforts to regulate nuclear proliferation in three specific periods following the signature of the NPT in July 1968, focusing on the factors that facilitated movement towards an international nonproliferation agreement.

1.2 Atomic Development Authority

The nuclear age commenced when an aircraft carrying a single three-metre-long device devastated a city of 400,000 people on 6 August 1945.[16] However, the size of the actual bomb did not reflect the effort that had gone into its manufacture. In order to produce the grapefruit-sized amount of highly-enriched uranium that devastated Hiroshima "a workforce as listed on a payroll and a physical plant of a similar size to that of the car industry in the United States" was needed.[17] Around 120,000 people were employed, including the most eminent engineers and scientists in the country.[18]

The bomb entered world history as the means to end "a war without mercy".[19] However, almost immediately after it had been dropped, the struggle commenced to curtail its proliferation and deployment through a legal structure intended to prevent its future use. On 15 November 1945, the first public statement regarding how this would be attained was made when Clement Attlee, the United Kingdom Prime Minister, Harry Truman, the United

[16] Rhodes cites a calculation of devastation adapted by the Armed Forces Institute of Pathology estimated that "Hiroshima bomb produced casualties 6,500 time more than a normal high explosive […] the total amount of death estimated about 200,000 within five years of explosion". See Richard Rhodes, *The Making of the Atomic Bomb* (Simon & Schuster, New York 1998) 734

[17] Ibid, 54

[18] Ibid.

[19] The expression is taken from the title of "*War without Mercy: Race and Power in the Pacific War*" by John W. Dower. The book is about the war between Japan and the United States. Dower shows how a "belief of war" could be deeply rooted, citing a U.S Army Poll taken in 1943 which illustrated that half of all soldiers believed that it would be necessary to kill all Japanese before peace could be achieved. See John W. Dower, *War without Mercy: Race and Power in the Pacific War* (Pantheon, New York 1986) 53

States President and William Lyon Mackenzie King, the Canadian Prime Minister, presented an Agreed Declaration.[20]

This Agreed Declaration between the United States, Britain and Canada recognised that any state potentially has the ability to obtain sufficient information to build a bomb, and it is impossible to plan any safeguards that will uniquely supply an adequate means of avoiding this.[21] This implies that only an international agreement could solve this problem. Such an agreement would avert the detrimental utilisation of atomic energy for military purposes, and would stimulate its utilisation for humane and peaceable purposes.[22] The benefits of the extensive theoretical and practical research that had been undertaken into nuclear energy should be made available to every state, generating an environment of reciprocal confidence which would enable political collaboration to thrive.[23] However, military applications of atomic energy rely on the same techniques and procedures that are needed for industrial purposes.[24] "We are not convinced that the spreading of the specialized information regarding the practical application of atomic energy, before it is possible to devise effective, reciprocal, and enforceable safeguards acceptable to all nations, would contribute to a constructive solution of the problem of the atomic bomb."[25] This suggests that it should not be permissible to share information before efficient and enforceable safeguards against the utilization of atomic energy for detrimental intentions could be designed.[26] Therefore, it was argued that the UN should inaugurate a commission to establish the interchange of fundamental scientific data for peaceable purposes and to regulate atomic energy to the extent which would guarantee its utilisation uniquely for peaceable intentions.[27] Another purpose of the Commission would be "the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass

[20] 'Atomic Energy: Agreed Declaration by the President of the United States, the Prime Minister of the United Kingdom, and the Prime Minister of Canada' Treaties and Other International Act Series 1504 (Washington, 15 November 1945)
[21] Ibid, para, 3
[22] Ibid, para, 2 (b)
[23] Ibid, para, 5
[24] Ibid, para, 6
[25] Ibid.
[26] Ibid.
[27] Ibid, para, 7 (a), (b)

destruction",[28] and the design of efficient safeguards through inspection as well as by further methods to safeguard assenting nations against the dangers of contraventions and avoidances.[29]

At the very least, this reasoning lacked clarity. Firstly, it was accepted that no safeguards could be effective if a state were determined to acquire nuclear weapons, leading to a determination that nuclear information should not be shared before the establishment of effective safeguards. Secondly, it was accepted that an effective solution to the dual-use issue would be to generate an environment of reciprocal confidence through sharing the results of scientific research, and also by insisting that such results should not be shared before an agreement on safeguards had been reached, even though such safeguards would be ineffective without a reciprocal confidence environment.

The foundational resolution of the newly-inaugurated UN General Assembly on 24 January 1946 was the basis of the November Declaration.[30] It resolved to establish an "Atomic Energy Commission" whose purpose would be to advise the Security Council to exchange scientific information for the purpose of ensuring that nuclear reactors be used only for peaceable purposes, eliminating atomic weapons from countries' armaments, and establishing appropriate safeguards against any nation possessing atomic bombs.[31] These proposals expressed identical notions and wording to those of the November Declaration.

The next public development of any significance from the international perspective was a report authorised by James Byrnes.[32] It was named: "A Report on the International Control of Atomic Energy". This later became

[28] Ibid, para, 7 (c)
[29] Ibid, para, 7 (d)
[30] The action had been accepted by the Soviet Union at the Moscow conference. See 'Moscow Meeting of Council of Foreign Ministers: Communique on the Moscow Conference of the Three Foreign Ministers' *Treaties and Other International Acts Series 1555* (Moscow, 27 December 1945)
[31] UN General Assembly Res 1 (I) (24 January 1946) UN Doc. A/64, para 1(2)
[32] James Byrnes was United States Secretary of State from 1945-1947 under President Harry S. Truman.

commonly referred to as the Acheson-Lilienthal Report.[33] Its objective was to present the opinions of the United States on the means by which the Commission should be able to complete its tasks. It should be noted that the report was intended to be presented at its inaugural meeting.

The report was issued on 16 March 1946. It had been prepared by the physicist, Robert Oppenheimer, a prominent figure in the development of the atomic bomb. [34] It approved the Agreed Declaration together with its logic. The report contained a number of propositions which, on reflection, appear to be practical, while at the same time idealistic. The report's notional method was to categorise nuclear enterprises by splitting them into those considered "safe" and those considered "dangerous". [35] In addition, the fuel cycle would also be categorised, over a number of different processes ranging from mining to reprocessing. All of these could be considered as dangerous since almost every aspect of the nuclear energy process could be regarded as having potentially dual usage.[36]

The report also claimed that the only way of creating the mandatory and productive safeguards needed was to initiate an international "Atomic Development Authority", which would own all global uranium stocks, including those stocks still underground. Additionally, this authority would have possession and control of enrichment provisions, which would include every reactor that enabled the production of plutonium, as well as all reprocessing plants. Those responsible for directing this authority would be the most

[33] It was named after Dean Acheson, United States Secretary of State in the administration of President Harry S. Truman, and David Lilienthal who was Chairman of the Tennessee Valley Authority and the Board of Consultants of the report.
[34] Robert Oppenheimer was the former Scientific Director of the Los Alamos National Laboratory where the first atomic bombs were created.
[35] David E. Lilienthal and others, 'A Report on the International Control of Atomic Energy United States Department of State Committee on Atomic Energy, prepared for the Secretary of State's Committee on Atomic Energy' (Acheson-Lilienthal report) (16 March 1946) 25-31
[36] The report stated: "When the news of the atomic bomb first came to the world there was an immediate reaction that a weapon of such devastating force must somehow be eliminated from warfare; or to use the common expression, that it must be 'outlawed'. That efforts to give specific content to a system of security have generally proceeded from this initial assumption is natural enough. But the reasoning runs immediately into this fact: the development of atomic energy for peaceful purposes and the development of atomic energy for bombs are in much of their course interchangeable and interdependent." Ibid, 4

prestigious scientists in the world.[37] Nation states would only be allowed to keep control of what would be considered "safe" enterprises, and would require a licence to operate any research reactor using denatured uranium as its fuel.[38]

This scheme, which advocated that scientists should entrust authority to other scientists,[39] gives the impression of being based on the assignation of limitless authority, both metaphorical and literal, to those scientists running the new regulating body. The report recommended that this authority should submit to the Security Council, although it would be allowed, in the interests of international security, to take precedence over national sovereignty by means not available to the Security Council under the terms of the UN Charter.[40] If the recommendations of the report had been applied, it is possible that the UN would have effectively become simply more than its political instrument. Certain people have suggested that the authority would eventually have become a kind of world government.[41] Although it advocated establishing a body that would have, in terms of international relationships, epitomised liberal institutionalism, the report achieved its objective of putting forward a

[37] "The first purpose of the agency will be to bring under its complete control world supplies of uranium and thorium. Wherever these materials are found in useful quantities. The international agency must own them or control them under effective leasing arrangements. One of its principal tasks will be to conduct continuous surveys so that new deposits will be found and so that the agency will have the most complete knowledge of the world geology of these materials." Ibid, 34. "All the actual mining operations for uranium and thorium would be conducted by the Authority. It would own and operate the refineries for the reduction of the ores to metal or salt. It would own the stockpiles of these materials and it would sell the by-products, such as vanadium and radium. It would also provide the necessary supplies of uranium and thorium for the present limited commercial uses." Ibid, 35

[38] Ibid, 34-43

[39] Ibid, 41

[40] The activity of the Security Council is subject to some legal limitations. The text of Chapter V of the UN Charter suggests it may undertake these only in situations which are exceptional, and even then only temporarily, and also according to the veto of the permanent members. The Atomic Development Authority would have had certain permanent quasi-sovereign entitlements in countries possessing thorium or uranium or, which conducted atomic research, or wished to construct atomic power stations or reprocessing plants.

[41] "They therefore proposed that no facility, easily transformable for weapons production, should be left in national hands, and concluded in favour of setting up a supranational authority which would exploit and develop the applications of the discovery of nuclear fission in the name and interest of all nations. In fact, they recommended an embryonic form of world government to deal with this problem of world importance". See Bertrand Goldschmidt, 'A forerunner of the NPT? The Soviet proposals of 1947: A Retrospective Look at Attempts to Control the Spread of Nuclear Weapons' (1986) 28 (1) *IAEA Bulletin* 58, 60

presupposition that would be agreed by any realistic person; namely that it is difficult to trust nation states.

The report also emphasised that it would be impractical to try to operate an anti-proliferation project which was based on the use of inspections. It concluded "there is no prospect of security against atomic warfare in a system of international agreements to outlaw such weapons controlled only by a system which relies on inspection and similar police-like methods".[42] The principal reasons supporting this conclusion were not only technical, but also included the social, political, and administrative problems which would inevitably apply to any attempt to impose settlements between countries when those states would each have the freedom to produce nuclear energy, but they only had promised not to utilise their nuclear capability to manufacture weapons.[43]

If the force of these arguments had been recognised, the influence of international control would have been evident. The hardest task encountered by a state wishing to implement a nuclear project would have been to acquire an adequate supply of uranium in order to build a bomb, and therefore the best means of preventing the development of a bomb would be to withdraw the supply of material to such a country. The actual implementation of a solution of this type would have been perceived as an outstanding success for the UN and for this novel and new international approach to international governance. It could have resulted in reduced competition between various nations; a key factor in the development and use of atomic weapons. The November Declaration states that it would give rise to an environment of

[42] Acheson-Lilienthal report, *supra* note 35, 4

[43] Ibid, 4-5. The statement then detailed the report's reasoning. The principal reason was national rivalry, already mentioned by the agreed declaration (November Declaration). In the words of the report: "National rivalries in the development of atomic energy readily-convertible to destructive purposes are the heart of the difficulty. So long as intrinsically dangerous activities may be carried on by nations, rivalries are inevitable and fears are engendered that place so great a pressure upon a system of international enforcement by police methods that no degree of ingenuity or technical competence could possibly hope to cope with them. We emphasize this fact of national rivalry in respect to intrinsically dangerous aspects of atomic energy because it was this fatal defect in the commonly advanced proposals for outlawry of atomic weapons coupled with a system of inspection that furnished an important clue to us in the development of the plan…". Ibid, 5

"reciprocal confidence";[44] or as the report states: the productive international resolution would make an immense contribution to the avoidance of war and would reinforce the UN.[45] Consequently, this solution would have generated the circumstances under which it would be successful, since the report would be self-vindicating.

Shortly after the publication of the Acheson-Lilienthal Report, on 14 June 1946, the United States gave a presentation to the Atomic Energy Commission. The presentation was made by Bernard Baruch, a financier who had become a diplomat. The presentation included a proposal for international control, and discussed United States disarmament.[46] It may be helpful to examine the institutional divisions between scientists and politicians before considering the Baruch plan in detail. These divisions provide an explanation as to why the concept of international control became included in the proposals made by the United States. This is not to disregard the strong indications that the actual motive of Anglo-American policy was to secure a nuclear power monopoly which could then be exploited in their diplomatic purposes in the emerging post-war order.

1.3 Debates for and Against the Use of Atomic Bombs

One of the exceptional aspects of the Manhattan Project was that the scientists who worked on it were able to access state secrets more easily than

[44] 'Atomic Energy: Agreed Declaration by the President of the United States, the Prime Minister of the United Kingdom, and the Prime Minister of Canada' Treaties and Other International Act Series 1504 (Washington, 15 November 1945) para, 8

[45] Acheson-Lilienthal report, *supra* note 35, para, 5

[46] Also contained some points not in the report. The additional material illustrates the human relationships fundamental to the US Government's actions. Beinsner, in his biography of Acheson, suggests that personal animosity was apparent in Baruch's amendments. Baruch included that any nation which disregarded the regulations of the Authority would be subject to automatic punishment, and also banned from making use of the Security Council veto to avert such punishment.
When the Acheson and Baruch groups met, Acheson argued that attempting to find the right instrument of control at the dawn of nuclear history was like "trying to devise a cowcatcher without ever having seen a locomotive." Though he failed to effect change in Baruch's sanctions, he continued the fight. Baruch, meanwhile, accused Acheson of taping their telephone conversations and staged a slowdown. Baruch, knowing he could rely on the support of army chief Dwight Eisenhower and White House chief of staff William Leahy, told Acheson to "find another messenger boy" Byrnes told Acheson that appointing Baruch was "the worst mistake I have ever made. But we can't fire him now". See Robert Beisner, *Dean Acheson: A Life in the Cold War* (Oxford University Press, New York 2016) 34-35

could political or military organisations.[47] An "experts' community" was established, which had a varied impact on policy-makers, depending on the level of unity among the experts.[48] The scientists employed on the manufacture of the bomb had a range of opinion, particularly regarding the bombing of civilian people, as well as on policy in the post-war era. However, it was impossible for them to express a united viewpoint because the compartmentalization of the Manhattan Project prevented those who had worked on the project from forming any professional group which might campaign for any particular policy. These included figures such as Vannevar Bush,[49] and his special deputy, James Conant, who had been close to the centre of the policymaking. However, no limitation was applied to the chief scientists in the Manhattan Project who were not public servants, and therefore did not feel constrained from acting in an independent manner determined by their consciences. These scientists were the strongest advocates of an approach which integrated three closely-related policy objectives; disarmament, the sharing of technological or scientific data relating to nuclear energy with the Soviet Union, and international control of nuclear activities. These were the policies that had been the basis of the November Declaration, and which were most clearly expressed in the Acheson-Lilienthal Report. However, the publication of the Baruch plan effectively ended hopes of seeing these ideas implemented. Other scientists advocated a different approach; that the nuclear era should begin not with a decision to do something, but an active decision not to use the bomb on Japanese population centres.

Two views of how to manage the control of atomic weapons may be distinguished; one supporting international control, and a weaker one,

[47] Secretary of War Henry Stimson informed President Truman about the bomb in a memorandum on 25 April 1945 (two weeks after Truman become President), see Henry L. Stimson, 'The Decision to Use the Atomic Bomb' (February 1947) 194 (1161) *Harper's Magazine* 97, 99

[48] For instance: "If every relevant expert agrees on the way to manage a specific problem, and consequently builds an epistemic community, there is a high likelihood that their advice will have an effect because [policy-makers] find it more difficult to disregard that advice." See Volker Rittberger, Bernhard Zangl and, Andreas Kruck, *International Organization* (2nd edn, Palgrave Macmillan, New York 2012) 99

[49] Vannevar Bush was the director of the US Office of Scientific Research and Development (OSRD) during World War II.

advocated by Bush and Conant among others, [50] which supported to the use of the bomb against cities in Japan. Alice Kimball Smith has suggested that the scientists had different opinions determined by who were closest to the "nerve centers of decision",[51] particularly those scientists who were members of the Interim Committee; a forum established by Henry Stimson for the purpose of integrating scientific developments with policy initiatives. The Government of the United States was given guidance by this committee with regard to its nuclear policies, including an endorsement of plans to drop atomic bombs on Nagasaki and Hiroshima. [52] People who were less strongly in support of the government tended to express doubts about this decision. [53]

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[50] Alice Kimball Smith, *Peril and a Hope: The Scientists' Movement in America 1945-7* (Chicago University Press, Chicago 1965) 13

[51] Ibid, 51

[52] The committee were included group of scientists who were Enrico Fermi, Arthur Compton, Ernest Lawrence and J. Robert Oppenheimer, in addition to James F. Byrnes, Ralph A. Bard, William L. Clayton, Vannevar Bush, James B. Conant, Karl Compton and George L. Harrison. In June 16, 1945 the scientists wrote a formal report on the "immediate use of nuclear weapon": "The opinions of our scientific colleagues on the initial use of these weapons […] range from the proposal of a purely technical demonstration to that of the military application best designed to induce surrender. Those who advocate a purely technical demonstration would wish to outlaw the use of atomic weapons, and have feared that if we use the weapons now our position in future negotiations will be prejudiced. Others emphasise the opportunity of saving American lives by immediate military use, and believe that such use will improve the international prospects, in that they are more concerned with the prevention of war than with the elimination of this specific weapon. We find ourselves closer to these latter views; we can propose no technical demonstration likely to bring an end to the war; we see no acceptable alternative to direct military use." See J. Robert Oppenheimer 'Recommendations on the Immediate Use of Nuclear Weapons' *US National Archives* (Record Group 77, Records of the Chief of Engineers, Manhattan Engineer District, Harrison-Bundy File, Folder 76) (16 June 1945).

Ralph Bard was the only member who believed Japan should be warned before using the bomb. He remarked, "It definitely seemed to me that the Japanese were becoming weaker and weaker. They were surrounded by the Navy. They couldn't get any imports and they couldn't export anything. Naturally, as time went on and the war developed in our favor it was quite logical to hope and expect that with the proper kind of a warning the Japanese would then be in a position to make peace, which would have made it unnecessary for us to drop the bomb and have had to bring Russia in […]". Quoted in Len Giovannitti and Fred Freed, *The Decision to Drop the Bomb* (Coward-McCann, New York 1965) 145. See also 'Memorandum on the Use of S-1 Bomb' *US National Archives* (Record Group 77, Records of the Chief of Engineers, Manhattan Engineer District, Harrison-Bundy File, Folder 77) (27 June 1945)

[53] Leo Szilard, the leader of the scientists opposing use of the bomb, stated that "I'll say this: almost without exception, all the creative physicists had misgivings about the use of the bomb. I would not say the same about the chemists. The biologists felt very much as the physicists did." See Leo Szilard, 'Interview: President Truman Did Not Understand' *U.S. News & World Report* (15 August 1960) available at <http://members.peak.org/~danneng/decision/usnews.html> accessed 7 August 2017. Einstein was one of the anti-nuclear nuclear scientists. An Article at the New York Time published Einstein's view, "Prof. Albert Einstein [...] said that he was sure that President Roosevelt would have forbidden the atomic bombing of Hiroshima had he been alive and that

The concept of international control appears initially in the formal dossier in a report, prepared by a study group under the chairmanship of Zay Jeffries, which had been provided for Stimson.[54] This report was presented on 6 November 1944. [55] In addition, the Tolman Committee, under the chairmanship of Richard Tolman, [56] emphasised the requirement for international control. The conclusions of the Tolman report were given to Lieutenant General Leslie R. Groves, [57] on 7 December 1944. Physicist, James Franck chaired meetings which discussed the dossier, the purpose of which was to suggest implementing international control. This pre-dates the proposition by Acheson-Lilienthal.

International control was also presented in June 1945 to Stimson, and supported by Hungarian scientist Leo Szilard who was one of the members. Szilard subsequently became one of the most politically active supporters of the anti-nuclear stance among the Manhattan Project staff. The text of the aforementioned dossier had been written by biophysicist Eugene Rabinowitz.[58] It claimed that it was essential that the trial of the bomb be executed at an uninhabited location. Additionally, it gave a warning that if a populated urban area were to be the target of the bomb, an arms race with the Soviet Union would be an inevitable consequence. It suggested that the utilisation of uranium should be monitored by a "Control Board" inaugurated for this purpose. This suggestion implies the necessity of mutual trust and the willingness of every side to abandon some portion of their sovereign

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it was probably carried out to end the Pacific war before Russia could participate." See 'Einstein Deplores Use of Atom Bomb', *New York Times* (19 August 1946) A1

[54] Zay Jeffries was part of the Metallurgical Laboratory team which build the world's first atomic pile (Chicago Pile-1 (CP-1)). The committee consisted of Enrico Fermi and Leo Szilard who convinced the nuclear chain reaction.

[55] Zay Jeffries and others, 'Prospectus on Nucleonic' (The Jeffries Report) (18 November 1944), The report was submitted to Arthur Compton, a Nobel prize-winning physicist, a top advisor at the Manhattan Project. The report was one of the first of a type to become acceptable during the whole time of post-war period. See Daniel S. Greenburg, The *Politics of Pure Science* (University of Chicago Press, Chicago 1999) 101

[56] Tolman was an American physicist and chemist who was Vice-Chairman of the National Defense Research Committee (NDRC) and also the Chairman of the Armor and Ordnance Division of the NDRC. In the last years of his life, he served as chief adviser to the US representative to the United Nations Atomic Energy Commission (Bernard Baruch).

[57] Leslie R. Groves was the director of the Manhattan Project and a United States Army Corps of Engineers officer.

[58] He was one of the nuclear scientist in anti-nuclear movement in the US. He co-found the Bulletin of Atomic Scientists magazine, which informed the people about the development of nuclear weapons and the threats they posed.

entitlements, through the acceptance of international control of some areas of national economy.[59]

Certain scientists ventured to influence policy by shifting the debate beyond the realms of bureaucracy and their participation in the committee. In 1939, Albert Einstein and Szilard had endeavoured to warn the United States of the possibility of a bomb. In March 1945 they wrote another letter in which they strongly argued why a bomb ought not to be dropped on civilians in Japan.[60] Their letter was also intended to give a warning to President Roosevelt. A meeting was planned between the President and Einstein and Szilard, but Roosevelt died before the meeting could take place. Following Roosevelt's death, the two scientists sought to discuss this matter with Truman, his successor. However, Truman's Appointments Secretary responded by saying that they should address their concerns to Byrnes, Truman's political advisor and Interim Committee representative. Byrnes had, in fact, already been chosen to be Truman's next Secretary of State. Following this, Szilard paid a visit to Byrnes's home, accompanied by two other scientists.[61] Despite listening to their arguments, Byrnes, who possessed considerable influence on policy, did not change his mind, and continued to maintain his views on the use of the bomb, which were opposed to those of Szilard.[62]

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[59] James Franck and others, 'Report of the Committee on Political and Social Problems Manhattan Project' (The Franck Report) (11 June 1945) para, IV. The report which stressed that "the use of nuclear bombs was considered as a problem of long-range national policy rather than military expediency" and received, reviewed and rejected by the Interim Committee. The interim Committee responded to the report by stating "we can propose no technical demonstration likely to bring an end to the war; no acceptable alternative to direct military use." See Oppenheimer, *supra* note 52

[60] The aim of Szilard and Einstein letter (2 August, 1939) was to encourage the President Roosevelt to fund the development of a nuclear weapon before Germany achieved it first. They believed the US should develop a nuclear weapon but should not use it. Einstein made another point in the letter (25 March 1945) directed towards the President, criticizing: "the lack of adequate contact between scientists who are doing this work and those members of your cabinet who are responsible for formulating policy."

[61] These were: Walter Bartky, Associate Director of the Chicago Metallurgical Laboratory, and Harold Urey, Director of War Research, Atomic Bomb project at Columbia University, a Nobel Prize winner.

[62] In an interview, Szilard explained their discussion on that day, stating: "Byrnes was worried about Russia's acquisition of Poland, Romania and Hungary and so was I. Byrnes believed that holding the bomb by America would put the Russia in more controllable position." See 'President Truman Did Not Understand' interview with Szilard for *U.S. News & World Report* (15 August 1960) available at <http://members.peak.org/~danneng/decision/usnews.html> accessed 26 September 2016. See also Martin J. Sherwin, *A World Destroyed: Hiroshima and Its Legacies* (3rd edn, Stanford University Press, Stanford 2003) 202. Szilard later wrote

The scientist who made the greatest attempt to justify international control was Danish physicist, Niels Bohr.[63] His deliberations regarding the atomic bomb led him to conclude that the choice which faced the Allies, was either international control or an arms race. It can also be said, that international control does not work unless it is in an environment of **"**reciprocal confidence". Although common ground existed between the internationalists, he claimed that mutual confidence would not be attained unless the Allies shared their information regarding the nuclear bomb with the Soviet Union as a matter of urgency, and most certainly before it was used.[64] Roosevelt gave Bohr an apparently sympathetic hearing, although he did not change his opinions, but Churchill gave Bohr a hostile reception.[65] As their meeting ended, Bohr enquired of Churchill if he may send a memorandum to him outlining the points he had indented to make at the meeting but had not had the opportunity to do so. Churchill responded that he would gladly receive

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that "The world would be much better off if Jimmy Byrnes had been born in Hungary and become a physicist and I had been born in the United States and become Secretary of State". See Spencer R. Weart, Gertrud Weiss Szilard (eds), *Leo Szilard: His Version of the Facts: Selected Recollections and Correspondence* (MIT Press, Cambridge 1978) 183-185. See also Lawrence S. Wittner, *The Struggle Against the Bomb, One World or None; A History of the World Nuclear Disarmament Movement Through 1953,* Vol I (Stanford University Press, Stanford 1993) 25. Four day after their meeting on 1 of June 1945, the Interim Committee concluded that: "Mr Byrnes recommended, and the Committee agreed […] the bomb should be used against Japan as soon as possible; that it be used on a war plant surrounded by workers' homes; and that it be used without prior warning". See 'Note of the Interim Committee Meeting' (*Harry S. Truman Presidential Library & Museum*, 1 June 1945) available at <https://www.trumanlibrary.org/whistlestop/study_collections/bomb/large/documents/fulltext.php?fulltextid=8> accessed 20 November 2017

[63] For Bohr's scientific and philosophical contributions see, Abraham Pais, *Niels Bohr's Times: In Physics, Philosophy, and Polity* (Oxford University Press, Oxford 1991) and Manjit Kumar, *Quantum: Einstein, Bohr and the Great Debate about the Nature of Reality* (Icon, London 2009). For his "open world" idea, mentioned in 'Open Letter to the United Nations' (9 June 1950) see Niels Bohr, Finn Aaserud and, Leon Rosenfeld, *Niels Bohr: collected works: Vol 11, The political arena (1934-1961)* (Elsevier, Amsterdam 2005) 3-191 and Rhodes, *supra* note 16, 782-783

[64] "The prevention of a competition prepared in secrecy will therefore demand such concessions regarding exchange of information and openness about industrial efforts including military preparations as would hardly be conceivable unless at the same time all partners were assured of a compensating guarantee of common security against dangers of unprecedented acuteness". See 'Niels Bohr's Memorandum to President Roosevelt' (*Atomic Archive*, July 1944) available at <http://www.atomicarchive.com/Docs/ManhattanProject/Bohrmemo.shtml> accessed 11 August 2017

[65] Roosevelt's seeming interest in Bohr's proposals may have been a pretence. He formally supported Churchill's opinion, agreeing that Bohr must not to be trusted, during a meeting held on September 18 at Hyde Park. See Sherwin, *supra* note 62, 109

such a memorandum, but preferred that it should make no reference to politics.

Following their subsequent meeting at Hyde Park, Churchill and Roosevelt made notes of their meetings with Bohr, which included the following comment: It is necessary to investigate Professor Bohr's action and to seek to be sure that he does not convey any information, to the Russians in particular.[66] General Groves took a further step involving Szilard and devised a letter to be sent to Stimson. This letter mentioned that: It is regarded as being absolutely necessary that Szilard, whom we regard as an enemy alien, be detained during the war.[67] Stimson refused to sign the letter and reacted to it by saying that there was "no possibility" of this at all. Nevertheless, the army's Counter-intelligence Corp placed Szilard under surveillance.[68]

1.4 Atomic Energy Commission

At the time when committees of scientists and others were arguing for the establishment of an international body to control the use of nuclear energy, there was an equally strong opposition to such ideas, comprising primarily a small group of politicians who were aware of the way the war was progressing and of the potential of the atomic bomb. This was mentioned by Byrnes in the course of his discussion with Szilard.

Nevertheless, Secretary of State designate Byrnes claimed that the United State's possession and demonstration of the atomic bomb would make it easier to manage the Soviets in Europe.[69] Several of Roosevelt's advisers supported this policy as they had begun to adopt a harder attitude towards the United States's Soviet allies. When Truman became President, he agreed with Byrnes' viewpoint that Europe was confronting a "barbarian invasion" and

[66] The decisions made at the Hyde Park meeting were recorded in an aide-memoire signed by Roosevelt and Churchill on September 19, 1944. See 'Post-Conference Conversations at Hyde Park' in Richardson Dougall and others (ed), *Foreign Relations of the United States, Conference at Quebec, 1944* (United States Government Printing Office, Washington 1972) Doc 299

[67] The draft letter for the internment of Leo Szilard is available at <http://blog.nuclearsecrecy.com/wp-content/uploads/2015/10/1942-10-28-Szilard-internment-draft.pdf> accessed 20 November 2017

[68] Ibid. Also the report of requesting Army Intelligence to investigate Szilard is available at < https://arxiv.org/html/physics/0207094> accessed 20 November 2017

[69] Sherwin, *supra* note 62, 202

argued that "the bomb might put us in a position to dictate our own terms at the end of the war".[70] He therefore backed the United Kingdom in its endeavour to revive the *cordon sanitaire* policy of Georges Clemenceau, the French Prime Minister. This was to exert pressure upon the Soviet Union to accept free elections in Bulgaria, Romania and Poland despite it being virtually certain that Romania and Poland would elect governments not amenable to the Soviet Union.[71] In reality, this effort to influence nations within the Soviet area of interest was too ambitious. Newly-installed President Truman attempted to use the power of the United State's economic leverage to put pressure on involved parties to support this plan, but these efforts proved ineffective.[72] Following this reversal, United States strategy adopted the policy advocated by Stimson; to resume diplomatic methods only after the atomic bombs had been dropped on Hiroshima and Nagasaki. This would mean the United States could negotiate from a position of having the bomb, while all parties would fully understand the potential catastrophic consequences of its use.

The policy was based on the results of the Trinity atom bomb test on 16 July 1945. During this it was discovered that an implosion-type plutonium bomb had a greater impact than had been expected. Consequently, at the Potsdam Conference, Truman revealed the complete extent of the insistence of the United States; it rejected applying any significant concessions, and clarified

[70] Rhodes, *supra* note 16*,* 618

[71] Declaration of Liberated Europe, *Yalta Conference* (10 February 1945): "the immediate reorganization of the present governments in Romania and Bulgaria […] immediate consolations to […] include representatives of all significant democratic elements 'three power assistance' in the holding of free and unfettered elections". Molotov, the USSR Foreign Minister, stated that "the Soviet government saw no reason for the powers to become involved in the domestic affairs of Bulgaria and Romania". Quoted in Gar Alperovitz*, Atomic Diplomacy: Hiroshima and Potsdam: the Use of the Atomic Bomb and the American Confrontation with Soviet Power* (Secker & Warburg, London 1965) 148-149

[72] On March 11, 1941 President Roosevelt signed Lend-Lease bills, which permitted him to "to sell, transfer title to, exchange, lease, lend, or otherwise dispose of […] any defense article […] for the government of any country whose defense the President deems vital to the defense of the United States."; "The Russian had already requested a large post-war credit, which Harriman estimated would amount to six billion dollars". The logic of the President was that "the United State could 'stand firm' on important issues 'without running serious risks'." See Alperovitz, *supra* note 71, 25-26

that in the case of there being no settlement, he was willing to postpone discussion of the matter until later.[73]

This strategy implied that the initial usage of this bomb was as a weapon of terror.[74] This was accepted by those who supported the decision to use the bomb, as well as by those in opposition to it. The major points of disagreement concerned the likely effects of the terror. Szilard and Bohr contended that if there was no possibility of obtaining equilibrium at zero, then there was no other option but to seek it at infinity; in other words, both the United States and the USSR would find it necessary to construct and stockpile atomic weapons indefinitely. The Truman and Byrnes viewpoint was to permit the United States to organise the post-war world so that a *Pax Americana* would exist, commencing in Manchuria and taking in Central and Eastern Europe. At that time, the association between nuclear power and aggressive diplomacy became clear; when the United States insisted that Bulgaria's elections be postponed, a demand which was made only four days following the Nagasaki bomb, comments were made regarding the nuclear

[73] Ibid, 173

[74] Senior advisors such as Dwight Eisenhower, Douglas MacArthur and William D Leahy declared their disagreements to the atomic bomb using highly emotive language.
Most of the senior advisors believed that Japan was ready surrender and using the bomb on inhabited cities was unnecessary. General Dwight Eisenhower stated: "I voiced to him my grave misgivings, first on the basis of my belief that Japan was already defeated and that dropping the bomb was completely unnecessary, and secondly because I thought that our country should avoid shocking world opinion by the use of a weapon whose employment was, I thought, no longer mandatory to save American lives." Likewise, Fleet Admiral William Leahy, Chief of Staff, noted that: "wars can't be won by destroying women and children." This quote had supported by Navy Ralph A. Bard who wrote "bombing without warning is contrary to the position of the U.S as a great humanitarian nation". See Holliston Perni, *A Heritage of Hypocrisy* (Pleasant Mount Press, Union Dale 2005) 68
The problem here was that the knowledge of military officers about using the bomb was limited, while at the same time the scientists had worked on the bomb without any political and military picture. One of member of the panel, J Robert Oppenheimer observed that "We didn't know beans about the military situation in Japan. We didn't know whether they could be caused to surrender by other means of whether the invasion was really inevitable. But in the backs of our minds was the notion that the invasion was inevitable because we had been told that." See Charles Thorpe, *Oppenheimer: The Tragic Intellect* (Chicago University Press, Chicago 2008) 164
Only a small group of politicians were aware of both situations. This meant that they were in a position of considerable power, which they utilised mercilessly. For instance, if the utilisation of the bomb had been delayed by a week in order to ascertain the impact of the Soviet declaration of war on Japan, as well as the subsequent swift collapse of the Japanese Manchurian army, then few American lives would have been lost. However, it was apparent that there was a race to drop the bomb prior to the Soviet declaration of war. It transpired that the US won that race by just one day. The Soviet Union reversed its pact of non-aggression with Japan on 7 August 1945, the day following the dropping of the bomb on Hiroshima.

bomb's place in the United States's newly-discovered "firmness". Following America's insistence that the government should be changed, the streets of Sofia were full of massive demonstrations as people shouted: "We have no fear of the nuclear bomb."[75]

Consequently, in the area of foreign policy a consensus developed that the United States ought to keep its nuclear monopoly for as long a time as it possibly could, also seek a method of exploiting such a monopoly at a time when everyone recognised that a new era was beginning. Groves was of the opinion that this monopoly may last for twenty years, while the Joint Chiefs of Staff, who were against disarmament, contended that wars are not caused by weapons, but by politicians. They argued: "armaments are a consequence and not a cause. The need for them, today as throughout history, arises from the existence of conflicting international aims and ideologies and will pass only with the passing of such fundamental reasons for conflict between nations". [76] In addition, there was a composite viewpoint, which contended that the United States ought to utilise its monopoly to pressurise the Soviet Union into accepting international arms control. [77]

With regard to domestic policy, before the Baruch plan was presented to the UN Atomic Energy Authority, Truman signed the Atomic Energy Act of 1946, on August 1 (with effect from January 1, 1947). This led to America's atomic

[75] *New York Times* (20 September 1945), quoted in Alperovitz, *supra* note 71, 216

[76] "They believe that present U.S. armaments are a vital factor contributing to our own as well as to international peace and security and that reduction of these armaments should not be considered independently of other problems affecting that peace and security. Prior to the settling of such problems the military requirements of the United States can not be determined. Foremost among these problems, from the military point of view, are the establishment of a system of effective international control of atomic energy which is acceptable to the United States; the conclusion of the peace treaties and enforcement of the terms therein having predominate military implications; and the conclusion of agreements for providing contingents of armed forces for the Security Council of the United Nations." See 'Memorandum by the Joint Chiefs of Staff to the Secretary of War (Patterson) and the Secretary of the Navy (Forrestal) (15 January 1947)' in S. Everett Gleason (ed), *Foreign Relations of the United States, 1947*, *Vol I* (United States Government Printing Office, Washington 1973) 365-366

[77] This was mentioned by James Conant, who was President of Harvard University as well as being a Chairman of the National Defense Research Committee (NDRC): "I am firmly convinced", he told Stimson, "that the Russians will eventually agree to the American proposals for the establishment of an Atomic Energy Authority of world-wide scope, provided they are convinced that we would have the bomb in quantity and would use it without hesitation in another war." See James G. Hershberg, *James B. Conant: Harvard to Hiroshima and the Making of the Nuclear Age* (Stanford University Press, Stanford 1995) 298; Sherwin, *supra* note 62, xxvii

power coming under the civil authorities by means of the Atomic Energy Commission. Consequently, the publication of any "restricted information" regarding nuclear energy, even if it had no military relevance, would be subject to a prison sentence of twenty years. It also led to it being a felony for any American corporation with a foreign associate to have any connection with the manufacture of fissionable material.[78] This marked the end of United States scientific collaboration with the emerging Eastern Bloc nations. It also ended collaboration with the United Kingdom and Canada, its nearest allies, which had originally been of assistance to the United States in developing the nuclear bomb.[79] It was not until 1958 that the Government of the United States consented to share any nuclear information with the United Kingdom legally. Moreover, the fact that the United States was not inclined to render assistance to the United Kingdom in the development of its nuclear industry despite close collaboration in this area during World War II, including collaboration on the production of the nuclear weapon, indicated that the United States would not be willing to share "the benefit of scientific research" with every state.

The nuclear secrecy policy ratified by the Senate of the United States in the Atomic Energy Act received the President's approval. This was to be expected, because in his Special Message regarding nuclear energy delivered on 3 October 1945 President Truman requested the United States legislature to begin work on this act, advocating; "drastic" and extensive action to manage the nuclear industry.[80] He specifically requested that the Atomic

[78] Edward H Levi, 'The Atomic Energy Act: An Analysis' (1 September 1946) 2 (5-6) *Bulletin of the Atomic Scientists* 18, 18

[79] Roosevelt's approval of the "restricted interchange" policy of October 1942 caused Churchill to warn him that it would "limit drastically interchange of technical information and entirely destroy the original conception of [here he quoted from Roosevelt's letter to him of October 11, 1941] 'A coordinated or even jointly conducted effort between the two countries.'" "That we should each work separately," he warned, "would be a somber decision." See Sherwin, *supra* note 62, 73. This situation, however, changed under the Quebec Agreement signed by Churchill and Roosevelt in August 1943 and the Hyde Park Memorandum of September 1944. Securing atomic partnership was also part of Atlee's intentions for the November 1945 declaration.

[80] Harry S. Truman, 'Special Message to Congress on the Atomic Bomb' (*Harry S. Truman Presidential Library & Museum*, 3 October 1945) available at <https://trumanlibrary.org/publicpapers/index.php?pid=165&st=&st1= > accessed 20 September 2017

Energy Commission should have much of the authority that the Acheson-Lilienthal report had advocated for their Atomic Development Authority.

While the international position had its model set within the UN approach, accompanied by optimism and utopian ideals, the nationalist position did not possess any ideological equivalent. This situation was particularly serious, as the absence of a clear ideological narrative setting out the benefits of the United States exploitation of its atomic monopoly risked surrendering any respect which the United States had gained in the past through its contribution to the defeat of Nazi and Japanese militarism. From a broad viewpoint, as claimed by Bohr and Szilard, the attempt to preserve the United States monopoly led to the inevitability of the Cold War (another method of self-vindication).

The exact composition was supplied on 22 February 1946 by George Kennan, a junior state department diplomat. While he was working at the Moscow Embassy as the Chargé d'Affaires, Kennan was asked by Washington to provide an explanation of an election speech which Stalin had delivered on 9 February. It was noted that Russian nationalism rather than communist dogma had been the central ideological tenet of the Soviets during the war. An example of this was the disbanding of the Communist International and the re-establishment of the Orthodox Church in 1943.

Kennan examined the characteristics of the Soviet regime. He stated that: "The very disrespect of Russians for objective truth —indeed, their disbelief in its existence — leads them to view all stated facts as instruments for furtherance of one ulterior purpose or another. There is good reason to suspect that this government is actually a conspiracy within a conspiracy".[81] Metaphorically speaking, Kennan argued that the best way to respond to a state acting in this way was to seek a means to contain its influence and

[81] 'The Chargé in the Soviet Union (Kennan) to the Secretary of State' in S. Everett Gleason (ed), *Foreign Relations of the United States, 1946, Eastern Europe, The Soviet Union*, *Vol VI* (United States Government Printing Office, Washington 1969) 674

effects, much like the way an atomic reactor's pressure vessel contains the radioactive fuel it holds.[82]

Additionally, this view was expounded in another dossier regarding the Cold War, "The United States Objectives and Programs for National Security". This outlined the plans of actions of the United States for its involvement in the Cold War and attached a new emphasis to Kennan's opinion that the Soviet Union, "unlike previous aspirants to hegemony, is animated by a new fanatic faith, antithetical to our own, and seeks to impose its absolute authority over the rest of the world."[83] Consequently, "conflict has become endemic and is waged, on the part of the Soviet Union, by violent or non-violent methods in accordance with the dictates of expediency".[84] It is possible to meet this by containment, in conjunction with a policy of "calculated and gradual coercion"[85] in order to undermine the Soviet system in the course of time. Such a policy could prove effective in a nuclear arms race.

1.5 The Baruch Plan

The plan supported by Baruch had to encompass seemingly incompatible attitudes to the role of nuclear weapons in the post-war era. However, one possible approach mirrored that taken by the nuclear scientists.[86] This was essentially a matter of requesting international control through the Atomic Energy Authority while advancing national control through the Atomic Energy Commission. However, in order to guarantee the effectiveness of international control, it was argued that any nation found guilty of conducting "dangerous" activities ought to receive deserved "punishment", including possible military

[82] In the words of Henry Kissinger, Soviet policies are described as the "inherent bad faith" model. "A perspective of this kind is obviously self-perpetuating, for the model itself denies the existence of data that could disconfirm it. At the interpersonal level such behaviour is characterised as abnormal – paranoia. Different standards seem to apply at the international level." See Henry Kissinger*, The Necessity for Choice: Prospects for American Foreign Policy* (Chatto&Windus, London 1961) 17. See also Sherwin, *supra* note 62, 153

[83] 'United States Objectives and Programs for National Security' *National Security Council* (14 April 1950) NSC-68, para, I

[84] Ibid.

[85] Ibid, para, VI

[86] According to David Tal, the scientists' intention was not to demilitarise the use of nuclear energy, but to offer a way to obtain nuclear weapons while at the same time dealing with the rhetoric of banning them. See David Tal, *The American Nuclear Disarmament Dilemma, 1945-1963* (Syracuse University Press, New York 2008) 2

intervention, and that any such intervention could not be subject to a UN Security Council veto. [87]

In reality this idea was impracticable, largely because a precondition of the Soviet Union accepting United Nations membership was that it would have a veto over resolutions of the Security Council.[88] Unless this veto could be withdrawn in the case of major decisions, any UN 'police' actions to punish countries which disregarded an agreement on disarmament would be extremely unlikely to be approved. From its inception, the permanent members of the Security Council were the Soviet Union, China, France the United Kingdom and the United States. The initial temporary members were Australia, Brazil, Egypt, Mexico, the Netherlands, and Poland. This meant that the Soviet Union could expect to lose any vote by a margin of nine to two, and would mean that without a power of veto, the Soviet Union would be the only state likely to be subject to UN punishments for infringements in this area. Furthermore, as claimed by Acheson, this treaty was prepared with the intention of keeping the peace, but contrastingly, it presented a precise *causus belli* for a third world war.[89] In addition, at the time when the Soviets were considering their response to Baruch, the United States conducted the two Crossroads tests, the fourth and fifth atomic explosions, at the Bikini Atoll in the Marshall Islands.[90]

In Western Europe, the idea of international control received a major boost with the inauguration of the European Coal and Steel Community in 1951. This later proved to be a significant step towards the formation of the

[87] UN Atomic Energy Commission, 'The Baruch Plan' (14 June 1946) AEC/PV. I, 4-14

[88] The Soviet Union expected a veto on all matters before the Yalta meeting on 4-11 February 1945, at which Stalin agreed that the veto would not be used in a procedural vote. See Paul Taylor, A. J. R. Groom, *United Nations at the Millennium: The Principal Organs* (Continuum, New York 2000) 14

[89] He argued that 'an agreement on nuclear disarmament is pointless, since the wrongdoer couldn't be any state other than the Soviet Union or the United States, which means any effort to enforce the agreement will lead to a conventional war between East and West'. He concluded "This is actually the situation which confronts us today without a treaty." See 'Memorandum of Conversation, by John C. Ross, Adviser, United States Delegation to the United Nations General Assembly' in S. Everett Gleason (ed), *Foreign Relations of the United States, 1946, General; the United Nations, Vol I* (United States Government Printing Office, Washington 1972) 984

[90] The first, "Shot Able" was device dropped on 1 July 1946, the second test, "Shot Baker" on 25 July.

European Union. However, it should be remembered that Europe was emerging from thirty years of warfare and political upheaval, and may have been more open to international controls than the United States and the Soviet Union, neither of which was unlikely to accept any imposition of international control by the other. The Soviet Union's official position was that it had no objection to international control as a matter of principle. When Sunday Times correspondent, Alexander Werth questioned Stalin on this matter on 17 September 1946, asking: "How, in your opinion, can atomic power best be controlled? Should this control be created on an international basis, and to what extent should the powers sacrifice their sovereignty in the interests of making the control effective" Stalin's response was that "Strict international control is necessary"[91] On learning that a nuclear bomb had been dropped on Hiroshima, Stalin's reaction was "War is a barbaric activity, but the utilisation of the atomic bomb is a super barbarity".[92]

The Baruch plan had occupied a large amount of time, but ultimately failed following two years of deadlocked negotiations at the Atomic Energy Commission. The Atomic Energy Commission pronounced itself as expired in 1948 without having attained anything.[93] As well as the amendments made by Baruch, the principal difficulty was that the United States expected the Soviet Union to dismantle its nuclear programme and agree to inspections, while the

[91] 'Stalin Cable Exchange with United Press: Denies Tension Growing With America' (*UPI Archives*, 20 October 1946) available at <https://www.upi.com/Archives/1946/10/29/Stalin-cable-exchange-with-United-Press-Denies-tension-growing-with-America/1017711832459/> accessed 20 November 2017

[92] David Holloway, *Stalin and the Bomb: The Soviet Union and Atomic Energy, 1939-1956* (Yale University Press, New Haven 1994) 132; Kevin Ruane, *Churchill and the Bomb in the War and Cold War* (Bloomsbury Publishing, London 2016) 144

[93] "The impasse was initially somewhat masked by the work of the experts, who first agreed that the control of atomic energy was technologically feasible. Then, during the autumn of 1946, with a background of mounting Cold War verbal hostilities at the UN General Assembly, and of certain dissension among American officials on the effect of their plan on their country's safety, the work of the UNAEC centered around the search for compromises on the most delicate points: the extent of international management, the transitional stages, and the suppression of the right of veto." See Goldschmidt, *supra* note 41, 60. What was the main sticking point? "The first task of the authority was to be the preparation of a global inventory of uranium resources, which as well as all of the fissile materials were to be placed under its ownership. This would have implied an early admission of foreign personnel in the Soviet Union, far earlier than the time when the United States would have had to surrender its nuclear weapons to the authority. Ibid 59. On 17 May 1948, UN Atomic Energy Commission reported, "it had reached an impasse in its work and that no useful purpose could be served by carrying on further negotiations at the Commission's level". See Paul C. Szasz, *The Law and Practices of the International Atomic Energy Agency*, Legal Series No.7 (IAEA, Vienna 1970) 18

United States retained their nuclear weapons for an indefinite time period. In contrast, the Soviet Union expected the United States to disarm before the inspection regime commenced. However, with the declaration of the Truman Doctrine in 1947,[94] any possibility of an Atomic Development Authority as advocated by Acheson-Lilienthal was finished, even if its ideas and principles continued to have support for many subsequent decades.

1.6 "The Man of Peace"

In 1953, in a speech to the UN, United States President Eisenhower commenced by saying that the United State's nuclear monopoly had now been breached by the Soviet Union and the United Kingdom. Subsequently, he forecast that the information possessed by a number of states would eventually be possessed by other countries also. He further predicted that this would result in a dangerous situation in which the two nuclear superpowers would suspect each other of malicious intent for an indeterminate time period, while the rest of the world looked on in fear. He continued by saying that if this situation was to be averted, the United States would need to seek something greater than a fundamental decrease or even the abolition of the use of nuclear matter with military intentions. Following this, he asked who could not be certain that if every scientist and technician in the world had adequate amounts of fissionable material for the purpose of evaluating and planning their ideas, that this capacity would be speedily converted into global, commercial and efficient utilization. Therefore, he suggested the establishment of an international uranium "bank", to which countries could

[94] "Truman's formulation of the Truman Doctrine in March 1947 formalised the cold war and finalised the revolutionary shift in American policy which the atomic bomb had fomented […] Truman spoke gloomily of a world frighteningly and dangerously but clearly divided between the purveyors of good and evil, light and darkness. Conjuring all the drama of this universal struggle, Truman made it imperative that every nation 'choose between alternative ways of life'. He left no doubt where a righteous America stood in this crisis: 'I believe that it must be the policy of the US to support free peoples who are resisting attempted subjugation by armed minorities or by outside pressures.'" See Stephen E. Ambrose, *The Rise to Globalism: American Foreign Policy since 1938* (8th edn, Penguin, London 1997) 85-86; "The Truman Doctrine established that the United States would provide political, military and economic assistance to all democratic nations under threat from external or internal authoritarian forces. The Truman Doctrine effectively reoriented US foreign policy, away from its usual stance of withdrawal from regional conflicts not directly involving the United States, to one of possible intervention in faraway conflicts". See US Department of State, 'The Truman Doctrine, 1947' *Milestones in the History of US Foreign Relations: 1945-1952*, available at < https://history.state.gov/milestones/1945-1952/truman-doctrine> accessed 20 November 2017

contribute, under the coordination of an international nuclear energy agency monitored by the UN. He continued that such an agency would be a "great virtue", as it would be undertaken with no provocation or reciprocal distrust of any endeavour to initiate a completely adequate system of universal inspection. In an idealistic rewording of Acheson-Lilienthal Eisenhower continued, "experts would be mobilized to apply atomic energy to the needs of agriculture, medicine and other peaceful activities. A special purpose would be to provide abundant electrical energy in the power-starved areas of the world".[95]

Eisenhower's speech implied a departure from the total confidentiality of the Atomic Energy Act. Its fundamental recommendation was the inauguration of an organisation which in effect resembled the Atomic Development Authority without its supranational aspirations. At the same time, it supported maintaining a group of scientific specialists with the capacity to provide help to states which fulfilled particular nuclear-related commitments. The IAEA, the first functional international control body to be established, emerged from this concept in 1957. After a period of 11 years, the "binding commitment in a multilateral treaty to the goal of disarmament by the nuclear-weapon States"[96] emerged as the NPT.

The NPT came into effect on 5 May 1970. The large number of signatories to this treaty meant that its terms dealing with issues of non-proliferation and disarmament would be almost universally applied. It also contained provision for review of its workings, enabling it to become the main international forum for the discussion of nuclear non-proliferation issues. Only India, Pakistan and the Democratic Republic of Korea chose to remain outside the NPT.

The NPT focused on three main areas: non-proliferation, disarmament, and the right of states to use nuclear energy for peaceful purposes. Articles I and II cover key non-proliferation responsibilities and detail prohibitions which apply

[95] Dwight D. Eisenhower, 'Atomic for Peace Speech' the 470th Plenary Meeting of the United Nations General Assembly (*IAEA, 8 December 1953)* available at < https://www.iaea.org/about/history/atoms-for-peace-speech> accessed 20 November 2017

[96] 'Treaty on the Non-Proliferation of Nuclear Weapons (NPT)' (*United Nations Office for Disarmament Affairs*) available at < https://www.un.org/disarmament/wmd/nuclear/npt/> accessed 18 December 2017

to both NWS and NNWS. Article lll stipulates that states must submit to international monitoring of their nuclear programmes and any exports relating to these activities. Article lll.1 places all signatories under the aegis of the IAEA, which is empowered take continuously evolving measures to ensure that no state engages in hidden or secret uses of its nuclear material, while Article lll.2 details the regulatory regime for the control of the international market in nuclear-related products and materials. Under Article IV of the NPT, member states are guaranteed their right to use nuclear energy for peaceful purposes, and are encouraged to collaborate to develop these uses. However, it is stated in Article IV.1 that the core non-proliferation provisions of the treaty will have precedence over any provisions dealing with peaceful applications of nuclear technology. Article IV.1 also protects states' rights not be subject to external interference except under the terms of the NPT. Article IV.2 allows for the transfer of technology to the less developed NTP states. Article VI deals with matters relating to the reduction and eventual elimination of nuclear weapons. It also details incentives that can be used to persuade NNWS to maintain policies that align with a non-proliferation agenda.

Overall, the NPT provided a comprehensive and robust legal structure that could offer member states a secure, stable and peaceful international environment in which the spread of nuclear weapons could be checked and controlled. This encouraged states to feel more confident. It also protected their right to use nuclear energy for peaceful purposes, and through the review cycle provided a structure that could facilitate discussion of nuclear issues between signatory states.

However, while Acheson-Lilienthal distinguished nuclear development as either innocuous or hazardous, the new system distinguished the member states as either safe or dangerous, and the states which were considered to be dangerous were to be subject to inspection. While universal disarmament had been the original goal of supporters of international control, vertical proliferation became the focus of attention. This was to be managed through bilateral discussions between the nuclear superpowers. Although Article IV of the NPT should have had some bearing on these discussions, in reality it had

little impact, and overall the talks did not make any substantial difference to the nuclear arms race.[97] The bomb which was dropped on the city of Hiroshima, nicknamed the "Little Boy Bomb"; had a power of around 15 kilotons. However, the bomb dropped on Nagasaki which was known as the "Fat Man Bomb" was more powerful at 21 kilotons.[98] At the time of Eisenhower's speech, the strength of thermonuclear bombs was measured in megatons; one megaton being equal to 1,000 kilotons.[99] Eisenhower also stated that there was a deployment of "tactical" nuclear weapons in every department of the United States military.

This categorisation, irrespective of Truman's viewpoint that the United States was a suitable "trustee" for the nuclear weapon, showed that the United States could be ruthless in using the bomb as a weapon of terror to advance its own objectives, and would consider using it for these ends in the future.

In November 1950, as Chinese forces defeated UN forces at the Battle of Chosin Reservoir in Korea, consideration was given to the tactical deployment of nuclear weapons.[100] In 1953, whilst talks concerning an armistice to end the Korean War were being held, the possible use of nuclear weapons was again discussed.[101] Similarly, near the end of the blockade of Dien Bien Phu

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[97] Article VI read as: "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." Nevertheless, Nixon's ambition was to keep the United States leadership of nuclear weapons' developments. For example, he authorized the development of a new kind of missile (MIRV) which allowed multiple warheads. Each of these missiles could give three to ten separately targeted warheads which means fewer missiles could lunch more bombs. See Ralph E. Lapp, 'Salt, MIRV and First-strike' (March 1972) 28 (3) *Bulletin of the Atomic Scientists* 21, 21

[98] John Malik, 'The Yields of the Hiroshima and Nagasaki Nuclear Explosions' (1985) *Los Alamos National Laboratory,* LA-8819, 25

[99] 'Total Megatonnage of U.S Nuclear Weapon Stockpile, 1950-1984' (July 1987) 43 (6) *Bulletin of the Atomic Scientists* 64*,* 64

[100] 'President Warns We Would Use Atomic Bomb in Korea, If Necessary; Soviet Vetoes Plea to Red China' *New York Times* (1 December 1950) 1. Also Truman clarified in a press conference that MacArthur is authorized to use atomic bombs if he thinks it's necessary. See Ambrose, *supra* note 94, 121

[101] "Once the armistice was achieved, on July 27, 1953, the Eisenhower Administration continued to define plans to use nuclear weapons if the Communists renewed the war". See Bernard Gwertzman, 'U.S. Papers Tell of 53 Policy to Use A-Bomb in Korea' *The New York Times* (8 June 1984) available at<http://www.nytimes.com/1984/06/08/world/us-papers-tell-of-53-policy-to-use-a-bomb-in-korea.html?mcubz=0> accessed 26 September 2016. In the National Security Council, President Eisenhower and Secretary of State each mentioned the possibility of using atomic bomb against Korea. President expressed the view that "we should consider the use of tactical atomic weapons on the Kaesong area, which provided a good

in Vietnam during 1954, a tactical deployment of nuclear weapons against the North Vietnamese forces was considered.[102] Further possible use of tactical nuclear arms was also discussed after the January 1955 assault by Chinese forces on the islands of Matsu and Quemoy which had been occupied by the Chinese Nationalist Government.[103] President Nixon was later to contemplate what was called a "madman strategy"[104] to compel the North Vietnamese to make peace by threatening them with the bomb. In 1962, during the Cuban missile crisis, the strategic utilisation of nuclear weapons was only narrowly averted. This was, in fact, the climax of "brinksmanship";[105] the policy employed by John Foster Dulles, Eisenhower's Secretary of State. These events show that states which were regarded as safe seriously considered the use of nuclear weapons. This implies an even greater risk of their use by states considered to be safe.

1.7 Conclusion

Nuclear non-proliferation has become a major theme of international politics in the 21st century. From this perspective it may be possible to overstate the significance of the NPT and its impact on relations between the Cold War superpowers. Achieving global non-proliferation was certainly a key component of talks between the USSR and the USA in the 1960s, but from a contemporary perspective the NPT itself does not appear to have been an effective mechanism for advancing this idea. It can be regarded as an

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target for this type of weapon". See 'Memorandum of Discussion at the 131st Meeting of the National Security Council, Wednesday, February 11, 1953' in William Z. Slany (ed), *Foreign Relations of the United States, 1952–1954, National Security Affairs, Vol II, Part 1* (United States Government Printing Office, Washington 1984) 237. See also Ambrose, *supra* note 94, 133-135

[102] It is still questionable weather US Secretary of State, John Foster Dulles, offered France two atomic bombs for use at Dien Bien Phu. See Fredrik Logevall, '"We might give them a few." Did the US offer to drop atom bombs at Dien Bien Phu?' (*Bulletin of the Atomic Scientists,* 21 February 2016) available at < http://thebulletin.org/we-might-give-them-few-did-us-offer-drop-atom-bombs-dien-bien-phu9175> accessed 20 November 2017

[103] Ambrose, *supra* note 94, 142. United States Secretary of State, Dulles, thought that a small atomic air burst, with minimal civilian casualties, would do the job quickly, and "the revulsion might not be long lived." See ibid, 141-144

[104] "I call it the Madman Theory, Bob. I want the North Vietnamese to believe I've reached the point where I might do anything to stop the war. We can't restrain him when he's angry — and he has his hand on the nuclear button". See H. R. Haldman, *The Ends of Power* (New York Times Books, New York 1978) 122

[105] In an article published by Life Magazine, Dulles defined his theory as "The ability to get to the verge without going to war is the necessary art." See James Shepley, 'How Dulles Averted War' (16 January 1956) 40 (3) *Life* 70

agreement which was informed primarily by the political stances of the Cold War superpowers, and as such (until very late in its negotiations process) was relevant almost exclusively to their interests and ambitions. This particularly relates to the superpowers' wish to achieve a stable status quo regarding nuclear weapons in Europe at a time when political instability and potential nuclear confrontations were destabilizing the situation in Europe through changing perceptions of the balance of threat between the USA and its allies, and the USSR and its satellite states. The NPT did not have the aspect of an agreement that could be regarded as the foundation of an international system of security governance. The NPT was conceived and realised in the context of the inter-relatedness of superpower interests in Europe and wider international non-proliferation issues. It was in the superpowers' interests to try to stabilise the situation through seeking a solution to the non-proliferation problem.

The number of states party to the treaty increased to over a hundred by 1980 and the NPT itself deserves much of the credit for this outcome. However, this does not mask the fact that most of the near-nuclear countries such as Israel, South Africa, Brazil, Argentina, India and Pakistan refused to join the NPT.

As Walker has stated, the world order in the context of nuclear armament was "precarious, controversial and incomplete."[106] Despite the efforts spent to bring it about, and the considerable achievement of producing an international treaty dealing with non-proliferation, the NPT faded from prominence relatively quickly, and was never a significant consideration in superpower deliberations. Nevertheless, it helped to establish an order which would later become the basis for a far more robust and wide-reaching nuclear non-proliferation agreement.

[106] William Walker, *A Perpetual Menace: Nuclear Weapons and International Order* (New York, Routledge 2012) 54

Chapter Two
How Iran Has Developed into a Threatening State

2.1 Introduction

It is important to understand that in such complex international political situations, there are often a number of smaller inter-related events which first take place before ultimately culminating in a greater outcome.[107] Therefore, an accurate analysis of the development of UK and US foreign policy towards Iran since the Qajar dynasty reveals an important chapter in the history of Iran's nuclear issue. This analysis provides the necessary historical platform upon which further examination can be fully conducted. It is not possible to understand the present situation without understanding how relations between Iran and the West have developed over the years and understanding what factors, both internal and external, have affected these relations. This chapter will focus on how Iran came to be regarded as a dangerous state by Western governments and examines whether present policies have been shaped by past experiences.

2.2 From the Qajar Dynasty to the Pahlavi Era

When Shah Nasor od-Din died in 1896, there was only one railway in Persia, connecting Tehran with the Shah Abdol-Azim shrines; a distance of five miles.[108] High mountains separated the densely populated areas from the seas and none of the rivers were navigable. Transport was effectively only by land across difficult terrain.[109]

Even though the potential advantages of rail transport were clear, there were no plans to construct such a network. This was because the United Kingdom and Russia considered what is now known as Iran to be a buffer state, and

[107] Peter A. Hall, 'Aligning Ontology and Methodology in Comparative Research', in J. Mahoney, D. Rueschemeyer (eds) Comparative Historical Analysis in the Social Sciences (Cambridge University Press, Cambridge 2003) 387

[108] Ella Constance Sykes, *Persia and its People* (Routledge, London [1910] 2011) 165

[109] Patrick Clawson, 'Knitting Iran Together: The Land Transport Revolution 1920-1940' 2(3/4) *Iranian Studies* 235, 235. The Karun river between Khoramshahr and Ahvaz is the only river suitable for navigation of boats and small ships.

each power considered it in their interests to make it as slow and difficult as possible for the other to move troops and materials across the country. Consequently, no railway was built. It was also required that Iran's political system should remain responsive to the major strategies of the United Kingdom and Russia. These two empires were different in character. The British Empire stood for democratic reform, constitutional monarchy, and industrial innovation, whereas the Russian Empire stood for intransigent conservatism and absolute monarchy. Consequently, both empires drew support from different groups in Iran. Nevertheless, both empires had a common interest in sustaining a weak and unreformed monarchy in power. As one historian stated, Iran was treated as "a dupe and a cat's-paw". [110]

The United Kingdom supported the Qajar dynasty[111] because companies and persons based in other countries were allowed by the Shah to control portions of the Iranian economy and also of the nation's natural resources. These rights were given in return for monetary contributions to the Shah, which supported his government. A £40,000 cash concession was offered by Baron Julius de Reuter in 1872.[112] This concession was paid beforehand. The agreement also required that a fair rent be paid in a reciprocal arrangement, and provided for the building of a railway and a tramcar. Reuter was granted rights to all mineral extraction entitlements, all irrigation work that had not already been exploited, a national bank, and many types of agricultural and industrial schemes.[113] Later, Lord Curzon, who was a strict political and monetary imperialist, described this as the fullest and most exceptional surrender of a nation's total stock of industrial resources to a foreign interest which has probably never been previously imagined.[114]

[110] As Lord Salisbury told Lord Dufferin about events in Persia in December 1879 that "Whatever happens will be for the worse, and therefore it is in our interest that as little should happen as possible." See Antony Jay, *Lend Me Your Ears: Oxford Dictionary of Political Quotations* (4th edn, Oxford University Press, New York 2010)
[111] Qajar dynasty (1785–1925) had come to power when Mohammad Khan Qajar (1785-1797) united Iran after long time of internal division.
[112] George Nathaniel Curzon, *Persia and the Persian Question,* Vol 1 (Cambridge University Press, Cambridge [1892] 2015) 475
[113] Ibid, 480
[114] Ibid.

Russian opposition obstructed this concession, as did internal dissatisfaction among the bazaari[115] and the ulama.[116] Opposition to concessions was widespread, with long-term consequences in particular for two concessions. The first of these was the 1890 decision to allow the British Tobacco Corporation to have a monopoly on growing and exporting tobacco. One of the effects of this was to strengthen nationalist sentiment in Iran.[117] The second concession to cause particular opposition was when William Knox D'Arcy, an English entrepreneur was awarded the right to explore Iran for oil for a period of 60 years for a payment of £20,000, which was the equivalent value of the D'Arcy company shares, in addition to 16 percent of any future profits. This arrangement excluded the five northern provinces of Iran which were under the influence of Russia.[118] In subsequent years, the D'Arcy concession grew steadily in financial and economic significance, and consequently Iran's importance also grew. Instead of being perceived as a way to block Russian ambitions regarding India, Iran became economically as well as strategically important for Britain. Following the triple entente in 1907, when Russia and France became allies of the United Kingdom, it's major rival became Germany, leading to the start of a new arms race.[119]

In the course of this change in British-Iranian relations, Iran itself was experiencing a period of tumult as the social forces which had become apparent during the tobacco revolt began to compel changes to the Iranian political process. As the result of a constitutional revolution in 1905, the first parliament of Iran, known as the Majlis was inaugurated in 1906. This limited

[115] Bazaari is the name given to Iranian merchants; whose influence often extends beyond their own sector.
[116] Ulama is a body of Muslim scholars who have advanced knowledge in Islamic matters. After a year, Naser al-Din Shah (son of Mohammad Khan Qajar) terminated the Reuter concession due to immense pressure from the ulama and also Britain's reluctance to support Reuter's ambitions. In 1889, However, the Shah granted Reuter a second concession to establish the first Iranian State Bank with exclusively rights to print bank notes and exploit the mineral wealth of Iran. See ibid, 489
[117] Ulamas declared tobacco to be religiously forbidden until the Shah cancelled the concession. In response to their instruction, all the people, including the wives in the harem of Nasir ed-Din Shah, laid down their pipes in defiance.
[118] Dilip Hiro, *Iran Under the Ayatollahs* (Routledge, New York 2013) 17-18
[119] The Royal Navy was engaged in an arms race with Germany. Churchill regarded the security of Britain as dependent on Iran's oil, he wrote, with oil "we should be able to raise the whole power and efficiency of the Navy to a definitely higher level; better ships, better crews, higher economics, more intense forms of war-power". See Winston Churchill, *The World Crisis Volume I: 1911-1914* (Bloomsbury, London [1950] 2015) 87

the authority of the Shah (otherwise known as the Mashruteh). Following this, in June 1908, the national assembly was attacked by Shah Mozaffar od-Din's Cossack Brigade, with many assembly members being arrested and subsequently executed. [120]

In July of the following year the Shah was forced by the constitutionalists to flee into exile in Russia. However, the Majlis soon became divided into factions of conservatives and radicals, leading to a breakdown in law and order. In the First World War, Iran was divided into three zones: the north of the country became a Russian zone, the western area of the nation became an Ottoman zone and the south-eastern part became a British zone, while 'Iranian' forces occupied Tehran. In the 1917-18 famine, an estimated 10 percent of the population died, [121] and the 1919-20 influenza pandemic resulted in a loss of 60 percent of the country's export market. [122] These events led to an effective collapse of government of Iran, which with the collapse of the Ottoman caliphate and the civil war being fought in Russia, meant that Iran subsequently became effectively subject to British rule.

Curzon endeavoured, in 1919, to gain from this circumstance by drawing up a treaty which would have led to Iran becoming a British protectorate without any control of its finances, oil or foreign policy. [123] Ahmad Shah, aged 21, agreed to these terms. However, it led to the reformation of the constitutional coalition, which forced the government to collapse. In addition it persuaded General Ironside, who commanded the British military in Iran, of the

[120] The constitutional revolution had limited the Shah's power, and executions could not be ordered without going through a legal process. However, any threat of political opposition was eliminated. For example, the Prime Minister of Naser al-Din Shah, Amir Kabir was taken from the palace and murdered with order of Shah in 1852. Abdolhossein Teymourtash, the first Minister of Court of the Pahlavi Dynasty, was murdered in prison in 1933 due to his secret negotiations with the APOC and Seyyed Hassan Modarres, the leader of the ulama, who openly disapproved of Reza Shah's rule was murdered in prison in 1937.

[121] Sadegh Abbasi, '8-10 million Iranians died over Great Famine caused by the British in late 1910s, documents reveal' *Khamenei.ir* (4 November 2015) available at <http://english.khamenei.ir/news/2197/8-10-million-Iranians-died-over-Great-Famine-caused-by-the-British> accessed 20 November 2017. For great details see Mohammad Gholi Majd, 'The Great Famine and Genocide in Persia, 1917-1919' 38 (1) *Iranian Studies* 192

[122] 65% of trade had been with Russia which decreased to 5% by end of World War I. See Michael Axworthy, *Iran: Empire of the Mind. A History from Zoroaster to the Present Day* (Penguin, London 2007) 218

[123] Hiro, *supra* note 118, 22. For full text of the agreement see, 'Anglo-Persian Agreement of 1919' (1985) II (1) *Encyclopedia Iranica* 59

impossibility of some of the terms contained in this treaty ever being implemented. In view of this, Ironside commissioned Reza Khan, a former sergeant of the unit who apparently had leadership abilities, to command the fighting unit.[124] Ironside's decision may have been prescient, because after a period of four years, the last Qajar was removed by the Majlis, and Reza Shah Pahlavi (the name he now used) was appointed to be the new Shah.

This action by the Majlis deputies appears inconsistent. The first objective of the constitutional revolution was to discontinue the control of imperial landlords who operated primarily for their own benefit. The second objective was to replace the influence of foreign powers through establishing a centralised contemporary nation state with a government whose aim was to further the interests of the nation. An example of this would be the construction of a rail network, as well as a re-negotiation of the conditions of D'Arcy's concession. Reza Shah was expected to achieve these goals. As a result, in order to make it easier to reach these objectives, the constitution was terminated and the Majlis was discontinued as a democratic assembly.[125]

2.3 A Golden era in Persia

Reza Kahn Pahlavi remained in his position until World War II, when Iran came to play a role in American and British lend-lease assistance for the USSR.[126] At the conclusion of the 1930s, the rule of the Shah was not popular with the majority groups in the country.[127] Therefore, in 1941, when Iran was occupied by the Allies, Reza Khan was forced to relinquish his position to Mohammad-Reza Pahlavi, his son.[128] When the new Shah was crowned in 1941, he promised to return to a system of constitutional monarchy after an

[124] Ironside noted in his diary: "He seemed to me a strong and fearless man who had his country's good at heart." See Lord Ironside (ed), *High Road to Command: The Diaries of Major-General Sir Edmund Ironside*, *1920-1922* (Leo Cooper, London 1972) 152-161

[125] Reza Shah increased his power by making amendments in Article 48 of the Constitutional Law to give him the power to dissolve the Majlis and the right to veto any laws passed by the Majlis.

[126] About five million tons were delivered over the course of the war.

[127] Islam was the main binding cultural influence among most of the people. Despite this awareness, Shah adopted Western ideas and practices; he forced men to shave their beards and wear Western attire. Meanwhile women were no longer allowed to wear the Islamic hijab.

[128] The reason for the Allies' action was because the Shah declared Iran neutral in World War II and, refused to expel German nationals from the country. See Michael Axworthy, *Revolutionary Iran: A History of the Islamic Republic* (Oxford University Press, New York 2016) 43-45

18-year recess, leading to contested elections to the Majlis taking place in 1943.

The fall of Reza Shah was followed by seven years of complex and widespread political, religious, social and economic turmoil.[129] Throughout this time, Muhammad Mossadegh remained a central figure, recognised as such both within Iran and outside the country.

Mossadegh had formed his political aims at an early stage of his life and appears to have maintained his focus on these objectives in the course of every subsequent event or action, including his opposition to Reza Khan.[130] Regardless of his perceived idiosyncrasies, his reputation for political integrity and patriotism engendered admiration among many of his fellow countrymen. This was even acknowledged by some of his opponents. Furthermore, in a nation with a history filled with violent upheavals, Mossadegh's approach was mainly constitutional and non-violent.[131] He was a "charismatic" leader.[132]

Iran faced a major crisis when the Shah attempted to broker an additional deal with the Anglo-Iranian Oil Company (AIOC) (renamed as such 1935). In 1933, Reza Shah had agreed to increase Iran's royalties by an amount representing 20 percent of the corporation's profits. [133] In 1949 AIOC Chairman, Sir William Fraser, went to Tehran to propose a deal in which an additional agreement to the contract pledged that AIOC's annual payment

[129] "Newspapers, political parties, labour unions and social organisations blossomed, but so did criminal gangs. The fear of authority that Reza Shah had instilled in people melted away. When one upper-class woman reprimanded her chauffeur for turning the wrong way into a one-way street, he replied, "Oh! It does not matter, now Reza Shah has gone." See Steven Kinzer, *All the Shah's Men: An American Coup and the Roots of Middle East Terror* (John Wiley & Sons, Hoboken 2003) 63

[130] In 1940, Reza Shah had ordered Mossadegh to be imprisoned indefinitely without charge, Ibid, 61. For further details about Mossadegh see Christopher de Bellaigue, *Patriot of Persia: Muhammad Mossadegh and a Very British Coup* (Bodley Head, London 2012)

[131] William Averell Harriman (Secretary of Commerce under President Truman) described Mossadegh as "different from any in my diplomatic experience […] Under pressure, he would take to his bed, seeming at times to have only a tenuous hold on life itself as he lay in his pink pyjamas, his hands folded on his chest, eyes fluttering and breath shallow. At the appropriate moment, though, he could transform himself from a frail, decrepit shell of a man into a wily, vigorous adversary." Quoted in Kinzer, *supra* note 129, 103

[132] Shireen T. Hunter, *Iran Divided: The Historical Roots of Iranian Debates on Identity, Culture, and Governance in the Twenty-First Century* (Rowman & Littlefield, London 2014) 50

[133] For full text of the agreement see J. C. Hurewitz, *The Middle East and North Africa in World Politics: A Documentary Record*, Vol 2 (2nd edn, Yale University Press, New Haven 1979) 433-441

would be no less than £4 million. Fraser also committed the AIOC to reduce the area of its drilling activities and to train a greater number of Iranian people for employment in administrative positions. He declined to enter into any further discussion regarding his offer or any other aspect of AIOC's business in Iran, including its policy to maintain complete confidentiality of its accounts. This resulted in it being impossible to authenticate whether the British were meeting their contractual obligations.[134] The British Treasury was collecting in tax double the amount which was paid to Iran as royalties.[135] The Shah insisted that his cabinet had agreed to these conditions, therefore they should be honoured, and he further insisted that his Prime Minister should make plans for the Majlis to endorse them. However, since the Majlis was about to come to the end of its term, its deputies chose to filibuster in order to avoid agreeing to the deal. As a result, the Shah sought to influence the new elections to the Majlis, leading to mass protests.[136] Ultimately, the Shah capitulated and a new election was held, resulting in a victory for the National Front Party, led by Mossadegh. Although the National Front won most of the seats in Tehran it did less well in the provinces and did not have a majority of seats in the new Majlis. However, it exerted considerable influence on its deliberations.[137] The agreed deal with the AIOC was the principal question to be considered by the new Majlis. It had become the centre of nationalist emotion and extensive opposition among Iranians.[138] In 1950, the situation

[134] Ibid, 398, note 96; John H. Bamberg, The History of the British Petroleum Company, Vol 2 (Cambridge University press, Cambridge 1994) 68

[135] In the years 1946 and 1947, the Iranian government received £7.13m and £7.10m, while British government taxation reached £15.59m and £16.82m respectively. See Bamberg, *supra* note 134, 325

[136] "Mohammad Reza Shah was not amused by this turn of events, and he resolved to do whatever was necessary to ensure that the next Majlis would heed him. Using a variety of techniques ranging from the recruitment of royalist candidates to bribery and blatant electoral fraud, he managed to secure the election of many pliable deputies. His presumption that he could cheat voters as his father had, however, proved quite mistaken. Iranians were thirsty for democracy and could no longer be terrorized into silence". See ibid, 69

[137] Ibid, 71

[138] This opposition was inflamed by a massive parade of over 80,000 of AOIC's Iranian employees. Manucher Farmanfarmaian, Director of the Iranian Petroleum Institute described their conditions that existed in Abadan, "Wages were fifty cents a day. There was no vacation pay, no sick leave, no disability compensation. The workers lived in a shantytown called Kaghazabad, or Paper City, without running water or electricity, let alone such luxuries as iceboxes or fans. In winter the earth flooded and became a flat, perspiring lake. The mud in town was knee-deep, and canoes ran alongside the roadways for transport. When the rains subsided, clouds of nipping, small-winged flies rose from the stagnant waters to fill the nostrils, collecting in black mounds along the rims of cooking pots and jamming the fans at

became worse when the American company Aramco, operating in Saudi Arabia, agreed to share its profits with the Saudi Government on an equal basis.[139]

On 7th March 1950, the Prime Minister, Ali Razmara, was assassinated. He had been appointed by the Shah specially to force through the agreement with the AIOC. Mossadegh was appointed Prime Minister, and consequently, his National Front Party dominated the Majlis. This led to the nationalisation of the AIOC, with compensation being paid to the British.

There was fierce reaction from the oil company's board of directors and from Clement Attlee's British Government. There was a similar reaction from the British press and consideration was given to every possible option. A plan was drawn up by the British military to take Abadan, there was an attempt by the British Secret Service (SIS) to influence the elections to the Majlis in 1952, and the Iranian oil industry was blockaded by the Royal Navy. [140] In addition, in the United States, the Truman administration sought to negotiate an agreement between Iran and the United Kingdom. However, this came to nothing because neither side was prepared to compromise their demands. The British maintained that they had a contractual entitlement to extract oil from Iran, either by means of the AIOC or by an intermediary under their control. [141] It can be argued that the negotiations were mishandled by both sides. The British initial position re-stated Fraser's minimal concessions, although they subsequently softened their position, while the Iranians

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the refinery with an unctuous glue." See Manucher Farmanfarmaian, *Blood and Oil: Memoirs of a Persian Prince* (Random House, London 1997) 184

[139] Agreements Between Saudi Arab Government and Arabian American Oil Company (1950); George McGee, one of Acheson's assistants, believed that the company had brought the trouble on itself by being "too rigid and too slow to recognize that a new situation had been created in Iran which required a new approach." and that "he had warned Anglo-Iranian months earlier that the fifty-fifty deal was forthcoming." See George Crews McGhee, *On the Frontline in the Cold War: An Ambassador Reports* (Greenwood Publishing Group, Westport 1997) 103; Kinzer, *supra* note 129, 89

[140] Some of Iranian oil was sold to an Italian company. As the tanker left the Persian Gulf, it was encircled by the Royal Navy and escorted to the British port of Aden. In the court, the Britain successfully argued that AIOC was the legal owner of the oil and the tanker was carrying stolen property. See Anglo-Iranian Oil Co Ltd v. Jaffrate (The Rose Mary) (Supreme Court of Aden) [1953] 1 WLR 246

[141] A negotiation team leaded by Richard Stokes, Lord Privy Seal, presented an eight-point proposal which was intended to be beneficial for both sides. For the text of the proposal see Bamberg, *supra* note 134, 444- 451

simultaneously hardened their position. Eventually, the United States convinced the United Kingdom to agree to accept an equal share of the profits, the principle of nationalisation and also to abide by any judgement of the World Court. If this offer had been presented before nationalisation, it is likely that it would have been successful.

However, Mossadegh rejected the offer, but offered arbitration according to Iranian law or the law of any other nation which had nationalised its industries, including the United Kingdom. It is possible that Mossadegh was not looking for a compromise agreement but a total victory or the complete collapse of the discussions. It is also likely that he underestimated the efficacy of the British blockade of the Iran oil industry. This prevented the export of oil from Iran, and also did not allow any oil-industry workers to enter Iran to assist the Iranian nationals to manage the industry. Ultimately, sufficient expertise was obtained by Iran to allow it to form the Iranian National Oil Company, but Mossadegh and his government had been weakened by this crisis. [142]

Publicly, the United States was required to support its ally, Britain, and applied measures to restrain American companies or individuals from violating the British embargo. However, privately, Truman's officials were critical of the United Kingdom's "completely nineteenth-century colonial attitude towards Iran". [143] The United Kingdom complained that the United States "indulgent" attitude [144] towards Iran had motivated Mossadegh to believe the United States would enter the arena in order to save his government. [145] In the meantime, Iran's oil exports, once worth 70 percent of the nation's total exports, declined to zero. [146]

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[142] Bellaigue, *supra* note 130, 162-156

[143] Averell Harriman visited Abadan and reported to Truman the blighted area he saw there, Quoted in Kinzer, *supra* note 129, 109

[144] US convinced the UK to accept 50/50 profit sharing and the nationalisation's principle, also to discontinue some "advanced plan" for military intervention. Also, Harriman tried to convince Mossadegh to reconsider his refusal to deal directly with the UK. See Bellaigue, *supra* note130, 169-170

[145] Britain was expecting America to support an invasion, while Acheson believed exchange of fire between Britain and Iran would have "disastrous political consequences". See Kinzer, *supra* note 129, 113

[146] Bellaigue, *supra* note 130, 138

A complaint was registered by the United Kingdom to the International Court of Justice (ICJ) and also to the Security Council, which examined this claim in October 1951. The United Kingdom's case was presented by Sir Gladwyn Jebb, who argued that the AIOC was the rightful owner of all oil underground in Iran. [147] Jebb also claimed that this was good for the AIOC, but was also of great advantage to Iran as well as to the United Kingdom and to all of the "free world". He also contended that all of the free world be largely poorer and weaker if this were not the case, as would the people of Iran, who, he argued, had been misled.[148] The case for Iran was presented to the New York meeting of the Security Council by Mossadegh. His position was that Iran was entitled to use its natural resources according to its own desire, and that it was right for Iranian oil to be a source of both work and food for the Iranian people. He further claimed that the continuous reference made by Jebb to the "free world's" dependence upon Iranian oil was intended to refer to the United States rather than to Iran. For more than a century, the United Kingdom's "completely colonial" reaction to meeting opposition from weaker nations had been to dispatch the Royal Navy's gunboats, this practice has often been employed with regard to Iran.[149] However, when the Cold War resulted in a new world order, a new and different approach had to be realised, to persuade the United States to utililise "United States Objectives and Programs for National Security". When the new Churchill government was elected in the United Kingdom in 1950, relations with the new Eisenhower administration in the United States became easier. One reason for this was the belief that United States foreign policy, which had previously been based on Kissinger's "inherent bad faith" paradigm,[150] was now being organised by John Foster Dulles and Allen Welsh. They both had a belief that the United States was engaged in a secret ideological battle with the Soviet Union for the

[147] He was the Executive Secretary of the UN Preparatory Commission and, the Acting UN Secretary-General for just three months.
[148] United Nations, 'Official Records of the Security Council' (1 October 1951) UN Doc. S/PV.559, 11
[149] United Nations, 'Official Records of the Security Council' (15 October 1951) UN Doc. S/PV.600. In November 1951, the *Economics* magazine wrote "the world's refinery arrangement have not waited on events in Abadan. With a small sacrifice in quality at other refineries, 55/60 percent of Abadan's refining capacity has been replaced […] while Mossadegh talks, the world's oil industry gets on with its work and Persian oil is being left in a backwater." Quoted in Bellaigue, *supra* note 130, 167
[150] Kissinger *supra* note 82

soul of humanity. Therefore, plans were prepared to remove Mossadegh from power, together with his National Front Party. This plan was implemented in August 1953.

The United Kingdom Government and the Anglo-Iranian Oil Company had the intention of retaining control of Iran's mineral wealth while simultaneously keeping concessions to a minimum. For Mossadegh, the oil belonged to Iran and should be used as a fuel for a secular, modernised, democratic Iran, possibly a republic, and that the act of taking control was to be the birth of this new nation. The United States viewed taking control of Iran as a way of inaugurating a new era of leadership by the United States of the free world. This intention would have demonstrated a willingness to confront communism by violent or non-violent methods, in accordance with dictates of expediency, up to the point of imminent nuclear war.

Mossadegh was removed from office in 1953, and the Shah was reinstated in a coup which the United States now admits the CIA was heavily involved in planning.[151] Following this, the CIA and the Shah's government retained a close association, and jointly with the Israeli Mossad, were involved in establishing SAVAK, the secret police force of the Shah, which was reputed to use types of severe torture.[152]

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[151] On March 17, 2000 Madeleine Albright, U.S secretary of state said: "In 1953, the US played a significant role in orchestrating the overthrow of Iran's popular Prime Minister, Mohammad Mossadegh. The Eisenhower administration believed its actions were justified for strategic reasons, but the coup was clearly a setback for Iran's political development and it is easy to see now why many Iranians continue to resent this intervention by America in their internal affairs. Moreover, during the next quarter century, the US and the West gave sustained backing to the Shah's regime. Although it did much to develop the country economically, the Shah's government also brutally repressed political dissent. As President Clinton has said, the US must bear its fair share of responsibility for the problems that have arisen in US-Iranian relations". Quoted in Mark J. Gasiorowski, Malcolm Byrne, *Mohammad Mosaddeq and the 1953 Coup in Iran* (Syracuse University Press, New York 2017) xiii. Also The CIA has publicly admitted that it was behind the notorious 1953 coup. See 'CIA admits role in 1953 Iranian coup' *The Guardian* (19 August 2013) available at < https://www.theguardian.com/world/2013/aug/19/cia-admits-role-1953-iranian-coup> accessed 20 November 2017

[152] Saeed Shahsavandi was member of Mojahedin who had suffered in the prisons of SAVAK. In an oral interview with BBC Persian (in Farsi language) he declared that during his prison time, 'SAVAK used "foot whipping" to torture him, in which the pain felt was greater than an actual injury'. See 'BBC Persian: SAVAK, part I', (*Youtube*, 21 July 2015) available at<https://www.youtube.com/watch?v=LNFfdb-LKII> accessed 17 December 2017

It would be difficult to exaggerate the effect of this seizure of power from a democratically elected nationalist government on the historical consciousness of the Iranian people who subsequently lived under the Shah's rule. For instance, when Iraq invaded Iran in 1980, it was assumed that Iraq was following the bidding of the United States. The war was usually called "The Imposed War".[153] Consequently, when the United States asked the World Court to condemn Iran's unlawful detention of American embassy workers in Tehran in 1979, Tehran argued that "the Court cannot examine the American application divorced from its proper context, namely the whole political dossier of the relations between Ian and the United States over the last 25 years. This dossier includes, inter alia, all the crimes perpetrated in Iran by the American government, in particular the coup d'etat of 1953 which had been instigated and carried out by the CIA, the overthrow of the lawful national government of Mossdegh […]".[154] In effect this statement declared that Iran's actions had been prompted by a belief that another coup was being planned by the United States.

In addition to tainting the relationship between Iran and the United States, the coup was an impediment to the political development of Iran.[155]

2.4 Conclusion

An examination of the history of relations between Iran and the West would imply that the current nuclear impasse is rooted in a far deeper problem between Iran and the West. The origins of the current nuclear dispute can be traced back farther than the 1979 revolution and the 1953 coup, to the Reuter concession of 1872. This agreement can be seen as a manifestation of Iran's having fallen from its previous position as an imperial power to that of a nation which could be dominated by the commercial interests of foreign states.

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[153] "Sadam's imposed war against our people's revolution was financed by United States. Ayatollah Khomeini always looked on Sadam as an American mercenary." See Williamson Murray, Kevin M. Woods, *The Iran-Iraq War: A Military and Strategic History* (Cambridge University Press, Cambridge 2014) 89

[154] United States Diplomatic and Consular Staff in Tehran case (USA v. Iran) (Judgment of 24 May 1980) ICJ Reports (1980) para, 35

[155] Albright, *supra* note 151

Nevertheless, the events of 1953 were a foundational moment in the construction of Iran-West relations, and were the result of a confusion between emerging Iranian nationalism, Britain's attempts to maintain Iran as a de facto colony in an era of global decolonisation and the Cold War system of containment — which was itself the outcome of processes discussed in the previous section. This chapter argues that the CIA's coup against the National Front government of Muhammad Mossadegh, and subsequent US and Israeli support for the regime of Shah Mohammad-Reza Pahlavi, set the stage for what has followed. Therefore, the current preoccupation with the nuclear issue and the political and ideological perspectives of the different parties involved in the dispute should not deflect us from an awareness of how they rooted in the context of Iran's history of relations with the West.

Chapter Three
Iran's Nuclear Issue and the International Community

3.1 Introduction

This chapter will discuss the applicability of sources of international law in relation to issues stemming from Iran's nuclear programme between August 2002 and the conclusion of the JCPOA in July 2015. It will address the questions which surrounded Iran's nuclear controversies. These questions originate from international nuclear law, which has its foundations in the 1968 NPT.

Additionally, the chapter will focus on both sides of the legal conflict surrounding Iran's nuclear activities. One side comprises principally the United States supported by three European powers: The United Kingdom, France, and Germany (hereinafter referred to as "the West"), while Iran comprises the other side. Although the Western countries each appear to have different levels of diplomatic relations with Iran, they share a consensus regarding Iran's nuclear issue.

Iran has asserted its justification that the Security Council failed to adhere to Article 39 of the UN Charter when it pronounced Iran's activities to be a threat to peace.[156] Iran believes that its rights to nuclear energy are guaranteed by the self-determination doctrine, in addition to its rights to development and permanent sovereignty over its natural resources.[157] Furthermore, Iran claims that the IAEA Board of Governors has never specified any change in direction from nuclear material to nuclear weapons based on Article XII(C) of the IAEA Statute and Article 19 of the Iran Safeguards Agreement.[158] In contrast the IAEA and the West maintain that Iran has not fulfilled its Comprehensive

[156] United Nations, 'Letter dated 24 March 2008 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General' (26 March 2008) UN Doc. A/62/767-S/2008/203, 6
[157] Ibid.
[158] IAEA, 'Communication dated 8 December 2011 received from the Permanent Mission of the Islamic Republic of Iran to the Agency regarding the Report of the Director General on the Implementation of Safeguards in Iran' (12 December 2011) IAEA Doc. INFCIRC/833, para, 20(b)

Safeguard Agreement obligations, resulting in a breach of Article II and Article III of the NPT. Finally, this section will reach the conclusion that Iran's nuclear issue is widely misrepresented, leading to a general misapprehension of the problem.

3.2 Iran's Nuclear Dispute

Iran's nuclear activities are often a cause of confrontation with the "international community". Based on diplomatic evidence, and the arguments submitted by the IAEA Board of Governors, this confrontation is mainly between a group led by the United States, and followed by the EU countries, most significantly Germany, France and the United Kingdom, with strong support from Australia, Canada and Japan. This group appears to be opposed by what could be described as the rest of the world; the 120 member states of the Non-Aligned Movement (NAM), which emphasise Iran's right to control its nuclear fuel cycle and its right to initiate and develop a nuclear programme.[159]

Russia and China hold a position of neutrality regarding these matters and stand somewhere between the two sides. Both maintain diplomatic and economic ties with Iran. They have remained largely peripheral to the conflict, unenthusiastically accepting the Security Council's resolutions regarding Iran while attempting to soften their impact.[160]

The current political situation between Iran and Israel has been a cause of dispute. There is no relationship between these two countries at a diplomatic, political or any other level. Because of its hostile relations with Iran, Israel did not participate in any of the negotiations, but applied constant pressure on its ally, the United States, to adopt a stance against Iran which was as hardline

[159] NAM, 'The Declaration of the XVI Summit of Heads of State or Government of the Non-Aligned Movement, (Tehran Declaration)' 16th Summit of Heads of State or Government of the Non-Aligned Movement (Tehran, 26-31 August 2012) NAM 2012/Doc.7, para 6

[160] For example, a report indicated that "the Obama administration on Thursday spared China and Singapore from potentially onerous financial penalties required under a strict American law on Iranian sanctions, saying that both countries had earned an exemption by significantly reducing their purchases of Iranian crude oil." See, Rick Gladstone, 'U.S. Exempts Singapore and China on Iran Oil' *The New York Times* (28 June 2012) available at <http://www.nytimes.com/2012/06/29/world/us-exempts-china-and-singapore-from-sanctions-on-iranian-oil.html?mcubz=3> accessed 21 November 2017. UNSC Res 1737 (27 March 2007) freed the provision of Russian light water reactor equipment to Bushehr nuclear power plant from the scope of enforcement measures in order to win Russian support.

as possible. This policy was evidenced in the talks when the EU3 presented policies which were essentially those of the United States, which were themselves representations of Israeli policy.

There have been several stages to Iran's nuclear dispute. It apparently commenced with the construction of a 5 MWe (Mega Watt (electrical)) Tehran Research Reactor (TRR) in 1967, when Iran officially began to research and develop a nuclear programme. [161] At this early stage, Iran's nuclear efforts were supported by the United States. [162] At that time, the Shah of Iran, Mohammad Reza Shah Pahlavi, was a staunch ally of the United States, and supported its policies. The United States supported the Iranian nuclear programme, as using nuclear energy as a source of power in Iran would make more of Iran's crude oil production available to be utilised by the United States petrochemical industry. [163]

In 1974, after oil prices fell sharply causing the first oil crisis, the Shah of Iran founded the Atomic Energy Organization of Iran (AEOI). The AEOI prepared a 20-year plan for the country's nuclear programme, including the completion of a nuclear fuel cycle. [164] At the time of Iran's Islamic revolution in 1979, Siemens had begun to operate two reactors at Bushehr. These were destroyed in 1980 by an Iraqi airstrike during the Iraq-Iran War.[165]

The United States and Israel began to make allegations against Iran in the 1990s, claiming that Iran had attempted to develop nuclear weapons. The reason behind this allegation was a recognition that Iran's inability to respond

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[161] 'A brief introduction to the Atomic Energy Organization of Iran' (*Atomic Energy Organization of Iran*) available at <http://www.aeoi.org.ir/Portal/home/?47317/%D8%B5%D9%81%D8%AD%D9%87-About-us> accessed 21 November 2017

[162] See 'Contract for the transfer of enriched uranium and plutonium for a research reactor in Iran. Signed at Vienna, on 10 March, at Teheran, on 10 May, and at Vienna, on 7 June 1967' (22 December 1967) *United Nations Treaty Series,* No 8866

[163] Rouhollah K. Ramazani, *The United States and Iran: The Patterns of Influence* (Praeger, Santa Barbara 1982) 61

[164] 'A brief introduction to the Atomic Energy Organization of Iran' (*Atomic Energy Organization of Iran*) available at <http://www.aeoi.org.ir/Portal/home/?47317/%D8%B5%D9%81%D8%AD%D9%87-About-us> accessed 21 November 2017

[165] 'Nuclear Power in Iran' (*World Nuclear Association*, April 2017) available at <http://www.world-nuclear.org/information-library/country-profiles/countries-g-n/iran.aspx> accessed 21 November 2017

proportionately to chemical weapons attacks by Iraq during the Iran-Iraq war had changed Iran's thinking, leading Tehran to seek to develop the military potential of its nuclear energy programme. The Iran-Iraq war ended in 1988. By the early 1990s, in the aftermath of this conflict, Iran was pressing ahead with its nuclear programme, receiving assistance from China (with whom Iran concluded two nuclear cooperation agreements), Pakistan, and Russia. In 1995 Iran and Russia agreed on a cooperation protocol under which Russia undertook to finish the building of a nuclear reactor at Bushehr. The possibility of Russia constructing a uranium enriching facility in Iran was also considered.[166]

As Acheson-Lilienthal and Eisenhower's Atoms for the Peace speech predicted, these complaints and allegations have appeared in many forms and contexts during the dispute.[167] IAEA inspectors viewed Iran's nuclear sites in the 1990s, after which they announced that Iran's nuclear attempts represented a peaceful nuclear programme.[168]

Iran mainly complained about the difficulties the country encountered in obtaining assistance for its nuclear programme, arguing that bodies such as the Zannger Committee interfered with its sovereignty and went against the central tenets of the NPT and the IAEA.[169] The Zangger Committee was launched in 1971 by a group of 15 countries which possessed nuclear industries.[170] Its principle objective was to ensure compliance with Article III Section 2 of the NPT, which forbids the transfer and production of any

[166] Michele Gaietta, *The Trajectory of Iran's Nuclear Program* (Palgrave Macmillan, New York 2016)
[167] For US arguments see, Office of the Secretary of Defense, 'Proliferation: Threat and Response' (2001) 34-38, available at <https://fas.org/irp/threat/prolif00.pdf> accessed 21 November 2017. For Israel arguments see, 'Iran: Nuclear History' (*Jewish Virtual Library*) available at <http://www.jewishvirtuallibrary.org/history-of-iran-s-nuclear-program> accessed 21 November 2017
[168] Yael Ronen, *The Iran Nuclear Issue* (Hart, Oxford 2010) 43
[169] For example, at the UN General Assembly debate on the IAEA (UN Doc. A/51/PV.42) on 28 October 1996, Iranian representative, Danesh-Yazi raised concern about "the unjustifiable instance of some nations on the unilateral evaluation and certification of the activities of other members of the Agency".
[170] Named after its first chairman, Prof. Claude Zangger, with currently 39 members including all the nuclear weapon States, see 'Home Page of Zangger Committee' (*Zangger Committee*) available at <http://zanggercommittee.org/> accessed 11 September 2017

fissionable technology or material unless it is under IAEA safeguards.[171] However, the NSG, which now has 48 member states, and has grown significantly in importance and size, supports international scientific and technological cooperation to promote the peaceful applications of nuclear technology.[172] Iran was prompted to complain that the United States had imposed unilateral sanctions aimed at deterring individuals from entering into transactions with Iran's oil industry, and had also used its influence to persuade NSG members, as well as the Zangger Committee, to hamper Iran's attempts to acquire and develop its nuclear industry in the way stated in Article IV (2) of the NPT.[173] The Clinton administration and its successors described Tehran's policies as "an extraordinary threat to national peace and security".[174] From that point onwards, Clinton banned all United States transactions with Iran.[175] Furthermore, in 1996, the sanctions imposed on Iran and Libya took effect, penalising any non-American individual or organisation that made investments in Iran's oil industry if the value of the investments exceeded $20m.[176]

In August 2002, Iran's nuclear conflict entered a new stage when the National Council of Resistance of Iran (NCRI),[177] which opposed the regime in Iran,

[171] Article III (2), NPT provides: "Each State Party to the Treaty undertakes not to provide: (a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear weapon state for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards required by this Article."

[172] 'Participants' (*Nuclear Suppliers Group*, 1974) available at <http://www.nuclearsuppliersgroup.org/en/participants1> accessed 21 November 2017

[173] "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 co-operate in contributing alone or together with other states or international organisations 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."

[174] 'The President: Executive order 12597 - Prohibiting Certain Transactions with Respect to the Development of Iranian Petroleum' (17 March 1995) 60 (52) *Federal Register* 14615; President Carter's executive order 12170 had already blocked the Government of Iran's properties in the US, 'Executive order 12170 – Blocking Iranian Government Property' (14 November 1979) 44 *Federal Register* 65729

[175] 'The President: Executive order 12959 – Prohibiting Certain Transactions with Respect to Iran' (9 May 1995) 60 (89) *Federal Register* 24757

[176] The Iran and Libya Sanctions Act of 1996 (Public Law 104–172, 5 August 1996) 110 *STAT.* 1541, 1542-1543

[177] The National Council of Resistance of Iran (NCR) was founded in July 1981 in Tehran to oppose Iran's current regime and establish a pluralist democracy. The Council's headquarters

revealed that Iran had two covert concealed nuclear facilities; a centrifugal enrichment plant located in Natanz (a city in Isfahan Province), and a heavy water production facility in of Arak (a city in Markazi Province). [178] Subsequently, the United States claimed that this proved that Iran's nuclear programme was "neither peaceful nor transparent". [179]

Iran claimed that these facilities had been kept secret due to prevent any attempt by the United States to sabotage Tehran's efforts to acquire nuclear technology. Iran acknowledged the existence of the enrichment plant at Natanz, and emphasised its peaceful and commercial uses.[180] Iran also came clean about the establishment of the heavy-water plant at the city of Arak.[181] In June 2003, the Director General of the IAEA, Mohammad El Baradei, reported to the Agency's Board of Governors that "Iran has failed to meet its obligations under its safeguards agreement with respect to the reporting of nuclear material, the subsequent processing and use of that material and the declaration of facilities where such material was stored and processed."[182] He urged Iran to "conclude an additional protocol agreement", even though the amount of fissionable material was small. [183] Meanwhile, the IAEA experts discovered the possible existence of highly-enriched uranium in some samples taken in Iran. Iran claimed that this was due to contamination from centrifuge components which Iran had imported.[184] Furthermore, in June, the

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are currently active in Paris. There are five organizations represented in the NCRI, including the Mujahadin Khalq Organization of Iran.

[178] 'Timeline: Iran's Nuclear Program' (*National Council of Resistance of Iran*, 24 April 2007) available at <https://www.ncr-iran.org/en/news/nuclear/3290-timeline-irans-nuclear-program> accessed 21 November 2017

[179] Richard Boucher, 'Daily Press Briefing' (*US Department of State: Archive,* December 13 2002) available at <https://2001-2009.state.gov/r/pa/prs/dpb/2002/15976.htm> accessed 21 November 2017

[180] 'Nuclear energy for peaceful purposes, a right of nations: Khatami' *Peyvand* (9 February 2003) available at <http://www.payvand.com/news/03/feb/1046.html> accessed 21 November 2017

[181] IAEA, 'Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran' (6 June 2003) IAEA Doc. GOV/2003/40, paras, 3,5

[182] Ibid, para, 32

[183] Ibid, paras, 33,35

[184] For Iran's statement see, IAEA, 'Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran' (26 August 2003) IAEA Doc. GOV/2003/63, para, 48. IAEA reported on 2004 regards "two important issues relevant to the Agency's investigation in order to provide assurance that there are no undeclared enrichment activities in Iran: the origin of LEU and HEU (highly enriched uranium) particle contamination found at various locations in Iran and the extent of Iran's efforts [...] With respect to the first issue, contamination, since the issuance of the last report to the Board, the Agency and the State from which most of the

Board of Governors of the IAEA, in response to the Director General's report, requested Iran to rectify all safeguarding problems as stated in the report, in order to avoid reprocessing uranium hexafluoride and to conclude the additional Safeguards Agreement.[185] According to emerging reports, the United Kingdom, France, Germany and the High Representative of the EU (EU3) offered to assist Iran in the development of its nuclear fuel technology in return for Tehran's signing the Additional Protocol. Iran refused to do this,[186] causing the European countries to adopt a tougher attitude. In September, the Board of Governors urged that "Iran remedy all failures identified by the Agency and co-operate fully with the Agency by taking certain specified actions by the end of October 2003".[187] Iran responded that, since the 1979 Islamic Revolution, the country had suffered from sanctions of materials related to the peaceful use of nuclear energy and the reason for its hesitation in complying with the additional protocol or embracing confidence-building initiatives was because of its concern over the intention of the United States to deny Iran the benefits of peaceful nuclear energy.[188]

However, Iran's attitude suddenly softened and the country applied a more conciliatory tone. This might be attributed to three reasons: 1) The presence of the United States military in neighbouring countries, notably Afghanistan and Iraq,[189] 2) Iran's former President Mohammed Khatami's proposal to the

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imported P-1 centrifuges originated have, in a cooperative effort, continued to share their respective analytical results. These results generally do not contradict the results from samples taken in Iran […] the Agency is continuing this investigation in an effort to confirm the actual source of contamination." The uranium contamination was the outcome of Iran's purchasing its centrifuges from a country which the IAEA does not identify, supposedly Pakistan. See IAEA, 'Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran' (15 November 2004) IAEA Doc.GOV/2004/83, paras, 108-109

[185] IAEA, 'Record of the 1072nd Meeting' (Vienna, 19 June 2003) IAEA Doc.GOV/OR.1072, paras, 52- 56

[186] Dan De Luce, 'Europeans fail to end Iranian nuclear crisis' *The Guardian* (20 September 2003) available at <https://www.theguardian.com/world/2003/sep/20/iran.politics> accessed 21 November 2017

[187] IAEA, 'Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran' (12 September 2003) IAEA Doc.GOV/2003/69, para, 4

[188] IAEA, 'Record of the 1081st Meeting' (Vienna, 12 September 2003) IAEA Doc.GOV/OR.1081 para, 8 (Iran)

[189] "Bush pinpoints North Korea, Iran and Iraq as the 'axis of evil'", Julian Borger, 'President broadens war on terrorism' *The Guardian* (31 January 2002) available at <https://www.theguardian.com/world/2002/jan/31/usa.julianborger> accessed 21 November 2017

United Nations that there should be a "dialogue of civilisations",[190] 3) an increasing sense that the quickest and surest way for Iran to achieve a nuclear industry was through cooperation. Whatever the reason for Iran's more moderate attitude, Khatami approached Tim Guldimann,[191] to suggest direct negotiations with the United States on all issues of conflict. The conditions the United States asked of Iran (Iran's "roadmap") were 1) Iran would make no attempts to acquire weapons of mass destruction, 2) Iran would endeavour to deal decisively with all terrorists (particularly Al Qaeda) trespassing on its territory, 3) Iran would actively engage in the political stabilisation of Iraq, with a view to establishing a democratic government, 4) Iran would deal with Hezbollah, so that it could be downgraded to a mere political and social organisation within Lebanon, 5) Iran would end its support for Hamas and would attempt to prevent Hamas and Islamic Jihad from performing actions which violate civilians within the 1967 Israel borders, 6) Iran would assist in resolving the Palestinian problem peacefully by supporting a two-state solution.[192] In return, Iran requested the United States to: 1) avoid supporting any change in Iran's political system by direct outside interference, 2) remove sanctions and allow Iran access to World Trade Organisation membership, 3) allow Iran to gain access to peaceful nuclear technology, 4) end its support of the Mujahadin Khalq Organization of Iran (MKO).[193]

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[190] United Nations, 'Should be Year of Dialogue Among Civilizations; President of Iran Tells General Assembly' (21 September 1998) Press Release GA/9446

[191] Tim Guldimann is the Swiss Ambassador representing US policies in Iran at the beginning of May 2003.

[192] Tim Guldimann, 'Roadmap' *Washington Post* (4 May 2003) available at <www.washingtonpost.com/wp-srv/world/documents/us_iran_1roadmap.pdf> accessed 23 August 2017

[193] Ibid. Galbraith states that: Revelling in the "Mission Accomplished" acclaim in Iran, Bush's government disregarded Iran's proposition and disapproved of Guldimann even for his submission of it. After a number of years, the terse renunciation of Iran's proposal by Bush's government started to appear as being overtly absurd, at which point the government proceeded to silence the account, see Peter W. Galbraith, *Unintended Consequences: How War in Iraq Strengthened America's Enemies* (Simon and Schuster, New York 2008) 78. Pellaud contended that, Colin Powell, the Secretary of State considered that "it was a very propitious moment" to answer the preparedness of Iran on which to embark'. Nevertheless, with office of Cheney, the Vice President became aware of this, the report was mothballed and subsequently disregarded. An accusation was made that Guldimann acted on his own authority, and that he was the roadmap's only writer. See Bruno Pellaud 'Negotiating with Iran: Alternative Approaches' in Joachim Krause (ed), *Iran's Nuclear Programme: Strategic Implications* (Routledge, New York 2012) 53-82

In October 2003, shortly after having stated these requirements, the Tehran Statement was issued by the EU3 and Iran, which included Iran's declaration of its willingness to work fully with the IAEA. Iran committed itself to sign and ratify the Additional Protocol and emphasised that the country's uranium enrichment and reprocessing activities had been suspended. Furthermore, Iran committed itself to act on the basis of the requirements of the protocol and was urged to adopt a transparent approach to its nuclear issue.[194] In return, the EU3, with reference to the NPT, agreed to recognise Iran's rights to have a nuclear industry and to allow Iran to obtain "easier access to modern technology and supplies in a range of areas".[195]

In November, the Director General of the IAEA released a report which declared that "To date, there is no evidence that the previously undeclared nuclear material and activities […] were related to a nuclear weapons' programme. However, given Iran's past practice of concealment, it will be some time before the Agency is able to conclude that Iran's nuclear programme is exclusively for peaceful purposes."[196]

A month prior the realisation of the above report, the European Council expressed its willingness to prepare strategies to accomplish further co-operation and trust-building in Iran's nuclear programme in order to enhance international confidence. The intention was to promote the peaceful uses of the nuclear programme and to support the movement to eliminate terrorism and change Tehran's stance on the Middle Eastern peace process.[197] This was endorsed, on 3 November, in the UN General Assembly debate, when the Russian Ambassador spoke about the politicisation of Iran's nuclear issue and maintained that his country would hold to its commitments to cooperate

[194] IAEA, 'Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran' (10 November 2003) IAEA Doc.GOV/2003/75, para, 13
[195] 'Agreed Statement at the End of a Visit to the Islamic Republic of Iran by the Foreign Ministers of Britain, France and Germany' (Tehran Declaration) (21 October 2003) para, 3 (d). The Tehran declaration reconfirmed in the Paris agreement concluded on 15 November 2004.
[196] IAEA, 'Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran' (10 November 2003) IAEA Doc.GOV/2003/75, para, 52
[197] Council of the EU, 'Brussels European Council, Presidency Conclusion of 16 and 17 October 2003' (25 November 2003) Council Doc. 15188/03, 17

with Iran on nuclear-related issues.[198] These developments suggest that there was a possibility of moving towards an agreement. This would depend on the Additional Protocol being ratified and Iran's undertaking to suspend its enrichment activities, including halting the domestic production and import of all enrichment-related materials and equipment.[199] In October, Iran's leaders indicated they would be willing to hold talks to settle the wider political issues as set out in the roadmap and outlined by the European Council.[200] This was affirmed in the IAEA Director General's report, which acknowledged that Iran was working openly with the Agency and demonstrating its willingness to cooperate by: 1) providing information regarding the origin of imported equipment and materials, 2) providing access to the IAEA in order to enable inspection of all locations which the Agency has asked to visit, 3) giving permission to conduct interviews with certain individuals.[201]

However, Iran had failed to comply with its Safeguards Agreements. This was condemned by the Board of Governors of the IAEA, and the representatives of Canada, Australia and France threatened to refer the case to the Security Council. This hardline stance was not in the spirit of cooperation that had characterised Iran's recent contacts with the West. On the other hand, Brazil argued that there was not sufficient evidence of non-compliance to justify the referral under Article XII C of the IAEA statute. [202]

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[198] UN General Assembly, 'Report of the International Atomic Energy Agency, Statement by the Russian Federation' (3 November 2003) UN Doc. A/58/PV.533, 6-7

[199] Iran shut down all centrifuges at Natanz facility on 12 November 2004. See IAEA, 'Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran' (24 February 2004) IAEA Doc.GOV/2004/11, para, 63. The additional protocol signed by Iran on 18 December 2004 (Ibid, para, 5) and suspension of centrifuge manufacturing happened on 24 February 2004 (Ibid, para, 62)

[200] Guldimann Mentioned about Khamenei's reaction to the roadmap through Iran's ambassador, Sadeq Kharrazi, whom disclosed that Iran leadership agreed with 85-90% of the provisions of the proposal. See Michael Rubin, 'The Guldimann Memorandum, The Iranian "Roadmap" Wasn't a Roadmap and Wasn't Iranian' *Weekly Standard* (22 October 2007) available at <http://www.meforum.org/1764/the-guldimann-memorandum> accessed 21 November 2017

[201] IAEA, 'Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran' (10 November 2003) IAEA Doc.GOV/2003/75, para, 51

[202] A part of Article XII(C) provides: "The Board shall report the non-compliance to all members and to the Security Council and General Assembly of the United Nations.". See also IAEA, 'Record of the 1085th Meeting' (Vienna, 21 November 2003) IAEA Doc.GOV/OR1085, paras, 6 (Canada) 28(Brazil) 37 (France) 45 (Australia)

In 2004, the Agency raised several issues regarding Iran's execution of research and testing of P2 centrifuges (believed to be more advanced than P1s). Furthermore, the Agency claimed that it had discovered that Iran had been conducting research utilising polonium-210, a neutron source employed to launch a chain reaction. The Agency's reports also noted that traces of highly enriched uranium had continued to be detected on centrifuges.[203] This was explained by Tehran as being a result of tests conducted at a uranium hexafluoride facility.[204] Mohammad El Baradei issued a report on June 2004 to call this action a technical attempt to produce feed material. However, the Agency emphasised that the organisation was more interested in the highly-enriched uranium and in acquiring full knowledge of how the P2 centrifuges were being used.[205] When the IAEA Board of Governors met in March, it was agreed to defer further discussion of Iran's progress.[206] Iran regarded this decision as being a consequence of the United States pressure on the IAEA, and threatened to cease co-operating with the Agency until it acted independently.[207] On May 2004, Iran delivered the initial declaration under the Additional Protocol for the IAEA as a trust-building move.[208] However, the West did not see it in this way. The testing of a hexafluoride line at Isfahan, which had been considered a technical infringement by the IAEA, was presented as an escalating action or a source of "deep concern" causing disapproval, due to Iran's failure to adequately reveal the necessary declarations.[209]

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[203] IAEA, 'Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran' (24 February 2004) IAEA Doc.GOV/2004/11, paras 39-48, 75

[204] IAEA, 'Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran' (1 June 2004) IAEA Doc.GOV/2004/34, para 6

[205] IAEA, 'Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, Corrigendum' (18 June 2004) IAEA Doc.GOV/2004/34/Corr.1, paras, 46-47

[206] IAEA, 'Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran' (13 March 2004) IAEA Doc.GOV/2004/21, para, 9

[207] 'Statement by Dr. Kharrazi on IAEA Decisions Regarding Iran' (*Iran Watch*, 10 March 2004) available at <http://www.iranwatch.org/library/government/iran/ministry-foreign-affairs/statement-dr-kharrazi-iaea-decisions-regarding-iran> accessed 21 November 2017

[208] 'Iran submits declaration under Additional Protocol' (*IAEA*, 22 May 2004) available at <https://www.iaea.org/newscenter/mediaadvisories/iran-submits-declaration-under-additional-protocol> accessed 21 November 2017

[209] G8, 'Sea Island Summit 2004: G8 Action Plan on Non-proliferation' (Georgia, 9 June 2004) para, 4 available at <http://www.g8.utoronto.ca/summit/2004seaisland/nonproliferation.html > accessed 21 November 2017. Also, on September 2004, Mohamed ElBaradei continued to stress to Iran that, "during this delicate phase while work is still in progress to verify its past

On 18 June 2004, the United States Ambassador to the IAEA, Kenneth Brill, set out the opinion of the United States, that Iran had not collaborated in working towards a resolution which would deal with all unsettled matters, neither had it completed its suspension obligations. He contended that it was perilous to fail to believe that Iran was in possession of a secret military project, and that Iran had spent billions of dollars secretly searching for every possible type of enrichment technology. He continued that exceptionally high levels of uranium enrichment, which considerably exceeded the amount required to generate electricity, had been reported by the IAEA. It was possible that as each day passed, Iran could draw nearer to manufacturing the enriched uranium which is required to produce weapons. Brill concluded that in a situation of this nature, all Iran needed to do was to proceed with its policy of "delay, denial and deception", at the same time as generating facts which were beyond inspectors' observation.[210]

3.3 Iran's Nuclear Programme Amongst Others

At the same time that the existence of Natanz and Arak were discovered, inspectors from the IAEA in Washington came across the South Korean (ROK) nuclear programme. It became evident that this country had breached its Safeguards Agreement by enriching uranium and by testing plutonium; practices which had been undertaken intermittently for 20 years.

Gareth Porter stated: "The nature of some of those enrichment activities […] have caused us to suspect that there is an interest in pursuing a nuclear weapons programme." More importantly, "South Korea concealed the truth in its dealings with the IAEA [...]" by claiming that "it had not used any nuclear material in its laser enrichment research".[211] In 2004, Mark Gorwitz, issued a report which stated that "levels of enrichment averaged about 10% and

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nuclear programme, and in light of serious international concerns surrounding that programme, it should do its utmost to build the required confidence through the Agency." See Mohamed ElBaradei, 'Introductory Statement to the Board of Governors' (IAEA, 13 September 2004) available at <https://www.iaea.org/newscenter/statements/introductory-statement-board-governors-5> accessed 21 November 2017

[210] IAEA, 'Record of the 1102nd Meeting' (Vienna, 18 June 2004) IAEA Doc.GOV/OR.1102, para, 77

[211] Gareth Porter, 'The Week the IAEA Applied a Nuclear Double Standard' *Inter Press Service* (19 December 2009) available at <http://www.ipsnews.net/2009/12/politics-the-week-the-iaea-applied-a-nuclear-double-standard/> accessed 21 November 2017

reached almost 80%. According to the South Korean government, about 200 milligrams of enriched uranium were produced. South Korea reportedly used 3.5 kilograms of uranium as feed for the experiments […] the unreported uranium enrichment tests […] are a proliferation concern which merits comprehensive investigation by the IAEA."[212]

Therefore, there was a similar situation in both Korea and Iran. Iran possessed a larger enrichment programme but the ROK possessed amounts of enriched uranium which considerably "exceeded the requirements for generating electricity". Nevertheless, at that time, no particular pressure was applied to the ROK to verify a negative and show that no other programmes were being developed to manufacture a bomb. It was not clear that the ROK had no intention to manufacture a bomb.[213]

On 13 September 2004, El Baradei reported to the IAEA Board of Governors that "the failure of South Korea to report to the Agency regarding the conversion and enrichment of uranium and the separation of plutonium is a matter of deep concern". He continued "I would ask the Republic of Korea to continue to provide active cooperation and maximum transparency, in order for the Agency to obtain a comprehensive understanding of the extent and scope of these previously undeclared activities, and to verify the correctness and completeness of the ROK´s declarations with regard to its nuclear programme".[214] However, the following day a report was released by the Washington Post which claimed that "senior officials of the Bush administration had acknowledged the assistance of the United States ally in volunteering to admit and co-operate with IAEA inspectors".[215]

Contrastingly, El Baradei commended Iran for its co-operation and indicated that many major matters concerning the nation's nuclear work had been explained. These included the origin of the highly-enriched uranium

[212] Mark Gorwitz, 'The South Korean Laser Isotope Separation Experience' (2004) *Institute for Science and International Security Reports*, available at <www.isis-online.org/publications/dprk/sklisword2.html > accessed 8 March 2017
[213] See Siegfried S. Hecker, Sean C. Lee and, Chaim Braun 'North Korea's Choice Bombs over Electricity' (Summer 2010) 40 (10) *The Bridge* 5
[214] Mohamed ElBaradei, *supra* note 209
[215] Dafna Linzer, 'U.N. Watchdog Details S. Korean Atomic Efforts' *Washington Post* (14 September 2004) A 22

contamination, as well as the P2 centrifuges.[216] El Baradei was quoted by the Washington Post as saying it would be impossible for him to fix a timeline to conclude the Iran inquiry; however, he added that the key issues that remained were to be resolved by the year's end. He made no comment as to whether a report ought to be made to the Security Council regarding Iran, with regard to any violations of the NPT. However, according to IAEA diplomats there was a growing possibility of South Korea encountering a referral. From another perspective, the Bush Government wanted a decision which fixed a time limit for Iran to discontinue completely all its contentious nuclear activities, or to be subject to UN Security Council action.[217] In this case, it is implied that Iran would be subject to a referral to the Security Council because it had conducted tests at Isfahan.

It is evident that the two nations seriously violated their agreements regarding safeguards, and also that by mid 2004, both countries had taken action in order to lessen the IAEA's serious concerns. Nevertheless, no more action was taken against South Korea,[218] and in 2007 it was granted a clean bill of health.[219] In contrast, although the IAEA's concerns with Iran's nuclear activities were substantially less serious, Iran continued to be the focal point of Western anxiety about covert nuclear proliferation.

Iran accepted that it had obtained P1 centrifuges from Abdul Qadeer Khan's organisation,[220] and that they had been used in Pakistan's weapons

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[216] Mohamed ElBaradei, *supra* note 209
[217] Linzer, *supra* note 215
[218] "The IAEA Board of Governors has concluded discussions on the implementation of the safeguards in the Republic of Korea…the Board shared the Director General's view that given the nature of the nuclear activities described in his report, the failure of the Republic of Korea to report these activities in accordance with its Safeguards Agreements is of serious concern. At the same time, the Board noted that the quantities of nuclear material involved have not been significant, and that to date there is no indication that the undeclared experiments have continued. The Board encouraged the Republic of Korea to continue its active cooperation with the Agency, pursuant to its Safeguards Agreement and Additional Protocol." See 'IAEA Board Concludes Consideration of Safeguards in South Korea' (*IAEA*, 26 November 2004) available at <https://www.iaea.org/newscenter/news/iaea-board-concludes-consideration-safeguards-south-korea > accessed 23 August 2017
[219] "There is no indication that the undeclared experiments have continued". See IAEA, 'Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran' (11 November 2004) IAEA Doc.GOV/2004/84, paras 41-42
[220] Ian Traynor, 'Iranians admit receiving nuclear warhead blueprint from disgraced Pakistani expert' *The Guardian* (19 November 2005) available at

programme, which provided an explanation for the traces of highly-enriched uranium found on them. It is not easy to understand why the P1 centrifuges attracted so much interest. P2 were twice or three times as efficient as the P1 design. The measure of a centrifuge's capacity is in separate work units (SWU). It was estimated that a P1 unit would operate at approximately 1SWU per annum, while in an ideal situation a P2 might possibly operate at three SWUs per year. However, the capacity of the most modern centrifuges in the United States and in Europe is 200-300 SWUs per year.[221] The major concern, which became a matter of significant interest for the G8, was whether to allow any centrifuge type, regardless of its operating speed.

In his report in September 2006, the IAEA Director General expressed regret at the lack of progress towards applying the full range of safeguards to nuclear activities as a result of consultations with Middle Eastern countries.[222] This was a reference not just to Iran, but also to Israel, which possessed nuclear weapons, but had refused to sign the NPT and had continued to refuse to ratify a Safeguards Agreement with the IAEA.

When Iraq's Osirak reactor was destroyed by Israeli warplanes on 7 June 1981, Menachem Begin's administration harshly criticised both France and Italy for providing Iraq with nuclear material. He requested that these appalling acts of inhumanity be abandoned and stressed that Israel would take any action to block the pathways to allowing these countries, which he called his country's enemies, to acquire weapons of mass destruction.[223] By that time, a nuclear test had been conducted by Israel in the southern Indian Ocean.[224]

<https://www.theguardian.com/world/2005/nov/19/iran.iantraynor> accessed 21 November 2017

[221] IAEA, 'Nuclear Technology Review 2016' (7 June 2016) IAEA Doc. GC (60)/INF/2, see also Ronen, *supra* note 168, 6

[222] Mohamed ElBaradei, 'Introductory Statement to the Board of Governors' (*IAEA*, 11 September 2006) available at <https://www.iaea.org/newscenter/statements/introductory-statement-board-governors-10> accessed 21 November 2017

[223] 'Statement by the Government of Israel on the Bombing of the Iraqi Nuclear Facility near Baghdad' (8 June 1981) *Israel's Foreign Relations, Selected Documents 1981-1982*, available at <http://mfa.gov.il/MFA/ForeignPolicy/MFADocuments/Yearbook5/Pages/26%20Statement%20by%20the%20Government%20of%20Israel%20on%20the%20Bo.aspx> accessed 21 November 2017

[224] On 22 September 1979, the US Vela satellite recorded the 'double flash' of nuclear explosion which admitted by Israelis as a nuclear test (three low-yield nuclear artillery shells had been tested). See Leonard Weiss, 'Flash from the past: Why an apparent Israeli nuclear

This was regarded as being Israel's equivalent to the United States' test in 1945, with only two major differences. Firstly, Israel did not have the global monopoly of nuclear weapons as the United States did, but had a regional monopoly, and secondly, in contrast to the Truman administration, Israel was in a better position to preserve its monopoly.

The military attack by Israel was described as "an international misconduct and a clear breach of UN charter" in Security Council Resolution 487, which was adopted by the Security Council at its 2288th meeting.[225] The resolution "recognised the inalienable sovereign right of Iraq and all other states, particularly the developing countries, to establish programmes of technological and nuclear developments for their economy and industry for peaceful purposes".[226] The established programmes should be "in accordance with their current and future needs and be consistent with the internationally accepted objectives of preventing the proliferation of nuclear weapons".[227] Moreover, the resolution urged Israel "to place its nuclear facilities under IAEA safeguards".[228] Stephen Zunes, an American international relations scholar, demonstrated that Israel was at the time breaching more than 31 Security Council resolutions, therefore, it would have been a surprise to see an urgent response by Israel to move towards compliance with the IAEA safeguards.[229] However, the Security Council applied no sanctions against Israel as a result of this non-performance of a resolution. Moreover, the United States appeared unwilling to examine the nuclear capabilities of Israel during the late years of the 1970s.[230] At the early stages of the Carter administration, in the

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test in 1979 matters today' (*Bulletin of the Atomic Scientists,* 8 September 2015) available at <http://thebulletin.org/flash-past-why-apparent-israeli-nuclear-test-1979-matters-today8734> accessed 21 November 2017

[225] UNSC Res 487 (19 June 1981) UN Doc. S/RES/487, para, 1

[226] Ibid, para, 4

[227] Ibid.

[228] Ibid, para, 5

[229] Stephen Zunes, 'United Nations Security Council Resolutions Currently Being Violated by Countries Other than Iraq: A Global Affairs Commentary' (1 October 2002) *Foreign Policy in Focus*, available at <http://www.foreignpolicy-infocus.org/commentary/ 2002/0210unre5.html > accessed 2 March 2014

[230] US inspectors visited the Dimona facility (its where nuclear weapons were produced) for the last time in 1969.
The US senators on a fact-finding trip to Israel were refused entry in 1977. See Seymour M. Hersh, *The Samson Option: Israel, America and the Bomb* (Faber & Faber, London 1991) 262

course of Senate hearings regarding the Arms Export Control Act,[231] vigilance was applied in order to guarantee that no data concerning Israel's nuclear weapons projects were openly discussed.[232]

The aforementioned words of Ambassador Brill to the Board of the IAEA were ironic in that they could be accurately applied to Israel, as that country had commenced a secret military project which was being effected at some considerable cost to the Israel economy.[233] Furthermore, "delay, denial and deception" were used to keep inspectors away from the discrete locations where the programme was being developed.[234]

Despite the fact that it was clear Israel and Iran were being treated differently, Iran may have been more gravely concerned by the glaring difference between their treatment and that of Iraq. During the build up to the invasion of Iraq in 2003, an obligation was placed upon Iraq to verify a negative situation, and at that time it was evident that regardless of the emergence of any confirmation regarding the non-existence of weapons of mass destruction, it was impossible to obtain clear verification of the absence of such weapons. As demonstrated by Brill's comments, the United States was engaging in a similar tactic regarding Iran. In other words, the work on Iran's fuel cycle had ceased, and each of its facilities had been placed under protection. However, it could still be argued that Iran's authentic nuclear programme was being continued at an altogether different location. Again, Kissinger's paradigm of "bad faith" which could never be disproved by any facts is apparent in this situation (see note 82). Furthermore, it was perceived that the approach taken prior to the invasion of Iraq could be applied to the case of Iran.[235] It was

[231] Arms Export Control Act (1976) prohibited the US to provide foreign aid to any countries that delivered or received, acquire or transfer nuclear reprocessing, enrichment materials or technology.
[232] Hersh, *supra* note 230, 163
[233] For example, basic argument for/against nuclear arsenal between scientist ad engineers held off Israel from the development of a computer industry. Hersh, *supra* note 230, 137
[234] Hersh, *supra* note 230, 111
[235] In customary international law, preemptive self-defense has its origins in the Caroline test. The Caroline test originates from litigation over the 1837 British destruction of the SS Caroline, in which US Secretary of State Daniel Webster argued that preemptive self-defense can only ne used if necessity is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation" and that the use of force extends to "nothing unreasonable or excessive".

apparent that this opinion could be justified by Iran's historical failure to comply with the Safeguards Agreement as well as a "technical" violation of the voluntary suspension of enrichment, which had been strongly criticised.

This method was made possible by the legal structure of the statute of the IAEA as well as the NPT Safeguards Agreement. This was because none of these documents contained any information regarding what would be considered a level of cooperation sufficient to convince the IAEA Board of Governs that a state (specifically Iran) was not operating a nuclear weapons programme. This indicated that to whatever extent Iran was collaborative and open, it would remain possible for Ambassador Brill to maintain the opinion that Iran was not being collaborative or open. In fact, Iraq's situation between 1991 and 2003 and the current situation in Iran indicate a flaw in the inspection and verification system, which had not been detected by Acheson-Lilienthal. This difficulty was that the inspections were not sufficiently effective in discovering the secret projects; and furthermore, that this ineffectiveness resulted in states subject to inspections being unable to rely on the results of those inspections as the basis for acquitting themselves. In addition inspections also provided the bases for a referral to the Security Council regarding Iran's activities, although, as claimed by Brazil, no verification that Iran was manufacturing nuclear weapons existed.[236]

An additional international parallel is demonstrated by the treatment of the Democratic People's Republic of Korea (DPRK). From a neutral viewpoint, the conduct of the DPRK regarding nuclear proliferation was very poor. The

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In the view of Alan Deshowitz, this test has been passed in the case of Iran because Israel's existence had been continually threated by Iran, and also Hezbollah had launched several military attacks against Israel. Nevertheless, other people have indicated that a rudimentary growth of this kind regarding the root of legal attack would be extremely unlikely to further the cause of global peace. "What would occur if China perceived a threat from Taiwan, or if India perceived a threat from Pakistan? This could apply a precedent which would be a major impediment to the application of international law". Alan Dershowitz, 'Hezbollah's Goal: "Going After [the Jews] Worldwide"' (*Huff post*, 25 May 2011) available at < http://www.huffingtonpost.com/alan-dershowitz/hezbollahs-goal-going-aft_b_26983.html> accessed 21 November 2017; Chris McGreal, 'Iran's nuclear programme: legal debate stirs over basis for US or Israeli attack' *The Guardian* (12 April 2012) available at <https://www.theguardian.com/profile/chrismcgreal+world/israel?page=3> accessed 2 October 2016

[236] IAEA, 'Record of the 1085th Meeting' (Vienna, 21 November 2003) IAEA Doc.GOV/OR1085, para, 28 (Brazil)

DPRK has had a practice of making aggressive and frequent threats to take extreme measures against adjacent states, and has on occasions flown medium-range missiles over Japan.[237] However, despite the fact that reference was made to it being part of President Bush's "axis of evil", there was little or no indication of an intent to take hostile action against North Korea. A number of observers deduced the reason for this as being that it was thought that the DPRK already possessed an atomic device. Nevertheless, the activities of the United States in the Middle East strongly motivated Iran, in the same way as Israel, to obtain nuclear weapons as a ultimate deterren. However, as Israel was the major power in the region, Iran was exposed to a military threat. This meant that the United States was providing Iran with a plausible reason for manufacturing nuclear weapons. Furthermore, this apparent intent was one of the reasons why Iran represented such a danger to global peace.[238] The issue of intent will be discussed at a later stage.

3.4 Intention to Use Nuclear Weapons

From a legal perspective, a person's intent is frequently a significant factor. Nevertheless, although this situation may be understood from the perspective of a person's statements or conduct, complicated collective objectives, for example those of a nation, are comprised of a number of minds within many institutions. Therefore, the intent informing a state's policies is extremely difficult to infer. However, even in such a case, many interpretations may be relevant as various participants may perceive any series of occurrences or set of circumstances in different manners at different times. In an extensively quoted statement, James Acton considers the difficulties associated with determining a state's intent.[239] For instance, despite the fact that previous sections have contended that the United States regarded the manufacture and utilization of an atomic weapon in 1945 as an objective, the decisions were made by only a small, distinct group of policymakers. The situation is different in the modern world, where various organisations may possess

[237] 'Japan readies missile defence over North Korean rocket' South China Morning Post (3 December 2012) available at <http://www.scmp.com/news/asia/article/1096411/japan-readies-missile-defence-over-north-korean-rocket> accessed 21 November 2017

[238] For more details on this point see Saira Khan, *Iran and Nuclear Weapons: Protracted Conflict and Proliferation* (Routledge, New York 2010) 89-110

[239] James M Acton, 'The Problem with Nuclear Mind Reading' (2009) 51 (1) *Survival* 119, 126

different viewpoints on the manufacture of nuclear weapons at various times. Since there can be changes of administration, some nations may opt not to make any decisions, but simply to establish a scientific capability that will in the course of time enhance a break-out capability without specifically intending to do so. This was the situation of Sweden during the 1960s.[240] Furthermore, there is the familiar problem of dual use; the reality is that only a few of processes dealing with nuclear energy have a significant bearing on the construction of weapons.

Australia's Ambassador to the IAEA, Deborah Stokes commented that "it would be useful if there was an established definition of the term non-compliance" which could be applied to the evaluation of cases. A description for this expression would be principally "technical and factually" based.[241] James Acton recognised this difficulty, and proposed a progressive series of measures, eventually culminating in a referral to the Security Council, that would be taken against a state depending on the gravity and type of its non-compliance. He identified different areas of non-compliance, including the level of military involvement, the extent of any deception and the extent of any efforts to avoid detection, and the degree of collaboration with the IAEA, in addition to other factors.

Despite the fact that a test of this kind, or a sequence of tests, would partially supply a structure for a procedure whose criteria were in accordance with the requirements of the IAEA Board of Governors, this would not have been exactly factual mechanism that was advocated by Ambassador Stokes. This is because the majority of Acton's tests were subjective. For instance, Acton presented a table which analysed the activities of Iran and the ROK, demonstrating that Iran's non-compliance with its Safeguard Agreements was worse than that of the ROK. However, with regard to the heading "Co-ordination with the IAEA", he simply reiterated the opinions of the Western countries, which had not been given any definition in legal documents, and as demonstrated in past sections, accept a retributive manner regarding minor

[240] Ibid.
[241] IAEA, 'Record of the 1085th Meeting' (Vienna, 21 November 2003) IAEA Doc.GOV/OR1085, para, 45 (Australia)

problems. In addition, while Iran attracted much criticism for its lack of compliance with the Security Council and the IAEA, the ROK was not subject to any similarly critical resoutions. This led Iran to conclude that these resolutions were politically motivated.[242] The most frequent complaint raised by Western nations concerning Iran's nuclear programme concerned the period of time during which it was hidden, although an identical situation applied with the ROK.

As previously observed, it was to some extent the impracticability of "reading" the Soviet Union which persuaded Kennan that the differences between the Soviet Union and the United States were so fundamental that it was impossible to obtain a *modus vivendi*. It appears that those who perceive Iran from the United States/Israel viewpoint have a similar attitude.

On 18 April 1995, at the NPT Review and Extension Conference, the British Chairman indicated that the impact of the export control measures, about which Iran had registered a complaint, only applied to those states "about whose ultimate intentions there were widespread doubts".[243]

From a purely factual perspsective, the major origin of uncertainty is not that Iran may be seeking to develop its nuclear industry or using more effective centrifuges, but rather it is Iran's aim to obtain a closed fuel cycle; a cycle which reprocesses used fuel instead of storing it. This process is undertaken only by a small number of countries. The country which possesses the highest centrifuge capacity is Russia, followed by the United States and France. China, Germany, Japan, the Netherlands and the United Kingdom all have low enrichment capabilities while Argentina and Pakistan have particularly small nuclear industries.[244] With regard to closed fuel cycles, France and the United Kingdom are the only states possessing major reprocessing industries, whereas those in Japan and Russia are small. It is argued that economically it

[242] Acton, *supra* note 239, 132-133
[243] United Nations, '1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Summary Record of the 3rd Meeting' (New York, 18 April 1995) NPT/CONF.1995/SR.3, para 36 (UK)
[244] 'Country Nuclear Fuel Cycles' *Technical Report Series no. 425* (2nd edn, IAEA, Vienna 2005) <http://www-pub.iaea.org/MTCD/publications/PDF/TRS425_web.pdf> Iran and Israel are not considered here.

makes little sense for Iran to make fuel in its cascades, and even less to reprocess it. The EU3 Foreign Minister referred to this by stating, "the elements at the core of the debate are financially illogical; these are at Isfahan and Natanz and Iran contends, that they are exclusively for the purpose of manufacturing fuel for nuclear reactors. We have expressed a willingness to work in order to give the country a guarantee of a supply".[245]

Iran's decision to adopt a closed fuel cycle appears to be unusual, and the means by which it was implemented appear to be secretive. However, the justification for this put forward by Iran; that security of supply was the determining factor in this choice rather than economic factors should be considered. In the light of the 1951-53 British oil restrictions, the ban on trade by the United States and the irregular record of the EU in resisting pressure from the United States, all of this is credible. Furthermore, if Iran relied on EU fuel rods, it would consequently become more susceptible to pressure from the United States. The payment of $1 billion by Iran to the French Commissariat à l'Énergie Atomique as part payment of the cost of building the multinational Eurodif plant, with its current capacity of 8 million SWU has an unfortunate history. Following the revolution in Iran, France rejected the delivery of fuel to Iran due to sanctions, despite the fact that Tehran continued to hold an indirect share in the Eurodif company. According to Oliver Meier: "Iran considers this rejection as proof of the unreliability of outside nuclear supplies and uses the Eurodif episode to argue its case for achieving energy independence by supplying all of the elements of the nuclear fuel cycle itself".[246] It is possible that this history may have been the cause of Iran's unwillingness to agree to EU3 pledges that Europe would provide fuel for Iran's industry. In addition there is a Russian proposal to establish an enrichment facility in Russia, which would be jointly owned by Russia and Iran. With regard to this, the likelihood of a fuel cycle which is internationally controlled remains a possible technical solution and an alternative to a plant in Iran.

[245] Jack Straw and Others, "Iran's Nuclear Policy Requires a Collective Response" *The Wall Street Journal* (22 September 2005) A16

[246] Oliver Meier, 'Iran and Foreign Enrichment, a Troubled Model' (*Arms Control Association,* 1 January 2006) available at <https://www.armscontrol.org/printpdf/1973> accessed 31 August 2017

In the course of the dispute, Iran has persistently maintained that the matter has been has been politicised in an inappropriate way, and that it should be permitted to establish a nuclear industry in the same way as other NPT members. In emphasising this issue, Iran has placed a strong dependence upon Article IV of the NPT. We will return to this later.

3.5 Iran's Nuclear Issue referred to the Security Council

Iran's voluntary suspension of activities associated with the fuel-cycle prepared the way for the Paris accord. This emphasised that it would be essential to maintain the suspension of nuclear activities while negotiations for a long-term agreement were underway for the continuation of the overall process, and stated that the agreement should provide "objective guarantees that Iran's nuclear programme is exclusively for peaceful purposes [and] provide firm guarantees on nuclear, technological and economic cooperation and firm commitments on security issues". [247]

After the negotiations, it emerged that the EU3 had been put under pressure by the Bush administration [248] and that what they termed as objective guarantees, were in reality an attempt to dismantle Iran's fuel cycle. However, Iran maintained that it had an entitlement to develop a fuel cycle under safeguards, and accordingly did not accept the EU proposals. [249]

Similar to what happened regarding discussions on the issue of nationalisation in 1951, preliminary negotiations did not go well, placing the two sides on a collision course. It was not possible to devise an ideal solution to bring the two sides together in order to conduct give-and-take policy negotiations. Although Iran made many accommodating offers, the West did

[247] IAEA, 'Communication dated 26 November 2004 received from the Permanent Representatives of France, Germany, the Islamic Republic of Iran and the United Kingdom concerning the agreement signed in Paris on 15 November 2004' (26 November 2004) IAEA Doc. INFCIRC/637, 4

[248] Ibid.

[249] 'Summary of the Latest Round of Nuclear Talks Between Iran and the European Union As Seen and Transcribed by Reuters' (*Iran Watch*, 26 January 2005) available at <http://www.iranwatch.org/library/international-organization/european-union-eu/summary-latest-round-nuclear-talks-between-iran-and-european-union> accessed 21 November 2017

not move from its opening position and rejected any compromises. As Iran saw there was no consensus on the part of the West, it may have seen some advantage in gradually hardening its stance, leading to ever greater divergence between the two sides as the talks continued.

In order to sustain the talks, Iran suggested a range of options. Tehran offered: 1) to dispense indefinitely with its reprocessing of spent fuel, which would block the plutonium pathway to a bomb, 2) to enrich uranium only up to a low level for conversion to uranium dioxide to be used in the manufacture of fuel rods, [250] 3) to resume work at the Isfahan conversion plant under strictly monitored conditions, 4) to ensure that the work at Natanz was appropriate for the requirements of the fuel needed by the light water reactors offered to Iran by the EU3.[251] Iran's newly-elected President, Mahmood Ahmadinejad, shortly after coming to power in September 2005 stated Iran's willingness to partner other countries' public and private sectors to allow Iran's enrichment programme to be implemented.[252] When it became apparent that the EU3's agenda was exclusively to seek to dismantle Iran's fuel cycle facilities, the talks began to collapse. [253]

It can be deduced from this failure that the West itself cannot trust its own non-proliferation mechanism. The programme of inspections and monitoring could have been made to work. Acheson-Lilienthal had mentioned that about 300 scientists were needed to camp around an enrichment plant in order to ensure compliance (see note 43). However, only three scientists were recruited to conduct the inspections in Iran. [254] The nuclear activities pursued by Iran were seen to be lawful under the NPT, and consistent with the reasons that prompted the founding of the IAEA; supporting the development

[250] 'Elements of Objective Guarantees' (presented by Iran in the meeting of the steering committee, Paris, 23 March 2005) para, 2, quoted in Ronen, *supra* note 168, Doc 104
[251] IAEA, 'Communication dated 1 August 2005 received from the Permanent Mission of the Islamic Republic of Iran to the Agency' (1 August 2005) IAEA Doc. INFCIRC/648, 4
[252]'Address by Mahmood Ahmadinejad President of the Islamic Republic of Iran', the Sixtieth Session of the United Nations General Assembly (New York, 17 September 2005)
[253]Julian Borger ''Progress' in Moscow: Iran says no with PowerPoint' *The Guardian* (18 June 2012) available at <https://www.theguardian.com/world/julian-borger-global-security-blog/2012/jun/18/iran-russia> accessed 30 September2017
[254] 'New IAEA Team Arrives in Iran' *Radio Free Europe Radio Liberty* (28 January 2007) available at < https://www.rferl.org/a/1074323.html> accessed 30 September 2017

of peaceful nuclear energy.[255] Nevertheless, the Iran issue showed that the level of cooperation with the Safeguard Agreements or any other kind of supplementary agreement would be of no significance if the West had no desire to accept that Iran's nuclear development was peaceful. This would appear to suggest that Acheson-Lilienthal was correct in concluding that the non-proliferation regime was ineffective.

Although IAEA inspectors had not been able to demonstrate any activities pursued by Iran which could be shown to be linked with the development of nuclear weapons, and no trace of nuclear weapons programmes had been found in Iran, the country failed to meet the enhanced standards imposed on it by the IAEA Board of Governors. This resulted in Iran's referral to the UN Security Council on February 4, 2006.[256] The Security Council adopted Resolution 1696 (2006) based on Article 40 of Chapter VII of the UN Charter to terminate Iran's pursuit of its nuclear enrichment programme.[257] The Security Council demanded that Iran "Suspends all enrichment-related and reprocessing activities, including research and development, to be verified by the IAEA."[258]

In Paragraph 6 of Resolution 1696, the Security Council "called upon Iran to act in accordance with the provisions of the Additional Protocol and to implement, without delay, all transparency measures as the IAEA may request in support of its ongoing investigations".[259] The Security Council's permanent members generally agreed that this provision imposed mandatory requirements on Iran,[260] which the language of Resolution 1696 clarified. It is worthy of note that British Ambassador Emyr Jones Parry and American Ambassador Bolton, in the course of the discussion of this resolution,

[255] "The Agency is authorized to encourage and assist research on, and development and practical application of, atomic energy for peaceful uses throughout the world". See Statute of the International Atomic Energy Agency (IAEA Statute) (1957) last amended 1989, Article III (A)(1)
[256] IAEA, 'Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran; Resolution adopted on 4 February 2006' (4 February 2006) IAEA Doc.GOV/2006/14
[257] Ibid, paras, 1,3,7,8
[258] UNSC Res1969 (31 July 2006) UN Doc. S/RES/1696, para, 2
[259] Ibid, para 6
[260] United Nations, '5500th Meeting' (New York, 31 July 2006) UN Doc. S/PV.5500

maintained that the requirements of Resolution 1696 which use the term "calls upon" determined the mandatory aspect of the resolution.[261]

Resolution 1696 represented a distinct interruption of Iran's entitlements and requirements according to the Iran-IAEA Safeguards Agreement, especially Article 37, which permits Iran to possess some natural and depleted uranium with a particular enrichment level.[262] An interesting aspect of this particular provision of Resolution 1696 is that Iran joined the NPT in 1970 and accepted a Safeguards Agreement that came into effect on 15 May 1974. Iran signed the Additional Protocol with the IAEA on 18 December 2003,[263] but did not ratify it.[264] It appeared that Tehran did this in response to the United States allegations that it was seeking nuclear weapons, as an attempt to prove "the peaceful nature of its nuclear activities."[265] This Additional Protocol permitted the undertaking of unexpected and unscheduled inspections of Iran's facilities. However, it did not take effect. In 2003, the Additional Protocol began to provide the IAEA with the unlimited access it needed to conduct thorough inspections. However, Iran changed its mind when, at the beginning of 2006, the Agency raised the issue of whether a breach of certain international obligations had occurred.

Joyner makes reference to situations regarding nuclear enrichment programmes in Japan and in South Korea, which have a basic similarity to the nuclear programme in Iran, but were not subject to criticism at an international level. He contends that the different way in which Iran was treated was not as a result of any violation of the NPT, but due to the jurisdiction of the Board of

[261] Ibid, 3 (US) 4 (UK); the United States implied this same point with respect to the "calls upon" provisions of Resolution 1737. United Nations, '5612th Meeting' (New York, 23 December 2006) UN Doc. S/PV.5612, 3 (US)

[262] IAEA, 'Agreement between Iran and Agency for the Application of Safeguards in Connection with the Treaty on the non-proliferation of Nuclear Weapons' (13 December 1974) IAEA Doc. INFCIRC/214, Art 37

[263] 'Iran Signs Additional Protocol on Nuclear Safeguards' (*IAEA*, 18 December 2003) available at <https://www.iaea.org/newscenter/news/iran-signs-additional-protocol-nuclear-safeguards> accessed 21 March 2015

[264] IAEA, 'Conclusion of Safeguards Agreements, Additional Protocols and Small Quantities Protocols' (3 July 2015) available at <http://www.iaea.org/safeguards/documents/sir_table.pdf> accessed 21 November 2017

[265] Greg Bruno, 'Iran's Nuclear Program' (*Council on Foreign Relations*, March 10 2010) available at <http://www.cfr.org/iran/irans-nuclear-program/p16811> accessed 21 November 2017

Governors of the IAEA, which consider the situation in Iran to be somewhat different.[266] Joyner believed that Iran was correct with regard to the non-proliferation law. However, "the legal landscape changed with the adoption of Resolution 1696, especially through Article 103 of Charter" which apparently meant that decisions on the basis of the Charter should have precedence over Iran's entitlements according to the NPT.[267]

No formal provisions on sanctions were included in Resolution 1696. However, six months later, Iran's failure to satisfy the requirements stipulated in this resolution prompted the Security Council, on 23 December 2006, to apply Article 41 of Chapter VII of the UN Charter, and to adopt Resolution 1737 (2006).[268] An arms embargo, financial bans and travel sanctions were imposed by the UN Security Council. Under the arms embargo, states were not permitted to export to and import from Iran any items that could contribute to Iran's enrichment-related, processing or heavy water-related activities or to the development of nuclear weapons delivery systems.[269] In order to advance this agenda of prohibition established by Resolution 1737, a comprehensive list of prohibited items was produced. These included: materials, equipment, goods and technology pertaining to nuclear programmes, technical aid, training, financial support, economic resources or the supply of services. This list was displayed and attached to Resolution 1737.[270] In addition, financial sanctions froze all assets and financial resources owned by individuals or entities which were associated with Iran's nuclear programme.[271]

The imposition of binding obligations on disarmament and arms control on Iran, in addition to other obligations, clearly occurred following the adoption of Resolution 1737.[272] This resolution went further than Resolution 1696, which had required Iran to "act in accordance with the provisions of the Additional

[266] Daniel H. Joyner, *International Law and Proliferation of Weapons of Mass Destruction* (Oxford University Press, New York 2009) 51-54
[267] Ibid.
[268] UNSC Res 1737 (23 December 2006) UN Doc. S/RES/1737
[269] Ibid, para, 3
[270] Ibid.
[271] Ibid, para, 12
[272] Ibid, para, 2

Protocol". [273] Resolution 1737 "called upon Iran promptly to ratify the Additional Protocol". [274] As previously stated, some permanent members of the Security Council held discussions over this resolution as to whether the "calls upon" provisions of Resolution 1737 imposed mandatory obligations on Iran. [275]

Resolutions 1696 and 1737 raised legal issues related to the importance of "calls upon". In addition the Security Council's ability to impose treaty obligations on states was raised in Resolution 1696 and Resolution 1737. This is an indication of the degree to which the UN Security Council was willing to generate new nuclear non-proliferation commitments that were generally similar to pre-existing treaty commitments. This was not simply a case of the Security Council attempting to persuade a state to observe its current commitments, as maintained by certain reporters.[276] Furthermore, this demonstrated the willingness of the Security Council to act in a forceful manner to withdraw nuclear weapons capacity from a state, irrespective of contrasting reports.[277] As a result, Iran argued that its sovereignty had been infringed.[278] In a case of this nature, it is possible that it may have benefited to Iran to rely on a legal resolution in order to establish its entitlements and commitments.[279]

After Iran's failure to abide by Resolutions 1696 and 1737 in March 2007, Resolution 1747 was adopted by the Security Council. This new resolution sanctioned individuals who had links with Iran's nuclear programme.[280]The resolution stipulated that all entities and individuals would be affected by the travel, financial and nuclear-related goods bans and sanctions. [281] The

[273] UNSC Res1969 (31 July 2006) UN Doc. S/RES/1696, para, 6
[274] UNSC Res 1737 (23 December 2006) UN Doc. S/RES/1737, para, 8
[275] United Nations, '5612th Meeting' (New York, 23 December 2006) UN Doc. S/PV.5612, 3 (US)
[276] Berhanykun Andemicael, *The OAU and the UN: Relations between the Organization of African Unity and the United Nations* (Africana, New York 1976) 123, 124
[277] James S. Sutterlin*, The United Nations and the Maintenance of International Security: A Challenge to Be Met* (Praeger, Westport 2003) 110
[278] Elaine Sciolino, 'Threats Rattle at Nuclear Meeting on Iran' *New York Times* (9 March 2006) A6
[279] James D. Fry, *Legal Resolution of Nuclear Non-Proliferation Disputes* (Cambridge University Press, Cambridge 2013) 163
[280] UNSC Res 1747 (24 March 2007) UN Doc. S/RES/1747, para, 2
[281] Ibid.

resolution also prohibited Iran from supplying, selling, purchasing, or transferring any arms or related materials.[282] After reports released by the Agency indicated that enrichment activities, reprocessing activities and heavy-water-related projects had not been suspended, the Security Council imposed further measures on Iran.[283] Resolution 1803 empowered states to carry out, as they considered necessary, whatever inspections on aircraft and vessels importing or exporting goods to Iran under the name of Iran Air Cargo and the Islamic Republic of Iran Shipping Lines.[284]

The logic of the Security Council was not based on an assumption that Iran had been undertaking a questionable action, but rather based on its own inability to verify that Iran had acted in accordance with the Council's requirements. The recognised difficulties were that some Iranian nuclear programmes "could possess a military atomic dimension" and also that Iran has not substantiated total and continued deferment of its alleged nuclear activities. Resolutions 1696 and 1737 do not specify what it considers to be the Iranian activity which constitutes a threat to peace and which cannot be regarded as a faultless activity from a legal perspective. Furthermore, the subsequent Resolution 1803(2008) did not recognise any threat to peace. It stressed that "Iran has not established full and sustained suspension of all enrichment related and reprocessing activities and heavy water-related projects as set out in resolution 1696(2006), 1737(2006), and 1747(2007)". Therefore, it was concerned "by the risks of proliferation which are apparent in Iran's nuclear activity", and consequently moved directly to Article 41 in order to apply more sanctions. Similarly, the subsequent Security Council Resolution 1929 (2010) repeated accounts from previous resolutions and is predicated on Iran's failure to "co-ordinate with the IAEA in accordance with

[282] Ibid, para, 5
[283] IAEA, 'Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions 1737 (2006) and 1747 (2007) in the Islamic Republic of Iran: Report by the Director General' (22 February 2008) IAEA Doc.GOV/2008/4; IAEA, 'Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions 1737 (2006) and 1747 (2007) in the Islamic Republic of Iran: Report by the Director General' (15 November 2007) IAEA Doc.GOV/2007/58
[284] UNSC Res 1803 (3 March 2008) UN Doc. S/RES/1803, para, 11

the Additional Protocol",[285] as well as "to prohibit the possibility of the military extent of Iran's nuclear activity".[286]

The procedure of implementing Resolution 1929 was witnessed with some hesitation regarding the need for the sanctions contained within it. Brazil opposed the sanctions since they did not consider them to be an efficient tool, and advocated the possibility of settling the nuclear-enrichment issues by means of negotiation. Brazil argued that it was abnormal to apply sanctions with haste prior to the parties involved being able to discuss the application of the declaration, and sanctions should be postponed rather than advanced in order to guarantee advancement in approaching the question.[287] The Council members who endorsed and voted for Resolution 1929 did not argue effectively for the necessity of its adoption. This supports the interpretation that the reasoning behind these adopted resolutions was part of a politically-motivated agenda. This should be contrasted with a section of Chapter VII which declares it essential to confront existing threats. [288]

All of these resolutions share common features, and in each of them the Security Council acts under either Article 40 (Resolution 1696) or Article 41 (Resolution 1727, 1747, 1803 and 1929) of the Charter, but without making a declaration (as per Article 39 of the Charter) to state that Iran's conduct is a threat to international peace and security. In addition, the lack of confidence in Iran is highlighted in each resolution, and is regarded as one of the main justifications for the imposition of sanctions and other demands. Ultimately, the Security Council stressed in every resolutions, "the importance of political and diplomatic efforts to find a negotiated solution guaranteeing that Iran's nuclear programme is exclusively for peaceful purposes".[289]

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[285] UNSC Res 1969 (31 July 2006) UN Doc. S/RES/1696, para, 3
[286] Ibid, para, 5
[287] United Nations, '6335th Meeting' (New York, 9 June 2010) UN Doc. S/PV.6335, 2-3 (Brazil)
[288] Alexander Orakhelashvili, *Collective Security* (Oxford University Press, New York 2011) 202
[289] UNSC Res 1969 (31 July 2006) UN Doc. S/RES/1696, para, 3; UNSC Res 1737 (23 December 2006) UN Doc. S/RES/1737, para, 20; UNSC Res 1747 (24 March 2007) UN Doc. S/RES/1747, para, 9; UNSC Res 1803 (3 March 2008) UN Doc. S/RES/1803, para, 15,16; UNSC Res 1929 (9 June 2010) UN Doc. S/RES/1929, para, 32, 33

3.6 Iran's Legal Arguments: The Unlawfulness of the Council's Resolutions

This section addresses the counterarguments presented by Iran against the Security Council resolutions. Iran's claims targeted the violation of procedure as specified in the Charter, the IAEA Statute, and the Iran Safeguards Agreement for the adoption of the resolutions, and breaches of its rights of self-determination and development.

3.6.1 Article 39 of the United Nations Charter

Article 24 of the Charter gives the Security Council primary responsibility for maintaining international peace and security. In Paragraph 2, it is clarified that "the specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII." One of these powers, which is specified in Article 39, states that the Security Council may establish the occurrence of a threat to peace, breach of the peace, or an act of aggression. Any one of these threats could trigger Article 41 or 42 to maintain international peace and security. This indicates that in certain circumstances, the UN Security Council may resort to certain measures. When peace is threatened or an act of aggression begins, Article 41 or 42 is triggered in order to apply measures intended to restore international peace and security. Should peace be threatened, it is necessary for the objective of those measures to be the maintenance of international security and peace; in other words, taking action to prevent any situation in which it would be necessary to re-establish security and peace. As the preamble emphasises, the aim of the United Nations is to prevent generations in the future from being affected by the terror of war.

Iran argued that the Security Council had never stated that the Iranian nuclear program constituted a "threat to the peace, a breach of peace, or act of aggression" as set out in Article 39 of the UN Charter.[290] These

[290] IAEA, 'Communication dated 8 December 2011 received from the Permanent Mission of the Islamic Republic of Iran to the Agency regarding the Report of the Director General on the Implementation of Safeguards in Iran' (12 December 2011) IAEA Doc. INFCIRC/833, para, 20 (c)

considerations are regarded as prerequisites for the implementation of measures under Chapter VII. [291]

The UN Charter does not expand on what amounts to a "threat to peace", "a breach of the peace", or an "act of aggression". The absence of an accurate definition was deliberate, the reason being that the objective of the founders was to provide the Security Council with the highest degree of flexibility in deciding how best to respond to specific circumstances.[292] However, when the Charter was formulated, the majority of observers would have anticipated that a violation of peace would involve an intense dispute between states, and that if peace were threatened, this would also involve circumstances which would likely lead to a dispute and an aggressive act, which could be described as one state taking military action against another.[293]

The UN Charter does not contain a definition of peace, although it is a key term used in Article 30. Peace is often taken as meaning simply the absence of war, but has been interpreted as having a much wider meaning in the context of the UN Security Council; not just the absence of war within or between nation states, but also involving issues relating to economic, humanitarian and ecological relations within and between nations[294]. It can be argued that this wider definition was used in a 1992 statement by the President of the Security Council.

He stated, "the absence of wars and military conflicts among States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have

[291] Jochen A. Frowein, Nico Krisch, 'Article 39', in Bruno Simma and other (ed), *The Charter of the United Nations. A Commentary* (2nd edn, Oxford University Press, New York 2002) 717, 726-727

[292] Jochen A. Frowein, Nico Krisch, 'Chapter VII; Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression', in Bruno Simma and others (eds), *The Charter of the United Nations, A Commentary* Vol I (2nd edn, Oxford University Press, New York 2002) 718

[293] Ibid, 718-728

[294] Statement of the Heads of States and Governments of Members of the Security Council. 31 January 1992: "The absence of wars and military conflicts among States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security. The United Nations membership as a whole, working though the appropriate bodies, needs to give the highest priority to the solution of these mattes." UN Doc S/PV.3046.

become threats to peace and security. The United Nations membership as a whole, working though the appropriate bodies, needs to give the highest priority to the solution of these matters."[295] As suggested, "the concept of the threat to the peace can be understood in an extraordinarily broad manner when there is unanimity within the Security Council."[296] It is noted that Council decisions regarding invoking Article 39 and Chapter VII powers have been made both when armed inter-state conflict has been involved and when it has not[297].

Furthermore, there is contradictory international jurisprudence regarding whether it is possible to limit the discretion of the Council in making decisions according to Article 39. It was deduced by the International Criminal Tribunal regarding the former Yugoslavia in the Tadic case that the Security Council does not possess total discretion as to what exactly constitutes a threat to peace. [298] The International Criminal Tribunal for Rwanda in the Kanyabashi case maintained that according to Article 39, the discretionary evaluations of the Council were not justified. [299] With regard to this issue, the ICJ has not clearly declared its own stance. However, in the Lockerbie case, an opinion was given by Judge Christopher. G. Weeramantry that "the Council and no other is the judge of the existence of the state of affairs that brings Chapter VII into operation".[300]

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[295] United Nations, '3046th Meeting' (New York, 31 January 1992) UN Doc. S/PV. 3046

[296] Jochen A. Frowein, 'Article 39', in Bruno Simma and other (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, New York 1994) 612

[297] In Southern Rhodesia and in South Africa, the establishment of minority rule and racist policies was the major factor prompting Council to determine the existence of a 'threat to the peace' and economic sanctions and arms and oil embargoes were applied. In Resolution 788 (1992) the Council decided that the deteriorating civil war situation in Liberia should be considered a threat to the peace. In the case of Resolution 688 (1991), the Council addressed "a massive flow of refugees towards and across international frontiers" as a threat to international peace and security. In the case of Somalia, the Security Council in Resolution 794 (1993) found a 'threat to the peace' in the failure of statehood and "magnitude of human tragedy". In Resolution 955 (1994), it was declared that the genocide in Rwanda should be considered as a threat to peace. In all these cases the Council broadened the notion of what is considered a threat to international peace and security and imposed extensive enforcement measures including, in some cases, the authorisation of member States to use armed force.

[298] The Prosecutor of the Tribunal v. Dusan Tadic, Case No. IT-94-1-AR72 (2 October 1995) para, 29

[299] The Prosecutor v. Joseph Kanyabashi, Case No. ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction (18 June 1995) para, 20

[300] Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United

The Security Council's treatment of the Iranian nuclear issue is generally marked by a rather vague evaluation of whether that situation involved a threat to peace, thereby justifying the application of Chapter VII measures. All five previous UN resolutions on Iran mention proliferation risks.[301] The Council's rhetoric closely approaches the area which is covered by Article 39 but does not go so far as to declare that these potential risks can be regarded as a threat to peace. Alexander Orakhelashvili held the opinion that these resolutions did not move the issue beyond the area of "allegations" and "speculation".[302]

When Resolution 1696 (2006) was adopted by the Security Council, the United States released a statement which alleged that Iran was pursuing plans to manufacture nuclear weapons, thereby placing international peace and security directly at risk.[303] After the adoption of Resolution 1737 (2006), some other states joined the United States in alleging that Iran was harbouring an ambition to develop nuclear weapons.[304] It is ironic that the only state to utilise the wording of Article 39 of the Charter when sanctions were applied to Iran was Iran's own representative, who remarked that: "Recently, the Israeli Prime Minister vaunted about his country's atomic weapons. However, rather than expressing any concern whatsoever, or even commenting on the severe danger posed to safety and peace at an international level, or regarding the non-proliferation regime, the Security Council applied sanctions on a party of the Non-Proliferation of Nuclear

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Kingdom) (Provisional Measures)(Orders of 14 April 1992), ICJ Reports (1992) 66; Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United State of America) (Provisional Measures)(Orders of 14 April 1992), ICJ Reports (1992) 176; Also Arangio-Ruiz discussed "The Council has neither the constitutional function nor the technical means to determine, on the basis of law, the existence, the attribution or the consequences of any wrongful act […] that Chapter (VII) and the other relevant Charter provisions do not seem to cover the assessment of responsibility except for the determination of the existence and attribution of an act of aggression." See Gaetano Arangio-Ruiz, 'Fifth report on State responsibility' (1993) II (1) *Yearbook of the International Law Commission*, UN Doc. A/CN.4/453 and Add.1-3, para, 211

[301] UNSC Res 1969 (31 July 2006) UN Doc. S/RES/1696, 2; UNSC Res 1747 (24 March 2007) UN Doc. S/RES/1747, 2; UNSC Res 1803 (3 March 2008) UN Doc. S/RES/1803, 2; UNSC Res 1929 (9 June 2010) UN Doc. S/RES/1929, 3

[302] Orakhelashvili, *supra* note 288, 173

[303] United Nations, '5500th Meeting' (New York, 31 July 2006) UN Doc. S/PV.5500, 3 (US)

[304] United Nations, '5612th Meeting' (New York, 23 December 2006) UN Doc. S/PV.5612, 3 (US), 4 (Qatar), 5 (UK), 6-7 (Japan)

Weapons' Treaty who has never, as Israel has, launched an attack or expressed its intention to use force against any UN member".[305]

In the debates which occurred prior to the acceptance of Resolution 1929, it was shown that there had been no breach of commitments regarding the Iran nuclear issue. The Brazilian representative, while voting against Resolution 1929, stated that one of the reasons for doing so was that: "by adopting sanctions [resolution], this Council is actually opting for one of the two tracks that were supposed to run in parallel — in our opinion, the wrong one".[306] The representative of Turkey expressed profound concern that "if sanctions were applied, this action would have a negative impact upon the general diplomatic procedure".[307] The Council member who sponsored and supported Resolution 1929 failed to supply an effective justification of the necessity to accept the Resolution, despite of the issue of nuclear enrichment leading to a resolution by accepted measures.[308]

The Non-Aligned Movement (NAM), which is committed to supporting the interests and ambitions of the developing nations, has a membership of 120 nations. This is almost two-thirds of the entire membership of the UN.
The Non-Aligned Movement called for a right to allow Iran to pursue and develop its peaceful nuclear program based on the Agency's framework. "Peaceful use of atomic technology and nuclear fuel cycle policies should be respected for all countries, including Iran." [309] This statement emphasised that every situation regarding Iran's peaceful nuclear activities ought to be

[305] Ibid. 8-9 (Iran)
[306] United Nations, '6335th Meeting' (New York, 9 June 2010) UN Doc. S/PV.6335, 3 (Brazil)
[307] Ibid.
[308] For example, US representative stated that "Despite consistent and long-standing demands by the international community, Iran has not suspended its uranium enrichment and other proliferation-related activities. The Security Council has passed a resolution today aimed at reinforcing the need for Iran to take these steps and comply with its obligations", Ibid, 4. The reason to adopt the resolution from Japan was that "Iran is obliged to suspend all enrichment-related activities until it fully satisfies and clarifies the international community's concerns about the nuclear programme and thereby restores confidence". Ibid, 9
[309] NAM, 'The Declaration of the XVI Summit of Heads of State or Government of the Non-Aligned Movement, (Tehran Declaration)' 16th Summit of Heads of State or Government of the Non-Aligned Movement (Tehran, 26-31 August 2012) NAM 2012/Doc.7, para, 6

resolved within the IAEA's structure on the basis of "legal and technical" specifications.[310]

The NAM considers the IAEA to be the only organisation which issues verification of its members' commitments. "No pressure or intervention should exist regarding the agency's activities, particularly in the case of verifying the peaceful nature of its members' nuclear activities; otherwise the efficiency and credibility of the Agency is undermined." [311] Moreover, the NAM stressed that the Agency ought to persevere with its endeavours to solve the Iranian nuclear problem according to its authority vested in the IAEA Statute.[312]

Considering the "technical and legal" aspects, together with the unique role which is played by the Agency in this process, The NAM reached the viewpoint that the Iranian nuclear enrichment issue was of no threat to peace and security, and therefore invalidates the action under Article 39 of the UN Charter. This indicates further that the UN Security Council has not developed a fully coherent, concise, and transparent view on how to manage Iran's nuclear enrichment programme under Article 39 and 41 of the UN Charter.

The absence of an appropriate Article 39 dictates that all resolutions concerning Iran have been politically motivated, instead of being a component in a real attempt under Chapter VII to confront legitimate existing threats.
Although some other believe that when a judgment under Article 39 can be perceived to be diplomatically impossible, although there is an acceptance on taking action under Articles 40-42, and it is therefore unwise to refuse the mandatory impact of such decisions.

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[310] NAM, 'Statement on the Islamic Republic of Iran's nuclear issue' 15th Ministerial Conference of the Non-Aligned Movement (Tehran, 27-30 July 2008) NAM 2008/Doc.3/Rev.1, para, 8

[311] NAM, 'Statement on the Islamic Republic of Iran's nuclear issue' (Havana, 11-16 September 2006) NAM 2006/Doc.1/Rev.3, para, 2; United Nations, 'Letter dated 21 December 2006 from the Permanent Representative of Cuba to the United Nations addressed to the President of the Security Council' (22 December 2006) UN Doc. S/2006/1018, para, 3

[312] NAM, 'Statement on the Islamic Republic of Iran's nuclear issue' 15th Ministerial Conference of the Non-Aligned Movement (Tehran, 27-30 July 2008) NAM 2008/Doc.3/Rev.1, para, 8

However, observing this from a different perspective, proliferation could be regarded as a 'threat to peace' when related to Iran's nuclear issue, since the United States has justified its support for the "on the table option" of using force in order to tackle the threat of Iranian nuclear weapons, should diplomacy and sanctions should fail in the first instance.

3.6.2 Inability to Issue Verification under the Safeguards Agreement and the IAEA Statute

Another argument presented by Iran was that the IAEA has never established instances of non-compliance (or of the deviation of nuclear material to nuclear weapons).[313] Iran supports its claim, which is cited as Article XII(C) of the IAEA Statute[314] and Article 19 of the Iran Safeguards Agreement.

Article 19 concerns a situation in which the information provided by a state and findings provided by IAEA inspectors are not consistent with a clear idea of lawful action, in a way which implies that safeguarded atomic material may have been redirected to another location. This Article reads as follows:
"If the Board, upon examination of the relevant data, which has been reported to it by the Director General, discovers that the Agency is unable to verify the absence of any diversion of nuclear material required to be safeguarded under this Agreement, to nuclear weapons or other nuclear explosive devices, it may make the reports for which provision is made in Paragraph C of Article

[313] IAEA, 'Communication dated 8 December 2011 received from the Permanent Mission of the Islamic Republic of Iran to the Agency regarding the Report of the Director General on the Implementation of Safeguards in Iran' (12 December 2011) IAEA Doc. INFCIRC/833, para, 20 (b)

[314] Paragraph C of Article XII of the Statute of the Agency reads as "The staff of inspectors shall also have the responsibility of obtaining and verifying the accounting referred to in sub paragraph A-6 of this article and of determining whether there is compliance with the undertaking referred to in sub paragraph F-4 of article XI, with the measures referred to in sub- paragraph A-2 of this article, and with all other conditions of the project prescribed in the agreement between the Agency and the State or States concerned. The inspectors shall report any non-compliance to the Director General who shall thereupon transmit the report to the Board of Governors. The Board shall call upon the recipient State or States to remedy forthwith any non-compliance which it finds to have occurred. The Board shall report the non-compliance to all members and to the Security Council and General Assembly of the United Nations. In the event of failure of the recipient State or States to take fully corrective action within a reasonable time, the Board may take one or both of the following measures: direct curtailment or suspension of assistance being provided by the Agency or by a member, and call for the return of materials and equipment made available to the recipient member or group of members. The Agency may also, in accordance with article XIX, suspend any non-complying member from the exercise of the privileges and rights of membership."

XII of the Statute of the Agency (hereinafter referred to as 'the statute'). Furthermore, it may, where applicable, apply additional measures for which provision is made in that paragraph. By applying such action, the Board shall take into account the degree of assurance provided by the safeguards measures which have been applied, and shall also afford the Government of Iran every reasonable opportunity to furnish the Board with any necessary reassurance." [315]

Iran considered the referral of its case to the Security Council to be an act in breach of the provisions of the Statute of the Agency and the NPT, because no non-compliance or diversion of nuclear activities to banned purposes had been reported or concluded by the Agency's inspectors. [316] Iran argued that escalating its nuclear issue to UN Security Council level was not justified, and not in accordance with Article 19, stating that "the IAEA Director General has persistently stated in every report which he has presented, that the Agency had the ability to prove that the declared nuclear material and related activities within Iran have not been redirected to military usage; and furthermore, that they have certainly been applied exclusively for peaceable usage".[317] This statement probably originated from the reports of the Director General in

[315] IAEA, 'The Text of the Agreement Between Iran and the Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons' (13 December 1974) IAEA Doc. INFCIRC/214, Art 19

[316] 'Statement by B.E. Dr. Ali Asghar Soltanieh Ambassador and Permanent Representative of the Islamic Republic of Iran to the United Nations and Other International Organizations', the First Session of the Preparatory Committee for the 2010 NPT Review Conference (Vienna, 1 May 2007). This statement has been confirmed by Cuba and Venezuela who argued that "only the Agency had the mandate to verify and draw conclusions about a country's nuclear programme on the basis of objective and factual information", see IAEA, 'Record of the 1081st Meeting' (Vienna, 12 September 2003) IAEA Doc.GOV/OR.1081 para, 29 (Cuba)."The Director General had not reported definite non-compliance on the part of Iran, even though the Agency was the body with the technical capacity to make such a pronouncement. That fact had been omitted from the resolution just adopted, showing its political bias and thereby setting a precedent that severely affected the technical credibility of the Agency", see IAEA, 'Record of the 1141st Meeting' (Vienna, 24 September 2005) IAEA Doc.GOV/OR.1141, para, 17 (Venezuela). See also the statement by Reza Aghazadeh, Iran's vice president and president of the AEOI, at the IAEA General Conference (18–22 September 2006) "the decision taken by the Board of Governors to convey Iran's nuclear issue to the UN Security Council had no legal basis and contradicted the IAEA Statute and its practice."

[317] IAEA, 'Communication dated 14 December 2012 received from the Permanent Mission of the Islamic Republic of Iran to the Agency regarding the Report of the Director General on the Implementation of Safeguards in Iran' (20 December 2012) IAEA Doc. INFCIRC/847, para, 79(b)

which stated, “all the declared nuclear material in Iran has been accounted for, and therefore such material is not diverted to prohibited activities”.[318]

In other words, Iran contended that any action taken against it by the Security Council could not be justified, and drew attention to the findings of all IAEA reports on its nuclear activities dating from November 2004, none of which found any diversion of declared nuclear material. This would imply tacitly that breaches of safeguards become relevant only when a state has, in fact, redirected nuclear material. Breaches of a less serious nature; for example failings to report or denying inspectors access to sites, are not perceived as proliferation concerns and may therefore be effectively disregarded.[319] Moreover, Joyner discerns that the IAEA Board of Governors’ referral of Iran’s issue to the Security Council, without any evidence from IAEA inspectors to support the claim that Iran had violated its fundamental NPT commitments or that it was in continuing violation of its Safeguards Agreement had led to disapproval of the decision of the Board of Governors as being “premature”.[320]

The general interpretation of “diversion” is the withdrawal of nuclear material from a safeguarded programme. An additional definition of diversion is included in Article 28 of Iran’s Safeguards Agreement, namely the movement 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”.

Goldschmidt defined diversion, arguing that “failure to declare importation of nuclear material, denying the import when questioned by the Agency and use

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[318] IAEA, ‘Communication dated 12 September 2005 from the Permanent Mission of the Islamic Republic of Iran to the Agency’ (15 September 2005) INFCIRC/657, 28, see IAEA “The Agency is able to verify the non-diversion of declared nuclear material in Iran”, IAEA, ‘Implementation of the NPT Safeguards Agreement and Relevant Provisions of Security Council Resolution 1737 (2006) in the Islamic Republic of Iran’ (22 February 2007) IAEA Doc.GOV/2007/8, para, 27

[319] Supporter of Iran’s argument believe that “the Iranian failure to declare various activities violated the Safeguards Agreement. But there is no finding of non-compliance in the sense of diversion of nuclear materials.” For example, see Michael Spies, ‘Limits on the Non-Proliferation Regime—And why Multilateralism is the Only Solution’ (*Lawyers’ Committee on Nuclear Policy*, 9 February 2006) available at <http://lcnp.org/disarmament/AU2006IranRemarks.htm> accessed 22 November 2017

[320] Daniel H. Joyner, ‘The Security Council as a Legal Hegemon’ (2012) 43 *Georgetown Journal of International Law* 225, 240

of the material in undeclared nuclear activities clearly constitute diversion of nuclear material". He further argued that as the IAEA had not verified that there had not been any diversion of material that would need to be safeguarded, under Article 19 of the Safeguards Agreement, the Board would have authority to inform the Security Council, in accordance with paragraph C of Article XII.[321]

Furthermore, it was suggested by the legal adviser of the IAEA in a statement made in March 2009, that it would be permissible to activate Article 19 in the case of any action taken by a state which is considered to be non-compliant with its Safeguards Agreement and which also increases to a degree whereby the Agency is unable to verify any non-diversion.[322] Consequently, the inability of Tehran to supply any documentation or data relating to the reactors is "inconsistent with" Iran's duties as set out in its subsidiary arrangements. Furthermore, the IAEA legal adviser explained the problem in presupposing that Tehran's refusal to supply this information could itself be regarded as an act of noncompliance with, or a violation of Iran's Safeguards Agreement.

The Board of Governors was, in fact, not reliant upon Article 19 when passing the Iranian file to the UN Security Council, although it still could have used this channel. The pledges given by the Director General of the IAEA regarding there being non-diversion applied only to information that had been possessed by Iran since 2003, together with the country's admission of having made such material subject to safeguards. From every other perspective, the Director General had frequently indicated that the Agency was unable to supply any guarantees regarding the absence of any undeclared nuclear material or activities within Iran, or the solely peaceable characteristics of that nuclear programme, without the full cooperation of Iran.[323]

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[321] Pierre Goldschmidt, 'Rule of Law, Politics and Nuclear Non-proliferation' (Presentation to the Ecole Internationale de Droit Nucléaire at the University of Montpellier, France, Session 2007) 7

[322] 'Statement by the Legal Advisor to the Meeting of the Board of Governors' (March 2009) para, 10

[323] IAEA, 'Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran: Report by Director General' (28 April 2006) IAEA Doc.GOV/2006/27, para, 33

It is of interest to observe that, in March 2006, El Baradei avoided commenting on the legal basis of the referral of the case of Iran to the UN Security Council and just stated: "Let us not become over involved in the legalities". [324] It is apparent that he anticipated that the Security Council would be concerned with the case in such a way as to bring about a peaceable resolution to any dispute (regarding Chapter VI of the Charter), and would not have predicted that the Council would engage in direct action in accordance with Chapter VII of the Charter.[325]

3.6.3 The Right to Utilise Nuclear Energy for Peaceful Purposes under the NPT: Article IV

The NPT can be challenged with regard to the precise meaning of its Article IV. The phrasing of Article IV (1) indicates that: "nothing in this Treaty shall be interpreted as affecting the inalienable right of all parties to the Treaty in order to develop research, production and utilisation of nuclear energy for peaceful purposes, without discrimination and also in conformity with Articles I[326] and II[327] of this Treaty."

A continuing debate with Iran focuses on the presupposition that its nuclear activities are totally peaceable, and that it is legally following its inalienable right in accordance with Article IV of the NPT, since "peaceful use of nuclear energy without possession of a nuclear fuel cycle is an empty proposition."[328] Any bid to restrict Iran's plans by limiting the range of its endeavours, or by

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[324] 'Transcript of Director General's Remarks at Conclusion of IAEA Board Meeting' (*IAEA*, 8 March 2006) available at <http://www.iaea.org/newscenter/transcripts/2006/transcr08032006.html > accessed 18 January 2015

[325] Ibid.

[326] Article I provides: "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."

[327] Article II provides: "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."

[328] 'Address by Mahmood Ahmadinejad President of the Islamic Republic of Iran', the Sixtieth Session of the United Nations General Assembly (New York, 17 September 2005) 8

bringing about the postponement of its activities, especially the process of uranium enrichment, would consequently be a violation of its entitlements.

It is emphasised by Iran that the inalienable right of a nation to enhance nuclear technology with a peaceable intention originates from a globally recognised notion that technological and scientific attainments are the general inheritance of humankind; furthermore, it is unsatisfactory that some have a tendency to restrict access to peaceable atomic technology to an exclusive club which is comprised of states which are technologically advanced according to the non-proliferation pretext.[329]

A conference which was attended by NAM countries was held in Tehran and the participants' final statement echoed and reiterated Tehran's stance. They stated that all states should be empowered to have a basic and inalienable right to conduct research, to develop, produce and utilise nuclear energy intended for peaceful purposes. They stressed that no discrimination should exist and that the utilisation of nuclear energy should conform to the respective international and legal obligations in order to discourage any interpretation which blocks or limits the right of states to attempt to acquire nuclear energy for peaceful purposes. Therefore, Iran's decisions, like those of other states seeking peaceful uses of nuclear technology, including the acquisition of a nuclear fuel cycle, must be respected. [330]

Europe and the United States have, from another perspective, contended that Article IV implies that if a state does not conform to Articles I and II, it consequently surrenders its entitlement to build an atomic industry, and as Iran had not conformed with Article II, it had therefore surrendered its entitlements. The British Foreign Secretary, Jack Straw, advocated that "States which fail to comply with their safeguards obligations inevitably lose the confidence of the international community. The bargain which is at the heart of the treaty is then called into question. We should consider whether

[329] 'Statement by Kamal Kharrazi, Minister of Foreign Affairs of the Islamic Republic of Iran' the Seventh NPT Review Conference (New York, 3 May 2005) 4-5

[330] NAM, 'The Declaration of the XVI Summit of Heads of State or Government of the Non-Aligned Movement, (Tehran Declaration)' 16th Summit of Heads of State or Government of the Non-Aligned Movement (Tehran, 26-31 August 2012) NAM 2012/Doc.7, para 6

such states should not forfeit the right to develop the nuclear fuel cycle […]".[331] Likewise, Andrew Semmel, the representative of the United States emphasised that the inalienable right derives exclusively from "demonstrable and verifiable compliance with Articles I, II and III of the Treaty", and that the benefits of Article IV are "extended only to NPT parties that are clearly in compliance with the mentioned Articles".[332] In effect, their argument is that Iran, through violating its obligations under Article III and Article II has forfeited it rights under Article IV.

However, an altogether more powerful debate argued by Gary Schmitt contended that "the main issue regarding the NPT is its apparent provision that non-nuclear weapon states have a 'right' to nuclear technology and help in exchange for the abandonment of weapons. Iran stipulates that this 'right' permits it to both manufacture a nuclear energy plant, and also to build the required framework for the enrichment of uranium. The intent of the treaty was to prevent proliferation, and it would be a strange thing indeed if the provisions mandated precisely the danger it was trying to forestall".[333] The report supported this argument by citing Albert Wohlstetter, a strategist, who remarked: "It is important to be aware that the NPT is a treaty which is opposed to proliferation and does stand in the way of nuclear development". [334] Consequently, in the case of Iran, the United States administration "should be arguing that Tehran has no inalienable right to its nuclear program. By dint of its multiple and prolonged deceptions with respect to that program, and the fact that the programme has no feasible economic

[331]Jack Straw, 'Weapons of Mass Destruction' Written Ministerial Statements (25 February 2004) available at <https://publications.parliament.uk/pa/cm200304/cmhansrd/vo040225/wmstext/40225m02.htm> accessed 22 November 2017

[332] 'Statement by Dr Andrew K. Semmel, Alternative Representative of the United States of America' the Second Session of the Preparatory Committee for the 2005 NPT Review Conference Peaceful Nuclear Cooperation: NPT Article IV (Geneva, 7 May 2003). Quoted in Daniel H. Joyner, *Interpreting the Nuclear Non-Proliferation Treaty* (Oxford University Press, New York 2011) 64

[333] Gary Schmitt, 'Memorandum to Opinion Leaders' (*Project for the New American Century*, 16 March 2005) available at <http://www.resisttyranny.com/pnac/web.archive.org/web/20070217162216/www.newamericancentury.org/iran-20050316.htm> accessed 30 August 2017

[334] Albert Wohlstetter, Gregory Jones, Roberta Wohlstetter, 'Why the Rules Have Needed Changing' in Albert Wohlstetter (ed.), *Towards a New Consensus on Nuclear Technology*, Vol I, *Summary Report Prepared for U.S. Arms Control and Disarmament Agency* (Pan Heuristics, Los Angeles 1979) 6

rationale, Iran has forfeited the ground on which it can plausibly argue that its programme is 'in conformity with articles I and II of the treaty'."[335]

Furthermore, David Albright et al. issued a report which was critical of the NAM declaration. "The NAM summit ended on 31 August in Tehran with the adoption of a communiqué that is troubling and even hypocritical in its support for Iran's nuclear program […] The NAM communiqué supports Iran's "nuclear energy rights", specifically the right to develop all aspects of the nuclear fuel cycle, including enrichment. This position misconstrues the NPT. Under Article IV, Iran cannot claim the right to nuclear energy production—or a right to enrich at all while it is under investigation for possible non-peaceful uses of these capabilities […] So the NAM communiqué failed to acknowledge the need for Iran to fully comply with the international treaty on nuclear weapons. Iran tried to portray that the final communiqué represented a diplomatic victory for Tehran and its controversial nuclear program. But the summit's resolution instead undermined the NAM's credibility, since it demonstrated that developing states can't be counted on to deal seriously with nuclear nonproliferation issues".[336]

It should be noted that Article IV (1) does not indicate that the NPT should not empower and permit states to construct nuclear power plants or develop a nuclear fuel cycle. Every state has this entitlement because they are sovereign states.[337] Therefore, irrespective of the contentions of the writer by Gary Schmitt, Iran, like all other states, is entitled to possess a nuclear industry.[338] Iran may also assert its entitlement to produce atomic energy, and its entitlement to manufacture the most expensive low-enriched uranium

[335] Schmitt, *supra* note 333; 'Compliance and the Treaty on the Non-proliferation of Nuclear Weapons' Second Session of the Preparatory Committee for the 2010 Review Conference of the Treaty on the Non-Proliferation of Nuclear Weapons Palais des Nations (Geneva, 2 May 2008) available at <https://2001-2009.state.gov/t/isn/rls/rm/111181.htm> accessed 22 November 2017

[336] David Albright, Andrea Stricker, 'NAM Countries Hypocritical on Iran' (*United State Institute of Peace: The Iran Primer*, 7 September 2012) available at <http://iranprimer.usip.org/blog/2012/sep/07/nam-countries-hypocritical-iran> accessed 15 September 2017

[337] Ronen, *supra* note 168, 16

[338] However, it might be really challenging for these states to operate this right without benefiting of IAEA and NGS states guidance. According to Schmitt argument, "the word 'right' switches from the right to claim nuclear technology and assistance and becomes the right to acquire weapons themselves." See Schmitt, *supra* note 335

in the world, regardless of there being an enquiry. As previously stated, Iran suspended the development of its enrichment capacity of its own volition, as specifically recognised by the EU3 during the Paris agreement; it did not surrender its entitlement to enrich.

Furthermore, despite Straw's argument, neither did Iran surrender its entitlement to operate a nuclear fuel cycle, since it is impossible to surrender an inalienable right; if this wasn't the case then, any State Party to the NPT that decided or agreed not to seek a nuclear weapons capability would not be enhancing its rights, but would be risking its capacity to exercise its rights.[339] UN Charter Article 51 deals with the "inherent right of individual or collective self-defence". It also notes that states, in the course of defending themselves, are required to inform the Security Council of their situation, and subsequently to concede the right to self-defence during the time when the Council is deliberating the matter. However, there remains the question as to whether a state that did not refer such an issue to the Council would be surrendering its entitlement to self-defence. This would not be the case, since inalienable rights may not be surrendered as a result of an omission to undertake a contractual obligation.

Additionally, another question which arises focuses on the force and rationale behind Gary Schmitt's arguments regarding the intention of the NPT.
As mentioned previously, the treaty differentiates between safe countries which have weaponized their nuclear science and nuclearized themselves (NWSs) such as the United Kingdom, France, China, the United States, and Russia, and the states that have not weaponized their nuclear science, and are therefore potential proliferators. From a broad perspective, Article VI of the Treaty exacts a requirement upon NWSs to negotiate with genuine intent regarding the removal of their nuclear weapons. Furthermore, the Treaty imposes obligations on the non-nuclear weapons states (NNWSs) to block pathways to their possible manufacture of nuclear weapons. It can be argued

[339] Why is it "inalienable"? The reason is that any nation is entitled to have scientific development. According to Acheson-Lilienthal, "The industry required and the technology developed [for nuclear development] are the same industry and the same technology which play so essential a part in man's almost universal striving to improve his standard of living and his control of nature". See Acheson-Lilienthal report, *supra* note 35, 2

that the only reason for a NNWS to join the NPT, aside from political pressure from the international community, would be, as Eisenhower had stated, that they would be allowed "to utilise nuclear energy for medical and agricultural, requirement as well as […] energy". This would enable the development of a nuclear industry, with the help of the IAEA and, under the conditions of nations involved in the NSG and the Zangger Committee.[340] If the right to such help were removed and it would be of no benefit for any state to join the NPT, as argued previously, a state which became a member of the NPT would, in fact, be risking the surrendering its entitlements, instead of enhancing its capacity to employ them. The NWSs have not been successful in negotiating reductions in their nuclear arsenals [341] and giving up a right to assistance would leave NNWSs with little to bargain with except their decision not to have nuclear weapons. However, if NNWSs were to join the NPT there would be clear advantages for NWSs, and so they would have an interest in promoting the development of a civil nuclear industry. This indicates that there is an interconnection between sharing technology and non-proliferation.

Furthermore, it is not certain that Iran was not compliant with NPT requirements. However, the country is conforming or has been conforming with the IAEA and its Safeguards Agreement, which is an independent legal document.[342] Only states which have not signed a Safeguards Agreement can

[340] Eisenhower, *supra* note 95

[341] In 1981, ten years following NWS's commencement of negotiating away of their atomic weapons, George Kennan was disgusted by the practical meaning of his limitation policy. He said "We have gone on piling weapon upon weapon, missile upon missile, new levels of destructiveness upon old one. We have done this helplessly, almost involuntarily, like the victims of some sort of hypnotism, like men in a dream, like lemmings headed for the seas". See George Kennan, 'How to Break the Nuclear Impasse: A Modest Proposal', *New York Review of Books* (1981) quoted in Edward Kennedy, Mark O. Hatfield, *Freeze! How You Can Help Prevent Nuclear War* (Bantam, New York 1982) 98. This procedure remains in action. Obama's Government declared its support for a comprehensive upgrading project of atomic weapons, including their development and research as well as manufacturing structure and methods of delivery. In the course of the coming 10 years, $88 billion will be expended on modernising weapons and developing facilities for new ones, together with $125 billion an intercontinental ballistic missile for the coming generation, as well as a new cruise missile, and a long range atomic weapon. See Jon B. Wolfsthal, Jeffrey Lewis and, Marc Quint, *The Trillion Dollar Nuclear Triad: US Strategic Nuclear Modernization Over the Next Thirty Years* (James Martin Center for Nonproliferation Studies, Monterey 2014) 8

[342] Furthermore, a legal debate is in progress as to whether the Natanz and Arak sites practically represented non-compliance, because Iran contends that according to its Safeguards Agreement, the necessity for notification applies only 180 days prior to the introduction of fissionable material in 2003. See Paul K. Kerr, 'Iran's Nuclear Program:

be regarded as non-compliant with Article lll. It can also be argued that even if Iran were non-compliant with its Safeguards Agreement, it could easily take actions which ensured that it became compliant with the terms of the agreement – something which Iran in fact did. This was followed by intense questioning and inspections, but despite what the West claimed, no serious violation of Iran's Safeguards Agreement was detected.

In addition, consideration ought to be given to the matter of breaches of Article II. With the exception of writers like Ottolenghi, few people contend that Iran does not comply with Article II.[343] As Acheson-Lilienthal observed, almost all nuclear activity can be seen as moving towards a break-out capability, and this development is spurred on by the IAEA Statute and Article IV (2) of the NPT. Furthermore, if any NNWS state conducts U-238 enrichment activities or begins to operate a reactor, the time required before a nuclear weapon can be constructed will be reduced. This holds true irrespective of the level to which a country's nuclear facilities are safeguarded.

The legal position on what can be regarded as a slowly developing breakout capacity is a major area for change in interpreting the NPT. Zhang claims that, "in the 1980s, the European viewpoint was insistent that the 'unalienable entitlement' was restriction-free, with the exception of the specific suppression of atomic explosions". [344] In the opinion of the United States, "the NPT commitment not to 'manufacture' nuclear weapons included a prohibition on all related development, component fabrication and testing".[345] This view has largely prevailed, especially with regard to Iran's nuclear activities. The position adopted by Israel (the Begin Doctrine) views the operation of a

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Tehran's Compliance with International Obligations' (2017) *Congressional Research Service,* 7, available at <https://fas.org/sgp/crs/nuke/R40094.pdf> accessed 22 November 2017

[343] Emanuele Ottolenghi, *Iran: The Looming Crisis: Can the West Live with Iran's Nuclear Threat?* (Profile Books, London 2010)

[344] Xinjun Zhang, 'The Riddle of "Inalienable Right" in Article IV of the Treaty on the Non-Proliferation of Nuclear Weapons: Intentional Ambiguity' (2006) 5(3) *Chinese Journal of International Law* 651

[345] Leonard S. Spector, 'Repentant Nuclear Proliferants' (1992) 88 *Foreign Policy* 21, 35

research reactor, such as the Iraq installation at Osirak,[346] as a violation of the NPT pledge.

A further problem is that, according to the terms of the NPT, it is not clear exactly which nuclear energy activities can be construed as no longer exclusively peaceable but directed towards the manufacture of a nuclear weapon in contravention of Article II, and at which stage in their development this should be regarded as happening. In turn this makes it difficult to assess which activities, and to what extent, come under the protection of Article IV. This lack of clarity may provide a legal loophole which a potential proliferator state could exploit. This may be the case with Iran, which has consistently argued that its actions have always been consistent with the exercising of its rights guaranteed in the NPT.

Although NWSs have accused Iran of developing a nuclear weapons programme, there is no exact definition of what constitutes such a programme. Consequently it is very difficult to reach a definitive conclusion about any nation's possible development of nuclear weapons up to the point at which a nuclear weapon has been produced in specific violation of the NPT.

3.6.4. The Invocation of the Self-Determination Principle under International Law

Iran's purpose in arguing against the UN Security Council was to assert its economic self-determination. [347] It contended that the peaceable application of nuclear energy was a method of recognising the self-determination criterion, and consequently the Council would be unable to suspend it. Curiously, at no time did it contend that self-determination provided the entitlement to manufacture nuclear weapons. It contended only that self-

[346] Begin Doctrine declared by Israeli Prime Minister, Menachem Begin, in June 1981. The Doctrine is known for the Israeli government's preventive strike regarding the ability to reach nuclear weapons. For example see Dan Williams, 'Insight: Has Iran ended Israel's Begin Doctrine?' *Reuters* (7 November 2011) available at <http://uk.reuters.com/article/us-israel-militarydoctrine/insight-has-iran-ended-israels-begin-doctrine-idUSTRE7A61SA20111107> accessed 22 November 2017

[347] United Nations 'Letter dated 24 March 2008 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General' (26 March 2008) UN Doc. A/62/767-S/2008/203, 6-7

determination would be the means to prevent the Council from insisting on the suspension of nuclear activities where such activities were peaceable.[348]

Article 24(2) of UN Charter constrains the Council's power by a restrictive provision which declares that "in discharging these duties, the Security Council shall act in accordance with the purposes and principles of the United Nations." The objectives and the principles of the UN to which this article refers, are seen in Articles 1 and 2 of the Charter, and involve all the rights possessed by states, such as self-determination, the respect of human rights, the issue of sovereign equality, the compulsion to act in good faith, and a compulsion to remain outside matters, particularly regarding the domestic jurisdiction of member states, as stipulated by the ICJ in the Certain Expenses advisory opinion of 1962: "When the organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the organization".[349]

The NPT has specifically accepted the entitlement of states to the peaceable utilisation of nuclear energy.[350] This means that should any state or international institution apply any action to restrict these entitlements, they will have breached the foundational precept of international law, which includes, *inter alia*, not intervening in the internal affairs of other states. Every state which has signed the NPT has confirmed "that each country's choices and decisions in the field of peaceful uses of nuclear energy should be respected without jeopardizing its policies or international cooperation agreements and arrangements for peaceful uses of nuclear energy and its fuel-cycle policies."[351] Consequently, it would be correct to contend that the action of the Security Council against Iran distinctly contradicts the criteria of the NPT as well as the Statute of the IAEA.

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[348] Ibid.
[349] Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter) (Advisory Opinion) ICJ Report (1962), 168
[350] The Non-Proliferation of Nuclear Weapons Treaty (NPT) (1 July 1968) Art IV
[351] '2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document' (New York, 2000) NPT/CONF.2000/28 (Parts I and II), 8, para, 2

Moreover, on the basis of Common Article 1(3) of the 1966 International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), "the States parties to the present Covenant […] shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations." [352] Accordingly, the realisation of that right and freedom must comply with the Charter. From a general perspective, every granted right and freedom must not depart from the path of international laws and applicable treaties. With regard to the issue of non-proliferation of nuclear weapons, central emphasis should be placed on the IAEA Statute and the NPT which are the main treaties. Therefore, if Iran's nuclear activities are in conformity with these principles, Iran could justifiably invoke self-determination.

3.7 Western States' Legal Arguments: Iran Violated the NPT

The essential Western legal argument is that Iran, up to the signing of the JCPOA agreement, had not been compliant with its obligations under its Comprehensive Safeguard Agreement with the IAEA.[353] The West claimed that Iran had, on many occasions, breached its Safeguards Agreements with respect to the reposting, reprocessing and utilisation of nuclear material, and also in its reporting of the facilities in which such materials were processed and stored.

These failures caused the IAEA Board of Governors to contend that Iran had not complied with its Safeguards Agreement regarding its attempt to develop

[352] Iran singed (4 April 1968) and ratified (24 June 1975) both Covenants. United Nations, 'International Covenant on Civil and Political Rights' (*United Nations Treaty Collection,* 24 April 2015) available at <https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtdsg_no=iv-4&lang=en> accessed 22 November 2017

[353] This statement is likely based on followings reports, IAEA, 'Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran' (26 November 2003) IAEA Doc. GOV/2003/81; IAEA, 'The Text of the Agreement between Iran and the Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons' (13 December 1974) IAEA Doc. INFCIRC/214; IAEA, 'Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions in the Islamic Republic of Iran' (22 May 2013) IAEA Doc. GOV/2013/27

enriching and reprocessing technologies.[354] The Agency[355] and the West[356] acknowledged that these technologies caused concern since they could be utilised to produce fissile material in order to develop nuclear weapons.

This argument was demonstrated by a Wisconsin Project on Nuclear Arms Control report by Lincy and Milhollin who drew on IAEA data in order to assert that a sufficient amount of weapons-grade uranium could be produced by Iran to enable it to develop a single atomic warhead in one year and seven months.[357]

The United States used this argument to accuse Iran of breaching Article III of the NPT. The United States Department of State prepared a report in 2014 which claimed that "Iran's non-adherence to the requirements of its Safeguards Agreement additionally involves a breach of its NPT Article III requirements".[358] Based on this Article, NPT non-nuclear-weapon states-parties are "required to accept IAEA safeguards", in accordance with the IAEA's statute "for the exclusive purpose of verification of the fulfillment of their obligations assumed under this Treaty with a view to preventing division

[354] As reported by the Director General in his report, 'Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran' (10 November 2003) IAEA Doc. GOV/2003/75, and confirmed in 'Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran' (2 September 2005) IAEA Doc. GOV/2005/67

[355] Mohamed ElBaradei, 'Towards a Safer World' (*IAEA*, 16 October 2003) available at <https://www.iaea.org/newscenter/statements/towards-safer-world> accessed 22 November 2017

[356] IAEA, 'Communications Received from Certain Member States Regarding Guidelines for the Export of Nuclear Material, Equipment and Technology' (20 March 2006) IAEA Doc.NFCIRC/254/Rev.8/Part 1a; US Department of State, 'Promoting Expanded and Responsible Peaceful Uses of Nuclear Energy' (16 April 2007) available at <https://2001-2009.state.gov/t/isn/rls/other/83210.htm> accessed 22 November 2017

[357] Valerie Lincy, Gary Milhollin, 'Iran's Nuclear Potential before the Implementation of the Nuclear Agreement' (*Iran Watch*, 18 November 2015) available at <http://www.iranwatch.org/our-publications/articles-reports/irans-nuclear-timetable> accessed 22 November 2017

[358] US Department of State, 'Adherence to and Compliance with Arms Control, Non-proliferation, and Disarmament Agreements and Commitments' (July 2014) 27, available at < https://www.state.gov/documents/organization/230108.pdf> accessed 22 November 2017. See also US Department of State, 'Adherence to and Compliance with Arms Control, Non-proliferation, and Disarmament Agreements and Commitments' (August 2005) 80, available at <https://www.state.gov/documents/organization/52113.pdf> accessed 22 November 2017; James M. Acton, 'Deterring Safeguards Violations' (2009) *Carnegie Endowment for International Peace*, 6, available at <http://carnegieendowment.org/files/acton_policy_outlook.pdf> accessed 22 November 2017; Kerr, *supra* note 342, 12

of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices."

Despite the fact that Joyner disputed their assertion by contending that: "[I]n the case of the IAEA safeguards system, even if there appear to be reasons to determine that a state is non-compliant with the central NPT obligations, the Agency will only find that the state is non-compliant with its safeguards agreement. This determination does not in fact concern the material component of the NPT, but rather only the procedural component contained in the safeguard agreement, such as declaring a relevant facility. It appears, therefore, that there is no direct link between non-compliance with safeguard agreement and a violation of Article III of the NPT."[359]

To justify this argument, closer consideration must be given to the IAEA characteristics and observations that: 1) The Agency is a self-enclosed, treaty-oriented and international organisation, 2) The IAEA precedes the NPT by ten years, (the IAEA was established more than 10 years before the NPT), 3) the IAEA has its own constitutional treaty, the IAEA Statute, 4) It has its own separate membership as an international organisation, 5) Its statute includes detailed regulations and procedures concerning its duties and authority. [360] Joyner believed there to be only one legal interconnection between the IAEA and the NPT. This is stated in Article III (4) of the NPT: "NNWS that are party to the Treaty shall conclude agreements with the International Atomic Energy Agency in order to meet the requirements of this Article." [361]

However, others have pointed to the language of Article III, arguing that "Procedures for the safeguards required by this Article shall be followed with respect to source or special fissionable material […]" and "the safeguards required by this Article shall be applied on all source or special fissionable material […]" demonstrate an obligation in Article III (1) to enter a Safeguards Agreement with the IAEA, and also a commitment to conform to the

[359] Joyner, Roscini, *supra* note 11, 129-130
[360] Daniel H. Joyner, *Iran's Nuclear Program and International Law: From Confrontation to Accord* (Oxford University Press, Oxford 2016) 76
[361] Joyner, Roscini, *supra* note 11, 129-130

conditions of that Safeguards Agreement.[362] They hold the opinion that "conforming to a Safeguards Agreement is an innate part of accepting it". They contend that "arguing the contrary would seem to rob Article III of any distinctive meaning within the NPT. If accepting safeguards does not require complying with them then, except in the trivial case of 'rejecting' an entire Safeguards Agreement outright, it would be impossible for a state to ever violate Article III."[363] Nevertheless, non-compliance with the IAEA and in turn with the NPT's Article III, will probably result in non-compliance with the NPT itself, although this cannot be assumed.

Another matter which is associated with the NPT is the legal argument made by the West against Iran, which asserts that in the past Iran had been given help in the development of its nuclear weapons in breach of the requirement of NPT Article II.[364] Article II, states that all non-nuclear weapon states have undertaken 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."
In February 2012, several United States intelligence agencies, such as the CIA, reportedly claimed that Iran had been conducting research which could have enabled the country to begin to develop destructive nuclear weapons, although Iran was making no efforts to do so,[365] and senior officers of every leading United States intelligence agency said that no definitive proof had

[362] John Carlson, 'Defining Noncompliance: NPT Safeguards Agreements' (*Arms Control Association*, 8 May 2009) available at <https://www.armscontrol.org/act/2009_5/Carlson> accessed 22 November 2017
[363] Acton, *supra* note 358, 4
[364] US Department of State, 'Adherence to and Compliance with Arms Control, Non-proliferation, and Disarmament Agreements and Commitments' (July 2014) 27, available at < https://www.state.gov/documents/organization/230108.pdf> accessed 22 November 2017
[365] Ken Dilanian, 'U.S. does not believe Iran is trying to build nuclear bomb' *Los Angeles Times* (23 February 2012) available at <http://articles.latimes.com/2012/feb/23/world/la-fg-iran-intel-20120224> accessed 22 November 2017. The 2007 National Intelligence Estimate on Iran's Nuclear Intentions and Capabilities assess with high confidence that "since fall 2003, Iran has been conducting research and development projects with commercial and conventional military applications". See Gregory F. Treverton, *CIA Support to Policymakers: The 2007 National Intelligence Estimate on Iran's Nuclear Intentions and Capabilities* (Center for the Study of Intelligence, Washington 2013) 17

been found that Iran had made any endeavour to manufacture nuclear weapons since 2003.[366]

The Agency investigated the evidence of the content of El Baradei's presentation in June 2008 on PMD (possible military dimensions to Iran's nuclear programme).[367] This investigation referenced "alleged studies" on a so-called Green Salt Project by Iran involving high-explosive testing and missile re-entry vehicles. On the basis of these activities it was extrapolated that Tehran had failed to comply with both of the aforementioned Article II provisions. However, the IAEA, acting on its own behalf, failed to obtain any evidence of a specific plan on the part of Iran to manufacture nuclear weapons or their components.

Despite there being no IAEA conclusion on this effect, a State Department report produced in 2005 on the topic of how states comply with non-proliferation treaties, contended that Iran was in breach of NPT Article II: "The United States has already announced an alert regarding the attempts to seek a nuclear weapons' capability. The range of nuclear development endeavours initiated by Tehran have been shrouded for almost 20 years. Iran's covert procurement channels, dishonouring obligations of the submission of reports to the IAEA, the failures in applying safeguards to such activities, and the inability to account for economic gains by this programme, leave no doubt that Iran is on the road of nuclear weapons' manufacture". Moreover, this statement indicated that Iran has been receiving assistance in its attempts to breach Article II of the NPT.[368]

In order to define and clarify the term "manufacture", William Foster, Director of the Arms Control and Disarmament Agency (ACDA) declared it not feasible to produce a "comprehensive definition or interpretation" for this term. He expressed uncertainty with regard to the effectiveness of these endeavours

[366] Seymour M. Hersh, 'Iran and the Bomd: How Real is Nuclear Threat?' *New Yorker* (6 June 2011) 31

[367] Mohamed ElBaradei, 'Introductory Statement to the Board of Governors' (*IAEA*, 2 June 2008) available at <https://www.iaea.org/newscenter/statements/introductory-statement-board-governors-26> accessed 22 November 2017

[368] US Department of State, 'Adherence to and Compliance with Arms Control, Non-proliferation, and Disarmament Agreements and Commitments' (August 2005) 80, available at <https://www.state.gov/documents/organization/52113.pdf> accessed 22 November 2017

which have no “specific fact situations”.[369] Nevertheless, the United States has declared unequivocally that the prevention of “manufacturing” a nuclear weapon, and also of searching for or obtaining any assistance in this regard, could considerably assist the ultimate construction of such a weapon.[370]

Foster has also indicated to the Senate that in his opinion any facts which suggest that a particular action which is motivated by a wish to facilitate the acquisition of a nuclear weapon should be regarded as a demonstration of non-compliance.[371] Therefore, as with Article I, a significant factor in Article II compliance analysis is to determine and expose the aim of a particular activity.

When considering these statements in the light of interpreting the Article II ban on the manufacture of nuclear weapons, it is evident that in the opinion of the United States, a wide interpretation ought to be given to the word “manufacture” within this context. This would include within its range not exclusively the real physical construction of an explosive nuclear device, but additionally a raft of activities which in themselves do not constitute the construction of a nuclear weapon. However, not every expert agrees with this interpretation.

Joyner rejects this view by referring to the “plain” interpretation of the terms of Article II, which has been affirmed by the negotiating history of the NPT. In order to provide a simple definition of the word "manufacture,” he declared, it is necessary to search for the word in a dictionary and subsequently, the following definition is discovered: “making goods from raw materials by manual labour or machinery”. The dictionary also provides some synonyms, such as to “put something together” to “assemble” and to “fabricate.’” Consequently, the “plain” definition of the word "manufacture" in Article II signifies the physical development of a nuclear explosive device, or perhaps

[369] Quoted in Kerr, *supra* note 342, 18
[370] US Department of State, ‘Adherence to and Compliance with Arms Control, Non-proliferation, and Disarmament Agreements and Commitments’ (August 2005) 64, available at <https://www.state.gov/documents/organization/52113.pdf> accessed 22 November 2017
[371] Quoted in Kerr, *supra* note 342, 18

in its broadest interpretation, the physical development of the components of a nuclear explosive device.[372]

Joyner argues for a restricted interpretation of the word “manufacture” in order to support the contention that no proof exists that Iran violated the NPT, since no evidence has been given to the IAEA that Iran has physically built an explosive nuclear device or any components thereof.[373] Nevertheless, the variance in defining the word “manufacture” persists further than the immediate consequences of this discussion.[374] It poses uncertainties with regard to the range of accepted usages of atomic development and the reach of the NPT.

When Article II’s legal standard is utilised, particularly the constraint on the manufacture of nuclear weapons, one can come to the conclusion that Iran has been in compliance with Article II. Debates have been held by legal experts to look into whether Article II can narrowly or broadly define the term "manufacture". However, most conclusions tend to arrive at a narrow interpretation, meaning that Iran has not violated Article II. Russia, which has disapproved of the imposition of sanctions on Iran on the basis that there is no proof of any intention to manufacture nuclear weapons,[375] shares the narrow interpretation, and thus “all this is not enough to accuse Iran of a formal breach of the letter of the NPT”.[376]

3.8 Conclusion

This chapter has addressed the hypocritical actions which it is broadly believed have been undertaken by the United States and Israel against Iran’s missile and nuclear industries. This is because the principal battlefield has certainly been a diplomatic one which has been undertaken in association

[372] Daniel H. Joyner, Jonathan Cohen (ed), ‘Iran's Nuclear Program and the Legal Mandate of the IAEA’ (*JURIST*, 9 November 2011) available at <http://www.jurist.org/forum/2011/11/dan-joyner-iaea-report.php> accessed 22 November 2017
[373] Ibid.
[374] Ibid.
[375] ‘Putin: ‘No Information on Iran's Work on Nuclear Weapons’’ *Sputnik News* (3 December 2009) available at<https://sputniknews.com/russia/20091203157086953/> accessed 22 November 2017
[376] Alexei G. Arbatov, ‘The Inexorable Momentum of Escalation’ in Patrick M. Cronin (ed), *Double Trouble: Iran and North Korea as Challenges to International Security* (Praeger Security International, Westport 2008) 65

with the NPT, the IAEA, the UN Security Council and the Safeguards Agreements.

Iran's case highlighted the flawed legal interpretations of the NPT and of the IAEA's sources of law, and a harmful, incompatible, contradictory, duplicitous and hypocritical implementation of the law in this case by the West.[377] In Iran's case it would appear NPT regime is not suitably well-structured to address issues of non-proliferation when there is insufficient evidence. Its provisions have remained insufficient to block the way of suspected defectors, since it has emerged that no precise criteria for tackling suspicions when they arise has been evidenced.

The NPT relies on its being accepted by states parties that nuclear weapons, by their very existence, are a cause of international insecurity. Possibly expecting that states without a nuclear capability would agree that it is in their interests not to seek to acquire nuclear technology, those who drafted the NPT did not seem to anticipate that states may determine that their interests could be better served by achieving nuclear status, and to have assumed that if a state determined to take this line it would do so for good reason, and would withdraw from the treaty. [378]

The NPT's consensual programme was inaugurated at the time of the Cold War. The political climate of the time motivated compliance with the Treaty as well as the safeguards programme of the IAEA. It is contended by some people that this consensual programme has become not only, to a growing degree, unsuitable for managing the danger of the proliferation of nuclear weapons but, in fact increases the reasons for such proliferation.[379]

Since Iran has never obtained nuclear weapons, this provides a poor case study on the basis of the presupposition that it is considerably easier to give up the potential ability to produce nuclear weapons than to decommission

[377] Daniel H. Joyner, 'Iran's Nuclear Program and International Law' (2013) 2 *Penn State Journal of Law and International Affairs* 237, 291
[378] Emily B. Landau, 'A Nuclear Iran: Implications for Arms Control in the Nuclear Realm' in Ephraim Kam (ed), *Israel and a Nuclear Iran: Implications for Arms Control, Deterrence, and Defense No. 94* (Institute for National Security Studies, Tel Aviv 2008) 36
[379] Ronen, *supra* note 168, 40

actual nuclear weapons and the manufacturing facilities required for their construction. It can be illustrated the reasons behind Iran's decision to seek nuclear program and subsequently to decide to agree to a JCPOA with the West and close the door to future capacity of developing nuclear weapons.

Chapter Four
The Right of an Injured State to Resort to Non-military Countermeasures

4.1 Introduction

In January 2012 the Council of the EU announced the imposition of additional sanctions on Iran, including, inter alia, the freezing of the assets of the Central Bank of Iran and an import ban on Iranian oil. As these measures went much further than those agreed in the resolutions of the UN Security Council, the legal justification for them must be found elsewhere. For this reason, it can be concluded that as a result of Iran's non-compliance with the NPT and the IAEA Safeguards Agreement, deemed an internationally wrongful act, other states are permitted to apply measures over and above the UN Security Council resolutions aimed at invoking Iran's international responsibilities. Within the ILC Articles on State Responsibility these types of measures are referred to as countermeasures.[380] Arguably, this resembles the conclusions of the Council, published on the day the measures were announced, that they were a response to Iran's non-compliance with its international obligations, specifically its failure to address concerns about its nuclear programme and lack of full cooperation with the IAEA.[381]

The purpose of this chapter is to examine the legal requirements and functioning of countermeasures in the context of non-compliance with nuclear non-proliferation obligations. It further provides an evaluation of the legality of the aforementioned unilaterally imposed restrictive measures of the EU against Iran by referring to the Law of State Responsibility. A number of important questions are raised over the international legality of the EU actions as a result of the severity of the restrictive measures taken against Iran and their repercussions for both political and socio-economic stability, not just in Iran but also regionally and internationally. These matters will be addressed

[380] ILC, 'Draft Article on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) UN Doc. A/56/10, Arts 22,49-54
[381] Council of the EU, 'Conclusions on Iran' (3142th Foreign Affairs Council meeting, Brussels, 23 January 2012) para, 2

through considering, inter alia, the existence or otherwise of an internationally wrongful act, the concept of an injured party, and finally, proportionality.

4.2 The EU Restrictive Measures Against Iran

The approach taken by the EU towards Iran has been characterized by diplomatic engagement, dialogue and persuasion, contrasting with the American approach which relied heavily on threats of force. This strategy has, at its centre, the requirement for Iran to fulfil its treaty obligations. In accordance with this, Iran would give the necessary guarantees to assure the EU that it would refrain from pursuing a military dimension to its nuclear programme.[382]

Since Iran's non-compliance with the NPT was reported to the UN Security Council in 2006, the EU decided to change its approach to Iran's nuclear activities and began to implement a set of UN Security Council sanctions against Iran. The Council of the European Union made the sanctions enforceable within the framework of the Common Foreign and Security Policy (CFSP). Implementation was guided by Council regulations adopted under Article 215 of the Treaty on the Functioning of the European Union (TFEU) (ex 301 TEC).[383]

In 2007, Security Council Resolution 1737 became the first Common Position taken regarding the sanctions imposed by the Council against Iran. The Council of the European Union "called on all countries to implement" Resolution 1737 "in full and without delay". The measures restricted the sale of goods and technology capable of contributing to the enrichment of nuclear materials and banned the provision of technical support and services which

[382] See for example, Council of the EU, 'the Statement by Javier Solana, EU High Representative for the CFSP, on the agreement on Iran's nuclear programme' (15 November 2004) S0304/04

[383] "Article 215 of TFEU provides a legal basis for the interruption or reduction, in part or completely, of the Union's economic and financial relations with one or more third countries, where such restrictive measures are necessary to achieve the objectives of the Common Foreign and Security Policy (CFSP)", see 'Decisions adopted in the framework of the Common Foreign and Security Policy' (2016) 2, available at <http://eeas.europa.eu/archives/docs/cfsp/sanctions/docs/measures_en.pdf> accessed 20 October 2017

may assist the nuclear programme.[384] Subsequently, in adopting Common Positions 2007/246/CFSP the scope of the export ban on goods and technology was broadened to cover all types of military material.[385] In 2008, the Council adopted Common Position 2008/652/CFSP which required Member States to be vigilant regarding their monitoring of particular forms of financial contact between Iranian institutions and ones based in EU states.[386] While the EU approach had initially been conciliatory, it was moving towards relying more on coercion.

Amid concern that further sanctions would not only harm Iran but also neighbouring states such as Turkey, and could add to regional instability, Turkey and Brazil agreed a nuclear fuel swap deal with Iran. Under this agreement, signed in May 2010, Iran would export low enriched uranium nuclear fuel to Turkey in return for a small quantity of highly enriched uranium in the form of fuel rods for use in a nuclear research reactor.[387] Despite an initially positive reaction in Europe, within days of the deal being announced all five permanent members (P5) of the UN Security Council rejected it as unsatisfactory. The European Council argued that the Iran-Turkey-Brazil nuclear fuel swap arrangement "would not address the core of Iran's nuclear issue."[388] The Council subsequently joined the P5 in calling for additional measures which were included in UN Security Council Resolution 1929. Indeed, the European Council went beyond this by requesting that the UN Security Council implement additional measures beyond what had originally been proposed.[389] A Council Decision on 26 July 2010, both confirmed the existing measures taken since 2007 and also introduced export bans on technologies, goods and equipment related to the oil and gas sectors.[390]

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[384] 'Council Common Position 2007/140/CFSP of 27 February 2007 concerning restrictive measures against Iran' [2007] OJ L61/49
[385] 'Council Common Position 2007/246/CFSP of 23 April 2007 amending Common Position 2007/140/CFSP concerning restrictive measures against Iran' [2007] OJ L106/67
[386] 'Council Common Position 2008/652/CFSP of 7 August 2008 amending Common Position 2007/140/CFSP concerning restrictive measures against Iran' [2008] OJ L285/22
[387] For full text of the Iran-Brazil-Turkey deal see, 'Joint Declaration by Iran, Turkey and Brazil' (17 May 2010) available at < https://fas.org/nuke/guide/iran/joint-decl.pdf> accessed 20 October 2017
[388] Council of the EU, 'Conclusions' (17 June 2010) EUCO 13/10, 12, para, 2
[389] 'Council Decision 2010/413/CFSP of 26 July 2010 concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP' [2010] OJ L195/39, para, 5
[390] Ibid, Art 4

Implementation of this decision, achieved through Council Regulation 961/2010 and subsequently amended by Council Regulation 267/2012 of 23 March 2012, introduced still further restrictive measures on Iran. The import ban was broadened to cover natural gas and a list of goods "which might be relevant to industries controlled directly or indirectly by the Iranian Revolutionary Guard Corps or which might be relevant to Iran's nuclear, military and ballistic missile programme."[391] This drew in sectors such as ship-building technology, industrial process software, and graphite and raw or semi-finished metals including steel and aluminum. [392] Entering into agreements to either finance or construct new oil tankers was also prohibited.[393] The final step came in January 2012 when the Central Bank of Iran also became subject to restrictive measures, joining the 14 other Iranian banks in having their assets frozen throughout the EU. [394] The EU also imposed financial measures appearing to be comprehensive instead of targeted sanctions. After adopting Regulation 961/2010, transfers of funds greater than €10,000 to or from an Iranian person or entity were subjected to authorisation and notification procedures.[395]

It is reasonable to argue that the EU's Iranian engagement policy caused a temporary halt to uranium enrichment activities, and was a factor in leading the Iranian government to renegotiate its stance in 2015.[396] However, it is also true that the EU sanctions regime has been described as the "most far

[391] Council Regulation (EU) No 267/2012 of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation (EU) No 961/2010' [2012] OJ L 88/1, Art 15(1) 2
[392] Ibid. Art 10(c)
[393] Ibid, Art 37(a)
[394] 'Council Decision 2012/35/CFSP of 23 January 2012 amending Decision 2010/413/CFSP concerning restrictive measures against Iran' [2012] OJ L19/22, Annex I. Several designated Iranian banks and entities brought annulment actions before EU Courts, challenging the lawfulness of their appearance on the Council's sanctions lists. See e.g., Bank Mellat v Council of the European Union [2013] T- 496/10
[395] See International Monetary Fund, *Annual Report on Exchange Arrangements and Exchange Restrictions 2012* (International Monetary Fund, Washington 2012) 165
[396] For some time, the EU policy also delayed the transfer of Iran issues to the UN Security Council. In 2004 an agreement was reached between Iranian government representatives and ambassadors of the European Union's so-called three major powers (France, United Kingdom, Germany). Iran agreed to suspend its uranium enrichment "in exchange for a promise not to refer the matter to the United Nations Security Council for possible sanctions." See 'Iran agrees to suspend uranium enrichment' *CNN* (15 November 2004) available at <http://edition.cnn.com/2004/WORLD/meast/11/14/iran.nuclear/index.html> accessed 20 October 2017

reaching ever agreed",[397] and far exceeded in severity the sanctions imposed by UN Security Council Resolution 1929.

The sanctions adopted by the EU had major economic consequences not only for Iran but also at a regional and global level. They clearly impeded or halted private commercial relations as well as the flow of investment between Iran and the EU member states. More importantly, the sanctions were so far reaching that they affected the world at a macro-economic level and had a significant negative impact on regional and global macro-economic conditions.

The effect of the sanctions on the regional economy broadened the scope of the sanctions and made them global. This directly linked them to the economic situation of the region as well as its stability and security. Considering the extent of their impact, it is necessary to look into the legality of the sanctions that were imposed on Iran.

4.3 Legal Identification of EU Measures

There are different processes available to injured states to hold another state to account for its wrongful acts.[398] In this case, the most applicable measures are retorsion, sanctions and countermeasures.

The ILC has defined retorsion as "unfriendly conduct which is not inconsistent with any international obligation."[399] In other words, retorsion describes a lawful but purposely unfriendly act perpetrated by one state against another in retaliation for a similarly unfriendly but unlawful act.[400] However, most of the measures applied to Iran which went beyond the scope of UN Security Council resolutions could not be categorized as retorsion. Such measures did

[397] Theresa Papademetriou, 'European Union: Renewed Sanctions Against Iran' (*Library of Congress*, 2010) available at <http://www.loc.gov/law/foreign-news/article/european-union-renewed-sanctions-against-iran/ accessed> 18 October 2017

[398] Arangio-Ruiz explained these measures in seven categories: "self-defence", "sanction", "retorsion", "reprisals", "countermeasures", "reciprocal measures", "Suspension and termination of treaties", for greater details see Gaetano Arangio-Ruiz, 'Third Report on State Responsibility' II (1) *Yearbook of the International Law Commission* (1991) UN Doc. A/CN.4/440/Add.1, paras, 8-36

[399] ILC, 'Draft Article on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) UN Doc. A/56/10, commentary on countermeasures, para, 3

[400] Elisabeth Zoller, *Peacetime unilateral remedies: An Analysis of Countermeasures* (Transnational Publisher, New York 1984) 5

not comply with the international obligations of the EU and its Member States.[401] Furthermore, this type of measure undermined the ability of some EU Member States to uphold treaty commitments arising from their Bilateral Investment Treaties with Iran.[402] Generally, measures of this kind go further than simple "disapproval by involving the suspending of performance of international legal obligations normally owed to Iran."[403]

Moreover, such measures cannot be classified as sanctions based on the UN Security Council resolutions. This is because the very nature of the resolutions are different from the measures taken by the EU against Iran. For example, the adoption of a blanket economic embargo by the EU cannot be justified as enforcing the Security Council resolutions because those resolutions do not include such harsh, fully fledged embargos. If such measures had been included, any state conducting business with Iran and its state-owned entities would be violating UN resolutions and breaching its international obligations.[404]

Furthermore, as explained by Antonios Tzanakopoulos, sanctions are collectively imposed by organisations (most notably the UN) as a centralized response to illegal actions of a member and not a third state. In the case of the EU and its imposition of 'sanctions' against a third state, the reality is one of a decentralized response to illegality through countermeasures.[405]

Additionally, there is a suggestion that while the UN Security Council resolutions sanctioning Iran allow some discretion for states, this discretion is

[401] For example, the freezing of the assets of the Iranian Central Bank breached the state immunity doctrine. Article 19 of the United Nations Convention on Jurisdictional Immunities of States and Their Property (2 December 2004) provided that: "No post-judgment measures of constraint, such as attachment, arrest or execution, against […] the central bank or other monetary authority of the State […] may be taken in connection with a proceeding before a court of another State." It might also be in conflict with Article VIII (2)(a) of the International Monetary Fund (IMF) Agreement which stated that no members shall, without the approval of the Fund, impose restrictions on the making of payments and transfer for current international transactions.

[402] Dupont, *supra* note 11, 312-313. For Iran Bilateral Investment Treaty with other countries see 'Islamic Republic of Iran' Investment Policy' (*HUB*) available at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/98> accessed 10 October 2017

[403] Calamita, *supra* note 11, 1397

[404] Ibid, 1417

[405] Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford University Press, New York 2011) 77

limited in scope and fails to provide the legal basis for comprehensive sanctions.[406] With these considerations in mind, the unilaterally imposed EU measures can be classified as countermeasures since they fall within the scope of the 2001 Draft Article on Responsibility of States for Internationally Wrongful Acts (ARSIWA).[407] Because the EU is an international organisation rather than a sovereign state, different criteria, namely the 2011 Draft articles on the Responsibility of International Organizations (DARIO), need to be applied to any assessment of the legality of the countermeasures it imposed on Iran. [408]

A further complication is that the DARIO provisions only cover countermeasures of an international organisation against another international organisation; Iran is a sovereign state.[409] Notwithstanding this, the ILC has commented that there is virtually no difference between the DARIO and ARSIWA conditions for lawful countermeasures and hence "one may apply by analogy the conditions that are set out for countermeasures taken by a State against another State in articles 49 to 54 on the responsibility of States for Internationally Wrongful Acts."[410] Consequently, an assessment of the legal status of countermeasures targeting Iran could consider that the circumstances which trigger countermeasures in DARIO may be applied to the provisions of ARSIWA.[411] DARIO states that "an international organization incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization."[412]

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[406] Calamita argue that as the resolutions give the Council and Committee the power to extend the scope of the measures, member states cannot rely on them for legal protection and the Charter (particularly Articles 25 and 103). See Calamita, *supra* note 11, 1405
[407] Dupton, *supra* note 11, 323
[408] Makan Sharifi, 'Legal challenges to the UN and EU sanctions against Iran' (Postgraduate thesis, Queen Merry University, London 2015) 35
[409] United Nations, 'Report of the International Law Commission Sixty-first session' (4 May-5 June and 6 July-7 August 2009)' UN Doc. A/64/10, 98, para, 2
[410] Ibid.
[411] Sharifi, *supra* note 408, 35
[412] ILC, 'Draft articles on the Responsibility of International Organizations, with commentaries' (2011) UN Doc. A/66/10, Art 17(2)

With the above considerations, the measures imposed by the EU, as an injured state, would be identified as countermeasures. In order to consider the functioning of countermeasures in the context of non-compliance with non-proliferation obligations, the definition of countermeasures and the conditions that must be met for countermeasures to be lawful will be examined in greater detail at the following sections.

4.4 Definition of Countermeasures

The International Law Dictionary defines 'Countermeasures' as "a concept within the general area of state responsibility for internationally wrongful acts, referring to non-forcible and proportional unilateral measures which an injured state may take in response to another state's wrongful act, so as to induce that state to cease its conduct, to make reparation, and –where appropriate- to offer assurances and guarantees of non-repetition."[413]

It has been claimed that the term has its origins in German rather than English as, Swiss international lawyers coined the word "*Gegenmassnahmen*" in the inter-war years and that it was deployed in the official legal lexicon.[414] Others, however, reject this finding and propose that 'countermeasures' is a term first coined in 1916 by British lawyers.[415] Whatever its provenance, it is generally accepted that widespread usage of the term began in the late 1970s. At the Arbitral Tribunal, the term's first use came in the Air Service Agreement case (1987) and indicated a non-forcible measure. The Tribunal declared that when finding another state in violation, "the first State is entitled, within the limits set by the general rules of International Law pertaining to the use of armed force, to affirm its rights through 'counter-measures'."[416]

However, Tribunal member Reuter, argued at an International Law Commission meeting discussing article 30 of Part One of the Commission's Draft on State Responsibility, that the term 'countermeasures' "meant

[413] Boleslaw Adam Boczek, *International Law: A Dictionary* (The Scarecrow Press, Oxford 2005) 45
[414] Zoller, xvi, *supra* note 400, note 8
[415] Omer Yousif Elagab, *The legality of Non-forcible Counter-measures in International Law* (Clarendon Press, Oxford 1988) 2
[416] Air Service Agreement of 27 March 1946 between the United States of America and France, Report of International Arbitral Award Vol XVIII (9 December 197) 443, para, 81

nothing". He informed the meeting that the Tribunal was simply "seeking to avoid the words 'reciprocal obligations' and 'reprisals'."[417] There was no clarification as to why the Tribunal might want to avoid these words but the assumption was that 'reprisals' is most often associated with belligerent actions.

Subsequently, the International Court of Justice and the International Law Commission followed the Tribunal. Bearing in mind the status of these institutions, the practical effect was to promote the term 'countermeasures' to the forefront of international law. Following this, the term could be straightforwardly applied in doctrine,[418] jurisprudence[419] and practice.[420] Despite all this, the precise legal content of the notion of countermeasures is still unclear, leaving room for confusion and ambiguity.[421]

As can be gathered from the court's precedent, countermeasures are usually taken on the basis of the first state's assessment of what it needs to do in response to a perceived wrongful act. As Alland points out, the 'self-assessed' dimension of countermeasures reveals the danger they pose within the international legal order. Countermeasures may be imposed by one state on another simply if the first state believes the other state has committed an internationally wrongful act against it. There is no requirement for any independent evaluation to establish if such an act is internationally wrongful.

Attempts by the Special Rapporteurs (Riphagen and subsequently Arangio-Ruiz and Crawford) given responsibility for clarifying the scope and content of the countermeasures concept seem to have encountered problems. Riphagen's solution was to avoid using the term, replacing it instead with

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[417] United Nations, 'Summary Records o the 1717th meeting' (1983) I *Yearbook of the International Law Commission*, UN Doc. A/CN.4/SER.A/1983

[418] See e.g., Zoller, *supra* note 400; Elagab, *supra* note 415

[419] See e.g., Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) (Judgment of 27 June 1986) ICJ Report (1986) 14, para, 249 (mentioned 'proportionate counter-measures'): "The act of which Nicaragua is accused, even assuming them to have been established and imputable to that state, could only have justified proportionate counter-measures on the part of the state […]"

[420] See e.g., United Nations, 'Summary Record of the 20th Meeting' (New York, 16 November 1992) UN Doc. A/C.6/47/SR.20

[421] Math Noortmann, *Enforcing International Law: From Self-help to Self-contained Regimes* (Ashgate, London 2005) 35

either 'reciprocity' or 'reprisals'. Similarly, Arangio-Ruiz "preferred, […] to abstain, at least for the time being, from using the term 'countermeasures'."[422] In considering the appropriateness of deploying the term 'countermeasures' he wrote: "with all respect for the title of Article 30 of Part One (the text of which, however, uses a different word, as well as for the Arbitral Tribunal and for the Court which has used the neologism) we are not quite sure that the term is the most felicitous one."[423]

However, Arangio-Ruiz did promote the use of the term 'countermeasures' as he viewed it as the most appropriately neutral term. It also benefits from comprehensiveness, as it covers a wide range of measures an injured party may take.[424] When introducing his fourth report to the International Law Commission Arangio-Ruiz stated forthrightly that "he had decided *to conform to fashion* and speak of countermeasures instead of reprisals."[425] From this point on, it was the concept of countermeasures which became the topic of protracted ILC discussions.

According to Nigel White, the ILC defined countermeasures as "non-forcible measures taken by an injured State in response to a breach of international law in order to secure the need of the breach and, if necessary, reparation."[426] Alland observed that: "A countermeasure is not necessarily a reaction to a 'measure': if it is possible to say that a State reacts, for instance, against a 'measure' of nationalization of its goods or a 'measure' of suspension of rights that it holds by virtue of an international convention, this is not the case when a State reacts against conduct, especially passive conduct."[427]

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[422] Gaetano Arangio-Ruiz, 'Preliminary Report on State Responsibility' (1988) II (1) *Yearbook of the International Law Commission*, UN Doc. A/CN.4/416 & Corr.1 & 2 and Add.1 & Corr.1, para 14, note 12

[423] Ibid.

[424] Ibid.

[425] United Nations, 'Summary record of the 2265th meeting; State Responsibility' I *Yearbook of the International Law Commission* (1992) UN Doc. A/CN.4/SR.2265, para, 2

[426] Nigel D. White, *The Cuban Embargo Under International Law: El Bloqueo* (Routledge, London 2014) 88. This definition is based on the ILC definition in, United Nations, 'Report of the Commission to the General Assembly on the Work on its Fifty-third Session' (2001) II *Yearbook of International Law Commission*, UN Doc. A/CN.4/SER./A/2001/Add.1 (Part 2) commentary to countermeasures, para, 3

[427] Denis Alland, 'The Definition of Countermeasure' in Kate Parlett, and others (eds), *The Law of International Responsibility* (Oxford University Press, New York 2010) 1128

4.5 Conditions for the Lawfulness of Countermeasures

To be lawful, countermeasures must meet certain basic principles of international law. These principles are established in International Law jurisprudence. The first such case ever to be adjudicated by the ICJ was the Corfu Channel Case. This saw the Court reject a claim to self-protection and self-help made by the United Kingdom. The Court ruled that despite having had Royal Navy ships destroyed in Albanian waters, the United Kingdom had acted illegally when its minesweeper ships entered those waters, and had infringed the sovereignty of Albania.[428]

The ICJ also decided upon the lawfulness of countermeasures in the Gabčíkovo-Nagymaros Project Case. [429] Gabčíkovo-Nagymaros was the name of a major dam construction project on the Danube River, where it divides Hungary and Slovakia. Slovakia proposed taking countermeasures against Hungary through enacting a plan known as 'Variant C'. This principally involved a unilateral move to divert the Danube and build an overflow dam and levee. [430] When denying Slovakia's case that Variant C constituted a lawful countermeasure, the ICJ clarified the conditions which had to be met for a countermeasure to be ruled permissible in international law. Countermeasures would have to be responsive and targeted at the transgressor; they would have to come only after an attempt to have the transgressor desist in its internationally wrongful act or an attempt to secure reparations for it; and would have to be reversible, facilitating what may be regarded as the *sine qua non* of any countermeasures; that the transgressor should be encouraged to comply with its legal obligations. [431] Lastly, countermeasures would have to be proportional; "the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question."[432] The Court's decision went in favour of

[428] Corfu Channel Case (United Kingdom v. Albania) ICJ Reports (1949) 35
[429] Gabčíkovo-Nagymaros Project Case (Hungary v. Slovakia) ICJ Reports (1997) para, 83
[430] Ibid, 25
[431] Ibid, 55-57
[432] Ibid, para, 85

Hungary, ruling that the Slovak countermeasures failed the proportionality test and were therefore unlawful.[433]

There was a mixed reaction from States regarding the ICJ decision in the Gabčíkovo-Nagymaros Project Case and the repercussions for the work the ILC was doing on countermeasures. Some States were against the inclusion of an ARSIWA chapter entirely dedicated to countermeasures, believing that this would promote their arbitrary and unjustified use.[434] However, the majority of States proposed a single article to incorporate "the elements on which there was consensus among States".[435] Another group of States maintained that a new ARSIWA chapter was necessary in order to clarify uncertainties, arguing that the chapter could establish an equilibrium between "the use of this instrument and the provision of the necessary guarantees against its misuse".[436] These parts were eventually adopted by the International Law Commission in 2001 after they had been amended, and despite the decision to incorporate them not being unanimous.[437]

Satisfying the aforementioned criteria does not automatically create the right to take countermeasures, as certain actions are required for activation of that right. These actions are 'procedural conditions' set out in article 52 of ARSIWA.[438]

Firstly, the injured state must give the allegedly offending state an opportunity to respond to the allegations of wrongdoing and to return to and maintain

[433] Ibid, para, 85
[434] See the comments of Japan, the United Kingdom and the United States in 'Comments and observations received from Governments' (19 March, 3 April, 1 May and 28 June 2001) UN Doc. A/CN.4/515 and Add.1–3, 74-77
[435] Ibid, 76 (Japan)
[436] Ibid, 75 (Netherlands). The final Special Rapporteur on State responsibility, James Crawford, suggested three alternate solutions to those of the ILC; firstly, dropping the chapter on countermeasures and adding a single article to the chapter on circumstances precluding wrongfulness; secondly, keeping only the chapter on conditions for recourse to countermeasures; and thirdly, keeping the draft as it was, with a few improvements, see James Crawford, 'State Responsibility' (2001) UN Doc. A/CN.4/517 and Add.1, para, 60
[437] ILC, 'Report of the Commission to the General Assembly on the work of its fifty-third session' (2001) UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) commentaries to Art 49-54
[438] The commentary of Tribunal in Air Service Agreement arbitration formed Article 52 of Draft ARSIWA. See Air Service Agreement, *supra* note 416, paras, 91, 94–96

lawful status.[439] This principle was highlighted in the case of Gabcikovo-Nagymaros Project in which the ICJ stated that the injured State would have had to request the offending state to halt its wrongful conduct or compensate the injured state for its damaging act.[440] Secondly, the injured state would have had to notify the offending state of any decisions to apply countermeasures and would have had to be open to negotiations with that State.[441] The ILC stated in its comments that countermeasures may be highly consequential for the targeted State, therefore the offending state should be given an opportunity to reconsider its actions in the light of proposed countermeasures.[442]

The aforementioned procedural requirements put in place a mechanism for States considering applying countermeasures to secure compliance with NPT obligations. In the case of Iran, the EU would need first to request that Iran fulfil its NPT obligations, before proceeding to countermeasures. In this instance, as the EU and Iran had already held extensive discussions regarding Iran's nuclear activities, it can be argued that the requirements of Article 52(1)(a) had been met. The negotiations provided Iran with a platform for responding to the EU, with the potential to open a dialogue which could have advanced the nuclear issue. This procedure is to be aimed at achieving compliance and is not to be used punitively.

According to the terms of Article 52(1)(b), the EU had failed to comply with the requirement to send Iran a formal prior notification containing "detailed explanations of contemplated countermeasures". [443] While it can be acknowledged that international relations are often conducted through informal channels, in this case the need to achieve legal certainty could only have been met through a written notification.[444] However, the injured state

[439] ILC, 'Draft Article on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) UN Doc. A/56/10, Art 52(1)(a)
[440] Gabcikovo-Nagymaros, *supra* note 429, para, 56
[441] ILC, 'Draft Article on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) UN Doc. A/56/10, Art 52(1)(b)
[442] ILC, 'Report of the Commission to the General Assembly on the work of its fifty-third session' (2001) UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) commentaries to Art 52, para 5
[443] Yuji Iwasawa, Naoki Iwatsuki, 'Procedural Conditions' in Kate Parlett and others (eds), *The Law of International Responsibility* (Oxford University Press, New York 2010) 1152
[444] Dupton, *supra* note 11, 324

would be able to take "such urgent countermeasures as are necessary to preserve its rights"[445] even without prior notification of the intention to do so.[446]

To achieve clarification of the lawfulness of the unilateral countermeasures imposed by the EU against Iran, it is vital to examine limitations through considering, inter alia, the existence or otherwise of an internationally wrongful act, the concept of an injured party, and finally proportionality.[447]

4.6 The Existence of a Wrongful Act

One condition which, if met, can legitimate countermeasures and preclude them from being declared wrongful is if the measures are a response to an earlier breach of international law on the part of the targeted state.[448]

This condition was clarified by ICJ in the Gabcikovo-Nagymaros Project case, as follows: "In order to be justifiable, a countermeasure must meet certain conditions [...] in the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State".[449] Special Rapporteur Arangio-Ruiz added, that "the existence of an internationally wrongful act should have been objectively established. Any State resorting to countermeasures in the belief in wrongfulness of the other party's conduct will do so at its own risk." This highlights that there is a risk that any State imposing the countermeasures could "be held responsible on its part for an internationally wrongful act if the alleged prior violation were proved not to have occurred."[450] Arangio-Ruiz also clarified the degree of

[445] ILC, 'Draft Article on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) UN Doc. A/56/10, Art 52(2)
[446] ILC, 'Report of the Commission to the General Assembly on the work of its fifty-third session' (2001) UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) commentaries to Art 52, para 6. The word "urgent" must be used to refer to countermeasures which are needed to protect the rights of the injured State, including the temporary freezing of assets, temporary stay orders, among other measures. See James Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge University Press, Cambridge 2002) 299
[447] A comprehensive analysis of every countermeasure condition is not necessarily required here, hence the conditions that have been analysed has been inspired from Dupton, *supra* note 11
[448] ILC, 'Draft Article on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) UN Doc. A/56/10, Art 49(1)
[449] Gabcikovo-Nagymaros, *supra* note 429, para, 83
[450] Gaetano Arangio-Ruiz, 'Fourth report on State Responsibility' (1992) II (1) *Yearbook of the International Law Commission*, UN Doc. A/CN.4/444 and Add.1-3, paras 37-38.

certitude that a state should have before imposing countermeasures against a wrongdoing state; "Nor does it mean that there has to have been prior agreement between the allegedly injured State and the alleged wrongdoing State as to the existence of an internationally wrongful act. On the other hand, it would not be sufficient for the allegedly injured State to believe in good faith that an internationally wrongful act had been committed in violation of its right."[451]

The legal space between a third party assessment of wrongfulness and an injured state's own assessment, made in good faith, of the wrongfulness of an action is particularly narrow.[452] Following on from this, the absence of an obligatory dispute settlement process in international law may mean that a state's self-determination that a wrongful action has been taken against it could lead to tensions escalating between the injured and the wrongdoing states, especially when the alleged wrongdoing state rejects the idea that it has performed a wrongful act.

Responding to this potential problem, some commentators have argued that the right to apply countermeasures can only be available once international procedures aimed at peaceful dispute settlement have been exhausted. Particularly, Special Rapporteur Riphagen has argued that, to the degree that the targeted state is disputing the facts or the legal basis on which the allegations of a breach are based, there is really only one avenue open to accept a third party settlement of the claim.[453] Similarly, Arangio-Ruiz has asserted that failure to require the use of peaceful settlement procedures prior to applying countermeasures constitutes a backward step in the development of international law, insofar as it erodes the treaty regimes that contemplate a mechanism for dispute settlement.[454] The article on State Responsibility does not force a state to take recourse to dispute settlement prior to adopting

[451] Ibid, para 2
[452] Alland, *supra* note 427, 1129
[453] Willem Riphagen, 'Fourth report on the Content, Forms and Degrees of International Responsibility (part two of the draft articles)' (1983) II (1) *Yearbook of the International Law Commission,* UN Doc. A/CN.4/366 and Add.1 and Add.1/Corr.1, para 103
[454] Gaetano Arangio-Ruiz, 'Sixth report on State Responsibility' (1994) II (1) *Yearbook of the International Law Commission,* UN Doc. A/CN.4/461 and Add.1-3, para, 7

countermeasures,[455] even when the transgressor state is in dispute over the wrongfulness of the conduct in response to which the countermeasures were adopted. That said, if a state instigates countermeasures, it must still meet its obligations under any process for resolving a dispute with a transgressor state.[456]

It should be stated at this point that under the so-called 'principle' of auto-determination or auto-interpretation[457] it has been suggested that any State can and may make its own interpretation of the applicable rules of international law, and consequently may determine for itself its legal position in relation to other states. This argument would effectively make it impossible to produce a definitive determination as to whether an internationally wrongful act had taken place, because it would be one State's assessment against another's.[458]

As previously discussed, the view that Iran was in total and clear violation was by no means unanimous among UN members. The EU and United States could certainly have been mistaken in the way they interpreted the facts and formed their evaluation. Therefore the allegedly injured State should only seek countermeasures under the presumption of a sound argument.[459] Resorting to countermeasures, therefore, would entail a risk of being proved wrong.

The legitimacy of the UN Security Council has been questioned in the context of the determination of wrongful acts. Arangio-Ruiz states that, "the Council has neither the constitutional function nor the technical means to determine, on the basis of law, the existence, the attribution or the consequences of any

[455] The primary reason that the previous use of an established conflict resolution procedure was not adopted as a condition for the implementation of countermeasures was that this might impose an onerous burden on the injured state. See United Nations, 'Summary record of the 2277th meeting' (1992) *Yearbook of the International Law Commission*, UN Doc. A/CN.4/SR.2277, para, 9

[456] ILC, 'Draft Article on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) UN Doc. A/56/10, Art 50 (2)(a)

[457] Andre' de Hoogh, 'Comments' in Harry H.G. Post (ed), *International Economic Law and Armed Conflict* (Martinus Nijhoff, Dorchester 1994) 43-46

[458] Charles Leben, *Les sanctions privatives de droits ou de qualite dans les organisations internationales specialisees* (Bruylant, Brussels 1979) 363-6, who also maintains that countermeasures cannot be considered "sanctions", although they can be regarded as a response to a perceived wrongful act.

[459] Ibid; Hoogh, *supra* note 457, 45

wrongful act".[460] He argues that "the existence of such an act and the allegedly injured State's right to take countermeasures should [not] have been the object of a priori determination by an arbitral or judicial procedure or subject to any kind of action of a political or fact-finding body."[461]

While the UN Security Council has an undeniably political aspect, André De Hoogh argues that there is no difference between the Security Council and states in terms of countermeasures. He remarked that: "for ages States have been allowed to press claims and resort to countermeasures on the basis of their allegation that another state had breached international law. And in doing so they have never been induced, as a matter of law, to have prior recourse to a judicial body. So why should we deny the Security Council this possibility of invoking the responsibility of States and having recourse to countermeasures? Just because it is a political body?"[462]

Arangio-Ruiz's argument concerning the UN Security Council is based on his view of the "essentially political function of the maintenance of the peace".[463] He also posits that the UN Security Council is inevitably selective in its actions as there is no regularity or necessity for it to take action. Furthermore, it is not bound by any universally applied criteria, thereby leaving open the possibility of unequal treatment of different cases.[464] It is undeniable that different states have received different treatment from the UN Security Council when accused of international transgressions.

Aside from the lack of clarity of the UN Security Council's situation concerning its discretion to make determinations, Security Council Resolution 1929 (2010) states that the UN Security Council "shall, in the event that the report [by the Director General of the IAEA] shows that Iran has not complied with resolutions 1737 (23 December 2006), 1747 (24 March 2007), 1803 (3 March 2008) and this resolution, adopt further appropriate measures under Article 41

[460] Arangio-Ruiz, *supra* note 300, para, 211
[461] Arangio-Ruiz, *supra* note 450, para, 2
[462] Andre' de Hoogh, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry Into the Implementation and Enforcement of the International Responsibility of States* (Martinus Nijhoff Publishers, Hague 1996) 234
[463] Arangio-Ruiz, *supra* note 300, para, 220
[464] Ibid.

of Chapter VII of the Charter of the United Nations to persuade Iran to comply with these resolutions and the requirements of the IAEA, and underlines that further decisions will be required should such additional measures be necessary."[465]

Hence, the lawful status of the EU countermeasures, independent of the UN Security Council, is dependent on there being an actual act of unlawfulness on the part of Iran, with an international tribunal determining that a breach of International law has actually occurred.[466] Therefore, in this instance, the EU relied upon Iran's alleged breach of its NPT and Safeguard obligations.[467] More specifically, Iran is alleged to have breached Article II of the NPT.

This argument hinges on the meaning and application of the term 'manufacture'. The EU proposes that any research or development that could be applied to the production of a nuclear weapon would constitute manufacturing, and therefore be prohibited under NPT Article II. In addition, NPT Article III (1) obliges a state to comply fully with the terms of the Safeguards Agreement it has reached with the IAEA. Consequently any instance of Iran's failing to uphold the terms of its Safeguards Agreement would place Iran in a position of responsibility for the breach of this article. Furthermore, as Article IV of the NPT states that the right of a state to use nuclear technology and materials for peaceful purposes is contingent on its meeting its specific non-proliferation obligations, including those detailed in Article III, Iran's failure to comply with its Safeguards Agreement placed it in a position where it could not exercise its Article IV right to use nuclear technology, including uranium enrichment, for peaceful purposes. The validity of such arguments has been examined in detail in sections 3.6-3.7.

[465] UNSC Res 1929 (9 June 2010) S/RES/1929, para 37 (c); UNSC Res 1803 (3 March 2008) S/RES/1803, para 19(c) contained similar provision.
[466] Dupton, *supra* note 11, 326
[467] "Iran continues to refuse to comply with its international obligations and to fully co-operate with the IAEA to address the concerns on its nuclear programme, and instead continues to violate those obligations". See Council of the EU, 'Conclusions on Iran' (3142th Foreign Affairs Council meeting, Brussels, 23 January 2012) para, 2

There are two salient points to be made. Firstly, in spite of the IAEA argument that the countermeasures followed an IAEA determination of non-compliance by Iran regarding its NPT obligations,[468] neither IAEA inspectors nor the Agency's Director General have reported such non-compliance. It is important to make a distinction between procedural safeguard obligations, which may indeed have been breached, and ones that are substantive.[469]

Secondly, even if Iran has not complied with the Safeguards Agreement, there are provisions in the NPT and the IAEA Statute which offer opportunities to resolve such a situation.[470] For example, the Statute of the IAEA requires that the Agency should report any non-compliance to the General Assembly, to UN member states, and to the Security Council.[471] The provision also permits the Agency to stop providing assistance to the noncompliant nation, to suspend its membership rights and to demand the return of equipment and materials given to it. The aforementioned provisions and the provisions for dispute settlement indicated in both the IAEA Statute [472] and the Safeguards Agreement, could allow the non-proliferation regime to become a "self-contained" regime,[473] which would as a consequence inhibit the application of "extra-treaty enforcement mechanisms such as countermeasures."[474]

[468] "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". See Calamita, *supra* note 11, 1433

[469] Sahib Singh argues that "only interdependent obligations enable a decentralized response upon breach, allowing all state parties to the obligation in question to take countermeasures upon invocation of responsibility of the defaulting state". He categorised the majority of non-proliferation substantive obligations which prohibited a state to "develop, produce; acquire, retain, possess; use; receive transfer of, transfer to, provide; and assist, encourage or induce another state" as "interdependent obligations". While the few procedural obligation which include "reporting possession, location, intended transfers, new plants, access to facilities for inspection" are qualified as interdependent obligations. See Sahib Singh, 'Non-Proliferation Law and Countermeasures', in Joyner, Roscini, *supra* note 11, 212-219

[470] Dupton, *supra* note 11, 328

[471] IAEA Statute, Art XII(C)

[472] IAEA Statute, Art XVII (A)

[473] Dupton, *supra* note 11, 328

[474] Calamita, *supra* note 11,1435

4.7 The Concept of an Injured State and a Non-Injured State

The authorisation for "an injured State" to take countermeasures given in the final Articles on the Responsibility of States for Internationally Wrongful Acts by the ILC is clear.[475] There is equivocation, however, where the Articles consider if states may take countermeasures when a state has not incurred a direct injury resulting from the previous breach. While the Articles do not directly prohibit the application of countermeasures by these states, their application is not condoned.[476]

It would require unanimity among all EU member states that they all should be considered injured states before the EU could take measures which would be separate from any Security Council resolution urging or requiring action. Therefore, in the context under consideration in this paper it must be determined whether the EU qualifies as an 'injured' international organization; whether Iran's alleged breaches of its NPT obligations are of such a nature to violate the collective interest of all the NPT Members, including all EU Member States who are also party to that treaty, and whether countermeasures can be taken against Iran based on the perceptions and position of any individual State which may regard itself as directly injured (eg the US). These will entail analysis of Articles 42 and 48 of the Articles on State Responsibility as well as a consideration of the nature of the NPT itself. This will entail analysis of Articles 42 and 48 of the Articles on State Responsibility as well as a consideration of the nature of the NPT itself. Interpretation of the Articles has triggered widespread debate, specifically pertaining to nuclear obligations and the NPT. It could be argued that their precise construction is intended to preclude NPT arguments, thus removing the countermeasures option.[477]

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[475] ILC, 'Draft Article on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) UN Doc. A/56/10, Art 49

[476] Ibid, Art 54

[477] Jonathan L. Black-Branch, 'Countermeasures to Ensure Compliance with Nuclear Non-Proliferation Obligations' in Jonathan L. Black-Branch, Dieter Fleck (eds), *Nuclear Non-Proliferation in International Law: Volume II* (Springer, Hague 2015) 370

A state may be considered "injured" if it incurs an injury under any of the three situations presented in Article 42 of the ILC Articles. Firstly, in the case of the violation of a state's individual right(s),[478] secondly, if a state has been particularly impacted by the breaching of a collective obligation [479] (interdependent), and thirdly when the violation of a collective obligation substantially alters the situation of every other state in regard to its performance.[480]

For the first category the obligations concerned are those arising from a bilateral treaty relationship. According to Article 42, a state can be considered to be "injured" when another state which has a specific obligation to it violates that obligation. Such bilateral obligations, however, are not confined to bilateral treaties or bilateral customs. Normally, a multilateral treaty establishes a set of rules which apply equally to all member states, while in other circumstances performance of a treaty requires a relationship of a bilateral nature between two states. In such cases, notwithstanding the plurality of the said rules, the treaty gives rise to a set of obligations that are bilateral in nature whereby one State Party carries the obligation under the treaty and another carries the right.[481]

The obligations owed under the NPT are multilateral in character, but there is an argument that in some circumstances there are bilateral obligations implied in this treaty. For example, in the situation in which North Korea undertakes nuclear tests and neighbouring South Korea is affected by the resulting radiation, it can be argued that, notwithstanding their multilateral commitments, this relationship is in effect bilateral. It involves two parties whose actions are primarily aimed at each other, and do not engage the wider

[478] ILC, 'Draft Article on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) UN Doc. A/56/10, Art 42 (a)
[479] ILC, 'Draft Article on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) UN Doc. A/56/10, Art 42(b)(i)
[480] Ibid, Art 42(b)(ii)
[481] United Nations, 'Material on the Responsibility of States for International Wrongful Acts' (2012) *United Nations Legislative Series*, ST/LEG/SER B/25, commentary to Art 42, paras 7-8. One example is, Vienna Convention on Diplomatic and Consular Relations. Although it is multilateral treaty, it establishes rights and obligation between two states. See Bruno Simma, 'International Crimes: Injury and Countermeasures. Comments on Part 2 of the ILC Work on State Responsibility' in Joseph H. Weiler, Antonio Cassese and, Marina Spinedi (eds), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* edited by (Walter de Gruyter, Berlin 1989) 286-287

international community.[482] There could be an argument that this situation, and potentially others, could lead to an invocation of Article 42(a), which permits an injured state to invoke countermeasures against the wrongdoer State Party.

Apart from this classical situation, the breach of an obligation *erga omnes partes* or of an obligation *erga omnes* can also give rise to the statutes of an injured state on the part of the state to which this obligation is owed. This is the only case, however, if the breach either "specially effected that State; or is of such a character as radically to change the position of all the other States to which the obligations is owed with respect to the further performance of the obligation."[483]

Sub-paragraph of Article 42 covers the cases in which "[…] the legal effects of an internationally wrongful act extend by implication to the whole group of states bound by the obligation or to the international community as a whole, the wrongful act may have particular adverse effects on one state or on a small number of states." [484]

In the case of North Korea and South Korea, in which radiation fallout from nuclear weapons testing conducted by the former may have affected the latter, the actions of a single state impacted on one other state to which it had responsibilities. It can be argued that North Korea's NPT obligations exist to all state parties to the NPT whose legal interests may be deemed to be affected by its actions, according to Article 48, irrespective of whether or not these states were directly injured by these actions.

North Korea is no longer party to the NPT, having withdrawn from it in 2003, nevertheless it can be argued that the community of NPT states parties still has a responsibility to the injured state (South Korea) irrespective of whether the injury has been perpetrated by a non-member state.

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[482] Black-Branch, *supra* note 477, 372
[483] ILC, 'Draft Article on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) UN Doc. A/56/10, Art 42(b)
[484] Ibid, Commentary to Art 42, para, 12

As noted in the general commentary, the articles do not define the "nature or extent of the special impact that a State must have sustained" in order to be considered 'injured'. The commentary notes that such would be assessed on a case-by-case basis, "having regard to the object and purpose of the primary obligation breached and the facts of each case."

However, "For a state to be considered injured it must be affected by the breach in a way which distinguishes it from the generality of other states to which the obligation is owed."[485]

Article 42(b)(i) of the ILC Articles reproduces Article 60.2(b) of the Vienna Convention on the Law of Treaties, which allows a party 'specially affected' by a material breach of a multilateral treaty to suspend the treaty in whole or in part, in relations between itself and the defaulting state. In the case of the NPT, which is a contract treaty which is based on a structure of reciprocal obligations between its signatories[486], any member state or states which act in violation of its terms can be interpreted as challenging the central tenet of the agreement through taking actions which 'specially affect' all other state parties to the treaty and which "radically change […] the position of every party with respect to the further performance of its obligations under the treaty."

The second category, in contrast, handles the violation of collective obligations when this particularly affects the state concerned, or makes a radical change to the position of all the other states. It is argued that the rights created under some agreements between states are indivisible, and therefore place an equal obligation on all state parties to uphold these obligations.[487] As stated, the idea of interdependent or integral obligations[488] conceived in the Final Articles should be narrowly construed to cover "obligations which

[485] Ibid.
[486] Daniel H. Joyner*, Interpreting the Nuclear Non-Proliferation Treaty* (Oxford University press, New York 2012) 108
[487] Edith Brown Weiss, 'Invoking State Responsibility in the Twenty-First Century' *(*2002) 96 *American Journal of International Law* 798, 801
[488] "The notion of 'integral' obligations was developed by Fitzmaurice […] the term has sometimes given rise to confusion, being used to refer to human rights or environmental obligations which are not owed on an 'all or nothing' basis. The term 'interdependent obligations' could be more appropriate". See ILC, 'Report of the Commission to the General Assembly on the work of its fifty-third session' (2001) UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) commentaries to Art 49, para, 5, note 669

operate in an all-or-nothing fashion, such that each state's continued performance of the obligation is an effect conditioned upon its performance by each other."[489] Here, interdependent obligations are those obligations whose performance is reliant on the compliance of all the other parties. [490]

Identification of the types of obligations being contemplated in Article 42(b)(ii), in the ILC Comments therefore supports the conclusion that any violation of the NPT, as a treaty comparable to a nuclear free zone treaty,[491] should place all states that are party to it in the position of the "injured State" and therefore allow them to instigate countermeasures.[492] However, Sahib Singh has argued that "this has led non-proliferation law specialists to loosely, and incorrectly, state that the character of non-proliferation treaties means that any breach of the obligations contained therein permits recourse to countermeasures through Article 42(b)(ii). This approach collapses the distinction between treaties and obligations, as well as the distinction between the law of treaties with the law of responsibility. It is important to classify obligations as independent or not, while the classification of the treaty itself is not relevant."[493]

In this regard, it has been argued that Iran's non-compliance with its nuclear-related obligations according to the NPT and its Safeguards Agreement are not "of such a character as radically to change the position of all the other

[489] James Crawford, Jacqueline Peel and, Simon Olleson, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading' (2001) 12 (5) *European Journal of International Law* 963, 974

[490] Hence, Art 42(b)(ii) is reflecting the wording of Art 60(2)(c) of the Vienna Convention on the Law of Treaties, associating the definition of the 'injured State' with the notion of interdependent obligations. The Article provides: "Any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty". See also, United Nations, 'Material on the Responsibility of States for International Wrongful Acts' (2012) *United Nations Legislative Series*, ST/LEG/SER B/25, commentaries to Art 42, paras, 4-5

[491] IAEA describes nuclear free zone treaties as "regional non-proliferation treaties". See Carlton Stolber and others, *Handbook on Nuclear Law* (IAEA, Vienna 2003) 137

[492] Gelard Fitzmaurice, 'Third Report on the Law of Treaties' *II Yearbook of the International* Law Commission (1958) UN Doc. A/CN.4/115, para 91; James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, Cambridge 2002) commentary to Art 42, para, 13

[493] Sahib Singh, *supra* note 469, 211

States" and so the requirements of the Article 42(b) (ii) have not been met.[494] The primary reason put forward is the obligation not to develop or produce nuclear weapons applies only to states that as yet do not have them. The states which already possess nuclear weapons are not affected by this obligation.[495]

While, under the provisions of Article 42, there is undoubtedly a solid reason for concluding that failure to comply with NPT obligations should be regarded as perpetrating an "injury" to each State Party, Article 48, which deals with states that would not be deemed "injured states" under the terms of Article 42, must also be considered. In particular, in relation to the right of a state that has been indirectly injured to take countermeasures.

4.7.1 The Concept of a Non-injured State

The definition of an 'injured state, as set out in the 1996 United Nations Report of the Commission to the General Assembly on the work of its forty-eighth session[496] is to include any state which is party to a multilateral agreement dealing with basic human rights and freedoms and another state which is in breach of that agreement, and where the rights in question are rooted in customary international law.[497]

In addition, no distinction is made regarding the rights of states which can be viewed as directly injured, and those third party states which have not been directly affected or harmed by the actions of the state which is in breach of the treaty, and which can be viewed as victims only from a legal perspective. It can be reasonably argued that these third party states therefore have no rights to receive reparations when they have not suffered direct harm as a result of the offending state's actions.

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[494] Sahib Singh, 'Iran, the Nuclear Issue & Countermeasures' (10 January 2012) *Cambridge International Law Journal,* available at <http://cilj.co.uk/2012/01/10/iran-the-nuclear-issue-countermeasures-2/> accessed 20 October 2017

[495] Ibid.

[496] United Nations, 'Report of the Commission to the General Assembly on the work of its forty-eighth session' (1996) II *Yearbook of the International Law Commission*, UN Doc. A/CN.4/SER. A/1966/Add.1

[497] United Nations, 'Report of the Commission to the General Assembly on the work of its forty-eighth session' (1996) II *Yearbook of the International Law Commission*, UN Doc. A/CN.4/SER. A/1966/Add.1, Art 40(2)(e)

The 1996 treaty was not clear on this point, and this situation endured until 2001 when the ILC, in its final draft, identified an injured state as one that had actually been negatively affected by a breach of a multinational agreement, notwithstanding that other states would continue to act to maintain the status of international law. This was noted by the General Assembly.[498]

Article 48 provides that individual states are affected by a particular breach on the basis of their membership of a group of states or of the international community as a whole rather than on the basis of their individual capacity. Furthermore, two conditions must be met. First, the state must be a member of that group, and second the obligations concerned must seek the protection of a collective interest.

Article 48(1) calls into question whether the NPT qualifies as having obligations to the whole international community, as it was "established for the protection of a collective interest of the group", specifically, the group of 191 States Party to the NPT.[499] Official observations to Article 48 are unhelpful in clarifying this ambiguity, and may even complicate matters further regarding the scope of Article 48(1) (a) as compared to Article 42(b) (ii). The comments include the observation that Article 48 collective observations may include "protection of the environmental protection treaties, human rights treaties, or regional nuclear free zone treaties."[500]

These ambiguities led Sicilions to conclude that "the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of states. At present there appears to be no clearly recognized entitlement of third states to take countermeasures in the collective interests."[501] In this way,

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[498] UN General Assembly Res 56/83 (12 December 2001) UN Doc. A/RES/56/83, para, 3

[499] 'Treaty on the Non-Proliferation of Nuclear Weapons (NPT)' (*United Nation Office For Disarmament Affairs*) available at <https://www.un.org/disarmament/wmd/nuclear/npt/> accessed 20 October 2017

[500] United Nations, 'Report of the Commission to the General Assembly on the work of its fifty-third session' (2001) II (2) *Yearbook of International Law Commission*, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) commentary to Art 48, para, 7. See also Malcolm D. Evans, *International Law* (4th edn, Oxford University Press, New York 2014) 495

[501] Linos Alexandra Sicilions, 'Countermeasures in Response to Grave Violations of Obligations Owed to the International Community' in Kate Parlett and others (eds), *The Law of International Responsibility* (Oxford University Press, New York 2010) 1148

according to Article 54 of the ILC, the application of countermeasures does not prejudice the right of a third state to instigate "lawful measures".

There have been different interpretations as to the precise meaning and scope of the reference to "lawful measures", and this remains open. For commentators opposed to the adoption of countermeasures in the absence of direct injury "lawful measures" is interpreted as meaning that states which have not been directly injured can only adopt measures that are lawful per se. Dennis Alland posits that Chapter II has prejudiced the right of Article 48 states to take 'lawful measures'. He reasons that by default countermeasures, unlike acts of retorsion, are not legal, and only under certain conditions can become legal.[502] Rejecting this viewpoint other commentators refer to the explicit exclusion of retorsion from the scope of application of ARSIWA;[503] and argue that specifically permitting retorsion would not make sense because it is in any case already permitted. While having Article 54 within a chapter on countermeasures suggests that it is aimed at a wider range of measures than just retorsion.[504] However, as Sicilianos has argued, under Article 48, countermeasures are neither prohibited nor sanctioned by the Articles.[505]

Bederman summarizes the ILC's stance on collective countermeasures as being the only plausible political solution, enabling states "to defer debate to another day and to allow customary international lawmaking processes to elaborate any conditions on the use of collective countermeasures."[506]

It is important to establish if Iran's alleged failure to meet its treaty obligations under the NPT constitutes a violation of the collective interest of all the signatory states to the NPT, which include all member states of the EU. While this issue remains unsettled and controversial, collective obligations are referenced in Article 48(1) (a) where obligations emerging out of "regional

[502] Dennis Alland, 'Countermeasures of General Interest' (2002) 13 *European Journal of International Law* 1221, 1232-33
[503] ILC, 'Draft Article on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) UN Doc. A/56/10, commentary to countermeasures, para 3
[504] Sicilions, *supra* note 501, 1145
[505] Ibid, 1143
[506] David J. Bederman, 'Counterintuiting Countermeasures' (2002) 96 *American Journal of International Law* 817, 828

nuclear free zone treaties are specifically included."[507] However, the particular obligations under the NPT allegedly breached by Iran, are assessed by some analysts to be only of a "technical" not "substantive" character, and therefore do not fall in the class of *erga omnes* obligations.[508] Furthermore, the EU's reliance on Articles 48(1)(a) Article 54 ARSIWA to invoke Iran's responsibility has been questioned, and it is unclear whether ARSIWA gives legitimate grounds to the EU to take actions against Iran.[509]

It is evident that at the time of the 2001 ILC Draft Article on Responsibility of States for Internationally Wrongful Acts, there were different categories of states which could claim to have been injured by a wrongful act. There was also at that time a move to legitimise third party countermeasures in the hope that this "might have the effect of reducing the risk of a spillover into military sanctions." [510] Another, opposing view was that a network of third party countermeasures "may prove a saving grace for international law." [511] due to the difficulties in passing resolutions in the Security Council.

On the other hand, the lack of clarity surrounding the application of countermeasures by non-directly injured states within the ILC leaves open the possibility of their potential misuse by powerful states.[512] There have been critical statements made by governments, including China, pointing to countermeasures as the preserve of the most powerful states or blocs as they are the only ones in a position to apply them against weaker states.[513] Japan also stated that such a "subrogation system of countermeasures" has no basis in international law.[514] It has also been claimed that empowering non-

[507] Calamita, *supra* note 11, 1424
[508] Dupton, *supra* note 11, 329
[509] Ibid.
[510] United Nations, 'Summary records of the meetings of the 53rd session' I *Yearbook of the International Law Commission* (2001) UN Doc. A/CN.4/SER.A/2001, 35, para, 4
[511] David J. Bederman, 'Counterintuiting Countermeasures' (2002) 96 *American Journal of International Law* 817, 831
[512] United Nations, 'Summary Record of the 15th Meeting' (New York, 15 October 2000) UN Doc. A/C.6/55/SR.15, paras. 29,31 (India)
[513] United Nations, 'Comments and observations received from Governments' (19 March, 3 April, 1 May and 28 June 2001) UN Doc. A/CN.4/515 and Add.1–3, 69-70; United Nations, 'Summary Record of the 11th Meeting' (New York, 22 October 2001) UN Doc. A/C.6/56/SR.11, paras. 59, 62 (China)
[514] United Nations, 'Comments and observations received from Governments' (19 March, 3 April, 1 May and 28 June 2001) UN Doc. A/CN.4/515 and Add.1–3, 79 (Japan)

injured States to take countermeasures would place the stability of the international legal order in danger and undermine the function of international law.[515]

Although third-party countermeasures remain a source of disagreement, they are one of the few courses of action that can be applied to enforce international order. However, it would appear that they are nether a threat to international stability as some have argued, nor are they the most effective way to resolve problems while upholding the framework of international law.

4.8 The Requirements of Proportionality

Article 51 of the ILC Articles provides that countermeasures "must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in questions." Crawford's comments on the ILC Articles assert that "proportionality is a well-established requirement for taking countermeasures, being widely recognized in state practice, doctrine and jurisprudence."[516] Indeed, with wording very close to the final draft of Article 51, the ICJ ruling on the Gabčíkovo-Nagymaros Project held that "the effect of a countermeasure must be commensurate with injury suffered, taking account of the rights in question."[517]

The vital question appears to be on the matter of proportionality and specifically how measures taken in nuclear proliferation issues can be deemed proportionate where non-compliance could be viewed as threatening

[515] Hutchinson (1998) 202; Crawford (2012) 584

[516] United Nations, 'Report of the Commission to the General Assembly on the Work on its Fifty-third Session' *Yearbook of International Law Commission* (2007) UN Doc. A/CN.4/SER./A/2001/Add.1 (Part 2) commentary to Art 51, para, 2. This remark is confirmed in the pronouncements of the ICJ and in international arbitrations. See e.g., Nicaragua v United States of America, *supra* note 419, para, 249 which stated "The act of which Nicaragua is accused, even assuming them to have been established and imputable to that state, could only have justified proportionate counter-measures on the part of the state […]"; Countermeasures "must certainty consider as excessive, and consequently illicit, reprisals out of all proportion to the at which has motivated them". See The Naulilaa Case, (Portugal v. Germany) (1928) II Reports of International Arbitral Awards 1011, 1028 (Case concerning the responsibility of Germany for damage caused by invasion in the Portuguese colonies in the South of Africa before the Portuguese entered the war)

[517] Gabčíkovo-Nagymaros, *supra* note 429, para, 85

peace. The ILC argued that "what is proportionate is not a matter which can be determined precisely."[518]

Proportionality can be viewed in different ways. Some commentators see it from the standpoint of the injury suffered, others base their assessment on the nature and significance of the rule that has been infringed while a third group maintain that the seriousness of the infringement should determine the evaluation of proportionality.

Both Oppenheim and Hall make reference to the question: in proportion to what? Oppenheim takes the standpoint that reprisals have to be proportionate to the harm done as well as to the level of compulsion required to secure reparations [519] Hall writes similarly that reprisals must be proportionate to the provocative act and "not in excess of what is needed to obtain redress."[520] The way Oppenheim conceives of proportionality clarifies that it can only be assessed within the overall context of the case, taking into consideration the harm caused, the breached principle and the objective being aimed for.

The Air Service Agreement Case also gave some clarification on this matter. The dispute emerged between France and the United States when the former refused to allow a Pan American plane traveling from the United States to Paris to unload passengers and cargo in Paris because there had been a change of plane in London. Furthermore, France also suspended future Pan American flights, arguing that Pan American's decision to use smaller aircraft for the London to Paris route violated the 1946 Agreement. Responding, the United States ordered two French airlines to file their flight schedules, and soon afterwards banned Air France from operating some of its flights to the United States. The Tribunal found that no equivalence existed between France refusing to permit a change of gauge in London on flights from the United States west coast and the United States' countermeasures suspending

[518] United Nations, 'Document of Fifty-second Session' *Yearbook of International Law Commission*, (2009) UN Doc. A/CN.4/SER./A/2000/Add.1 (Part 1) 91, para, 346
[519] Lassa Oppenheim, *International Law: A Treatise, Disputes, War and Neutrality,* Vol II (7th edn, Longmans, London 1952) 141
[520] William Edward Hall, *A Treaties on International Law* (6th edn, Oxford University Press, Oxford 1909) 266-267

altogether Air France flights to Los Angeles. “In the Tribunal’s view, it is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach.” [521] The Tribunal underlined that simply comparing the damages to the parties was insufficient to determine whether the United States actions were proportionate. Instead, it emphasised the principles and interests raised by the original actions by France and their general impact on United States air transport policy and on several international agreements with States beyond France in regard to gauge changes in third countries. However, the Tribunal did hold that the United States measures conformed to the principle of proportionality as they “do not appear to be clearly disproportionate when compared to those taken by France.”[522] Furthermore, it held that proportionality deals with the intended result and the means used to achieve it, not the breach and the response to the breach.[523]

The Tribunal’s methodology was reinforced to some degree in the Gabcikovo-Nagymaros Project case wherein the ICJ assessed the proportionality of the countermeasures based on the harm caused to the rights of every riparian state to unfettered navigation and usage of their shared waterways. In this case it appears that the court applied the principle of endangerment rather than the amount of actual harm in determining whether the countermeasures were in proportion.[524]

The two methods differ only slightly. In the Air Service Agreement Case, the countermeasure was comparable to the effects and scope of the initial violation, and the Tribunal assessed whether the countermeasures were proportionate to the consequences of the initial violation of the principle concerned. In the Gabcikovo-Nagymaros Project case, by contrast, the main consideration was whether the countermeasures were disproportionate, as they affected the doctrine of equal rights of riparian nations.

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[521] Air Service Agreement, *supra* note 416, 443-444, para, 83
[522] Ibid.
[523] Ibid.
[524] Gabčíkovo-Nagymaros, *supra* note 429, para, 85

A point of similarity in the two cases is that assessing proportionality was not purely dependent on the quantitative aspect of the injury suffered (the legal effect deriving from wrongful act) but also involved a qualitative aspect (the legal effect of the breach), including the seriousness of the infringement and the significance of the interest protected by the breached rule.

This is described by Cannizzaro as the essence of proportionality. There must be both appropriateness in the aim of the respondent state and the aim itself must also be appropriate and reasonable, taking account of the context of the structure of the breached norm and the legal consequences resulting from the breach. [525] He rejected the notion that proportionality was determined quantitatively by examining the relationship between the response and the prior breach. Instead arguing that "in a plurality of instruments and tools of self-redress"[526] the international legal order should emphasise the role each response has to play. Put otherwise, different countermeasures, different functions, and different ways to measure proportionality.[527]

Notwithstanding the requirement for proportionality to be examined on a case-by-case basis, with the Air Service Agreement judgement in mind, there appears to be noticeable disproportionality between Iran's alleged transgression and the countermeasures adopted by the EU. Any comparison between the alleged breaches of the NPT and Safeguards Agreements obligations and the broad range of restrictions targeting Iran's oil and gas sectors and Iran's banking industry would surely find a major imbalance between breach and response. [528] It has been said that "the principle of proportionality is like beauty, it exists only in the eye of the beholder". [529]

Clearly, there is a different dimension to a case involving nuclear weapons capabilities due to the enormity of the threat and the interests a State has in ensuring its security. This scale of consequences leaves both qualitative and

[525] Enzo Cannizzaro, 'The Role of Proportionality in the Law of International Countermeasures' (2001) 12 (5) *European Journal of International Law* 889, 891
[526] Ibid, 889
[527] Elena Katselli Proukaki, *Countermeasures, the Non-Injured State and the Idea of International Community* (Routledge, London 2009) 273
[528] Dupton, *supra* note 11, 331
[529] Thomas M. Franck, 'On Proportionality of Countermeasures in International Law' (2008) 102 (4) *The American Journal of International Law* 715, 716

quantitative questions unanswered regarding what an appropriate and proportionate countermeasure response.

4.9 Conclusion

This chapter has examined the use of countermeasures as a response to non-compliance with NPT obligations. It has also looked at related obligations for international organisations as well as states, including situations regulated by the IAEA and nation states which could lead to UN Security Council Sanctions and state's countermeasures.

Bearing in mind that UN Security Council sanctions are often ineffective, it appears that there is a sound legal basis for implementing countermeasures in response to international transgressions such as non-compliance with the NPT if these countermeasures are carried out according to stated legal requirements and restrictions.

However, based on the case study discussed in this thesis, there is no clarity regarding the basis on which the EU identified Iran's initial wrongful act. It is doubtful that the EU could be viewed as an injured party. The proportionality of the countermeasures it instigated, such as those aimed at the shipbuilding industry, the Central Bank and oil and gas can also be questioned. This is a highly specialised legal domain, but its further development is likely to be very significant considering the necessity to foster international cooperation as a means to ensure compliance with current nuclear obligations.

Chapter Five
Legal Examination of Iran's Nuclear Agreement: Joint Comprehensive Plan of Action (JCPOA)

5.1 Introduction

A new chapter in Iran's nuclear history began on 14th July 2015 with the signing of a comprehensive agreement between Iran and China, France, the Russian Federation, the United Kingdom, the European Union and the United States (E3/EU+3) on a Joint Comprehensive Plan of Action (JCPOA). The JCPOA is a complex agreement of non-treaty terms whose sustainability and verification will apply for at least 15 years. It has been designed to restrain and prohibit Tehran's utilisation of highly-enriched uranium and plutonium for the development of a nuclear military capability, and to hinder any covert attempts to develop a nuclear weapons programme. In exchange for agreeing to the terms of the JCPOA, existing nuclear-related sanctions against Iran were terminated, and Iran was allowed to pursue a small-scale, restricted, peaceful, civilian nuclear energy programme operating within specified parameters, allowing intrusive observations and monitoring as well as some permanent continuous transparency measures.

Resolution 2231 (2015) was adopted by the UN Security Council and endorsed in this agreement. This came after Iran provided the explanations demanded by the IAEA in an attempt to obtain disclosure of all significant matter relating to present, or past attempts by Tehran to develop nuclear weapons. [530] The implementation of this deal was dependent upon the submission of a report by the IAEA Director General to the IAEA Board of Governors and the Security Council, which would affirmed that Iran had

[530] 'IAEA Receives Information from Iran under Road-map Agreement' (*IAEA*, 15 August 2015) available at <https://www.iaea.org/newscenter/pressreleases/iaea-receives-information-iran-under-road-map-agreement > accessed 14 November 2017

applied the necessary measures in full. Once this was accepted, the implementation of the JCPOA could begin.[531]

The JCPOA featured many innovations in the form of the mechanisms intended to curb Iran's nuclear programme and provide Iran with sanctions relief. These covered areas including the legal status of the agreement, the way the involved participants were to be supervised in meeting their obligations, mechanisms for settling disputes as well as mechanisms to enable the lifting or re-imposing of sanctions. The arrangement of the deal also contained an innovative approach to addressing the potential risk of a state becoming a nuclear power.

The objective of this chapter is to analyse the novel characteristics of the JCPOA and of Resolution 2231 from an international law perspective. The chapter will continue with a thorough analysis of the complex framework of the JCPOA, and an examination of this agreement's capacity to resolve the decades-long disputes regarding Iran's nuclear capability.

Following a brief overview for the purposes of understanding the JCPOA, there will be an analysis of the JCPOA's provisions and timeline. This section will consider the participants' commitments emanating from the agreement and will discuss one of the principal concerns raised by the JCPOA; that of how to monitor and enforce the Accord. This will be followed by a discussion of whether the JCPOA will be acknowledged as a treaty from the viewpoint of the 1969 Vienna Convention. By examining the complex structure and content of the JCPOA, this chapter will draw the conclusion that the JCPOA is not a legally-binding agreement, but rather a political one which does not create any domestic or international legal obligations for its participants.

[531] 'Statement by IAEA Director General Yukiya Amano on Iran' (*IAEA*, 16 January 2017) available at <https://www.iaea.org/newscenter/statements/statement-by-iaea-director-general-yukiya-amano-on-iran-16-january-2017> accessed 14 November 2017

5.2 Understanding the Joint Comprehensive Plan of Action

The route to initiating the JCPOA emerged from the Joint Plan of Action (JPA) which was designed by Iran and the P5+1 countries in Geneva. This was followed by an agreement between the parties involved in the JCPOA framework, which presented the broad parameters to be implemented in the JCPOA agreement. Eventually, the JCPOA was finalised after many decades of diplomatic discussion and two years of challenging negotiations.

5.2.1 The Joint Plan of Action (JPA)

The JPA introduced a short-term comprehensive solution to problems caused by Iran's nuclear programme by freezing most aspects of the programme in exchange for the removal of limited economic sanctions. This was to allow time for participants to reach a long-term solution. The principal provision of the JPA commanded Iran to convert half of its reserves of uranium hexafluoride, which contained 20 percent U-235 to no greater than 5 percent U-235. The remainder of the uranium hexafluoride was to be converted to uranium oxide in order to provide fuel for the Tehran Research Reactor and to furnish the IAEA with specific information regarding undeclared nuclear facilities, data regarding the source of materials and reports of nuclear activities in all operating locations.[532] In return, the P5+1 countries were prevented from applying any further nuclear sanctions and were required to release Iran's frozen assets in overseas banks. They were also obliged to provide Iran with the opportunity to export petrochemicals, gold and precious metals.[533]

The 2013 JPA attempted to construct a deal for Iran's nuclear programme based on the rules which are applied to the peaceful nuclear programmes of states which do not possesses nuclear weapons and which are party to the NPT. Article IV (1) of the NPT establishes that "nothing in this Treaty shall be

[532] Joint Plan of Action (24 November 2013) 1-2, available at <http://eeas.europa.eu/archives/docs/statements/docs/2013/131124_03_en.pdf> accessed 11 February 2017
[533] Ibid, 3-4

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 Article I and II of this Treaty". This establishes the entitlement of party states to develop a civil nuclear programme with neither discrimination nor restrictions, apart from those which may emanate from the obligations of non-proliferation under the NPT.[534]

The absence of convergence between the United States and other parties regarding whether Iran was entitled to have a capacity to enrich uranium became a point of disagreement.[535] The implementation of the JPA was characterised by divergent opinions. The official line of the United States supported a restrictive interpretation of this interim agreement. A senior administration official of the United States argued that his country "would never recognise the right to allow Tehran to proceed with its enrichment programme and the JPA would not contradict this claim regarding enriching uranium."[536] In contrast, some international legal commentators have posited a conception, based on Article IV (1), which would entitle Iran to enrich uranium, although the United States continues to reject this idea.[537] However, the JPA recognises Iran's right to enrich uranium, without which a full indigenous fuel cycle is not possible. This rationalises Iran's right to maintain a uranium enrichment programme as part of its peaceful nuclear programme.

Regardless of these disputes, various legal scholars have described the JPA as a significant example of a successful diplomatic resolution which could be

[534] Joyner, *supra* note 266, 43-50; Mohamed I. Shaker, 'The Evolving International Regime of Nuclear Non-Proliferation (Vol 321)' in *Collected Courses of the Hague Academy of International Law* (Brill, Boston 2007) 120-127

[535] Aaron Blake, 'Kerry on Iran: 'We do not recognize a right to enrich'' *The Washington Post* (24 November 2013) available at <https://www.washingtonpost.com/news/post-politics/wp/2013/11/24/kerry-on-iran-we-do-not-recognize-a-right-to-enrich/?utm_term=.8fb15fb6379e> accessed 14 November 2017

[536] John T. Woolley, Gerhard Peters, 'Barack Obama: "Background Briefing by Senior Administration Officials on First Step Agreement on Iran's Nuclear Program"' (*The American Presidency Project*, 24 November 2013) available at <http://www.presidency.ucsb.edu/ws/index.php?pid=104198> accessed 14 November 2017

[537] 'Rouhani: Nuclear Deal Marks Failure of Enemies' Attempts to Promote Iran phobia' *Fars News Agency* (24 November 2013) available at <http://en.farsnews.com/newstext.aspx?nn=13920903001115> accessed 14 November 2017

employed to untangle future crises.[538] This accord was the first move towards a long-term solution to the Iran nuclear crisis, leading to the JCPOA.

5.2.2 The Joint Comprehensive Plan of Action (JCPOA)

Following the 2013 Accord concerning a possible JCPOA, Iran and the E3/EU+3 continued to discuss this matter for the next two and half years before reaching their final agreement on July 14th, 2015. On this date it was announced that a Joint Comprehensive Plan of Action had been agreed between Iran and the E3/EU+3, as well as a "Roadmap for the Clarification of Past and Present Outstanding Issues regarding Iran's Nuclear Programme". The full implementation of the JCPOA, which is to comprise a total removal of "economic, multilateral, and national sanctions" pertaining to Iran's nuclear programs will guarantee the exclusive existence of Iran's peaceful nuclear programme.[539]

This accord is endorsed by Resolution 2231 (2015) which has its own requirements regarding Iran's nuclear weapons development programme. These include continuing with restrictions stipulated in previous resolutions regarding Iran's conventional arms exports and imports. It also "calls upon" all states to "to take such actions as may be appropriate to support the implementation of the JCPOA"[540] while repealing and removing national sanctions.

The JCPOA was intentionally developed to be a legal non-binding agreement and not a treaty. However, it should be noted, the Accord created an extensive set of political commitments among the involved parties. The

[538] Daniel H. Joyner, *Iran's Nuclear Program and International Law: From Confrontation to Accord* (Oxford University Press, New York 2016) 244; Anne Penketh, 'Iran nuclear deal: Historic agreement reached with US and other world powers' *Independent* (25 November 2013) available at < http://www.independent.co.uk/news/world/middle-east/iran-nuclear-deal-historic-agreement-reached-with-us-and-other-world-powers-in-geneva-8960434.html> accessed 14 November 2017; Joby Warrick, Anne Gearan, 'Kerry heads to Geneva, raising hopes for historic nuclear deal with Iran' *The Washington Post* (23 November 2013) available at <https://www.washingtonpost.com/world/national-security/iran-wants-right-to-enrich-uranium-recognized-as-part-of-agreement-western-powers-wary/2013/11/22/ee7e46a8-5370-11e3-9e2c-e1d01116fd98_story.html?utm_term=.7d11180fcb38> accessed 14 November 2017

[539] Joint Comprehensive Plan of Action (JCPOA) (15 July 2015), 2 (Preface)

[540] UNSC Res 2231 (20 July 2015) UN Doc. S/RES/223, para 2

fulfilment of these commitments by the E3/EU+3 and the UN Security Council is central to the formulation and establishment of a legal and diplomatic resolution to the Iran nuclear issue.
The recognition criteria of these factors will be considered in detail below.

5.3 The Structure of the JCPOA

The Iran nuclear agreement has five main sections: Introduction and General Provisions, Nuclear, Sanctions, Implementation Plan and Dispute Resolution Mechanism. These are augmented by five annexes covering: Iran's nuclear-related commitments,[541] UN Security Council sanctions removal procedures, the unilateral restrictions imposed upon Iran,[542] a formulated list detailing how it may be possible to cooperate with Tehran in developing peaceful nuclear energy uses,[543] the Joint Commission modalities comprising Iran and the E3/EU+3,[544] and the E3/EU+3 and Iran series of reciprocal actions.[545]

The "nuclear" section of the JCPOA, which covers Paragraphs 1-17, is divided into three sub-sections: (1) enrichment, enrichment-related Research and Development, and nuclear stockpiles,[546] (2) the heavy-water reactor in Arak, heavy-water and its reprocessing,[547] and (3) transparency and confidence-building measures.[548] Each sub-section further refers to technical annexes. The first section is integrated with the JCPOA annex on nuclear-related measures,[549] the second section covers the design of the Arak reactor,[550] and the third Section deals with the important JCPOA Annex on the Joint Commission.[551] The Joint Commission, in addition to the Procurement Working Group (PWG) manages a critical function in the administration of the procurement channel; a licensing process for dual-use nuclear-related exports to Iran.

[541] JCPOA (15 July 2015) Annex I (Nuclear Related Commitments)
[542] Ibid, Annex II (Sanctions Related Commitments)
[543] Ibid, Annex III (Civil Nuclear Cooperation)
[544] Ibid, Annex IV (Joint Commission)
[545] Ibid, Annex V (Implementation Plan)
[546] Ibid, paras 1-7
[547] Ibid, paras 8-12
[548] Ibid, paras 13-17
[549] Ibid, Annex I (Nuclear Related Commitments)
[550] Ibid, Annex I (Nuclear Related Commitments) 28-29
[551] Ibid, Annex IV (Joint Commission)

Paragraphs 18 to 33 of the JCPOA cover commitments of the EU, the United States and the UN Security Council to the removal of the unilateral nuclear-related sanctions which are to be applied after the IAEA verifies that Iran has fulfilled its essential commitments. The Vienna Accord has a precise timetable detailing the “Implementation Plan” which is to be undertaken according to paragraphs 34 and 35 which are included in JCPOA together with the JCPOA Annex V (Implementation Plan).

The Vienna Accord is characterised by the Implementation Plan, which is its main area of difference from the JPA. The Implementation Plan includes a guarantee that no sanctions relief is to be granted by the E3/EU+3 until Iran has fully implemented all compulsory measures and obligations, following the sequence as well as the steps required to be performed under the JCPOA’s provisions. There are five major events to be marked within this process. Firstly there is the Finalization Day, followed by the Adoption Day, and then the Implementation Day. After these there is the Transition Day and finally the Termination Day, implemented by the UN Security Council Resolution.

The involved parties brought the JCPOA to completion by providing the JCPOA with a dispute resolution mechanism which was included in paragraphs 36 and 37. This “snapback mechanism” is part of a sequence designed to adjudicate and resolve complaints raised by the JCPOA contributors and participants regarding significant violations committed by Iran.

5.4 The JCPOA Implementation Timetable

The JCPOA is not only structurally complex, but also involves, of necessity, highly technical plans and solutions. These specify the most important aspects of the framework of the agreement.

In order to enhance a common understanding, and to clarify the key criteria of the Accord, as well as to analyse the Accord’s practical implications, it is essential to understand the temporal frameworks known as the Finalisation

Day, the Adoption Day, the Implementation Day, the Transition Day and the Day of UN Security Council Resolution Termination.

The Finalisation Day[552] occurred on 14th July 2015 when the involved parties completed their negotiations on the JCPOA. This event resulted in the adoption of Resolution 2231 (2015) which was supported by the Council of the EU, and the adoption of the conclusions on 20 July 2015.[553] This constituted a key step to the implementation of the JCPOA, since it highlighted the support voiced by other countries for "a comprehensive, long-term and proper solution to the Iranian nuclear issue".[554] Furthermore, it established the timing of the next phase; the Adoption Day.[555] This was to be operationalised on October 18 2015, 90 days after the endorsement of the JCPOA by the UN Security Council. The United States commented that "the 90-day period permits the United States congress, Iran's parliamentarians, and other involved parties to analyse the JCPOA".[556]

At this stage, Tehran informed the IAEA that it would fully enforce the Modified Code 3.1, coming into effect on the Implementation Day, and that it would return to a provisional application of the Additional Protocol.[557] This required Iran to embark upon the required preparation to fulfil its nuclear-related commitments by making the technical moves necessary to restrain its programmes.[558] These measures included reducing the number of centrifuges and converting the heavy-water reactor situated at Arak.[559]

The third phase, known as the Implementation Day,[560] occurred on 16 January 2016, which was the date for the IAEA to confirm the full implementation of Iran's commitments.[561] At the same time, the E3/EU+3

[552] Ibid, para, 34 (i); Ibid, Annex V (Implementation Plan) paras, 2-5
[553] Council of the EU, 'Council Conclusions on the Agreement on Iran's Nuclear Programme' (20 July 2015) Press Release 597/15
[554] UNSC Res 2231 (20 July 2015) UN Doc. S/RES/2231, 1
[555] JCPOA (15 July 2015) para, 34(ii); Ibid, Annex V (Implementation Plan) paras, 6-13
[556] The House Foreign Affairs Committee 'Iran Terror Financial Transparency Act' (11 January 2016) H.R. 3662-114th Congress, 2
[557] JCPOA (15 July 2015) Annex I (Nuclear Related Commitments) paras, 64-65
[558] Ibid, para 1
[559] Ibid, para 8
[560] Ibid, Art 34(iii); Ibid, Annex V (Implementation Plan) paras, 14-18.2
[561] Ibid, Annex V (Implementation Plan) para, 15

recognised their commitments under the accord of the JCPOA. [562] On Implementation Day, a report was presented by the Director General of the IAEA to its Board of Governors and to the UN Security Council affirming that "Iran has undertaken all the measures required under the JCPOA, such as reducing centrifuges and removing the core of the Arak reactor to enable Implementation Day to occur."[563]

On Implementation Day, the removal of some of the nuclear-related sanctions determined by the JPA was superseded by the lifting of all of the financial and economic sanctions implemented in order to produce a legal and diplomatic resolution to the problems related to Iran's nuclear programme, in accordance with the JCPOA.[564]

The fourth phase, known as the Transition Day,[565] will occur eight years after the Adoption Day (18th October, 2023), or earlier if the IAEA should draw the Broader Conclusion that all nuclear-related materials and all established facilities operating in Iran are being used only for peaceful purposes, and that Tehran is not involved in any unreported nuclear activities. According to the JCPOA, by the date of the Transition Day, the EU will have terminated its enforcement of nuclear-related sanctions and the United States should have found mechanisms for taking legislative action to effect the removal of their sanctions. Simultaneously, Iran should have attempted to secure administrative, constitutional and parliamentary endorsement of the Additional Protocol.[566]

The Security Council asked the Director General of the IAEA to adopt the necessary actions to verify and monitor the nuclear-related commitments which Iran was required to meet for their full duration under the JCPOA.[567] However, the Security Council could not produce measures to bring this into existence and remained largely silent regarding this issue. A problem arose

[562] Ibid, Annex V (Implementation Plan) paras, 16,17
[563] 'IAEA Director General's Statement on Iran' (*IAEA*, 16 January 2016) available at <https://www.iaea.org/newscenter/statements/iaea-director-general%E2%80%99s-statement-iran> accessed 14 November 2017
[564] JCPOA (15 July 2015) Annex V (Implementation Plan) paras, 16-18.2
[565] Ibid, Art 34(iv); Ibid, Annex V (Implementation Plan) paras, 19-22.1
[566] Ibid, Annex V (Implementation Plan) paras, 20-22
[567] UNSC Res 2231 (20 July 2015) UN Doc. S/RES/2231, para, 3

regarding the Accord due to the absence of controls and transparency. This particularly attracted attention to the Broader Conclusion, regarded as a necessary element for the Transition Day to occur.

This situation may have been further complicated by the absence of a legally binding document within the IAEA stipulating the conditions under which the concept of the Broader Conclusion should be brought into action.

Therefore, an internal decision is needed by the IAEA in order to verify the Broader Conclusion as to whether all nuclear material in Iran is being used exclusively for peaceful objectives. Parties of the JCPOA and/or the Security Council, as the required principals, will not have access to this generally rule-governed confirmation procedure; they will also be restricted to relying on decisions made by the IAEA. The verification process between Iran and the IAEA is, to a considerable extent, confidential. This is to ensure that the international community beyond the IAEA's sphere of activity will become aware of its limitations only after any violations have occurred.

The final stage in enforcing the Accord is the Termination Day [568] which will come into effect 10 years after the Adoption Day (the expiration date of UN Security Council Resolution 2231). This will conclude all determined provisions of the previous resolutions aimed at targeting Iran's nuclear programme from 2006 onwards, and will remove the Iran nuclear issue from the Security Council agenda. Consequently, the JCPOA should be regarded only as the beginning of a lengthy process, which, if successfully implemented by the involved parties, will end the problems surrounding Iran's nuclear power capabilities by 2025.

5.5 Principal Provisions of the JCPOA

The JCPOA provisions based on the preliminary framework agreement (2 April 2015) were reached before the Finalisation Day. The JCPOA was established for the purpose of inhibiting Iran's potential capability to use to develop nuclear weapons. In order to achieve this aim, the deal was planned to include monitoring provisions developed to identify attempts made by

[568] JCPOA (15 July 2015) para, 34(v); Ibid, Annex V (Implementation Plan) paras, 23-26

Tehran to design and develop nuclear weapons using reported or unreported facilities or covertly developed facilities. The provisions which the JCPOA offered were sufficient to meet the demands made by the United States administration regarding the breakout time (the time required to amass a sufficient amount of fissile material to develop a nuclear weapon).[569] Such a time was extended from current estimates of two to three months,[570] to one year for the initial 10-year period of the finalised agreement.[571]

The principal provisions to which Iran remains committed under the terms of the Vienna Accord are given in detail below.

5.5.1 The Enrichment of Uranium

Iran possesses two reported uranium enrichment plants, situated in the cities of Natanz and Fordow. Based on the terms of the Accord, Iran has pledged to reduce the number of operating centrifuges installed at these plants and to restrict all enrichment activities for a period of 10 to 15 years. The commercial-scale plant situated in the city of Natanz, is acknowledged as Iran's largest facility and contains over 16,000 installed centrifuges and a capacity to house over 50,000 centrifuges.[572] Iran's Fordow Fuel Enrichment Plant is a reported underground uranium enrichment site. It currently contains approximately 3,000 IR-1 centrifuges, 700 of which are operative for uranium enrichment. [573]

The Accord binds Iran to remove two-thirds of its installed centrifuge machines. This will mean reducing the numbers to fewer than 5,000 IR-1 installed centrifuges in Natanz, and fewer than 1,000 IR-1 installed centrifuges in Fordow. Furthermore, Iran is also required to physically remove the surplus

[569] A nuclear weapon would require roughly 25 kg of U-235 metal (90% enriched uranium), see IAEA, *IAEA Safeguard Glossary – 2001 edition*, International Nuclear Verification Series No. 3 (IAEA, Vienna 2002) 23
[570] Ibid, 25, 22
[571] 'The Historic Deal that Will Prevent Iran from Acquiring a Nuclear Weapon' (*The White House: President Barak Obama*, 2016) available at <https://obamawhitehouse.archives.gov/issues/foreign-policy/iran-deal> accessed 10 November 2017
[572] IAEA, 'Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions in the Islamic Republic of Iran' (27 August 2015) IAEA Doc.GOV/2015/50, 5-6
[573] Ibid, 7

centrifuge machines and all related enrichment equipment and infrastructure deployed at Natanz and Fordow, and to store them in Natanz where they are to be monitored by the IAEA.[574] For a period of 10 years, Iran's capacity to enrich uranium at Natanz will be restricted to about 5,000 IR-1 machines in their present cascade configuration, producing low-enriched uranuim. [575] Similarly, at Fordow, under the terms of the agreement, there is to be no enrichment of uranium and no production of fissile material for 15 years. Of the remaining 1,000 IR-1 centrifuges at Fordow, one third will be converted to stable isotope production, which is not regarded as uranium, while the remaining two-thirds are to be maintained on standby status, to be brought into use if required.[576]

The deal also restricts Iran's nuclear enrichment Research and Development activities. The Accord does not ban Iran from conducting uranium enrichment and Research and Development activities, provided that the country does not seek to amass enriched uranium. These limitations are to apply to Iran's nuclear Research and Development activities for a period of 10 years, during which time Iran is allowed to operate three models of centrifuge, the IR-4, IR-6, and IR-8, on condition that they are not utilised to separate isotopes during the production of enriched uranium. Iran is also required to develop only an agreed number of IR-6 and IR-8 centrifuges, beginning eight years after the finalisation of the Accord. Any testing of these is not to be instigated more than one and a half years prior to the end of year 10.[577]

These requirements were presented in a plan submitted to the IAEA as part of Iran's implementation of the Additional Protocol. However, this plan of action will be composed of "voluntary commitments", meaning non-binding and unrestrictive measures.[578] Iran has also pledged to reduce its total stockpile of enriched uranium from 7,800 kilograms to 300 kilograms, of which up to 3.67 percent will be enriched uranium hexafluoride, also known as UF6. This commitment will last for the 15 years following the signing of the Accord, and

[574] JCPOA (15 July 2015) Annex I (Nuclear-related measures) paras, 27-29
[575] Ibid, para 27
[576] Ibid, Annex I (Nuclear-related measures) paras, 45-51
[577] Ibid, Annex I (Nuclear-related measures) paras, 32-39
[578] Ibid, Annex I (Nuclear-related measures) para, 52

is in addition to the restrictions on enrichment activities at Natanz. The Accord directs Iran to achieve this either through the sale of the excess uranium to other countries or through degrading the surplus to a lower enrichment level.[579] The deal permits Tehran to continue its production and stockpiling of an unrestricted quantity of natural uranium hexafluoride, the form of uranium best suited for enrichment using gas centrifuges.[580]

After the 15-year period, all physical constraints on enrichment will be removed, including limitations on the numbers and types of centrifuge machines, the level of enrichment, the location of enrichment facilities, and the level of enriched uranium stocks.

5.5.2 Producing Plutonium

Iran's 40 megawatt heavy-water reactor located at Arak has not yet begun operation. The JCPOA requires it to be converted and reduced to the lesser power of a 20 MW heavy-water research reactor, replacing its low-enriched fuel with natural uranium in a bid to decrease the amount of plutonium produced in the spent fuel. This is to prevent production of "weapons-grade"[581] plutonium through normal operational activity.[582]

On Implementation Day, the existing reactor core is to be removed and its housing filled with concrete, rendering it permanently unusable.[583] In addition to requiring the re-design of Arak, the Accord also requires Iran to send all its spent fuel abroad, and prohibits Iran from constructing any extra heavy-water reactors. However, for 15 years, Iran is to be allowed to sell its surplus heavy water produced at Arak, and at a supporting zero-power test reactor on the international market. The Accord estimates that Iran will need nearly 130 tonnes of heavy water prior the completion of the modernised Arak reactor and almost 90 tonnes from that point onwards. Tehran will permit the IAEA to

[579] Ibid, para 7
[580] Ibid, Annex I (Nuclear-related measures) para, 50
[581] Described as plutonium with a high concentration of the Pu-239 isotope, see Deborah H. Oughton and others, 'Determination of 240 Pu/ 239 Pu Isotope Ratios in Kara Sea and Novaya Zemlya Sediments Using Accelerator Mass Spectrometer' (*IAEA*) 125, available at <http://www.iaea.org/inis/collection/NCLCollectionStore/_Public/30/046/30046710.pdf> accessed 10 November 2017
[582] JCPOA (15 July 2015) Annex I (Nuclear-related measures) para, 2
[583] Ibid, Annex V (Implementation Plan) para, 15.1

monitor the country's heavy-water stocks as well as its heavy-water production plant to smooth the way for the required indefinite verification of commitments issued by the agency. [584]

While these measures are in force, Tehran will only be allowed to design and construct small hot cells of less than six cubic metres in order to produce medical isotopes. Additionally, for the same period of time, Tehran will only be able to use its spent fuel in a non-destructive manner. This must not involve fuel chemical processing that might result in developing additional reprocessing knowledge and skills in Iran. The E3/EU+3's facilities will be made available for the destruction of post-irradiation fuel to occur outside Iran.[585]

John Kirby, a United States State Department spokesperson, affirmed on January 14 2016 that Tehran had adopted this measure.[586] This was followed by the IAEA report of January 16, 2016 which also stated that Tehran had fulfilled this requirement. [587] After the passage of the agreed 15 years, plutonium-related constraints will become a voluntary measure and Tehran will be expected, but not obliged, to rely on light-water reactors to generate power and facilitate research, and only obtain reactor fuel from outside of the country.

Moreover, based on the terms of the Accord, Iran "intends to ship out all spent fuel for all future and present power and research nuclear reactors." [588] The Accord also states that Iran will have no "intention of engaging in any spent fuel reprocessing or spent fuel reprocessing Research and Development

[584] Ibid, Annex I (Nuclear-related measures) paras, 10-14
[585] Ibid, Annex I (Nuclear-related measures) paras, 21, 23
[586] John Kirby, 'Daily Press Briefing' (*US Department of State: Diplomacy in Action*, 14 January 2016) available at <https://2009-2017.state.gov/r/pa/prs/dpb/2016/01/251272.htm> accessed 14 January 2017
[587] IAEA, 'Verification and Monitoring in the Islamic Republic of Iran in light of United Nations Security Council Resolution 2231 (2015)' (16 January 2016) IAEA Doc.GOV/INF/2016/1, para, 3
[588] JCPOA (15 July 2015) Annex I (Nuclear-related measures) paras, 16-17

activities" [589] and no intention of constructing facilities capable of spent fuel reprocessing.[590]

5.5.3 Possible Military Dimensions (PMD)

In accordance with the JCPOA announcement, Iran and the IAEA agreed on a "Roadmap for Clarification of the Past and Present Outstanding Issues" on July 14th, 2015. This included a timeline to settle by the end of 2015 all outstanding issues identified in the probe launched by IAEA to examine Iran's past and present nuclear activities, termed Possible Military Dimensions (PMD).[591] The IAEA Director General concluded the process by submitting a report to the IAEA Board of Governors on December 15, 2015. [592]

This characterizes all the measures relating to Iran and the IAEA. It particularly establishes that Iran should clarify, as it had done previously, by 15 August 2015, its position regarding the past and possible present nuclear activities of PMD mentioned in the IAEA report of 8 November 2011.[593]

This particularly refers to the PMD, and highlights the importance in this nuclear agreement of ensuring that alleged PMD issues, and other matters which raise concerns, should not occur during the next 10 to 15 years or even beyond that. In other words, the clarification of PMDs should not concentrate on secondary details but focus on the elements which are required to finalise the organisational and operational structures for IAEA verification and monitoring of Iran's nuclear activities over the coming years.

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[589] Ibid, para, 18
[590] Ibid, para, 20
[591] IAEA, 'Road-map for the Clarification of Past and Present Outstanding Issues regarding Iran's Nuclear Program' (14 July 2015) IAEA Doc.GOV/INF/2015/14; JCPOA (15 July 2015) para, 14
[592] 'IAEA Board Adopts Landmark Resolution on Iran PMD Case' (*IAEA*, 15 December 2015) available at <https://www.iaea.org/newscenter/news/iaea-board-adopts-landmark-resolution-on-iran-pmd-case> accessed 5 December 2017
[593] IAEA, 'Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions in the Islamic Republic of Iran' (8 November 2011) IAEA Doc.GOV/2011/65, paras, 18-65

On 15 August, 2015, Iran clarified the outstanding issues for the Agency by submitting the relevant documents,[594] having analysed this information, the Agency posed questions concerning some "ambiguous" issues contained in Iran's submitted documents. [595] This led to expert technical talks and negotiations, organised in Tehran, to disambiguate any issues concerning Iran's nuclear programme-related activities.[596] Two months later, the Director General of the IAEA presented to its Board of Governors the report entitled "Final Assessment on Past and Present Outstanding Issues Regarding Iran's Nuclear Programme". The report indicates that the information provided by Iran in August 2015 contained "ambiguities" and that the Agency and Iran collaboratively tried to moderate these issues in the subsequent months. However, many issues remained unresolved. For instance, the IAEA indicated that "Explosive Bridge Wire (EBW) detonators which have been developed by Iran have related features in building a nuclear explosive device", although it did acknowledge that these devices also have civilian or conventional military applications. [597] Furthermore, requests for extra information on "activities relating to scientifically-monitored explosive research capabilities" [598] remained unanswered by Tehran.

The Agency determined that Iran "conducted computed modelling of a nuclear explosive device prior to 2004, and between 2005 and 2009" at Parchin.[599] Despite Iran's rejection of these claims, the Agency issued a report claiming that "the information available to the Agency, including the results of the analysis of samples and satellite images, do not confirm Tehran's statements regarding the purpose of that building" and "[Iran's] extensive activities since February 2012 at that specific location stimulated the Agency to inquire into

[594] IAEA, 'Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions in the Islamic Republic of Iran' (27 August 2015) IAEA Doc.GOV/2015/50, para, 8
[595] IAEA, 'Road-map for the Clarification of Past and Present Outstanding Issues regarding Iran's Nuclear Programme' (21 September 2015) IAEA Doc.GOV/2015/59, para, 2
[596] IAEA, 'Final Assessment on Past and Present Outstanding Issues regarding Iran's Nuclear Programme' (2 December 2015) IAEA Doc.GOV/2015/68, para, 16
[597] IAEA, 'Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions in the Islamic Republic of Iran' (8 November 2011) IAEA Doc.GOV/2011/65, paras 18-65
[598] IAEA, 'Final Assessment on Past and Present Outstanding Issues regarding Iran's Nuclear Programme' (2 December 2015) IAEA Doc.GOV/2015/68, para, 50
[599] Parchin is a military site located at southeast of Tehran.

those activities which seriously undermine its ability to issue its verification effectively."[600] Despite these questions and other issues, the introductory statement issued by the Director General to the Board of Governors, stated: "nor has the Agency found any credible indications of the diversion of nuclear material in connection with the possible military dimensions of Iran's nuclear programme". [601]

On 15 December 2015, the IAEA Board of Governors examined the final assessment which the Director General presented regarding Iran's past and present nuclear weapons activities and adopted a resolution in which the IAEA Board agreed to close the file on Iran's past nuclear activities.[602]

5.5.4 Joint Commission

In an attempt to bring the JCPOA into effect, the Joint Commission was established through Annex IV. This Commission comprises representatives of all seven countries involved in the deal, as well as the High Representative of the European Union for Foreign Affairs and Security Policy, who has the role of coordinator. The Commission may inaugurate working groups with the main purpose, *inter alia,* of evaluating the final plans for the redesigned heavy-water research reactor, to exam and authorise plans submitted by Iran to re-launch its Research and Development on uranium metal fuel. This will make it easier to assess and discuss matters emerging from the implementation of the lifting of sanctions. In addition it should allow accurate assessments regarding any nuclear-related transfers or other activities involving Iran. It should also enable any concern of a participant of JCPOA regarding the possible non-performance of its commitments by another JCPOA participant under the terms of the Accord to be assessed with a view to resolving any problems.

[600] IAEA, 'Final Assessment on Past and Present Outstanding Issues regarding Iran's Nuclear Programme' (2 December 2015) IAEA Doc.GOV/2015/68, para, 80
[601] Ibid, para, 88
[602] IAEA, 'Joint Comprehensive Plan of Action implementation and verification and monitoring in the Islamic Republic of Iran in light of United Nations Security Council Resolution 2231 (2015)' (15 December 2015) IAEA Doc.GOV/2015/72

The decision to arrange this mechanism involves recognition of the need to approach the unavoidable difficulties resulting from the political stances towards the arrangements taken by both Tehran and Washington. This may originate from the common temptation to test the boundaries of the arrangements as set out in the Accord. It is likely that these problems and challenges will arise when the Accord is implemented and begins to take effect.[603]

There is no agreed period of operation of the Joint Commission stipulated in the terms of the JCPOA, or in Security Council Resolution 2231. Equally, there is no agreed deadline for its termination or any automatic process that will secure its termination.

However, the legal status of the Joint Commission is functionally dependent upon the implications of the JCPOA. Its operation will continue after the UN Security Council Resolution Termination Day, and from that point onwards, the JCPOA will be merely regarded as a Security Council document which is subject to the participants' political decisions. While participants in the JCPOA are not required to settle disputes with the assistance of the Joint Commission, they have the opportunity to use the Joint Commission's forum as a possible means of dispute resolution.

Based on the paper agreement, the structure of the Joint Commission offers the participants a means of managing the way in which the JCPOA is enacted. However, regarding voting on access to suspicious sites, it is argued that this should be achieved through consensus, since the Joint Commission, and any of its members are empowered to impede the any procurement proposals or plans which are considered to be a proliferation risk. Although the same requirement for consensus may decelerate the enactment of the JCPOA unless the P5+1 remains politically united.

[603] James M. Acton and others, 'Parsing the Iran Deal' (2015) *Carnegie Endowment for International Peace*, available at <http://carnegieendowment.org/2015/08/06/parsing-iran-deal-pub-60942> accessed 17 November 2017

5.5.5 Monitoring Process of Iran's Fulfilled Commitments

An important question which arose in the congressional and public debates centred on how Tehran's compliance can be verified. The Deal includes obligations and requirements to monitor and verify through on-site inspections at Natanz and Fordow and to conduct these inspections routinely. In order to ensure Iran's compliance with the JCPOA, the Accord particularly urges Tehran to implement "provisionally"[604] the Additional Protocol until October 2023, at which date it would "seek"[605] the ratification of the Protocol. However, no ratification of the Additional Protocol has occurred at the time of writing, so it still has not come into effect under treaty law. The Additional Protocol is designed to be a new legal tool which will consolidate the IAEA and improve the Agency's ability to identify unreported facilities and activities.[606]

Iran will also agree to enforce the modified version of Code 3.1, requiring it to give advance notice to the IAEA of any plans to build new facilities, instead of giving notification just before the introduction of nuclear materials.[607] The modified Code 3.1 allows the IAEA a better understanding of Iran's nuclear plans and makes the process of the creation of rules and safeguards for the new facilities easier. It is particularly significant that the modified Code 3.1 will be perpetuated provided the safeguards agreement between Tehran and the IAEA remains in force.[608] This essentially signifies that Tehran will be required to abide by these requirements as long as it remains a member of the NPT.

The monitoring system pursues two overall goals; to affirm that specified restrictions are not being disregarded at reported nuclear facilities, including Natanz, Fordow, Arak, and Isfahan, and designing measures to help detect clandestine or unreported nuclear activities.

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[604] Article 17 of the Model Additional Protocol says that a state may, before the Protocol enters into force, "declare that it will apply this Protocol provisionally." See also JCPOA (15 July 2015) para, 13

[605] JCPOA (15 July 2015) para, 34 (IV); Ibid, Annex V (Implementation Plan) para, 22.1

[606] IAEA, 'What is the Additional Protocol?' available at <https://www.iaea.org/safeguards/safeguards-legal-framework/additional-protocol> accessed 10 November 2017

[607] JCPOA (15 July 2015) Annex I (Nuclear-related measures) para, 65

[608] Ibid.

5.5.5.1 Investigation of Declared Facilities

For a period of 25 years, the IAEA will make a careful observation of Iran's natural production of uranium ore, or its acquisition of uranium ore from abroad. In addition it will verify the transfer of such ore to reported conversion facilities. However, the exact measures for monitoring the ore being produced and transferred are not determined by the JCPOA.[609] For a period of 15 years, which may be extended, the IAEA will be given permission to employ advanced technologies to undertake its monitoring activities at these reported nuclear facilities, including on-line enrichment measures and electronic seals providing continued measurements directly to the IAEA.[610] During this period of time the IAEA will conduct constant monitoring processes to ensure that the stored centrifuges and infrastructure at Natanz are not returned to operation and that their utilisation should be limited only to the replacement of failed or damaged centrifuges.[611] In addition, for a period of 15 years, if the IAEA should make any monitoring request, it will be given daily access to all relevant infrastructures and buildings at the enrichment facilities located in Natanz.[612]

For a period of 20 years, the IAEA will have the right to conduct continuing monitoring of all of the locations and specialised facilities and equipment. This will include monitoring the use of flow-forming machines and filament winding machines, which are specifically employed in producing centrifuge rotors and bellows.[613]

The enforcement of the JCPOA should result in IAEA resources being dedicated to verifying and monitoring Iran's facilities. Remote surveillance systems can also be deployed. Currently these are daily transmitting 25 percent more images and nuclear-related data to the IAEA than during the

[609] JCPOA (15 July 2015) para, 15
[610] Ibid.
[611] JCPOA (15 July 2015) Annex I (Nuclear-related measures) para, 70
[612] Ibid, para, 71
[613] Ibid, paras, 79-80.2

period prior to the implementation of the JCPOA, and almost double the data transmitted prior to 2014.[614]

Some members of the IAEA have hinted at an extra budgetary funding which will be available in the future.[615] As the enforcement of the JCPOA took effect on 16 January 2016, the funding needed to conduct the implementation in 2016 was estimated at €8.8 million. However, €8.5 million had already been spent by the end of 2016. By 21 February 2017, member states had promised to spend €13.7 million over budget in making contributions to JCPOA-related activities, and €5.2 million was added to the €6.2 million as the extra budgetary funding needed for 2017 in order to attain a balance between what the member states promised and what has actually been spent.[616]

President Obama confirmed that, "the JCPOA contains the most comprehensive inspection and verification regime ever negotiated to monitor a nuclear programme".[617] Furthermore, it was observed by Fitzpatrick, who portrayed the Deal as the most significant and far-reaching nuclear non-proliferation programme ever operationalised in the history of the NPT. It was also described it as an "explicit empowerment given to the IAEA to issue verifications that the weaponising of activities does not utilise nuclear materials".[618]

5.5.5.2 Investigation of Undeclared Facilities and Materials

The Deal initiated a mechanism to accredit and authorise the IAEA to inspect any unreported nuclear materials or of activities giving cause for concern which may not be compatible with the terms of the JCPOA for a period of 10

[614] IAEA, 'Iran and the IAEA: verification and monitoring under the JCPOA' (2016) 26-27, available at <https://www.iaea.org/sites/default/files/5722627.pdf> accessed 10 November 2017

[615] IAEA, 'Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions in the Islamic Republic of Iran' (8 November 2011) IAEA Doc.GOV/2011/65, para, 14

[616] IAEA, 'Verification and monitoring in the Islamic Republic of Iran in light of United Nations Security Council resolution 2231 (2015)' (24 February 2017) IAEA Doc.GOV/2017/10, para, 4

[617] 'Remarks by the President on the Iran Nuclear Deal' (*The White House: President Barak Obama*, 5 August 2015) available at <https://obamawhitehouse.archives.gov/the-press-office/2015/08/05/remarks-president-iran-nuclear-deal> accessed 20 November 2017

[618] Mark Fitzpatrick, 'Iran: A good deal' (2015) 57(5) *International Institute for Strategic Studies* 47, 49

years. However, the challenge inspection provisions, drawn up to issue verifications on Iran's compliance with its commitments, are not intended to investigate Iran's military and national security activities, including its military facilities. [619]

The aforementioned mechanism allows for a particular timeline and a specific dispute resolution mechanism. If the IAEA issues an access request to inspect a suspect facility, Tehran and the Agency will have 14 days to arrange the required access procedures to inspect the facility or to devise and seek alternative means of allaying the Agency's concerns. If this procedure fails, the matter will be referred to the Joint Commission, which will then have seven days to decide on appropriate action, either through consensus or by a vote of at least five of its eight members. Tehran will then be given three days to enforce the decision of the Joint Commission. All of these processes will need to be implemented within 24 days.[620]

This aspect of the challenge inspection process has attracted criticism for being unduly lengthy. In addition some critics have questioned the trustworthiness of this timetable, particularly when smaller facilities or quantities of nuclear materials are involved. These augments will be discussed in greater detail later.

5.5.6 Procurement Channel

The Procurement Channel is intended to control and regulate the flow of goods into the authorised nuclear programmes as well as to non-nuclear civil end use programmes launched by Tehran. It also seeks to limit Tehran's opportunities to disregard the Deal, or at least to reveal any attempts to do so. Furthermore, this mechanism of transparency could accelerate the process of detecting any banned proliferation-sensitive goods sourced from abroad which could be used in covert nuclear programmes or other ways inconsistent with the JCPOA. It is expected that exports to authorised, sensitive nuclear programmes such as uranium enrichment facilities will be relatively small for a number of years. In contrast, sales to civil industries, could be substantially

[619] JCPOA (15 July 2015), Annex I (Nuclear-related measures) para, 74
[620] Ibid, para, 78

larger.[621] Exports to Tehran's non-nuclear civil industry are also included in the Procurement Channel, giving its mission a wider scope. This is likely to make it more problematic to ensure that it will be implemented effectively. [622]

The Deal establishes a body known as the Procurement Working Group which meets regularly and is supervised by the JCPOA Joint Commission. The Procurement Working Group has taken charge of examining and approving any proposed transactions regarding certain nuclear-related items with dual uses, and also the export from any state to Iran of facilities, equipment, materials, and technology (as specified on the Nuclear Supplier Group control lists (NSG)). The Working Group operates on a consensus basis, meaning that any state is able to prevent a sale. This will continue to be effective for 10 years. The Deal stipulates some procedures as well as a timeline to examine requests and provisions in order verify the end-use of agreed transfers.

The JCPOA contains a provision which blocks the transfer of direct goods as well as the dual use of NSG, and the Part 1[623] and Part 2[624] lists which are regarded as being outside the Procurement Channel. It also lists any "other items if the relevant State decides that they could contribute to activities which are not compliant with the JCPOA".[625] This provision may be intentionally worded so that it can be used to block the sale or transfer of any goods which may be used in Iran's nuclear programme or other ways inconsistent with the JCPOA, even if these goods do not appear on the NSG lists.

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[621] David Albright, Olli Heinonen, 'Provisions to Limit Future Iranian Illicit Procurements for Its Nuclear Programs' (2014) *Institute for Science and International Security,* 4, available at < http://isis-online.org/uploads/isis-reports/documents/Albright_Proliferation_Sensitive_Goods_Iran_20Nov2014-Final.pdf> accessed 14 November 2017

[622] Ibid.

[623] IAEA, 'Communication Received from the Permanent Mission of the Republic of Korea to the International Atomic Energy Agency regarding Certain Member States' Guidelines for the Export of Nuclear Material, Equipment and Technology' (8 November 2016) IAEA Doc. INFCIRC/254/Rev.13/Part 1

[624] IAEA, 'Communication Received from the Permanent Mission of the Czech Republic to the International Atomic Energy Agency regarding Certain Member States' Guidelines for Transfers of Nuclear-related Dual-use Equipment, Materials, Software and Related Technology' (13 November 2013) IAEA Doc. INFCIRC/254/Rev.9/Part 2

[625] JCPOA (15 July 2015) Annex IV, para 6.1.1; UNSC Res 2231 (20 July 2015) UN Doc S/RES/2231, para, 19

Tehran is now aware of which items are not included in the international control lists but can be used for nuclear purposes.[626] Furthermore, prevention of shipments of unauthorized materials to Iran, based on the catch-all controls, blocks transfers to particular end-users since they can be connected with Iran's nuclear programme. However, the withdrawal of the majority of Iran's nuclear-related individuals and entities from the international control lists has made the export controls more complicated.[627]

As several limitations affect the Procurement Channel and could undermine its efficacy, disputes may arise. These will be discussed in more detail in the Challenges Implementing JCPOA section.

5.6 United Nations Security Council Resolution 2231 (2015)

In view of its detailed framework, it is plausible to consider Security Council Resolution 2231 as the focus of the nuclear accord with Iran. In conformity with the Security Council classification of decision-making, a significant resolution in communication and functioning (such as Resolution 2231) is employed by the Security Council members in order to keep peace and security on the international stage and to authenticate the consequence of the decision according to international law. The JCPOA "Preamble and General Provisions" section anticipates this decision, and reflects the approach taken by the E3/EU+3 to "submit a draft resolution to the UN Security Council endorsing this JCPOA affirming that conclusion of this JCPOA marks a fundamental shift in its consideration of this issue and expressing its desire to build a new relationship with Iran."[628]

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[626] Ibid, para, 6.5, provided that "Iran will not use, acquire, or seek to procure the items, materials, equipment, goods, and technology referred to in Section 6.1 of this Annex for nuclear activities which are inconsistent with this JCPOA."

[627] Ibid. For more discussion of difficultly to carry out catch-all implementation see David Albright, Andrea Stricker, 'Preliminary Assessment of the JCPOA Procurement Channel: Regulation of Iran's Future Nuclear and Civil Imports and Considerations for the Future' (2015) *Institute for Science and International Security,* available at <https://isis-online.org/uploads/isis-reports/documents/Procurement_Channel_JCPOA_analysis_31Aug2015_final_1.pdf> accessed 5 December 2017

[628] JCPOA (20 July 2015) para, (xiv)

The stipulation specifies that the Security Council Resolution is also to be employed to supply a gradual withdrawal of the sanctions which were imposed upon Iran for its failure to manage issues regarding its nuclear programme in the past; and an easing of the imposition of particular limitations upon Iran's capability to produce weapons-grade nuclear material. In addition, it is to recognise that the Security Council's will conclude its involvement in Iran's nuclear activities on Termination Day.

Security Council Resolution 2231 specifically references Article 25 of the UN Charter, and the agreement among UN member states that all Security Council decisions must conform with the terms of the UN Charter. Following the International Court of Justice stipulation through its Advisory Opinion of 21 June 1971 regarding "Legal Consequences for States of the Continued Presence in Namibia (South West Africa) despite Security Council Resolution 296 (1970)", Security Council decisions according to Article 25 may be legally-binding upon UN member states in the section which contains responsibilities which are presented to them. [629]

It has been advocated by certain scholars that the way of measuring this compliance ought to be dependent on the degree to which the Council's decisions and actions uphold the values of the terms of the Charter. [630] Furthermore, it is possible that other stipulations in the Charter may, in certain circumstances, have priority over Security Council decisions which may be in conflict with them.[631] The wording of Article 24 supports this argument, as it states: "In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations."

Prior to a conclusion concerning the binding nature of a Security Council resolution being reached, there ought to be a meticulous examination of its language. It needs to be asked if the authority granted by Article 25 has actually been applied in every separate situation concerning the resolution's

[629] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) ICJ Reports (1971) 16, paras, 113, 114
[630] Joyner, *supra* note 266, 188; J. Delbruck, 'Article 25', in B. Simma and others (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, New York 1994) 455
[631] Ibid.

terms which are to be explained, as well as the debates preceding them. This also involves the stipulations of the requested Charter, and generally every situation which may help to establish the legal consequences of a Security Council Resolution. [632]

Dirk Roland Haupt claims that the Security Council has formulated a practice to designate such decisions within resolutions employed according to Article 25 or any other appropriate stipulation in Chapter VII of the UN Charter. This is to be achieved through using the term “decides” in italics. This decisional indicator is frequently located between a resolution’s preamble and its operative paragraphs. However, Security Council Resolution 2231 is an instance of a diverging practice. The term “decides” is distributed across many operative paragraphs, including instances in which the same operative paragraph may embody a non-binding recommendation for action as well as legally-binding ones. [633]

The Security Council, in Paragraph 2 of the resolution “calls upon” every member state, as well as international and regional institutions to apply relevant action to advocate the implementation of the JCPOA in conformity with the timeframe as presented, and not to undertake actions which would weaken the implementation of commitments with the JCPOA. Kelsen has investigated the opinion that a “call upon” of this kind is no more than a recommendation if there is no intention to specify legally-binding commitments, and especially if the Council has no intention of reacting against any non-compliance by enacting enforcement measures. Nevertheless, when the direction to states emanates from a “decision” in the understanding of Article 25, with the affirmed objective of resorting to enforcement measures in situations of non-compliance, it can certainly be regarded as a legally-binding commitment upon the parties involved. In contrast, it can be concluded that if the direction in the particular resolution is

[632] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) ICJ Reports (1971) 16, para, 114

[633] Drik R. Haupt, ‘Legal Aspects of the Nuclear Accord with Iran and Its Implementation: International Law Analysis of Security Council Resolution 2231’ in Jonathan L. Black-Branch, Dieter Fleck (eds), *Nuclear Non-Proliferation in International Law - Volume III: Legal Aspects of the Use of Nuclear Energy for Peaceful Purposes* (Springer, Berlin 2016) 437

not to any extent enforceable, the Council is effectively stating that its resolution is a recommendation. [634]

Despite the fact that the term “calls upon” does not suggest a legally-binding impact, the wording of Paragraph 2 nevertheless can appear confusing. It includes a request to undertake actions or to cease from actions as though the JCPOA had a legally-binding impact upon the matters discussed in this section, even though this is not the case. This issue is more accentuated in Paragraph 7(b) which determined that when acting under Article 41 of the Charter of the United Nations, that when the IAEA gives the report to the Security Council, as indicated in Paragraph 5, “every State shall comply with paras 1,2,4, and 5 and the provisions in subparagraphs (a)-(f) of para 6 of Annex B for the duration specified in each paragraph or subparagraph and are called upon to comply with paras 3 and 7 of Annex B”.

The acknowledgment of Article 41 leads to a re-assessment of the JCPOA as being legally- binding, even if such a situation applies only to Clause 1 in Paragraph 7(b). However, this reveals a possible area of debate regarding the states which failed to participate in the discussions at the Vienna Accord, and which continue to be hesitant to remove or moderate national sanctions against Iran, or to cease lawful passive burdens aimed at significant areas of concern in Iran. It therefore remains for those states to make their own assessments of the extent of their lifting or upholding of national restrictive measures against Iran, a duty imposed on them as a consequence of binding elements in Security Council Resolution 2231.

5.7 Termination of Sanctions through JCPOA

Sanctions relief by the JCPOA conforms to the framework stipulation in the Accord. However, a substantial reduction in sanctions occurred on Implementation Day when the IAEA confirmed its verification of Iran’s completion of its nuclear requirements as set out in the Accord. The following sanctions relief was enforced:

[634] Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (The Lawbook Exchange, New Jersey 1950) 740

5.7.1 Sanctions Imposed by the United Nation Security Council

Before the implementation of the JCPOA, four principal UN Security Council resolutions had imposed sanctions on Iran namely: Resolution 1737 (2007), Resolution 1747 (2007), Resolution 1803 (2008), and Resolution 1929 (2010). Resolution 2231 states that the resolutions imposing sanctions on Iran would cease to be in effect if the Security Council, based on IAEA approval, should declare that Iran had implemented the aforementioned requirements regarding its core nuclear obligations.[635]

This operational step has been worded ambiguously and can be understood in different ways. One interpretation could be that Security Council Resolution 2231 devises a legal consequence, which develops conditionally on the basis of an event with a suspending effect. In this interpretation, the legal consequence follows the report based on IAEA submissions, and the suspending effect would be dependent upon the IAEA report. After having received the report, the listed resolutions would terminate automatically. However, this does not take into consideration a prior analysis of the IAEA report by the UN Security Council. An alternative interpretation could suggest that the UN Security Council may, after receiving and evaluating the IAEA report, with binding effect, adopt a resolution terminating the listed resolutions.

In order to establish the Implementation Day and accordingly terminate the aforementioned resolutions, the Security Council opted for the first interpretation by making certain modifications. After the Director General of the IAEA submitted the report, verifying Iran's commitment and compliance with the Agreement,[636] the report was circulated among the members of the Security Council by the President of the Security Council, and preparation was made to terminate the resolutions stated in Security Council Resolution 2231. The resolution termination appeared as an automatic legal consequence operative on the Implementation Day.

[635] UNSC Res 2231 (20 July 2015) UN Doc S/RES/2231, paras, 5, 7(a)
[636] IAEA, 'Verification and Monitoring in the Islamic Republic of Iran in light of United Nations Security Council Resolution 2231 (2015)' (16 January 2016) IAEA Doc.GOV/INF/2016/1

Other issues that arose were the suspension of UN sanctions regarding Iran's efforts to develop ballistic missiles capable of delivering nuclear warheads, and Tehran's attempts to import or export conventional weaponry. The JCPOA made it possible to remove the ban on Iran's development of nuclear-capable ballistic missiles within eight years, and the removal of the ban on selling or purchasing conventional arms within five years.[637]

The UN Security Council Resolution 2231 calls upon Tehran "not to undertake any activity related to ballistic missiles designed to be capable of delivering nuclear weapons, including launches using such ballistic missile technology."[638]The resolution also authorises the Security Council to block on a case-by-case basis the transfer to Iran of any materials, equipment, goods, or technology with the capability of being used to contribute to nuclear weapons delivery systems.[639]

In order to invoke Article 41, Chapter VII of the UN Charter, Resolution 2231 stipulates some requirements, among which are compliance with the UN restrictions on furnishing, selling or transferring missile technology to Iran by all states. The resolution also inhibits any provision of training or financial assistance which may help Iran to acquire such technologies.[640] However, binding restrictions regarding Iran's ballistic missile activities are not part of this resolution. Iran's imports of missile technology are closely watched and controlled by the UN Security Council and the new UN resolution requires Iran to provide all exporters of missile technology to Iran with "appropriate end-user guarantees".[641]

While it is likely that the UN Security Council will apply tight control over the import of sensitive missile technology for the duration of the ban, it is possible that it could permit certain dual-use imports, ostensibly for civilian purposes. In the absence of strict end-use authentication, these imports could be diverted to advance Iran's ballistic missile programme. Those opposing the

[637] UNSC Res 2231 (20 July 2015) UN Doc S/RES/2231, Annex B (Statement) para, 3, 5
[638] Ibid, para, 3
[639] Ibid.
[640] Ibid, para, 4
[641] Ibid.

Accord maintain that the removal of sanctions on ballistic missiles would ease the way for Tehran to develop delivery vehicles for nuclear weapons, in addition to other weapons of mass destructions (WMD), despite the restrictions imposed upon Iran's fissile material production.[642]

These criticisms intensified when long-range ballistic missile test-firings were conducted by Iran in March 2016 and in January 2017.[643] Many observers interpreted these as a violation of UN Security Council Resolution 2231. On 10 October 2015, Iran also,[644] conducted a flight test which drew the condemnation of the UN Iran Sanctions Committee Panel of Experts who regarded it as a violation of Security Council Resolution 1929 (2010). The question that arises here is whether the launches of such systems conducted by Iran after Implementation Day conform with Security Council Resolution 2231.

Security Council Resolution 1929 (2010) includes every part adopted by the Security Council to be enforced under Article 41 on Chapter VII of the UN Charter. This resolution was still in place when the October 2015 missile test firings were conducted. However this was no longer seen as the case at the time of the March 2016/January 2017 launches. The legal assessment of the tests conducted in October 2015 were governed by Security Council Resolution 1929 (2010), which determines that the Security Council "decides" that Iran must not engage in any activity which pertains to ballistic missiles with the capability of nuclear weapons delivery, including test firings utilising launches and ballistic missile technology.[645] The UN Iran Sanctions Committee Panel of Experts was charged with establishing whether the

[642] Kelsey Davenport, Daryl Kimball, 'Iran's Ballistic Missile Test: Troubling But Not Cause for Provoking Confrontation' (*Arms Control Association*, 1 February 2017) available at < https://www.armscontrol.org/blog/ArmsControlNow/2017-02-01/Irans-Ballistic-Missile-Test-Troubling-But-Not-Cause-for-Provoking-Confrontation > accessed 14 November 2017

[643] Behnam Ben Taleblu, 'Iranian Ballistic Missile Tests Since the Nuclear Deal' (2017) *Foundation for Defense of Democracies,* available at <http://www.defenddemocracy.org/content/uploads/documents/20917_Behnam_Ballistic_Missile.pdf>accessed 14 November 2017

[644] Ibid. All missile types used in these launches are MTCR Category I 176 Item 1 and 1.A.1 systems: the medium-range ballistic missile Shahab-3 is capable of delivering a payload 177 of around 700 kg to 2000km, the shorter-range ballistic missile Shahab-1 of 1000 kg to 300 km- both being Scud-based systems- and the short-range ballistic missile Qiam-1 of around 650 kg to 750 km.

[645] UNSC Res 1929 (9 June 2010) UN Doc.S/RES/1929, para, 9

missiles which were used had the capability to deliver nuclear weapons. The utilisation of the Missile Technology Control Regime list[646] threshold is considered to be a generally applicable guideline deemed to conform to established Security Council practice, although the control regime does not take into consideration the concerns of UN member states. The panel of experts drew the conclusion that Iran's action was a violation of Security Council Resolution 1929 (2010).[647]

However, the same pattern of reasoning did not apply to the March 2016 launches. Paragraph 9 of Security Council Resolution 1929 (2010) had been replaced by Paragraph 7(b) of Security Council Resolution 2231 (2015), according to which "all states are called upon to comply with Paragraph 3 […] of Annex B", which requests Iran not to conduct any activity associated with ballistic missiles designed to have the capability of delivering nuclear weapons, including launches which utilise such ballistic missile technology. The verb "decides" which is employed by Security Council Resolution 1929 (2010) has been superseded by the less forceful term "calls upon", even though it is part of the principal assertion of Paragraph 7 which refers to a decision of the UN Security Council acting according to Article 41 in Chapter VII of the UN Charter. Furthermore, the term, "capable of delivering nuclear weapons" has been replaced by the less specific "designed to be capable of delivering nuclear weapons".

It has been argued that the phrases "capable of delivering nuclear weapons" and "designed to be capable of delivering nuclear weapons" have the same pragmatic force, signifying that the interpretation of UN Security Council Resolution 2231 should not be considered different from the one stated in Security Council Resolution 1929 (2010). Under this interpretation, the launches conducted in March 2016, should not lead to a different conclusion

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[646] Missile Technology Control Regime (MTCR) Annex Handbook–2010' *Missile Technology Control Regime*, Category I-Item1, available at <http://mtcr.info/wordpress/wp-content/uploads/2016/04/MTCR_Annex_Handbook_ENG.pdf> accessed 14 November 2017, Category I-Item1; UNSC, 'Missile Technology Control Regime: Equipment, software and technology annex' (16 July 2015) UN Doc S/2015/546, Category I-Item1

[647] UNSC, 'Note by the President of the Security Council' (11 June 2014) UN Doc. S/2014/394, 3

from the one drawn by the UN Iran Sanctions Committee Panel of Experts regarding the factual aspects of the October 2015 tests.

On the other hand, Tehran rejected this and presented its own arguments based on a different interpretation of Resolution 2231. They argue that it bans only those missiles "designed to be capable" of delivering nuclear weapons and only "calls upon" Tehran not to engage in any missile activity.
Tehran's representatives at the UN believed that "Security Council Resolution 2231 does not prohibit legitimate and conventional military activities, neither does international law disallow them. Iran further argued that it has never sought to acquire a nuclear weapon and never will in the future, as it fully honours its commitments to the NPT and the JCPOA. Consequently, Iran's missiles are not and could not be designed for delivery of unconventional weapons".[648] This view was affirmed by Russia, who argued that recent missile tests conducted by Tehran did not contravene Resolution 2231 because this resolution only "calls upon" Tehran to refrain from tests rather than disallows them. Vitaly Churkin, the Russian Ambassador to the UN, confirmed this by arguing that a "call" is different from a "ban"; therefore, legally, a "call" cannot be violated. "A "call" may be accepted or ignored, but cannot be violated."[649]

In opposition to Churkin's position, France's Minister of Foreign Affairs Jean-Marc Ayrault expressed his country's "concern at Iran's persistence with its ballistic missile tests on several occasions", and stated that "Iran's persistence with tests opposes the spirit of UN Security Council Resolution 2231." He also said that this hinders the efforts in regaining the confidence which was initiated by the Vienna Agreement.[650]

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[648] 'Iran's UN mission: Raising missile tests at UNSC contradicts JCPOA' *Islamic Republic News Agency* (15 March 2016) available at <http://www.irna.ir/en/News/82002622/> accessed 14 November 2017
[649] 'Iran missile work not violating UN bans: Russia's Churkin' *Press TV* (8 February 2017) available at <http://www.presstv.ir/Detail/2017/02/08/509622/Russia-US-Iran-Trump> accessed 14 November 2017
[650] 'Iran warns US not to 'create new tensions' over missiles' *Al-Monitor: the Plus of the Middle East* (31 January 2017) available at < http://www.al-monitor.com/pulse/afp/2017/01/politics-iran-us-missile.html> accessed 14 November 2017

In addition, all states are permitted to supply Iran with major conventional arms as defined in the UN Register of Conventional Weapons and Related Components and Services. This is based upon the preconditions that the Security Council formulates and determines the certification of such supplies in advance on a "case-by-case basis". The removal of this provision will occur five years after the JCPOA Adoption Day.[651]

The removal of all these provisions will also occur if and when the IAEA has reached its Broader Conclusion, even if this happens within a period of five or eight years from the Adoption Day.[652]

5.7.2 Sanctions Imposed by the European Union

On the day that the JCPOA took effect, the EU ratified a law requiring the removal of the sanctions (namely Council regulation (EU) 2015/186, [653] Council Implementing Regulation (EU) 2015/1862[654] and Council Decision (CFSP) 2015/1863[655]); whose provisions took effect on Implementation Day. This discontinued most EU constraints on trade with Iran, including the EU imposed ban on importing or transporting oil, gas and petroleum products from Iran[656], as well as the sanctions on shipping and shipbuilding.[657] The EU also removed its restrictions on financial transactions between the EU and Iranian individuals and institutions, enabling Iran to utilise the Society for Worldwide Interbank Financial Telecommunication (SWIFT) system, thereby allowing Iranian individuals or companies to effect financial transactions from abroad to its commercial banks or its Central Bank.[658] Finally the EU bans on

[651] UNSC Res 2231 (20 July 2015) UN Doc. S/RES/2231, Annex B (Statement) para, 5
[652] Ibid, para, 3
[653] 'Council Regulation (EU) 2015/1861 of 18 October 2015 amending Regulation (EU) No 267/2012 concerning restrictive measures against Iran' [2015] OJ L274/1
[654] 'Council Implementing Regulation (EU) 2015/1862 of 18 October 2015 implementing Regulation (EU) No 267/2012 concerning restrictive measures against Iran' [2015] OJ L274/161
[655] 'Council Decision (CFSP) 2015/1863 of 18 October 2015 amending Decision 2010/413/CFSP concerning restrictive measures against Iran' [2015] OJ L274/174
[656] JCPOA (15 July 2015) Annex II (Sanctions-related commitments) paras, 1.2, 3.3
[657] Ibid, paras, 1.3, 3.4
[658] Ibid, paras, 1.1, 3.2

the export and import of gold and precious metals were itemised.[659] However, the European Council members left the EU arms embargo in place, together with restrictions on the transfer of ballistic missile technology. These are to continue for eight years after the implementation of the Accord.[660]

5.7.3 Sanctions Imposed by the United States

The United States has decided to leave the sanctions mentioned in Annex II in abeyance. These include: (1) the ban imposed on banking and financial transactions with institutions operating in Iran, including the Central Bank of Iran, as well as certain individuals and entities,[661] (2) the ban imposed to block the transfer of United States banknotes to Iran's government, (3) the bans imposed on the import from and export to Iran of natural gas, petrochemicals and related products, (4) the bans blocking transactions with state-owned or private energy entities in Iran, and the automotive, shipping and shipbuilding sectors, (5) the restrictions on trading in gold and other precious metals with Iran, (6) the bans imposed to block the sale of passenger airplanes to Iran, including relevant parts, goods and aircraft services.[662] In addition, the United States affirmed that non-US companies are empowered to undertake most kinds of trade with Iran without being penalised by the United States. However, any individual deemed a "United States person" remains prohibited from importing Iranian goods into the United States and is not permitted to furnish, transfer, export directly or indirectly, goods to Iran except with a specific *ad hoc* empowerment and authorisation from the Office of Foreign Assets Control (OFAC).[663]

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[659] Ibid, paras, 1.4, 1.6, 3.5, 3.6. In addition, the ban on import and export of software for integrating industrial processe; graphite and raw or semi-finished metals were removed, Ibid, para 3.6. See also JCPOA (15 July 2015) paras, 19-20

[660] 'Information Note on EU sanctions to be lifted under the Joint Comprehensive Plan of Action (JCPOA)' (23 January 2016) 36, available at <http://eeas.europa.eu/archives/docs/top_stories/pdf/iran_implementation/information_note_eu_sanctions_jcpoa_en.pdf> accessed 15 November 2017

[661] The individuals and entitles who were included in Specially Designated Nationals and Blocked Persons List (SDN List), for greater information o the SDN List see, US Department of the Treasury, 'Specially Designated Nationals And Blocked Persons List (SDN) Human Readable Lists' (5 December 2017) available at < https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx> accessed 7 December 2017

[662] JCPOA (15 July 2015) Annex II (Sanctions Related Commitments) paras, 4-7.9

[663] US Department of the Treasury, 'Guidance Relating to the Lifting of Certain U.S. Sanctions Pursuant to the Joint Comprehensive Plan of Action on Implementation Day' (2016) para, IV

5.8 The Snapback Mechanism

The snapback mechanism is an innovation practised in sanctions regimes. The JCPOA contains a so-called snapback provision which will initiate a conditional end to any easing of sanctions under the terms of the Deal, if it is established that Iran has demonstrated "significant non-performance" in its implementation of its commitments as set out in the Deal.[664] All of the sanctions provisions enacted previously by the UN resolutions will be reinstated without any other requirement to resort to new resolutions.

Based on the Accord dispute resolution mechanism, any of the involved parties in the Deal may refer any unfulfilled commitments by Iran to the Joint Commission for resolution. If the Joint Commission fails to resolve the issue within 15 days, the participants' Ministers of Foreign Affairs will proceed to address the dispute. If the issue continues to remain unresolved for a further 15 days, a non-binding assessment regarding the compliance issue can be requested by an Advisory Board. This board comprises three members, two of whom are nominated by the parties of the relevant dispute while the third is independent. The Advisory Board is then required to comment on the issue within 15 days. If the Joint Commission, after a maximum of five days from receiving an opinion from the Advisory Board, does not accept the opinion, and at least one of the complaining participants regards the issue to be a significant non-performance of commitments, that participant may regard the unresolved issue as a reason to leave its obligations unfulfilled under the Accord. The participant will also inform the UN Security Council about the unresolved issue of the significant non-performance. The UN Security Council will then be required to conduct a vote within 30 days of this notification on a resolution regarding whether or not the sanctions removal should remain in place. If no accepted resolution emerges, or if the draft resolution is defeated or if one of the states empowered with a veto blocks the resolution, then the original resolution's provisions will be re-imposed. However, the Security

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(b) available at <https://www.treasury.gov/resource-center/sanctions/Programs/Documents/implement_guide_jcpoa.pdf> accessed 15 November 2017

[664] UNSR Res 2231 (20 July 2015) UN Doc. S/RES/2231, para, 11

Council could determine differently.[665] This sequential stage revolves almost entirely around the Security Council decisions under Article 41 in Chapter VII of the UN Charter and therefore is legally binding.[666]

However, critics have posed major questions regarding the efficacy of the implementation of this mechanism, and have argued that even if the snapback mechanism is effective as a way to avoid multilateral debate concerning which sanctions must be reinstated, the "snapback" will not be rapid. This is because any international debate will simply focus on determining what comprises a "significant non-performance", and whether the unresolved issue and action in question qualifies as a "significant non-performance of commitment",[667] and subsequently, whether it is worth jeopardising the whole accord over this particular issue.[668]

A further difficulty facing the mechanism for re-imposing sanctions is that the reinstatement and snapback of all the sanctions being lifted by the JCPOA is effectively the only defined punishment that can be applied in the case of Accord violations. This action would have the effect of no longer binding Iran to its established commitments. Since the snapback reinstatement of sanctions is the only penalty for non-compliance, any other member of the Joint Commission, including the US, would probably be reluctant to abandon the deal in its entirety as a result of minimal violations, although there may be many of them. According to one critic, "the only issues that would be taken to the Security Council are serious Iranian violations, because you're certainly not going to risk Iran's abandoning the deal and engaging in nuclear

[665] JCPOA (15 July 2015) paras, 36-37

[666] UNSR Res 2231 (20 July 2015) UN Doc. S/RES/2231, paras 12-13. The only SC decision in which is not taken under Article 41 is the decision that a draft 'sanctions lifting maintenance resolution' shall be submitted by any member of the SC for a veto within 10 days of the notification or, if no member of the SC submits such a draft, by the President of the SC within 30 fays of the notification.

[667] UNSR Res 2231 (20 July 2015) UN Doc. S/RES/2231, para, 11.

[668] Matthew Levitt, 'The Implications of Sanctions Relief Under the Iran Agreement' (2015) *The Washington Institution for Near East Policy*, 1, available at <http://www.washingtoninstitute.org/uploads/Documents/testimony/LevittTestimony20150805.pdf> accessed 15 November 2017

escalation over smaller violations".[669] Thus, the snapback mechanism is not properly formulated to deal with small breaches, because when the only available punishment has major consequences, only major violations will be dealt with and prosecuted.[670]

Another obstacle is the restricted scope of the mechanism. It applies only to Security Council sanctions. In both Security Council Resolution 2231 and the JCPOA, the matter of reinstituting EU or United States nuclear-related sanctions has not been addressed. However, these national and regional sanctions constitute considerably greater and more intrusive regimes designed to target many more natural or legal individuals, elements and bodies than the UN sanctions regime. For Iran's pursuance of its nuclear programme, and for its economy, these sanctions, which are imposed in order to stifle military nuclear developments, denote a significantly greater burden than the UN sanctions from a stand-alone perspective.

While any permanent member of the Security Council,[671] empowered with the right to veto, can block any current sanctions removal, the snapback mechanism makes it impossible for any permanent member to veto the re-instatement of sanctions. If a "significant non-performance" of Iran's commitments under the Accord is reported by a JCPOA participant state, it is likley that this many have been proposed by a council member with the intention of reinstating the sanctions which had previously been lifted under the conditions stipulated in Resolution 2231. In this case, at least one permanent member would have the authority to veto the proposal, which if enacted would leave the sanctions inoperative.[672] However, Resolution 2231 generates a mirror image of such a situation. If a significant non-performance by Iran is reported, then the draft proposal presented to the Council could be

[669] Michele Kelemen, 'A Look At How Sanctions Would 'Snap Back' If Iran Violates Nuke Deal' *NPR* (July 20 2015) available at <http://www.npr.org/2015/07/20/424571368/if-iran-violates-nuke-deal-a-look-at-how-sanctions-would-snap-back> accessed 15 November 2017
[670] Ibid.
[671] The permanent member of the Security Council included the US, Britain, China, Russia and France.
[672] UN Charter (26 June 1945) Art 27. See also Loraine Sievers, Sam Daws, *The Procedure of the UN Security Council* (Oxford University Press, New York 2014) 296-316

"effectively to continue the terminations" of the sanctions.[673] If this proposal were vetoed it would cause the previously-lifted sanctions to be reapplied "in the same manner in which they were adopted in this resolution".[674]

In effect, there could be a case in which all five permanent members would have requested a unilateral decision to reinstate the sanctions, while according to the actual case stipulated in Resolution 2231, any move by only one permanent member would suffice in the process of reinstituting the sanctions. The representative of the United States emphasised this point during the meeting at which Resolution 2231 was adopted. She confirmed that "if the United States or any other state in the deal assumes that Iran has not adhered to its commitments and has contravened them, we can activate a process in the Security Council to reinstitute the United Nations sanctions."[675] John R. Bolton, the former United States Ambassador to the UN maintained that "the Resolution 2231 snapback provision would lead to a harmful precedent which would probably result in the abandonment of the veto power authorising all five permanent members of the council, particularly the United States, to manage Iran's unfulfilled commitments". Bolton, effectively contends that the snapback process which stated by him as a originating from President Obama's wish to inhibit China or Russia from vetoing the blocking of snapback, would generate a precedent for a process of this kind to be utilised in subsequent situations to prevent the United States from applying a veto.[676]

This charge can be assessed on the basis of the UN Charter. The snapback mechanism was not an isolated accepted procedure, but was part of a substantive draft resolution. Accordingly, the agreement reached by all five permanent members to launch the snapback mechanism could be voided by their veto power.[677] However, it is more likely that should any council member decide, in the future, to bring a provision similar to the snapback mechanism

[673] UNSR Res 2231 (20 July 2015) UN Doc. S/RES/2231, para, 11
[674] Ibid, para, 12
[675] United Nations, '7488th Meeting' (New York, 20 July 2015) UN Doc. S/PV.7488, 3-4
[676] John R. Bolton, 'The Iran Deal's Dangerous Precedent' *The New York Times* (3 August 2015) available at < https://www.nytimes.com/2015/08/03/opinion/the-iran-deals-dangerous-precedent.html?mcubz=2> accessed 15 November 2017
[677] UN Charter (26 June 1945) Art 27(3)

into a draft proposal, the resolution would also be substantive. Therefore, it would need the consent of all five permanent members, any one of whom could block it using their power of veto.

It is highly unlikely that a snapback mechanism would be presented in a purely procedural draft resolution, to which the veto power would not be applicable. In such a case, if the phrasing of the resolution in any way reduced the veto power given to the permanent members under Article 27(3) of the Charter, even if the resolution received a sufficient number of votes, it would not be implementable. This is because under Article 108 of the Charter, the Security Council is given no powers to amend the charter. For this to happen there would need to be an amendment which obtained "a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council." Therefore, the "snapback" precedent initiated by Resolution 2231 cannot be regarded as having undermined the veto power of the permanent members either by those who advocate or oppose the veto.

A key aspect of the snapback mechanism for sanctions is the determination of what constitutes a "significant non-performance of commitments" according to the terms of the JCPOA. This raises important questions as to what would happen if Iran were caught violating the JCPOA, or if the IAEA failed to reply to questions concerning aspects of Iran's programme. Moreover, if an issue of non-compliance should arise, it is not clear who would carry the burden of proof related to the alleged violation. It has not been established if the responsibility would lie with Iran and the verification of its compliance with the Deal, or if the P5+1would have to utilise particular metrics and a specific level of confidence to substantiate any violations.

Resolution 2231 and the JCPOA refrain from providing guidance to determine which acts or omissions qualify as "significant non-performance of the commitments" under the JCPOA. Moreover, there is no indication from these sources of which type of frequency or intensity threshold must be exceeded in order for such a conclusion to be drawn. Any instances of compliant practice

gained and developed on a "case by case basis" will contribute to the emergence of guidance in this situation.[678]

Although Lorber and Feaver have maintained that the JCPOA does involve mechanisms through which sanctions can be re-imposed, there are major practical and political repercussions in doing so, which could preclude the reinstatement of sanctions. Lorber and Feaver argue that "such a dramatic course of action could be dismaying and cause our allies to abandon the deal which would be likely to endanger or demolish the implementation and enactment of any reinstituted sanctions. It is worthy of note and also emphasised that in order for the sanctions regime to work, it needs to be built around a legal basis and an established capacity to enforce it, together with the political will to bring the sanctions regime to a successful completion."[679]

However, in the JCPOA the way in which the term "significant non-performance commitments" has been formulated suggests that any performance failings or deficiencies are likely to be observed when they are not of a serious nature and therefore not sufficiently serious for the sanctions reinstatement process to be triggered. It can be assumed that the participants involved in striking the Deal have contemplated that if deficiencies in JCPOA compliance occur and recur, but do not reach the threshold of significant non-performance, then they could be ignored since they would not jeopardise the operability of the Accord. To discourage and preclude any attempts to weaken the deal by a series of acts of non-compliance, it would appear to be necessary for the Security Council to establish the criteria for significant non-performance at an early stage. With regard to this, the President of the Security Council, argues that the Security Council needs to adopt "any necessary action to support and improve the implementation of resolution 2231 (2015)", and to undertake "outreach activities to promote proper

[678] Haupt, *supra* note 633, 441
[679] Eric B. Lorber, Peter Feaver, 'Do the Iran Deal's 'Snapback' Sanctions Have Teeth?' *Foreign Policy* (21 July 2015) available at <http://foreignpolicy.com/2015/07/21/do-the-iran-deals-snapback-sanctions-have-teeth/> accessed 15 November 2017

implementation of the resolution, including the provision of practical guidance", is enhanced.[680]

The final obstruction is that the timeframe for the mechanism is restricted. In accordance with Security Council Resolution 2231, this mechanism is not retroactive. Contracts closed by a legal or natural individual in Iran between Implementation Day and the date of the re-imposition of sanctions will not be affected by the reintroduced sanctions.[681] The retroactive applicability snapback exclusions mechanism has no time restrictions. Moreover, it implies that all contracts which are closed during the entire period until such a date when the Security Council Resolutions are reinstated, are not subject to the sanctions provisions.

Iran, having been placed in a favourable position, can preserve all the economic advantages obtained as a result of the country's economic growth and still require foreign investment and contracts to be fulfilled by foreign companies, even should UN sanctions be re-imposed. In the years following the agreement, global corporations and business institutions may invest heavily in Iran, and would resent losing their business because of any nuclear violations committed by Tehran.[682] However, the Obama administration asserted that they have clarified with their partners that if snapback should happen, long-term contracts would not be exempted.[683]

"EU snapback" would evolve a decision made by the Council of the EU, depending on proposals presented by the High Representative of the European Union for Foreign Affairs and Security Policy, and also Britain, France and Germany to re-impose all EU sanctions related to Iran's nuclear

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[680] UNSC, 'Note by the President of the Security Council' (16 January 2016) UN Doc. S/2016/44, para, 2(e)

[681] UNSC Res 2231 (20 July 2015) UN Doc. S/RES/2231, para 14. See also JCPOA (15 July 2015) para, 37

[682] Mark Dubowitz, Annie Fixler, and Rachel Ziemba, 'Iran's Economic Resilience Against Snapback Sanctions Will Grow Over' (2015) *Foundation of Defense for Democracy*, 9, available at <http://www.defenddemocracy.org/content/uploads/publications/Iran_economy_resilience_against_snapback_sanctions.pdf> accessed 15 November 2017

[683] 'The Historic Deal that Will Prevent Iran from Acquiring a Nuclear Weapon' (*The White House: President Barak Obama*, 2016) available at <https://obamawhitehouse.archives.gov/issues/foreign-policy/iran-deal> accessed 10 November 2017

programme which had been removed.[684] Thus, an EU sanctions re-imposition would require a new decision to be made by the Council. This cannot be reliably anticipated as it would require a unanimous vote. If EU and United States sanctions were omitted from the scope of the reinstatement mechanism, it would likely result in a situation in which Iran would no longer feel deterred.

Another issue which has remained complex in that respect is the transfer into EU law of reintroduced nuclear-related sanctions based on the snapback mechanism. The EU regime of nuclear-related sanctions reserved to Paragraph 26 of the JCPOA is excepted only in one situation. The JCPOA states that "the EU will refrain from re-introducing or re-imposing the sanctions that it has terminated implementing under this JCPOA, without prejudice to the dispute resolution process provided for under this JCPOA." This challenges the EU Law to map, in an adequate way, the principle of non-retroactive applicability of the snapback mechanism as indicated in Paragraph 14 of Security Council Resolution 2231.[685] This principle involves closed contracts with legal or natural individuals in Iran from Implementation Day until the reintroduction date of sanctions and ensures that the restrictive measures shall have no effect on them. It is of particular significance that the snapback mechanism does not have a retroactive effect, and therefore is not limited in time. This is likely to lead to complications regarding the way it can be interpreted and applied.

According to an assessment by Acton et al., the resolution dispute mechanism integrates sensitivity and rationality within the requirement for prompt action. It also supplies important leverage through calling upon the Security Council in a way which would result in the possibility of re-imposing the sanctions if Iran were found to be significantly non-compliant. They correctly indicate that, realistically, the degree to which the participants hold other participants to account for implementation and any measures envisaged

[684] 'Information Note on EU sanctions to be lifted under the Joint Comprehensive Plan of Action (JCPOA)' (23 January 2016) 40, available at <http://eeas.europa.eu/archives/docs/top_stories/pdf/iran_implementation/information_note_eu_sanctions_jcpoa_en.pdf> accessed 15 November 2017

[685] See also JCPOA (15 July 2015) para, 37

to enforce implementation will be dependent upon the circumstances which pertain at that time.[686] These will include the performance of the specified terms of the JCPOA, in addition to the wider, economic, security and political situation, notwithstanding that the JCPOA is confined to nuclear-related matters.

5.9 Challenges Facing the Enforcement of the JCPOA

Ninety days following the signing of the JCPOA, on October 18, 2015, the deal came into effect (Adoption Day). However, the respective advantages or disadvantages attributable to this deal remain debatable, and this situation is likely to continue for some time. These contentious issues are regarded from radically opposed perspectives by the JCPOA's 'pro' and 'anti' experts who have raised many issues regarding verification, monitoring, compliance and non-compliance, and the significance of nuclear latency. These issues form a key part of the debate over the deal among involved parties. However, if the Deal is to be successful, the extent to which, and how it is to be enforced will be pivotal.

Those supporting the Accord argue that the deal blocks all routes to the development of nuclear weapons. According to United States Energy Secretary Ernest Moniz, "all of the pathways to the development of a bomb have been closed, and it should be stressed that this is not a 10-year deal but has been designed to remain in place for a long period of time. We will see no end to this Accord, and there will be many phases which begin with extremely strict limitations on Iran's programme. We hope that they will comply with the deal for a long time and initiate confidence, but there are restrictions which apply for 10, 15, and 25 years and also other restrictions which we have imposed which will continue indefinitely, meaning that we have a long-term programme."[687]

A fact sheet released by the United States expanded the idea of what the JCPOA has achieved in closing off the "four pathways to the bomb". These

[686] Acton, *supra* note 603
[687] 'Face the Nation Transcripts April 5, 2015: Moniz, Graham, Santorum' *CBS News* (5 April 2015) available at <https://www.cbsnews.com/news/face-the-nation-transcripts-april-5-2015-moniz-graham-santorum/> accessed 15 November 2017

include uranium enrichment at Natanz and at Fordow, weapons-grade plutonium production at Arak, and covert endeavours to produce fissile material. While referring to the constant monitoring of the Natanz and Fordow sites, the fact sheet states that the Accord removed the possibility of manufacturing highly-enriched uranium at these sites. The fact sheet further states that "Tehran would be disempowered in producing weapons-grade plutonium due to the redesigned Arak reactor which is no longer able to produce any weapons-grade plutonium. Spent fuel rods (being deemed as a source material for weapons-grade plutonium) will be dispatched from the country", provided that "this reactor continues to exist and Iran will subsequently be disempowered in constructing a single heavy-water reactor for at least the next 15 years".[688]

The IAEA would not only continue to monitor every element of Tehran's declared nuclear programme, ranging from uranium mining to spent fuel and nuclear reactors, but will also continue to verify that no fissile materials are secretly transported to any undisclosed place in order to develop a bomb. This concern has led the United States to maintain that the fourth and final pathway; nuclear weapons development undertaken at clandestine and unreported sites, must be blocked. With regard to the possible existence of undisclosed nuclear sites, the White House has declared that if IAEA inspectors are notified of suspicious locations, the Additional Protocol to their IAEA Safeguards Agreement should be enacted. This has been accepted by Tehran. This will allow access to and inspection of any site that IAEA inspectors consider to be suspicious.[689] Moreover, the IAEA supported the claim made by the Obama administration affirming that Iran has blocked its four pathways to nuclear weapons.[690]

[688] 'The Historic Deal that Will Prevent Iran from Acquiring a Nuclear Weapon' (*The White House: President Barak Obama*, 2016) available at <https://obamawhitehouse.archives.gov/issues/foreign-policy/iran-deal> accessed 10 November 2017
[689] Ibid.
[690] IAEA, 'Verification and Monitoring in the Islamic Republic of Iran in light of United Nations Security Council Resolution 2231 (2015)' (16 January 2016) IAEA Doc.GOV/INF/2016/1

The supporters of the Accord, have indicated that this deal is exceptional in the scope of the inspection regime it operates.[691] Both Susan Rice, United States National Security Adviser, and Ernest Moniz characterised the verification mechanisms as allowing "unique and unprecedented transparency and inspections".[692] Josh Earnest, White House Press Secretary, and other proponents of the Accord, have portrayed the Iran deal as "the most intrusive set of inspections that have ever been forced upon a country's nuclear programme".[693]

Although the Obama administration and many others in the non-proliferation community have supported the deal, its critics have posed significant questions as to whether it achieves its primary objectives. They have maintained that the Iranian nuclear programme deal cannot satisfy the international community's primary objective of ensuring that Iran's pathways to making further progress towards increasing its nuclear weapons capabilities have been fully blocked. They also argue that the concessions offered to Iran by lifting sanctions and removing the arms embargo will encourage Iran to further pursue its regional ambitions.[694]

Meanwhile, opponents assert that although the agreement imposes limits on Iran's uranium enrichment capability, much of the Accord conforms to a specific timeframe. This is despite the fact that the removal of sanctions imposed upon Iran is considered as being permanent. However, since most of

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[691]'Statement by the President on the One Year Anniversary of the Joint Comprehensive Plan of Action' (*The White House: President Barak Obama*, 14 July 2016) available at <https://obamawhitehouse.archives.gov/the-press-office/2016/07/14/statement-president-one-year-anniversary-joint-comprehensive-plan-action> accessed 15 November 2017; 'Peters Statement on the Iran Nuclear Deal' (*Gary Peters: United States Senator for Michigan*, 9 August 2015) available at <https://www.peters.senate.gov/newsroom/press-releases/peters-statement-on-the-iran-nuclear-deal> accessed 15 November 2017

[692]'Remarks As Prepared for Delivery at AIPAC Annual Meeting by National Security Advisor Susan E. Rice' (*The White House: President Barak Obama*, 2 March 2015) available at < https://obamawhitehouse.archives.gov/the-press-office/2015/03/02/remarks-prepared-delivery-aipac-annual-meeting-national-security-advisor> accessed 15 November 2017

[693]'Press Briefing by Press Secretary Josh Earnest, 7/17/2015' (*The White House: President Barak Obama,* 17 July 2015) available at < https://obamawhitehouse.archives.gov/the-press-office/2015/07/17/press-briefing-press-secretary-josh-earnest-7172015> accessed 15 November 2017

[694] Tom Wilson, 'A Flawed Deal: An Assessment of the Iranian Nuclear Agreement' (2015) *5 Centre for the New Middle East Policy Paper*, 1, available at <http://henryjacksonsociety.org/wp-content/uploads/2015/09/Iran-A-Flawed-Deal.pdf> accessed 15 November 2017

the limits imposed upon Iran apply only for ten to fifteen years, the prospect of Iran resuming work on increasing its nuclear weapons' capabilities following the expiration of the limited time may result in many significant challenges which may be completely or partially unchecked by the JCPOA.[695]

Several limitations which affected the Vienna Accord will be considered below.

5.9.1 The Issue of Breakout Time

President Obama's officials maintained that in their negotiations, they did not seek to dismantle Iran's nuclear programme completely, but to increase Iran's breakout time. Breakout time is defined as the time needed to manufacture sufficient fissile material to develop a nuclear weapon. In Iran's case this is estimated to range from a few months to twelve months.[696] These officials have contended that the they attained these times by restricting Iran's uranium stockpile to only 300 kilograms of 3.67 percent enriched, by reducing the number of operating centrifuges at Natanz, by banning any enrichment at Fordow, and also by enforcing a re-design of the Arak reactor.[697]

Alan Kuperman has claimed that the different factors included in the breakout timetable (which is estimated to be twelve months) raise questions over a number of assumptions. These include the number and type of centrifuges utilised by Tehran in order to enrich uranium, the enrichment levels of the starting material and the quantity of enriched uranium required to develop a nuclear weapon. He claims that the breakout timetable is more likely to be only a few months.[698] The accepted restrictions, according to the ISIS inspection, do not ensure a breakout timeline of a period of one year within the initial 10 years of the Accord, if Iran is able to reassign its previously built

[695] Ibid.
[696] 'The Historic Deal that Will Prevent Iran from Acquiring a Nuclear Weapon' (*The White House: President Barak Obama*, 2016) available at <https://obamawhitehouse.archives.gov/issues/foreign-policy/iran-deal> accessed 10 November 2017
[697] Ibid.
[698] Alan J. Kuperman, 'The Iran Deal's Fatal Flaw' *The New York Times* (23 June 2015) available at <https://www.nytimes.com/2015/06/23/opinion/the-iran-deals-fatal-flaw.html> accessed 15 November 2017

IR-2m centrifuges at a reasonable rate.[699] By the fifteenth year, the estimated breakout time is likely to be down to a few months, similar to the situation prior to the establishment of the JCPOA. However David Albright and others contend that after a few years, the breakout timeline is likely to be reduced to a matter of days.[700]

It is not a straightforward task to evaluate the breakout time reduction over the course of this time period, since Iran's "enrichment Research and Development proposal," which identifies the type and number of centrifuges Iran is allowed to position, is not in the public domain.

5.9.2 The Issue of Monitoring and Verification

One of the most significant aspects of the JCPOA involves monitoring and verification, the scope and extent of which will have to be at a far higher level than previously undertaken in Iran by the IAEA. This will impose extra requirements on Iran to provide information and to facilitate access and monitoring. In order for the Accord to be successful, it is important to consider whether the verification provisions are enforceable and whether the challenges faced by inspection teams can be overcome.

Iran has undertaken commitments to allow access to its undeclared facilities, following requests from the IAEA. This follows a procedure regulated by the JCPOA which is instigated at the request of the IAEA following notification of a possible hidden site or undeclared nuclear operations. According to paragraph 78 of the JCPOA Annex I, "if the absence of undeclared nuclear materials and activities or activities inconsistent with the JCPOA cannot be verified after the implementation of the alternative arrangements agreed by Iran and the IAEA, or if the two sides are unable to reach satisfactory arrangements to verify the absence of undeclared nuclear materials and activities or activities inconsistent with the JCPOA", a countdown period of

[699] David Albright, Houston Wood, and Andrea Stricker, 'Breakout Timelines Under the Joint Comprehensive Plan of Action' (2015) *Institution for Science and International Security*, 1, available at <http://www.isis-online.org/uploads/isis-reports/documents/Iranian_Breakout_Timelines_and_Issues_18Aug2015_final.pdf> accessed 14 November 2017
[700] Ibid, 2

twenty-four days will begin. Subsequently, during this time period, Iran will grant the requested access to the IAEA, otherwise the issue will be referred to the JCPOA's dispute resolution mechanism.

Although this time scale of 24 days is not considered as being sufficient time to enable Iran to hide large-scale experiments conducted with nuclear materials or enrichment activities, it could help Iran to hide evidence related to Research and Development activities with non-nuclear components linked with smaller-scale programmes conducted with nuclear materials. As Olli Heinonen has argued: "It is clear that a large facility simply cannot be erased in three weeks without leaving any traces. However, any violations, at least in the early stages of the agreement, are likely to be small in scale […] much of this equipment is very easy to move; therefore it can be removed overnight." Furthermore, "the dispute settlement time of 24 days could be used to sanitise the place, construct new doors and wall tiles, paint the ceiling and remove the ventilation." [701] Subsequently, he concluded, "A 24-day adjudicated timeline reduces detection probabilities precisely where the system is at its weakest, detecting undeclared facilities and materials."[702] Although the size and type of facility is a crucial factor in determining how effectively traces of nuclear activity can be obliterated, the twenty-four day timetable could enable Iran to conceal significant evidence, or at least prevent inspectors from discovering an undeclared facility, thereby allowing Tehran or another member of the Joint Commission to argue against the evidence.

Furthermore, any issues concerning the verification and monitoring processes may signify the extent of Iran's commitment to the ratification of the Additional Protocol.[703] The Additional Protocol offers the required legal tools to enable the IAEA to expand its inspections, which should enable the IAEA to reach the "Broader Conclusion". Iran undertook a commitment to abide by paragraph 13 of the JCPOA in order to begin the provisional application of the 2003

[701] Olli Heinonen, 'Strengthening the Verification and Implementation of the Joint Comprehensive Plan of Action' (2015) *Foundation for Defense of Democracies,* 5, available at <http://www.defenddemocracy.org/content/uploads/documents/Strengthening_Verification_JCPOA.pdf> accessed 14 November 2017
[702] Ibid, 15
[703] JCPOA (15 July 2015) Annex I (Nuclear related Measures) para, 64

Additional Protocol as well as to proceed with the ratification process and also to enforce the Modified Code 3.1 of the Subsidiary Arrangements to the Safeguards Agreement completely.

During the talks on the Vienna Accord, no consistent view emerged to show that under international law, Tehran's provisional application of the Additional Protocol would be binding. Instead, it remained as a political commitment. If Iran can demonstrate that it has attempted to attain ratification, but has been unsuccessful, it can argue that it has complied with the political commitments it had undertaken. The provisions detailed above prepare the ground for a commitment to take action in a particular way, rather than a commitment to reach a certain result.

Consequently, it can be argued strongly that the ratification of the Additional Protocol could fail as a result of alleged or actual constitutional barriers. Without ratification, it can be argued Iran has not been meeting its voluntary commitments. [704] Furthermore, the provisions do not define when the Additional Protocol ratification finally has to be attained. Iran rejected the provision of an ultimate ratification date, which Tehran considered as an interference in its sovereignty. However, there is no reason for ratification before the Transition Day, other than a recognition that the provisional application of the Additional Protocol may have significantly impacted on the contents of the IAEA's "Broader Conclusion".[705] The Broader Conclusion can be considered as a finding which allows the EU to terminate its sanctions, and the United States to implement the legislative changes required to lift the final group of sanctions which are still in place. If the Additional Protocol is not accomplished, this would have no impact upon Iran's commitment to continue to apply the Additional Protocol provisionally and also to enforce the Modified Code 3.2 of the Subsidiary Arrangements to the Safeguards Agreement.

Olli Heinonen having not confirmed this, argued that "the enforcement of the Additional Protocol continues to be provisional until the Agency reaches a Broader Conclusion regarding the peaceful nature of Iran's nuclear

[704] Haupt, *supra* note 633, 447
[705] JCPOA (15 July 2015) para 34(iv)

programme; this contradicts current safeguards practices. Such conclusions have been drawn by the IAEA only when an Additional Protocol is in force and is ratified. This matter cannot be easily dismissed as we need to be aware of potential complications should Iran seek to leverage, pull back, or dilute some of its obligations under its 'provisional' status."[706]

Since the scheduling of Transition Day is automatic, it is important to note that Article 25(2) of the 1969 VCLT determines the conditions under which the provisional application of a treaty can be terminated. This can occur when "the State which until now has applied the treaty provisionally, notifies the other states, between which the treaty is being applied provisionally, of its intention not to become party to the treaty". On this basis, Iran may, at any time, announce its withdrawal from the provisional application of the 2003 Additional Protocol. If such steps are not taken, there should be no negative consequences for the JCPOA's accuracy, nor should the date of the Transaction Day be affected.

If a decision were made by the IAEA not to pursue this direction in its "Broader Conclusion" or if the JCPOA participates were not to activate the re-imposition of sanctions as a means of termination, suspension or withdrawal from the list of procedures planned for implementation between Transition Day and Termination Day it would certainly not suppress either the Termination Day or the legal consequences, encompassed by this event.

Despite the ambiguities in it's wording, the ratification of the Additional Protocol occupies a significant role. This has resulted in proponents speaking in favour of a deal. For example, President Obama announced, "because of this deal, inspectors will also be able to access any suspicious location". This

[706] Olli Heinonen, 'Testimony on 'The Iran Nuclear Deal and Its Impact on Terrorism Financing' before the Committee on Financial Services Task Force to Investigate Terrorism Financing' (2015) *Belfer Center for Science and International Affairs*, available at <https://www.belfercenter.org/sites/default/files/files/publication/Heinonen%20Testimony%20TaskForce%20on%20Terrorism%20Financing.pdf> accessed 15 November 2017

means that “the IAEA, which is responsible for the inspections, will have access when and where necessary.”[707]

Opponents of the JCPOA have criticised the inspection regime for not having “anytime, anywhere” access. This is because Tehran would not have consented to an agreement which required unfettered access to be given to experts to inspect its military sites. In addition, such access may be unnecessary. Under the deal, the Agency will, when required, be allowed to have timely access to any site which is causing concern. The Joint Commission will guarantee that the IAEA is empowered to inspect sites within 24 days, even if Iran initially denies this access.

The significance of the efficacy of the safeguards agreements and of the verification and monitoring arrangements guaranteeing the quality of the JCPOA implementation cannot be overestimated. It should be noted that the implementation of the deal is largely dependent on the level of cooperation between the IAEA and Iran.

So far, Tehran has denied undertaking any military nuclear research, but if, in the assessment, it were to admit that such operations have taken in place, or are taking place, it would be easier for Iran’s public diplomacy to handle such findings in the prevailing protective environment than in the spotlight of global publicity. The international community, particularly those countries which do not have a capacity to obtain independent intelligence relating to this issue, may find it difficult to have full trust in the fairness, truth and sustainability of the Agency's estimation of the dimensions of Tehran's nuclear program. However, in reality the Agency reports appear to have had a significant bearing on the gradual easing of sanctions against Iran, possibly leading to their eventual repeal, by JCPOA participants. Subsequently, the assessment made by the Director General of the Agency should offer a comprehensive response to the remaining issues regarding the potential military applications of Iran’s nuclear programme.

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[707] ‘Statement by the President on Iran’ (*The White House: President Barak Obama*, 14 July 2016) available at <https://obamawhitehouse.archives.gov/the-press-office/2015/07/14/statement-president-iran> accessed 15 November 2017

If the Director General of the IAEA should state that in the Agency's opinion, Iran has failed to indicate in its responses whether or not it has conducted research into nuclear weapons development, or has failed to indicate the scale and scope of any such research, the IAEA is unlikely to benefit in terms of public diplomacy. Doubt will persist as to whether Iran has really ended any ambition to acquire nuclear weapons, and the Deal's critics will see a reason to allege that Iran is secretly conducting nuclear research for military purposes, even if the results of the probes by the IAEA imply otherwise. The balancing act between the requirement to comply with the confidentiality obligation and the need to help those members of the international community that do not have the intelligence capacity to obtain objective data on possible breaches of the NPT committed by Iran is likely to be difficult.

Eventually, even if the Additional Protocol and challenge inspection mechanisms are used comprehensively and effectively, and the Agency obtains consistent and broad support from the international community, a basic difficulty will remain; it is not possible to inspect an undeclared nuclear facility without any awareness of its existence. The potential existence of undeclared facilities will always be an issue, and therefore, it will be impossible to state with any certainty that all pathways have actually been "blocked".

5.9.3 The Issue of the Absence of a Permanent Comprehensive Solution

Other criticisms of the deal have concentrated on the capabilities which Iran is empowered to maintain. The time periods involved have been a particular concern. As mentioned above, most of the restrictions imposed on Iran's nuclear program under the JCPOA will be removed after the first ten or fifteen years, and the majority of nuclear specialists acknowledge that the break-out time will then revert to its current two to three-month estimate.

Critics point to the claim of President Obama who stated that "a more relevant fear would be that in years 13, 14 and 15, they would have advanced centrifuges which can enrich uranium fairly rapidly, and at that time the

breakout times would have diminished almost to zero." [708] Albright and others see many strengths in the Accord, but they argue that "one of its most notable shortcomings is that it almost prepares the ground for Iran to emerge as nuclear power within a period of 10 to 15 years, with the potential, to develop sufficient weapons-grade uranium for several nuclear weapons within a few weeks." [709]

5.9.4 The Issue of the Procurement Channel

Supporters of the JCPOA, including the Obama administration, repeatedly maintained that the Accord closed the "four potential pathways to the bomb". Although a simple image, the basic idea of "blocking pathways" may be misleading. There is the possibility that non-compliance could be detected at any stage of any of the pathways to the acquisition of nuclear weapons, while it is impossible to be entirely confident that a system will be able to detect non-compliance, and certainly not that the pathways giving cause for concern can be "blocked".

Experts agree that there is a possibility that Iran could operate a secret programme. This would cause major concern. However, it is extremely difficult to demonstrate that something does not exist. Iran is a geographically large country, making it easier to establish and conceal covert operations. Any intention by Iran to avoid detection and monitoring would make the task of verification even more difficult. Possibly the subtle way the nuclear deal has been brokered is most clearly seen in the provisions which seek to manage hidden and covert programmes and activities. Critics have focused on the time it would take for IAEA inspectors to access unreported sites,[710] but this opinion is based on the flawed assumption which was prevalent during the

[708] 'Transcript: President Obama's Full NPR Interview On Iran Nuclear Deal' *NPR* (7 April 2015) available at <http://www.npr.org/2015/04/07/397933577/transcript-president-obamas-full-npr-interview-on-iran-nuclear-deal> accessed 15 November 2017

[709] David Albright, Houston Wood, and Andrea Stricker, 'Breakout Timelines Under the Joint Comprehensive Plan of Action' (2015) *Institution for Science and International Security*, 1, available at <http://www.isis-online.org/uploads/isis-reports/documents/Iranian_Breakout_Timelines_and_Issues_18Aug2015_final.pdf> accessed 14 November 2017

[710] Zachary Laub interviewed with Thomas E. Shea, 'How Will Iran Nuclear Inspections Work?' (*Council on Foreign Relation*, 30 July 2015) available at <https://www.cfr.org/interview/how-will-iran-nuclear-inspections-work> accessed 29 November 2015

Iraq war in the 1990s that "anytime, anywhere" inspections could be managed under conditions which do not appear in a post-war environment.[711]

For these reasons, the JCPOA was urged to initiate the Procurement Channel, through which the Joint Commission would revise and decide on proposals by countries which seek to undertake with Iran material business whose "end-use would be for the nuclear programme, or for other non-nuclear civilian end-use."[712]

The Procurement Channel suffers several restrictions which hamper its efficacy and may lead to disputes. For example, it is considered a state's determination whether or not "to seek to engage in transfers and activities" [713] and it is not Iran's responsibility to seek approval from the Procurement Working Group. Iran might utilise deal-brokering private sector operators, covertly supplies from a state that does not have strict export controls, or deal with a commercial entity that does not have authorization from the Procurement Working Group.

As Albright et al. mentioned: "many facets of the Procurement Channel were not addressed during the talks. During the coming months, it will be necessary for a range of capabilities and procedures to be designed and established by the E3+3 in order to enforce this channel."[714] Samore and others have argued that "the Procurement Channel is a powerful vehicle on paper", however, questions have been raised regarding the possibility of Iran's circumventing the Procurement Channel without detection; considering the scale of global commerce, the ongoing opportunities of using private dealers and brokers and the mere scope of the task undertaken by the Procurement Working Group, encompassing both nuclear and non-nuclear related issues.[715] Therefore, several questions will need to be answered in order to optimise the

[711] Richard Nephew, 'How the Iran Deal Prevents a Covert Nuclear Weapons Program' *(Arms Control Association*, 2 September 2015) 2, available at < https://www.armscontrol.org/printpdf/7168> accessed 29 November 2017
[712] JCPOA (15 July 2015) Annex IV (Joint Commission) para, 6.1.1
[713] Ibid. para, 6.4.1
[714] Albright, Stricke, *supra* note 627, 2
[715] Gary Samore and others, 'The Iran Nuclear Deal: A Definitive Guide' (2015) *Belfer Center for Science and International Affairs*, 50-51, available at <https://dash.harvard.edu/bitstream/handle/1/27029094/IranDealDefinitiveGuide.pdf?sequence=1> accessed 15 November 2017

effectiveness of this system: 1) Will dual-use technology acquired through this procurement channel be used in the production of nuclear weapons? 2) Which mechanisms will ensure that the procurement procedures which have been outlined in the JCPOA are the only import paths? 3) With regard to imported technologies, is it necessary to ask how far they need to be remove from nuclear end-use?

5.9.5 Uranium Enrichment and Plutonium Production

While Iran will have to remove about two-thirds of its installed centrifuges, including its more sophisticated IR-2 centrifuges, the country is allowed to retain 5,000 IR-1 centrifuges in operation and also to continue uranium enrichment at Natanz, as well as 1,000 centrifuges in service at Fordow. However, these cannot be utilised to enrich high uranium.[716] Consequently, although Iran will become disempowered in maintaining its substantial enrichment infrastructure, it will be permitted to retain an operational expertise in enriching uranium. The Accord does not force Iran to dismantle any IR-1 or IR-2 centrifuges, and allows the removed centrifuges to be stored at the same facility in which they formerly functioned.[717] Iran would potentially be entitled to reinstall the centrifuges at a later date, particularly following the expiration of the 15-year period.

Iran continues to be allowed to be involved in Research and Development on the more advanced IR-6 and IR-8 centrifuges, provided that they do not seek to build a stockpile of uranium.[718] According to Iran's nuclear chief, "the new generation IR-8 centrifuges which have been presented to the IAEA have a capacity of 24 SWU", which is 16 times more powerful than the current generation of IR-1 centrifuges.[719] In his analysis of the statements by Iran's leaders regarding the IR-8 centrifuge, David Albright concludes that "the IR-8 centrifuges are probably considerably less capable than is suggested by a

[716] JCPOA (15 July 2015) Annex I (Nuclear-related measures) paras, 27,46
[717] Ibid, paras, 29, 47.2
[718] Ibid. para, 32
[719] 'Iran modifies Arak reactor over nuclear concerns' *The Express Tribune* (27 August 2014) available at <https://tribune.com.pk/story/754354/iran-modifies-arak-reactor-over-nuclear-concerns/> accessed 15 November 2017

literal reading of Iranian statements regarding enrichment outputs". [720] However, "its greater length compared with the IR-1 and greater width compared with the IR-2m centrifuge would theoretically imply a capacity far in excess of the IR-1 centrifuge."[721] Although it could take many years before Iran is able to utilise these sophisticated centrifuges to produce uranium on an industrial scale, the country may be able to perfect these when the JCPOA restrictions end after the expiration of the agreed time.

Although the core of the reactor at Arak will be removed, Iran's capability to produce plutonium will not be blocked totally, but will be significantly reduced by the JCPOA. The reactor will be redesigned and downgraded from 40 megawatts-thermal (MWt) to 20 MWt and low-enriched uranium will be used for its fuel rather than natural uranium.[722] If these adaptations regarding the design and operation of the reactor become totally enforced, the Head of the Atomic Energy Organisation of Iran has estimated that it would lead to the production of almost one kilogram of plutonium annually instead of 6 to 8 kilograms.[723]

Furthermore, the low enriched uranium would be utilised as fuel for the reactor, which is intended to make the plutonium rather tougher for "weaponisation" purposes.[724] Finally, in the Bushehr reactor and at Arak, Iran would maintain a capability of producing plutonium. Despite the consideration of the technical difficulties and the problems in hiding its activities and programme, Iran might opt to construct another reactor rather than use the Arak reactor. This could be done openly after the expiration of the 15-year period, or covertly before then. [725]

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[720] David Albright, 'Technical Note: Making Sense out of the IR-8 Centrifuge' (2014) *Institute for Science and International Security*, 1, available at <http://isis-online.org/uploads/isis-reports/documents/IR8_Sept__2014.pdf> accessed 15 November 2017

[721] Ibid, 2

[722] JCPOA (15 July 2015) Annex I (Nuclear-related measures) para, 2

[723] 'Iran foresees sharp rise in uranium production' *Press TV* (10 April 2017) available at <http://www.presstv.ir/Detail/2017/04/10/517447/Iran-Atomic-Energy-Organization-of-Iran-Salehi> accessed 15 November 2017

[724] Samore, *supra* note 715, 2

[725] Henry Sokolski, 'The Iran Deal: An Omission We Still Can Fix' (*Nonproliferation Policy Education Center,* 15 October 2015) available at <http://www.npolicy.org/article.php?aid=1295&rid=4> accessed 15 November 2017

As discussed in the introduction to this chapter, President Obama emphasised that Iran's latent capabilities in future years, particularly in uranium production could result in potential challenges. Although the limits imposed on stockpile size and the number and type of centrifuges, and also the enhanced monitoring and verification mechanisms are meant to be gradually withdrawn. On April 7 2015, President Obama stated in the NPR interview, that "a more relevant feat would be that in year 13, 14, 15 they have advanced centrifuges that enrich uranium fairly rapidly, and at that point breakout times would have shrunk almost to zero".[726] However, others believe that if President Obama's statement proves to be true, then it appears that this deal achieves no more than postponing dealing with this issue for a period of 10 to 15 years, thereby invalidating arguments and evidence that the Security Council, together with the wider international community is taking action on this matter.[727]

In the fact, the deal leaves Iran's extensive nuclear infrastructure unchanged, thereby strengthening its latent nuclear capability. There is a worrying comparison with the 1994 Agreed Framework with North Korea which failed to dismantle North Korea's nuclear infrastructure. The Agreed Framework produced only a mothballing of the nuclear site at Yongbyon, which enabled North Korea to reinstate its nuclear weapons programme after it had been confronted with evidence that it was averting the Agreed Framework by boosting uranium enrichment capabilities. John Kerry presented an argument that the Iran deal differs from the Agreed Framework because it contains the requirement for that country to sign and satisfy the terms of the Additional Protocol, which was developed from the failure of the North Korean experience.[728] This builds on the strength of the Additional Protocol. However

[726] 'Transcript: President Obama's Full NPR Interview On Iran Nuclear Deal' *NPR* (7 April 2015) available at <http://www.npr.org/2015/04/07/397933577/transcript-president-obamas-full-npr-interview-on-iran-nuclear-deal> accessed 15 November 2017

[727] 'Menendez Delivers Remarks on Iran Nuclear Deal at Seton Hall University's School of Diplomacy and International Relations' (*Bob Menendez: United States Senator for New Jersey,* 18 August 2015) available at <https://www.menendez.senate.gov/news-and-events/press/menendez-delivers-remarks-on-iran-nuclear-deal-at-seton-hall-universitys-school-of-diplomacy-and-international-relations> accessed 15 November 2017

[728] John Kerry, 'Iran Nuclear Agreement Review' (*US Department of State: Diplomacy in Action*, 23 July 2015) available at < https://2009-2017.state.gov/secretary/remarks/2015/07/245221.htm> accessed 14 January 2017

the principal issue of failing to manage the basic and important problem of latency remains.

As implied, the true test of the JCPOA's effectiveness will be evaluated following its implementation. Proponents express confidence that it can be enforced effectively, but critics continue to be sceptical. It may be too early to judge with any certainty which side will eventually prove to be right, but several questions will definitely remain. It is unclear if the full enforcement of the provisions as stated in the Accord, including strict monitoring and verification mechanisms and the eventual Additional Protocol ratification by Iran, will actually occur. In addition, it is unclear if the mechanisms intended to block violations of the JCPOA be strong enough to allow concerns to be resolved.

5.10 The Question of Legally Binding the JCPOA under the Vienna Convention 1969

The JCPOA introduced a new form of solution to complicated situations such as the Iranian nuclear issue. Accurate consideration is needed to identify the position of this agreement in international law. The aim of this section is to establish whether the JCPOA is a legally-binding agreement under international law, and whether the agreement is contained within the definition of an international treaty from the perspective of the 1969 Vienna Convention.

One of the requirements for recognising the JCPOA under the definition of the 1969 Vienna Convention is that it would need to be "governed by international law". [729] Additionally its parties' intentions must be contained in the international agreement in order to create the legal obligations and rights governed by international law. Accordingly, J. L. Brierly identified a treaty as "an agreement […] which establishes a relationship under international law between the parties thereto."[730] H. Lauterpatch applied a different approach and stated "treaties are agreements between states […] intended to create

[729] Vienna Convention on the Law of Treaties (23 May 1969) Art 2(a)
[730] James L. Brierly, 'Law of Treaties' (1950) II *Yearbook of the International Law Commission* 222, UN Doc. A/CN.4/23, 223

legal rights and obligations of parties".[731] G. Fitzmaurice reintroduced these definitions and stated that a treaty is "an international agreement […] intended to create rights and obligations, or to establish relationships, governed by international law".[732] From another perspective, the provision in Article 2 of the Vienna Convention does not include any reference to the above approaches.

The Commission ignored any references to the intention of parties because it believes that this requirement is covered in the phrase "governed by international law".[733] With respect to this statement, it can be claimed that the phrase "agreement […] governed by international law" implies that the JCPOA or any other international agreement should create rights and obligations in international law which should be identified as a treaty. Accordingly, the preface of the JCPOA states that this agreement is to "ensure that Iran's nuclear activity will be exclusively peaceful and that there was no intention for Iran to construct nuclear weapons". Therefore, the JCPOA discovered a situation rather than created rights and obligations under international law. In other words, as explained in the previous chapter, the IAEA has never officially claimed that Iran's nuclear activities were in breach of any of the NPT or that its safeguard treaty obligations. In such circumstances, it appears natural to accept Iran's argument that there was no violation of any international rights and obligations regarding undeclared nuclear materials or the declaration of new facilities. Likewise, Iran was committed within its international treaties from 2008 onwards to adopt the JCPOA. Consequently, Iran did not fail to comply with its specific international obligations. In this respect, the JCPOA did not contain rights and obligations undertaken by Iran under treaty law, since the JCPOA's only aim is to ensure that Iran's nuclear programme be used exclusively for peaceful purposes.[734] This illustrated the discovering sense of this agreement. However, the JCPOA may have a

[731] Hersh Lauterpatch, 'Law of Treaties' (1953) II *Yearbook of the International Law Commission* 90, UN Doc. A/CN.4/63, 93
[732] Gelard Fitzmaurice, 'Law of Treaties' (1956) II *Yearbook of the International Law Commission* 105, UN Doc. A/CN.4/101, 107
[733] Humphrey Waldock, 'Law of Treaties' (1956) II *Yearbook of the International Law Commission* 3, UN Doc A/CN.4/177, 12; United Nations, 'Documents of the second part of the seventeenth session and of the eighteenth session including the reports of the Commission to the General Assembly' (1966) II *Yearbook of the International Law Commission*, UN Doc. A/CN.4/SER. A/1966/Add.1, 189
[734] JCPOA (10 July 2015) para, (ii)

legally binding effect to the point that all parties involved in the Agreement's provisions have made a mutual commitment within a specific timeframe. This therefore required a legally binding decision by the UN through Security Council Resolution 2231(2015).

The "Preamble and General Provision" section, the JCPOA expresses both parties' commitments as being a "voluntary measures" by saying: "Iran and the E3/ EU+3 will take the following voluntary measures within the timeframe as detailed in this JCPOA and its annexes." This declaration illustrated the clear intention of the parties for a legally non-binding agreement, and so none of the JCPOA provisions could be legally-binding if considered within the JCPOA framework. Although the JCPOA's "Preface" and "Preamble and General Provision" are not covered by a voluntary measure clause, they cannot have a legally-binding effect due to the statement used in paragraph (i) of the "Preamble and General Provision": "the JCPOA, which reflects a step-by-step approach, includes the reciprocal commitments as stipulated in this document and the annexes hereto, and is to be endorsed by the United Nations (UN) Security Council." The phrase "reciprocal commitment" clarifies the intention of the agreement parties to have purely political commitments rather than legally-binding obligations.

Additional evidence which attests to the legally non-binding nature of the JCPOA is the lack of representatives' signatures on the agreement. This does not refer to the souvenir signatures of representatives which are on the JCPOA cover page, but "the signature and referendum of a treaty by a representative […] constitutes a full signature of the treaty",[735] needed to demonstrate the consent of the parties to be bound by the treaty. While the original signature of the representative expresses the intention of the parties to be bound by the Vienna Convention 1969 as their final act, the lack of attention by the JCPOA negotiators to the terms of the Vienna Convention has demonstrated that parties have sought no more than politically binding commitments.

[735] Vienna Convention on the Law of Treaties (23 May 1969) Art 12 (2)(b)

Moreover, if the JCPOA had been accepted as a treaty it would have been necessary to register it and publish it in a UN document. According to Article 102 of the Charter of the UN "every treaty and international agreement entered into by UN state parties must be registered with the UN Secretariat and published by it." This requirement has not been applied to the JCPOA as this agreement is attached to UN Resolution 2231.

For treaty obligations to emerge, the consent of all of the participating states to create a binding agreement is necessary.[736] The indication of consent can be regarded as a useful indicator to discover if the participants intend to be bound by the treaty. These intentions can be seen in the language used to frame the agreement, in the context of its production and in the explanations given by the parties during its negotiation.[737] During the 20 months of negotiations between Iran and the 5+1 countries, following the achievement of the JCPOA, the negotiators always declared that the JCPOA was not an international treaty. John Kerry, Secretary of State of the United States, announced: "the administration never intended to negotiate a treaty".[738] This statement has been ratified by Mohammad Javad Zarif, the Iranian Foreign Minister, who stated that "the JCPOA is an agreement which introduced procedures to solve a problem that arises in the implementation of Iran's obligations as a NPT member, in the absence of a treaty framework".[739]

Moreover, consideration of the JCPOA under the "Guiding Principle applicable to unilateral declarations of states capable of creating legal obligations" adopted by the International Law Commission (2006) will also indicate that this is a legally non-binding agreement. The Guiding Principle stated "To determine the legal effects of such declarations, it is necessary to take

[736] Ibid, Arts 11-17
[737] Ibid, Arts 12 (1)(c), Art 14(1)(d)
[738] Stephen Collinson, 'Iran deal: A treaty or not a treaty, that is the question' *CNN Politics* (12 March 2015) available at <http://edition.cnn.com/2015/03/12/politics/iran-nuclear-deal-treaty-obama-administration> accessed 22 January 2017
[739] Kaveh L. Afrasiabi, 'The Legally Non-Binding Flawed Argument' *Iranian Diplomacy* (17 March 2015) available at <http://www.irdiplomacy.ir/en/page/1945424/The+quot%3BLegally+NonBindingquot%3B+Flawed+Argument.html> accessed 22 January 2017. Also Russian Deputy Foreign Minister, Sergei Ryabkov stressed that "We are negotiating a binding document, but under a generally recognized doctrine international political liabilities". See 'Russia satisfied with Vienna round of P5+1-Iran talks - Russian deputy foreign minister' *Russian News Agency* (17 October 2014) available at <http://tass.com/russia/754867> accessed 22 January 2017

account of their content, of all the factual circumstances in which they were made, and of the reactions to which they gave rise".[740] Furthermore, "a unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms".[741] The provision indicates that Iran and the 5+1 countries' commitments are voluntary in the JCPOA and its annexes, and therefore that the negotiators were influenced by voluntary self-commitments, rather than aiming to create obligations under international law or precedents. Iran has been unequivocal regarding the legally non-binding effect of the JCPOA and in its determination that other negotiators should not adopt any expression which could be regarded as a binding international agreement.

In consideration of the content of the JCPOA and its comprising columns as well as the presentation of an interpretation defining "treaty" based on the perspective derived from the 1969 Vienna Convention, it is possible to conclude that the content of JCPOA and its writers' intent do not imply a treaty, and that this is affirmed by reference to the rules of the international law of treaties and the Vienna Convention.

The reason that the participants preferred merely politically binding obligations can be seen in the restrictions which negotiators might experience in a treaty context agreement compared with a politically binding instrument. When an agreement is identified as a legally-binding treaty, all of the requirements of the Vienna Convention must be satisfied. JCPOA participants may have chosen a non-binding accord over a binding agreement as a strategy of addressing uncertainty. When states encounter an uncertain landscape which they anticipate will be impacted by future changes, they may seek to develop an entity capable of adapting itself to accept faster changes which may allow consensus to be reached faster and more easily.[742] For instance, in this

[740] United Nations, 'Text of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations adopted by the Commission' (2006) UN Doc. A/61/10, 368
[741] Ibid.
[742] Eugene Kontorovich, Francesco Parisi, *Economic Analysis of International Law* (Edward Elgar, Northampton 2016) 132

situation, it was impracticable for negotiators to invoke "snapback sanction"[743] provisions into the dispute resolution mechanism in the JCPOA in order to manage any further possible violations. Moreover, the ambitious scope and level of detail in the JCPOA text and the Accord's creative approaches to resolving problems stemming from what are certain to be a dynamic set of issues raised over the course of implementing the JCPOA would not be manageable under a legally-binding accord.[744]

This may offer a means to manage internal political considerations regarding international agreements as states, for domestic purposes, may insist that ratification or any other formal domestic procedural measure be enacted following the conclusion of an agreement[745.] If the JCPOA were a legally-binding agreement, it would call for the engagement of the legislature, particularly of the two principal sides (the United States and Iran). Consequently, the negotiators may have sought political agreements in an attempt to avoid legislative entanglement. Additionally, states may have an incentive to employ legally non-binding agreements rather than binding ones because they cost less to develop or change and the costs of any violation are also likely to be less. It is problematic that the costs relating to violation may inflict damage and loss to all the involved parties. For instance, reciprocal actions and retaliation (such as trade sanctions) can result in costs to both parties. Furthermore, a breach-committing state is likely to suffer a perceived loss of reputation. In contrast, all states which observe the agreement, not just those parties directly involved with it, are likely to benefit from an enhanced reputation and improved relationships with other parties taking a similar position.

Examination on this level of specificity has produced insights into why the JCPOA participants were more amenable to employing and enacting non-binding agreements (soft law). However, it must be emphasised that the

[743] JCPOA (15 July 2015) Art 34
[744] Joyner, *supra* note 538, 229
[745] For example, in the U.S, according to Article II, Section 2, Clause 2 of the United States Constitution, the president "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur". However, under limited situations, the president can enter into a binding international agreement known as executive agreements without any involvement by Congress.

legally non-binding form of the nuclear deal does not mean that it is likely to prove flawed or deficient in some areas, or that the parties involved will not treat it as a serious commitment. They will be expected to demonstrate a full intention to respect their commitments under the terms of the agreement. Professor Schanchter analyses the effect of political commitments as follows:
"States entering into a non-legal commitment generally regard it as a political or moral obligation and intend to conduct it in good faith. Other parties and states concerned have good reason to expect such compliance and to rely upon it. I submit that we must deduce from this that the political texts which express commitments and positions of various kinds are governed by the general principle of good faith […]. The fact that non-binding commitments may be easily terminated does not imply that they are illusory […] provided that they continue, even non-binding agreements can be authoritative and controlling for the parties. It would appear sensible to recognise that non-binding agreements may be attainable when binding treaties are not, and to seek to reinforce their moral and political commitments when they serve an end which we value". [746]

A letter from Julia Frifield, Assistant Security for Legislative Affairs, United States Department of State, to Mike Pompeo United States House of Representatives, added that "the success of the JCPOA will not depend upon whether it is legally-binding or signed, but rather on the extensive certification measures we have initiated, as well as Iran's understanding that we have the capacity to re-impose and intensify our sanctions if Iran does fail to meet its commitments."[747]

[746] Oscar Schachter, *International Law in Theory and Practice* (Springer, London 1991) 100-101. "There are simply no equivalent restrictions on either the form or substance of international agreements. The domain of permissible international agreements is simply the domain of possible agreements", see Charles Lipson, 'Why Are Some International Agreements Informal?' (1991) 45(4) *International Organization* 495, 507

[747] The full State Department letter is available at <http://www.nationalreview.com/article/427619/state-department-iran-didnt-sign-iran-deal-joel-gehrke> accessed 15 November 2017

5.11 Conclusion

The JCPOA has made positive strides to reduce Iran's stockpile of enriched uranium through reducing the number of operational centrifuges at Natanz, restricting the number and objectives of the centrifuges at Fordow, and establishing a consolidated mechanism to monitor and verify Iran's nuclear activities. All of these measures make it more difficult for Iran to utilise uranium as a source material in developing a nuclear weapon. Moreover, following the changes to the Arak nuclear reactor, the limits placed on the type of fuel that can be used, the requirements to remove the spent fuel and the 15-year prohibition in redeveloping facilities and initiating Research and Development all hamper the utilisation of plutonium as a source of material in the manufacture of nuclear weapons. The enforcement of Resolution 2231 and the JCPOA significantly impede Iran's capability to develop nuclear weapons.

Although the nuclear accord has been designed to be applied for a limited duration, Tehran will be required to retain its NPT safeguards agreement, and is required to ratify and enact its Additional Protocol. As Iran is a party to the NPT, the IAEA will be able to issue verifications on Iran's safeguards commitments under this treaty, such as the country's commitment to refrain from diverting declared nuclear material or the pursuit of nuclear activities undeclared to the Agency.

The successful enforcement of the JCPOA will terminate all of the provisions of Resolution 2231 as well as instigating the non-application of former resolutions. Moreover, "the Security Council will have concluded its consideration of the Iranian nuclear issue, and the item 'Non-proliferation' will be removed from the list of matters of which the Council is seized."[748]

However, this calls for a successful enforcement of the nuclear deal. Given the fact that the nuclear deal is not a binding international accord under treaty

[748] UNSR Res 2231 (20 July 2015) UN Doc. S/RES/2231, para, 8

law, the Accord may end before the stipulated Termination Day, based on the political determination of the participants. The means by which the Vienna Accord will be enacted is also of pivotal importance to establishing the lawfulness of the Security Council in the future, particularly if it should be called on to make a decisions regarding nuclear-related sanctions applied to countries of the size and political singificance of Iran.

This will be also important when dealing with the question of whether the NPT regime should become consolidated in the long-term. Hans Blix, in his report stated:

"the resolutions ratified by the Board of the IAEA have maintained that Iran, like all other parties to the NPT, is entitled (in accordance with Articles II and IV of the Accord) to produce peaceful nuclear energy. While some have attempted to argue that this right cannot be extended to encompass domestically enriched uranium, but rather a mere secure supply of fuel to only feed power reactors, it would appear to be legally correct, and also prudent to recognise this right for NPT countries. This would comply with articles II and IV of the treaty; allowing participation in all phases of the fuel-cycle. Trying to reinterpret the NPT and assert a new division of the world into "nuclear fuel-cycle-haves" and "have-nots" would hardly get broad support".[749] The central tenet of the Vienna Accord is the acknowledgement that Iran has a right to operate a nuclear fuel cycle as part of a peaceful nuclear programme. It is to be allowed to exercise this right from the Termination Day stipulated in UN Security Council Resolution 2231 at the latest, or sooner should there be an improvement in international relations and confidence in Iran.

Several different political interpretations have emerged around the JCPOA. The White House, under President Obama's Administration, and other P5+1 leaders contended that the nuclear deal has provided the most effective means to guarantee that Iran should not have the ability to acquire a nuclear weapon and to allow the United States to keep on the table all options to block Iran's path from developing a nuclear weapon, even after the key

[749] Weapons of Mass Destruction Commission, Weapons of Terrors: Freeing the World of nuclear, Biological and Chemical Arms (WMDC, Stockholm 2006) 70-71

nuclear limits of the JCPOA have ended.[750] The nuclear deal includes provisions for UN sanctions to be re-imposed if Iran does not fulfil its commitments.

Critics of the agreement have said that they are concerned that the extensive sanctions relief offered under the deal will help Iran to gain additional resources to expand its influence in the region. Opponents of the deal also contend that it did not impose any constraints on Iran's capability to develop ballistic missiles. Resolution 2231 banned Iranian arms exports and imports, but only for five years. It also included a voluntary constraint on Iran's development of ballistic missiles capable of carrying nuclear warheads, but only for eight years. After the expiry of these restrictions, Iran is likely to emerge as a key regional role player.[751]

Thus, different perspectives are held regarding the nuclear deal and whether the JCPOA is able to initiate long-term conditions which can provide incentives for Iran not to pursue its development of nuclear weapons. The nuclear deal and its related diplomatic and legal developments constitute a breakthrough for diplomacy and for peaceful resolutions to international disputes. It would be unreasonable to consider the Vienna Accord as solely a comprehensive solution settling the Iran nuclear issue. It has also made a distinct contribution to international dispute and security law with thematic connections that transcend nuclear non-proliferation. The Accord emerged from negotiations lasting for over a decade and succeeded in bridging the gaps between widely opposed initial negotiating stances, enabling the two sides to reach a compromise resolution.

The JCPOA, if it can be implemented effectively, could show how doors can be opened between opposing parties. This could be a way to bring greater stability to the Middle-Eastern region. From one perspective, the P5+1 have

[750] 'The Historic Deal that Will Prevent Iran from Acquiring a Nuclear Weapon' (*The White House: President Barak Obama*, 2016) available at <https://obamawhitehouse.archives.gov/issues/foreign-policy/iran-deal> accessed 11 November 2017

[751] Kenneth Katzman, Paul K. Kerr, 'Iran Nuclear Agreement' (2017) *Congressional Research Service*, Summary, available at <https://fas.org/sgp/crs/nuke/R43333.pdf> accessed 15 November 2017

achieved their objective of ensuring that Iran's nuclear program is exclusively peaceful, while from another perspective, Iran is authorised and entitled to enrich uranium for civilian purposes. Accordingly, the nuclear deal evolved from a give-and-take policy in which the two sides balanced principles and reality and short and long-term objectives, as well as reaching a compromise to trade off Iran's diminished nuclear capability with its maintenance of a potential nuclear capability. This approach is possibly the most important aspect of the JCPOA, and constitutes a remarkable diplomatic accomplishment for the E/EU+3 and for Iran. It has brought an important international crisis to a successful end, and also has demonstrated that when a delicate, complicated and politically difficult situation such as the non-proliferation of nuclear weapons arises, it is possible to resolve a conflict with an unfriendly counterpart in a peaceful manner.

Conclusion

This thesis has focused on the role and scope of the authority of international law in relation to the history of disputes concerning nuclear capability, as discussed in the previous chapters. In the initial historical account, the policy-making procedures of the United States, which preceded the establishment of international law with regard to the nuclear issue, were discussed. World War II proved to be a very difficult time for international law. However, it was generally agreed at the time that the end of the war marked the beginning of a new era in the field of international relations, and history has confirmed this perception. The founding of the United Nations Organisation as well as the Bretton Woods system of 1944 generated the legal and institutional framework of the international approach, although the simultaneous engagement by the world's superpowers in the Cold War impeded its effective operation.

This thesis has presented the opinion that the dropping of nuclear weapons on the mainland of Japan by the United States, as well as the negotiations which took place in London and Berlin, meant that a Cold War was unavoidable. The dawn of the atomic era, and awareness of its terrible destructive potential resulted in an estranged world and led to the current regime of non-proliferation. Although there were different levels of awareness of ethical considerations among the leading parties in the development of nuclear weapons, and a recognition of the moral implications of the decisions that were made, international law was rarely a factor in considerations of the potential impact of nuclear capability. Research for this paper has been unable to discover any historical reference to any citing of the IX Hague Convention of 1907 (Article 26), which states that "the Commander of an attacking force, before commencing a bombardment, except in the case of an assault, should do all he can to warn the authorities". When the Japanese courts discussed the utilisation of the nuclear weapons against Japan, it concluded "the attacks upon Hiroshima and Nagasaki caused such severe and indiscriminate suffering that they did violate the most basic legal

principles governing the conduct of war".[752] Furthermore, the ICJ considered this in its advisory opinion regarding whether the threat of nuclear weapons or their usage was legal,[753] despite legal restrictions being absent from the deliberations of the policy-makers.

Chapter two discussed the nationalisation of the holdings of AIOC in Iran as well as the resultant coup. A sequence of legal documents was at the centre of these crises. The first was the 1901 contract between Shah Mozzafar al-Din and Knox D'Arcy. Later, the 1933 revision by Reza Shah; and finally the Supplementary Agreement signed by Sir William Fraser and Shah Mohammad Reza Pahlavi, which never received endorsement from the Majlis (the Iranian parliament). The importance of these agreements may have been less significant than the broader geopolitical and economic situation in which they were framed. Although the Iranian monarch who signed the 1901 agreement nominally had absolute power, in reality he had very little. Additionally, he dissipated much of the nation's natural resources in order to fund his court's extravagant running expenses. There was a similar imbalance of power between the negotiating parties in subsequent international agreements. When this situation came to a head in 1951, it appeared to many disinterested observers that Iran had a stronger case in international law than the British government. Therefore, in going to law to seek a solution to the problem, the British government may in fact have weakened its position. The appeal made by the United Kingdom to the Security Council resulted in Mossadegh's response to the UN being broadcast internationally. Furthermore, The United Kingdom government's efforts to present the case to The Hague achieved no more than an injunction prohibiting nationalisation, since on 22 July 1952, the court stipulated that the 1933 agreement was made between Iran and an independent firm.

If the British Government persuaded the ICJ that this was an intergovernmental conflict, it might have been successful. However, it is

[752] Ryuichi Shimoda et al. v. The State (Tokyo District Court) (7 December 1963), English translation available at 'Ryuichi Shimoda et al. v. The State' (1964) 8 *The Japanese Annual of International Law* 212-252

[753] Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) ICJ Report (1996) 226

mainly the laws of the host nation which establish the legitimacy of nationalisation, and consequently, it is necessary that such a statute should authorise an act of expropriation. This would set out the required process as well as the level of compensation to be paid, and also the entitlement of the dispossessed party to apply to the domestic courts for judicial review. In this dispute, the nationalisation certainly satisfied the domestic law test. With the regard to international law, the situation is more controversial, as certain commentators contend that the expropriation must be intended to further a distinct public objective, without prejudice and upon the payment of a sufficient amount of compensation. This "international minimum standard test" [754] was fundamentally the issue that Mossadegh addressed when speaking to the Security Council.[755] Moreover, in another argument which concerned Iran, it was contended that the entitlement of a sovereign state to confiscate the property of an alien for public utilisation may be restricted by a proviso which stipulates that the ending of the contract prior to the date of expiry shall be by reciprocal consent. An agreement of this kind was included in the 1933 document.[756]

If the United Kingdom had won its case at the ICJ, it is likely that Iran would have persisted with its nationalisation agenda, since effective national self-determination would entail Iran having control of its own oil industry and being able to use its profits in the interests of its people. This is considered to be a "higher law". Likewise, had Iran won its case, it can be assumed that the SIS/CIA backed coup would have proceeded regardless. In other words, the American perception of there being a crisis, stemmming from the Communist victory in the Chinese Civil War, would likely have provided a psychological reason to justify taking action for a 'greater good'. However, this does not

[754] James Crawford, *Brownlie's Principles of Public International Law* (7th edn, Oxford University Press, New York 2012) 613-633

[755] United Nations, '560th Meeting' (New York, 15 October 1951) UN Doc. S/PV.560

[756] The restrictions of this entitlement were presented in another case which involved the Anglo Iranian company, in its later name as British Petroleum. In the case of the BP Exploration Company (Libya) v Arab Republic of Libya 53 I.L.R 297 (1979), the British Government successfully challenged Libya's expropriation as being the result of political considerations, consequently having no connection with the Republic's well-being. See Elihu Lauterpacht, C. J. Greenwood, A. G. Oppenheimer, *International Law Reports: Consolidated Table of Cases*, Vol 86 (Cambridge University Press, Cambridge 2004) 298 for a discussion on the relevant legal precedents.

indicate that international law had become a tool of propaganda. While international legal regulations may not have been the key factor in resolving the conflict, they did supply a series of reference points against which the conflict could be understood and judgements made. Furthermore, winning a case in international law has the significance of demonstrating that the successful party had right in terms of the law. While it may have been possible to present a compelling moral case for a specific course of action, this would have required a judicial finding to provide additional legitimacy. If the United Kingdom had won its case at the ICJ, the court's determination would, at the very least, have provided a striking contrast to the United Kingdom's own illegal conduct its consequences, such as the coup which occurred in Iran in the August of the following year. This was an unequivocal contravention of customary international law and also of Article 2 (3) of the UN Charter. [757] Although this was a multi-dimensional conflict, the international legal system did not assume the position of the relevant and final authority for resolving the rights and wrongs of the disagreement.

Chapter three did not discuss the many extra-legal dimensions to the debate on Iran's nuclear industry such as the internal workings of Iran's dysfunctional governing structures, although this has at times been an important factor in impeding the development of a resolution to the problem. Furthermore, the sabotage, assassination, and cyberattack programmes which it is widely believed that the United States and Israel have been conducting against Iran's missile and nuclear industries have not been discussed. This is because the principal field of contention has unquestionably been diplomacy, and also because this diplomatic conflict has been undertaken with regard to the NPT and the IAEA, as well as the Safeguard Agreements and the Security Council. This indicates that international law has been at the core of the issue.

Nevertheless, unfortunately, international law itself has been an contributory factor to the crisis. We have demonstrated that the legal system has not been used to perform many of the tasks which are expected of it. In particular, it

[757] The court in Nicaragua v. United States found out that the states are not allowed to use force, or to violate its sovereignty against another state under customary international law, see Nicaragua v United States of America, *supra* note 419, paras, 191-201

has not been used to arbitrate the Iran nuclear issue. Possibly as a result the dispute has intensified. International organisations such as the IAEA Board of Governors or the UN Security Council have failed to initiate unbiased tribunals, while different states have received different types of treatment. The state parties in the dispute have referred to a set of legal rules which had been unanimously condemned by Acheson Lilienthal as controversial, deficient, inadequately comprehended, extensively misconstrued, distorted and often disregarded; effectively permitting the proliferation of political agendas and subjective judgments. This has led to the dispute being conducted in a similar way to that predicted by political realists, in which the strongest states drive the process whilst other states become in effect unwilling passengers. Despite the fact that the legal process can provide a suitable structure and schedule for the actions of the states, this has not happened.

One of the intentions of Chapter four was to demonstrate the existence of the authority to apply enforcement measures. This authority exists in the context of a particularly strict legal structure, which itself stipulates many legal requirements and conditions which need to be met if it is to be implemented. It is considered important that countermeasures should be permitted only as a reaction to a previously wrongful act. In addition they should conform to the new legal commitments which emanate from this act. Furthermore, the appropriate provisions of the ILC Draft Articles dictate that the utilisation of countermeasures apply only to injured States, and do not recognise the right of any State which is not directly injured to apply countermeasures in the general or collective interest.[758] Finally, there is the requirement to guarantee that the adoption of countermeasures does not result in an unequal outcome. It is essential that proportionality be evaluated and considered in order to guarantee that no extreme action should be applied.

In the case where enforcement measures are applied inside boundaries fixed by universally accepted international law, the legal standing of the application

[758] ILC confirmed the uncertainty regarding this issue, see ILC, 'Draft Article on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) UN Doc. A/56/10, commentary to Art 54, para, 6

of countermeasures cannot be questioned. Nevertheless, the measures which have been applied regarding the nuclear issue in Iran were caused by the unilateral interpretation of the reacting states to an allegedly wrongful act, rather than the interpretation accepted by an impartial judicial or other institution.[759] The unilateral evaluation as to whether a wrongful act has initially taken place, and the legal necessities required to legitimise countermeasures of this kind render the process open to abuse.[760] This is why Iran expressed concern regarding the Western states effectively being permitted to take the law into their own hands and apply such measures.

Although at the time of their adoption, the use of countermeasures was contentious, they were included and were not subject to further controls or limitations under international nuclear law. It remains possible that this principle will be open to further development. According to Professor James Crawford, "the Articles have to prove themselves in practice".[761] Sixteen years after the recognition of the RSIWA by the UN General Assembly, there is still only minimal evidence to suggest that countermeasures provisions are likely to justify themselves.

In an international community in which many contentious issues stem from nation states promoting their own interests, among which the security and safety of their people is paramount, the requirement to have mechanisms of enforcement cannot be ignored. Without enforcement, the protection of the vital concerns of the international community would be seriously weakened, thereby severely reducing the utility and effectiveness of international law. The acceptance of community interests within a set of international legal principles would become purposeless, leading to a loss of integrity for international law and no relevant mechanisms to guarantee conformity with its standards. Nevertheless, a state cannot be defined without reference to its lawful rights, nor can its actions be totally comprehended unless reference is

[759] Alland,*supra* note 427, 1129
[760] Elena Katselli Proukaki believes the doctrine of proportionality plays an important role in the avoidance of unlawful countermeasures which might be used and abused by powerful states. See Proukaki, *supra* note 527*,* 248-281
[761] James Crawford, 'The ILC's Articles on State Responsibility: A Retrospect' (2002) 96 *American Journal of International Law* 874, 889

made to the steps undertaken to maintain those rights, those steps could bring the credibility of international law into question.

Despite this, the use of countermeasures to bring about compliance with treaty commitments may become a productive practice and be authenticated in current international law. Countermeasures are permissible in accordance with the 2001 RSIWA Articles and the 2011 DARIA, and from a horizontal viewpoint, may be required to guarantee conformity with *erga omnes* obligations. They could become a feasible option for enforcing NPT requirements in addition to further relevant obligations. However, states and international organizations must act with full respect to any stated legal requirements and limitations, and not seek to explain their actions using reasons which barely disguise their fundamental political (or geopolitical) interests or ambitions. In his book, ElBaradei has remarked that non-performance as such should not be the decisive factor in provoking a reaction to an alleged violation of obligations and commitments under the NPT and pertaining agreements. What is of greater significance in this context is to give more consideration to the political situation surrounding the non-compliant State Party. [762]

Consequently, it may be concluded that within international law, the principle is that the freedom to make use of all the potential of nuclear power is constrained. It has been established that no state is entitled to utilise nuclear energy without observing and executing all the IAEA rules and regulations and respecting the safeguards included in the NPT. A state must also demonstrate that it has peaceful intentions which conform with the UN Charter in order for the international community to have adequate confidence in the way it uses nuclear energy. Consequently, if any state's nuclear energy usage contravenes international law, the UN Security Council becomes responsible for depriving the violating state of its entitlement to use nuclear energy, and for applying restricted or unrestricted punitive measures in order to maintain international peace and security. Nevertheless, the Security Council and its permanent members have adopted a different stance to the nuclear

[762] Mohamed ElBaradei, *The Age of Deception: Nuclear Diplomacy in Treacherous Times* (Bloomsbury, London 2011) 203

programmes of developing nations which are considered to be suspicious or delinquent, and have applied different measures such as economic sanctions, military attacks, or the demolition of all nuclear facilities according to an agreement (e.g. Libya).[763] However, in the case of Iran, after sanctions had proved to be ineffective, an alternative method, the JCPOA, was devised.

In the final chapter, the complicated structure of the JCPOA was examined. The agreement's potential to provide a means to resolve Iran's nuclear crisis was considered, leading to the conclusion that if implemented comprehensively it should provide an effective settlement to the problem. Although the West has taken confidence-building steps, and has guaranteed to limit the restrictions placed on Iran's nuclear activities, given that these activities are consistent with Iran's NPT obligations, the demands placed on Iran to limit its nuclear programme and allow extensive inspections appear disproportionately strict. However, Iran has accepted the terms of the treaty in order to end the isolation and hardship caused by United States and EU sanctions.

It is unfortunate that the parties involved in the Iran nuclear crisis, prior to the JCPOA, appeared to think that best course of action was to implement serious measures first, then seek to find a way out of the problems they presented. It can be argued that Iran's case has been used like a diagnostic test, and that it has revealed the legal inconsistencies of the non-proliferation programme and the political relationships which have thwarted any region-wide resolution to the difficulties in the Middle East. The most optimistic scenario is that the solution to the Iranian conflict can develop as part of a broader solution to the outstanding problems of the Middle East, particularly a resolution to the Israeli-Palestinian issue, together with a re-analysis of the non-proliferation regime and the role of international control. Considering that the NPT places a small number of obligations upon the NWSs, and in view of Iran's intransigent attitude and Israel's equally intransigent attitude (although qualified by United States support), this does not to be appear to be a likely outcome.

[763] See IAEA, 'Implementation of the NPT Safeguards Agreement of the Socialist People's Libyan Arab Jamahiriya' (30 August 2004) IAEA Doc. GOV/2004/59

The Iranian nuclear crisis and the UN's involvement through making declarations and applying coercive sanctions and subsequently Resolution 2231 which endorsed the JCPOA, represent a complicating element for the nuclear non-proliferation regime, conventionally regarded as having the NPT as its "cornerstone".[764]

The NPT entered into force in 1970, following years of international negotiations. Since then it has been central to international efforts to restrict the proliferation of nuclear weapons. Over its first 25 years it can be argued to have been an effective mechanism in limiting the spread of non-peaceful applications for nuclear technology. It has near-universal membership of nation states. Three of the four nations that are not signatories to the NPT, (India, Pakistan and Israel), have particular nuclear issues that would make their agreement to the terms of the NPT difficult both domestically and in terms of their international relationships. The fourth non-signatory country (South Sudan) was founded only in 2011. Only one country (North Korea) has ever withdrawn from the treaty. However, it is likely that in an increasingly globalized context nuclear technology will be more widely available and the treaty will become increasingly peripheral as the limitations to its power and scope become more apparent. The UN Secretary-General's High-level Panel on Threats, Challenges and Change has written of "the erosion and possible collapse of the whole [nuclear nonproliferation] Treaty regime," going on to state that:

"We are approaching a point at which the erosion of the nonproliferation regime could become irreversible and result in a cascade of proliferation."[765]

The major issue which indicated that the effectiveness of the NPT was in decline involved determining how a state that is suspected of conducting nuclear proliferation should be dealt with.

It is clear that the NPT programme is not sufficient to manage situations such as the Iran nuclear crisis. Its measures are not equipped to search and

[764] The NPT is referred to as the "cornerstone" of the non-proliferation in John Woodliffe, 'Nuclear Weapons and Non-proliferation: The Legal Aspects', in Istvan Pogany (ed), *Nuclear Weapons and International Law* (St. Martin's, New York 1987) 84
[765] Ibid, 30-40

apprehend suspected defectors, as is shown in the deficiency of exact criteria for managing such suspicions when they emerge. It would appear that those who drew up the terms of the NPT had not envisioned that any state, while still a signatory to the NPT, would develop nuclear weapons capabilities.

However, in an increasingly unstable world where the access to nuclear technology is greater than ever, the NPT continues to be the only comprehensive regime which could control the situation. Therefore, it is imperative that the treaty be updated so that it conforms to the modern standards of international law.

Many proposals and initiatives have been advocated as a response to the challenges facing the NPT regime, which are reflected, *inter alia*, in the Iranian nuclear conflict.[766] None of these proposals address the NPT's formal asymmetry and the historic context of international practice, which are possibly the greatest impediments to its success.

Nevertheless, this treaty was inaugurated almost fifty years ago, in a considerably different world order, economic environment, and technological situation. Its limitations necessitate significant alterations to its present terms and conditions. While its principal articles should remain intact, the treaty ought to be augmented with further processes designed to deal with modern non-proliferation issues. NPT member states ought to offer a persuasive argument in favour of the development of peaceful nuclear programmes, even when they have potential for dual purpose applications. Such programmes ought to be accepted by the IAEA—and also, if required by the UN Security Council. With regard to this, the agreement of July 14, 2015 constituted a productive development, but not one that was fully recognized within the

[766] See e.g., Jack Garvey, *Nuclear Weapons Counterproliferation: A New Grand Bargain* (Oxford University Press, New York 2013); Pierre Goldschmidt, 'Priority Steps to Strengthen the Nonproliferation Regime' *Carnegie Endowment for International Peace Policy* (2007) available at <http://carnegieendowment.org/files/goldschmidt_priority_steps_final.pdf> accessed 15 January 2018; 'Secretary-General's address to the East-West Institute entitled "The United Nations and security in a nuclear-weapon-free world"'(*United Nations Secretary-General*, 24 October 2008) available at <https://www.un.org/sg/en/content/sg/statement/2008-10-24/secretary-generals-address-east-west-institute-entitled-united> accessed 15 January 2018; John Simpson, 'Is the Nuclear Non-Proliferation Treaty fit for purpose?' *United Nations Association of the UK Briefing Report* No. 1; Orde F. Kittrie, 'Averting Catastrophe: Why the Nuclear Nonproliferation Treaty is Losing its Deterrence Capacity and How to Restore it' (2007) 28 *The Michigan Journal of International Law* 337

agreement. It appears appropriate that several of the provisions of the JCPOA in their relationship to the nuclear programme restrictions and an improved transparency programme can act as guidelines that potentially leading to reforms which reinforce the international nuclear non-proliferation regime.

It cannot, at the present time, be determined with confidence whether the development of the whole non-proliferation regime has been either positive or negative. This is because its future prospects depend on innumerable geostrategic and political factors which are hard to presuppose, considering the duration of the deal. Nevertheless, there is certainty regarding the place of international relations theory, communications and diplomacy in analysing the complications of the nuclear crisis and its consequent resolution.

This paper concludes by declaring that international law has the very important goal of creating and preserving world peace. Any action which does not follow international law, even if a successful outcome is achieved, weakens international law. International law should be the only vehicle for achieving peace as law brings certainty and stability. To enable this, International law should evolve with the evolving world order. Bypassing international law because it does not meet the needs of the international community is not a solution, and is likely to raise problems in the long term.

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