

**Let's Get Into the Legalities– Examining and  
Analysing the International Legal Position of Iran in  
the context of the Iranian Nuclear Crisis**

**By**

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## **Abstract**

This thesis focusses on the assessing the legality of the responses of the IAEA, the UN Security Council and certain member states to the Iranian nuclear crisis from 2006 to 2015. The purpose of this thesis is to highlight the fact that the Iranian situation was primarily a legal dispute, encompassing various complex legal questions which were largely side-stepped in the handling of the crisis.

This thesis examines the mandates of the IAEA and Council to make the case that in numerous instances both engaged in ultra vires actions in their handling of the Iranian issue. This thesis examines the referral of the case by the IAEA to the Council and the resulting enforcement measures, their compatibility with the strictures of the Charter and the Council's powers. Unilateral sanctions imposed by the US and EU are analysed as countermeasures and their legality as such is assessed, as are the legal issues associated with forcible counter-proliferation measures of surgical strike and cyber-attack. Reflecting on the 2016 outcome, this thesis concludes that Iranian nuclear crisis was prolonged and exacerbated by the failure to treat the situation as a legal, rather than purely political issue.

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## Chapter 1 - Introduction

*"We should not really tinker around about legalities."*

Mohammed El-Baradei<sup>1</sup>

The Iranian nuclear issue encompasses many and varied issues of international law, both in its foundational shortcomings and implementation issues and in its evolution from the adoption of the United Nations Charter 70 years ago. While each chapter represents a different thread of international law which can be examined as a discrete issue, each topic ultimately interlinks with others to form a comprehensive study of a number of the most pressing of international law issues in today's climate. The Iranian nuclear situation is comprised of issues of treaty law, the law governing international organizations, Charter law, the law of state responsibility and the law governing the use of force and demands separation of the political context which has in this case dictated the implementation of these strands of international law.

Higgins suggests that the argument for the exclusion of legal considerations in favour of policy concerns specifically in UN Security Council decision making is often employed in cases where the party asserting it is in a weak legal position, citing the example of the British Prime Minister addressing the Council regarding the Suez Canal intervention.<sup>2</sup> This author contends that former IAEA Director General Mohammed El Baradei's statement discouraging placing emphasis on the

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<sup>1</sup> G. Segell, *Axis of Evil and Rogue States: The Bush Administration, 2000-2004*, at 204

<sup>2</sup> R. Higgins, 'The Role of the Security Council in the Settlement of Disputes', 64 AJIL 1 (1970) at 8

‘legalities’ in the Iranian nuclear case is subject to the same caveat. Framing the issue, at the IAEA level and beyond, as anything other than a legal one obfuscates the problem and permits often baseless accusations to gain traction and cause escalation.

### **Object of Study**

The object of this study is to provide a comprehensive analysis of these issues where they arise in the Iranian nuclear context in order to investigate the efficacy of the international legal apparatus governing this case by approaching the situation through a legal lens. This objective will ultimately serve the hypothesis that the issue would never have been permitted to escalate had it been framed in legal terms *ab initio* and approached as a legal dispute between the parties. The crisis should have been framed in terms of legal constraints incumbent upon all parties, which were largely sidestepped in favour of political resolution, the exigencies of which exacerbated the tensions involved. Former Director General of the IAEA Mohammed el-Baradei made the suggestion that tinkering with the legalities was unhelpful in this context<sup>3</sup> but I shall seek to demonstrate that the legal complexities of the case, properly accounted for and considered, may have prevented the height of tension reached in this situation.

In the aftermath of the Iran nuclear deal of July 2015, a case study which once focussed on a highly contentious issue now presents itself more as a legal overview for future cases of suspected proliferation and a thesis which seeks to explain the outcome of the Iranian case in legal rather than purely policy-based terms. Examination of each strand of applicable international law relating to allegations of weapons proliferation and the regulation of such cases has produced a study

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<sup>3</sup> *Ibid* n1

which, told through the narrative of the Iranian situation, attempts to touch upon the many and varied extra-legal factors at play. It is however the primary goal of this study to strike a more appropriate balance between the legal and political issues than was employed throughout the treatment of this case by the IAEA, the Security Council, the United States and the European Union.

This thesis therefore seeks to demonstrate two essential points. Firstly, that policy concerns dictated the course of the Iran crisis, when in reality numerous legal issues were at the heart of the situation and secondly that the measures imposed on Iran in response to allegations of a nuclear weapons program, in numerous instances, did not comply with the applicable international law. In order to engage with both issues, the governing legal documents and the obligations Iran has consented to therein must be identified, examined and analysed in order to clarify whether the issue was a legal one and if so, to reach on conclusion on whether or not the relevant legal agreements were properly applied.

INFCIRC/847<sup>4</sup> details the entirety of Iran's claim that its treatment at the hands of the IAEA and UN Security Council has been illegal. This articulation of Iran's stance, which it maintained throughout the crisis, is detailed and well-reasoned in its allegations of illegality yet the legal issues raised were never engaged with and consistently side-stepped. Ultimately, a legal dispute which spanned the spectrum of international law lay at the heart of this situation and remained unresolved

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<sup>4</sup> INFCIRC/847 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

as policy considerations of the institutional powers and various states drove the crisis over a decade of escalation. This thesis offers the in-depth examination of a number of Iranian claims of illegality which before the 2015 adoption of the Joint Comprehensive Plan of Action, had not been meaningfully considered or analysed.

By focusing on the issues surrounding implementation of Iran's Safeguards Agreement, it becomes clear that the Agency's response to the situation, although widely considered to be lawful and proportionate, may not have been in-keeping with the specific treaty in force between Iran and the IAEA. This thesis examines Iran's claim of illegality on the part of the IAEA in making a declaration of non-compliance and by transferring the nuclear dossier to the UN Security Council by identifying the relevant legal documents, interpreting them and applying their contents to the situation at hand. The legal merit of the Iranian contention that the IAEA acted outside of its mandate is therefore assessed by examination of the Agency's constitutive document and the powers accorded to it by virtue of the bilateral Comprehensive Safeguards Agreement with Iran.

With this vital starting point in hand, meaningful exploration of the Security Council's handling of the situation, wherein there existed a legal dispute regarding the issue of non-compliance, is possible. By treating the issue as a legal dispute, giving weight to Iran's contention that misconduct has taken place and situating the claim in its correct legal context the presumed legality of responses of the Council becomes questionable and susceptible to challenge. This thesis challenges the widespread assumption that the measures ordered by the Council, a comprehensive suite of

sanctions and the pursuit of the cessation of uranium enrichment in Iran, were in-keeping with the Charter's constraints.

## **Methodology**

With the above goal in mind, this author is inclined to align with the classic positivist school of thought as propounded by Fitzmaurice. While some references are made to approval of views of Yale School of thought scholars such as Schmitt or New Haven Scholars such as Reisman or Higgins on select specific issues, the foundations of this thesis generally are rooted in formalism, giving primacy to the rule of law and championing it in the many instances of its suppression by the dominant hand of politics. In-keeping with this, the study is grounded in a doctrinal approach seeking to identify, analyse and apply the relevant legal mechanisms and governing treaties to reach a reasoned conclusion.

International law is, by its very nature, necessarily a system susceptible to manipulation at the hands of powerful actors who seek to 'maintain a minimum world order', as New Haven scholars mentioned above advocate. However this thesis will demonstrate that the Iranian nuclear crisis and its handling by the institutional structures of the IAEA, UN Security Council and certain states illustrates the fact that placing undue emphasis on the law as it ought to be in order to support desired political outcomes, rather than analysing the law as it actually is and applying it accordingly, can have deleterious results in relations between states.

The selection of doctrinal methodology can be justified by the need to frame the inquiry in black-letter legal terms in order to expose the extent to which the crisis was frustrated by overarching on geopolitical concerns and to unearth the answer to questions of illegality. It is only when the core governing legal documents are examined, analysed and applied that a dispassionate appraisal of the situation can be produced. In a similar vein to the reasoning employed by the International Court of Justice in accepting jurisdiction to deliver an Advisory Opinion in the *Legality of the Threat or Use of Nuclear Weapons*<sup>5</sup> case, this thesis demonstrates that highly politicised issues can at the same time be analysed in a legal prism insofar as questions of legality or illegality exist.

Although legal positivism can be viewed as unhelpful and rigid in the face of an international legal system which is facing new and evolving challenges in an increasingly multipolar world, in particularly politically charged scenarios, it can remind us that constraints do exist, and must be adhered to in situations of international security sensitivity to prevent escalation. As a situation which was largely analysed through a policy-oriented approach, analysing that which Iran has legally consented to and placing the emphasis on the existing optics of law facilitates a move away from theories such as international legal process, which has been criticised for its inability to distinguish law from politics and blurring of the line therein.<sup>6</sup> A doctrinal approach facilitates this analysis.

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<sup>5</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports (1996) at p. 226

<sup>6</sup> A.C Arend, *Legal Rules and International Society*, (OUP)(1999) at 26

A choice of doctrinal methodology is often made in cases where specific law governing a situation is in its embryonic stages of development or appears unsettled, thus contributing to the knowledge in the field. However, this thesis seeks to demonstrate that adequate applicable law exists to govern a situation which was stripped of legal consideration, analyse the current framework as it is, and assess whether it was correctly applied to the Iranian case. In so doing, the study situates the issue in the correct legal framework and delves deeper into Iranian contentions of illegality to reach reasoned conclusions issues, which are firmly grounded as legal questions.

Non-nuclear weapons states like Iran consented to a defined and specific mandate of the IAEA and by expanding upon this, the IAEA has both damaged its position of esteem as a non-politicized body, and sparked a confrontation which escalated tenfold. While it is impossible to examine the issue in a non-politicized vacuum, and references to the intimate relationship between international law and international relations will necessarily be made in the course of the study, the decision to undertake a doctrinal examination stands to reason. The problems arising in the Iranian case are not beyond legal appraisal as the relevant treaties exist and can be employed to evaluate whether or not the actions of the international organisations and states involved have been cognisant of existing obligations incumbent on them.

The area of nuclear non-proliferation law is governed by an, admittedly complex, web of treaties and agreements with the Nuclear Non-Proliferation Treaty 1968 at the centre. While most are familiar with the NPT, its bipartisan structure and its prohibition on the acquisition or manufacture of nuclear weapons by the vast majority of states, it is likely most aren't as well versed in the legal

documents which facilitate implementation of NPT commitments – the Comprehensive Safeguards Agreements. Shedding light on the strictures of these documents allows for a deeper understanding of the system, what states have consented to and its strengths and shortcomings. Detailed analysis of such agreements in the Iranian case lays the foundation for the necessary legal inquiry into Iran’s contentions of illegality on the IAEA’s part.

The entirety of the international responses to the Iranian nuclear situation have been predicated on the presumption that the IAEA acted within the bounds of its mandate and the strictures of the CSA in first referring the issue to the Security Council. It may not have done, and as a result, a cascade of legally dubious responses were made. This study seeks to investigate the issue from the source – the legal dispute at this outset, and with this as a foundation, analyse the developments in the dispute in relation to the existing and applicable law with a doctrinal approach.

### **Originality**

This thesis is an original study in that it assesses the legality of the responses of both the IAEA and UN Security Council as well unilateral actions taken and threats made by members of the international community to expose how divorced from international law the Iranian nuclear situation became before its resolution. The study is unique in that it approaches the issue as one of a legal dispute between parties, and seeks to examine and analyse the claims of illegality made by Iran in this context by identifying and applying the appropriate legal rules, principles and documents.

In the context of the IAEA in particular, this study demonstrates that there are gaps in the existing understanding of the scope of the mandate afforded to the IAEA in its verification role, which has attracted little examination by legal scholars. This study seeks to fill in these gaps by utilising the



international law framework to analyse the powers granted to the Agency by virtue of its constituent document and to paint a clearer picture of the authority and limits of the IAEA in executing the mandate afforded to it by the bilateral Comprehensive Safeguards Agreement, in this specific instance and in cases which may arise in the future.

Furthermore, the examination of the specific right to peaceful nuclear energy in the context of fundamental rights of states and as a right which is intricately linked to economic self-determination represents an original contribution to a gap in the existing knowledge on this topic.

Finally, this thesis coincides with the conclusion of the issue after substantial efforts were made to embrace multilateral diplomacy, the results of which appear to affirm many of the failures in the treatment of the case noted throughout the study. This thesis will be a contribution to the field of study of nuclear non-proliferation law as an examination of the legal limits to counter-proliferation actions by key actors which will have to be borne in mind in future cases, and which illuminates the legal failings in the specific case of Iran, highlighting the need for transparency and cognisance of legal considerations in disputes which may lie ahead.

## **Thesis Outline**

With the enactment of the Nuclear Non-Proliferation Treaty 1968, nuclear weapons possessing states and those without a nuclear arsenal agreed that the issue of preventing a proliferation cascade and moving towards disarmament would be governed by the provisions enacted therein. It was therefore envisaged that the system created by the NPT, underscored by the monitoring mechanism it delegated to the IAEA, would regulate issues arising in this area. The specific non-proliferation legal framework therefore consists of the NPT, the Comprehensive Safeguards Agreements (hereinafter CSA) between Member States and the IAEA and the Subsidiary Arrangements

(hereinafter SA) to the CSA. The Iranian case however was not resolved within the confines of this treaty-based mechanism, but rather came to involve the UN collective security system as well as fall-back general international law procedures before a solution was reached. This study seeks to examine the legal issues inherent in the resort to this complex trifecta of remedial actions.

This first chapter shall focus on laying the historical foundation of the Iranian nuclear crisis in order to expand upon the many legal issues which have arisen as a result. The legal context in which the crisis has unfolded, the nuclear non-proliferation regime and the treaties which it comprises will be laid down. It will become apparent that many past actions of Iran require scrutiny, but this examination of these factual events shall be conducted through a legal prism. Care must be taken to identify and separate the legal issues from the omnipresent political overtones in this context. It shall therefore be necessary to unpack the applicable legal provisions as contained in the Nuclear Non-Proliferation Treaty, the IAEA Statute, the CSA and its SA in order to situate Iran's alleged breaches in the context of these governing documents.

Chapter II shall focus on the treatment of the case by the IAEA, namely the referral of the Iranian dossier to the UN Security Council based on a Board of Governor's report citing non-compliance, shall be scrutinised. The Agency's mandate in monitoring non-nuclear weapons state parties(hereinafter NNWS) to the NPT shall be investigated in order to establish whether or not Iran has acted inconsistently with its specific and defined legal obligations derived from the CSA and SA. This investigation is vital for the purposes of ascertaining whether or not Iran had breached

its NPT obligations, the implications of which have a bearing on the legality of the actions of the Security Council which followed.

Having analysed the IAEA's treatment of the case, the study shall progress in Chapter III to examine the actions of the UN Security Council in response to the referral by the Agency. Primary focus will be placed on the Council's enactment of a series of Chapter VII resolutions against Iran's nuclear program, the propriety and legality of which can be called into question when the strictures of Article 39 of the UN Charter are examined closely. Questions regarding the Council's broad discretion to make an Article 39 determination will be explored as well as the limitations placed on the Council in the form of the purposes and principles of the Charter and the extent to which the Council is bound by law in exercising its primary function. It will be demonstrated that the Council does not operate in a legal vacuum and the applicable provisions of the Charter which attest to this will be employed with reference to the Iranian nuclear situation.

With the conclusion that the Council is not unbound by law, the specific demand of the Council for Iranian cessation of uranium enrichment requires examination. This demand formed a central part of the Iranian crisis and called into question the normative content, status and source of the right to peaceful nuclear energy, recognised as 'inalienable' in Article IV NPT. It is necessary in Chapter IV of the thesis to analyse the right in detail in order to address the contention of Iran and Non-Aligned Movement states that the call of the IAEA and demand of the Council to suspend such activities is in contravention with Article IV. The crux of the entire issue could be said to be the defence of this right, in the face of Council demands for its extinguishment, however

temporarily. Therefore the limits identified in the preceding Chapter will require application to the specific demand of uranium cessation in order to establish whether or not the Council acted within its powers in demanding this measure.

In addition to the demands for a ban on uranium enrichment, the Council imposed a Chapter VII-based targeted sanctions regime upon Iran in order to coercively halt its nuclear program. These measures were then employed by UN Member states acting under the Article 25 obligation to carry out decisions made by the Council. Chapter V of this study focusses on the implementation and more specifically the expansion of the measures mandated by the Council in resolutions 1737-1929 by the US and EU in imposing extraterritorial sanctions as well as oil embargoes on Iran. Justification for the expansion beyond the parameters of the Council's demands will be sought in the law of state responsibility by investigating whether or not these unilateral actions can be classed as countermeasures and deemed lawful, to once again constrict the Iranian nuclear crisis to its legal limits.

Chapter VI first dispels any suggestion of the legality of the forcible policy options which remained 'on the table' when sanctions failed to induce Iranian compliance with demands to halt its nuclear program. Firstly, cyber-attacks are dealt with, assessing the lawfulness of future operations of this nature with reference to the previous Stuxnet cyber network attack on Iranian nuclear facilities in 2010. The classification of such actions as attacks which violate Article 2(4) of the Charter as well as activating Article 51 in certain cases will demonstrate the need to refrain from resort to these measures in future counter-proliferation efforts, situate Stuxnet in its legal context and pave the way for the same caveat to be made in relation to threats of surgical strikes on nuclear facilities.

The final topic to be dealt with closes the study appropriately by reflecting on the Joint Comprehensive Plan of Action agreed in July 2015 and the conclusions its adoption and content infer regarding the analysis in the preceding chapters. The international community employed measures based, for the most part, on flawed foresight in its treatment of the Iranian case from the outset and with the crisis now averted, hindsight could be said to represent twenty-twenty vision. However, the overriding lesson to be learned from the handling of the Iranian nuclear crisis by the IAEA, the UN, the US and the EU based on this study will be that insight of a legal nature is the vision to be preferred in these situations. What began as a legal dispute between the IAEA and Iran saw improper Security Council measures and unilateral action act as a catalyst for escalation, by which time the question of the existing legal situation had largely been side-stepped. Each of the following chapters will reframe the issue in legal terms.

### **Historical Context**

While the aim of this study is to examine the nuclear crisis in legal terms, brief explanation of the geopolitical climate at the time of the crisis is warranted to enable understanding of the factors at play in the escalation of the issue to the heights of tension it eventually reached.

Since the Islamic Revolution of 1979 and the related US hostage crisis, Iran has found itself with few friends in the international community. Against this backdrop, a suspected Iranian nuclear weapons program was an issue ripe for escalation when in 2002 the dissident group the People's Mujahedin of Iran (MEK) claimed the state's nuclear energy program was being developed in a clandestine manner for non-peaceful purposes. It became apparent that Iran had concealed part of its nuclear program, namely the operations in an undeclared facility at Natanz, for various reasons, however the contentious part of the revelation regarding attempts to develop a nuclear weapons

program remained to be proven. The MEK statements, part revelation and part accusation, caused reverberations throughout the international community for a number of reasons, which frame the context of this study.

The relationship between Iran and its regional neighbour Israel in the Pahlavi era was marked with a certain mutual understanding and shared US allegiance which began to erode with the revolution and Ayatollah Khomeini's aggressive stance towards Israel. Despite finding common ground over their mutual enemy Iraq during the Iran-Iraq war, Iran's support of Hezbollah and Hamas, refusal to recognise Israel as a legitimate state and ambitions for Palestinian liberation set the scene for confrontation down the line. This tense relationship was exacerbated by the MEK revelations, with Netanyahu claiming that the prospect of an Iranian nuclear weapon represented an existential threat to Israel and pledging to stop at nothing to prevent Iranian acquisition of the bomb.

Israel's position was bolstered by a sympathetic US, which had severed diplomatic relations with Iran in 1979 and increased Iranian isolation and distrust in 2002 with George W. Bush listing Iran as a member of 'the Axis of Evil'. In light of the covert nature of Iran's nuclear activities at Natanz, it was easy to allege that bad faith played a part in Iranian nuclear ambitions. This factor was crucial in fuelling the suspicion that Iran was seeking nuclear weapons and to allege that it would use such leverage in its dealings with Hezbollah and Hamas to specifically to strengthen its anti-Israel stance.<sup>7</sup>

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<sup>7</sup> In support of this argument see: E. Inbar, 'The Need to Block a Nuclear Iran', 10 Middle East Review of International Affairs 85 (2006), for counter argument see E. Borghard & M.Rapp-Hooper, 'Hizbollah and the Iranian Nuclear Programme', 55 Survival: Global Politics and Strategy 85 (2013)

The EU3 of France, Germany and the UK in response to the revelations sought to clarify the peaceful nature of the Iranian nuclear program in order to confirm compliance with Iran's NPT obligations. In the course of this inquiry the NPT framework which had failed to detect Iranian covert nuclear activities would come into play, meaning considerations of policy would become intertwined with the functioning of this system, the efficacy of which had already been called into question. The quest for confirmation of the peaceful nature of Iran's nuclear program led first to multilateral negotiations, which in 2003 marked the beginning of the Iranian nuclear crisis which would evade resolution for 12 years.

### **History of Iran's Nuclear Program**

Iran's nuclear program can be seen to have begun with the United States' Atoms for Peace program in 1953, which was facilitated by close relations between the ruling Shah Reza Pahlavi and the US administration at the time. The Atoms for Peace project, President Eisenhower's brainchild, was a direct result of the Manhattan project which saw the United States master the nuclear fuel cycle. Keen to ensure that the inevitable proliferation of nuclear technology was controlled and avoid the possibility of a nuclear arms race, Atoms for Peace aimed to facilitate sharing of nuclear expertise. Eisenhower originally sought to create an international fissile fuel bank to allow states to access nuclear energy in a monitored fashion, but this was soon replaced with the concept of cooperation in aiding the safe production of nuclear energy for peaceful purposes domestically in participating states.

Iran signed and ratified the Statute of the International Atomic Energy Agency in 1957. This was followed by Iran's signature of the NPT in 1968 and ratification in 1970, meaning that Iran forfeited its right to develop nuclear weaponry in exchange for access to what previously had been secret nuclear technology, with the aim of developing such processes for peaceful nuclear energy production. The Iranian nuclear program was thereby subject to IAEA inspection and monitoring, as well as Agency assistance upon signature of a Comprehensive Safeguards Agreement, INFCIRC/215 with the IAEA in 1974. The Shah secured numerous contracts with US and EU nuclear suppliers and worked towards development of an extensive nuclear energy program to industrialise the country and cultivate a position of regional dominance.

After the Islamic Revolution, focus on the civilian nuclear energy program began to wane and progress stalled in the years during the Iran-Iraq war. The program was renewed by President Rafsanjani in the early 90's, however US and EU assistance was not forthcoming in light of the new Iranian political climate. Contracts with suppliers in Russia and China were secured and progress was made on the nuclear program despite US pressure to cease this assistance to Iran based on membership commitments of the Nuclear Suppliers Group.<sup>8</sup> The Iranian program therefore was subject to numerous obstacles to obtaining the necessary components and materials for the production of nuclear energy for civilian purposes during this period.

The 2002 claims by the MEK revealed the lengths Iran resorted to in order to continue development of its nuclear program in light of NSG reluctance to provide assistance. The existence of two

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<sup>8</sup> M.Fitzpatrick, *The Iranian Nuclear Crisis: Avoiding Worst-case Outcomes* (Routledge)(2008) at 27-29



undeclared facilities under construction, the Natanz reactor and Arak heavy water facility gave rise to the IAEA Board of Governors report GOV/2003/60. This report chronicled the activities by Iran which the Board deemed inconsistent with its Safeguards obligations, notably the enrichment of small amounts of undeclared uranium and the construction of the aforementioned facilities. Iran then declared these facilities to the Agency, permitted inspection and as a confidence-building measure agreed to implement a more stringent design information provision in its Subsidiary Arrangement, known as Modified Code 3.1, as originally proposed in 1992 by the Board in GOV/2554/Att.2/Rev. 2.

Iran engaged in multilateral negotiations with the EU3 in order to address the issue and in October 2003 agreed to voluntary measures including but not limited to suspension of uranium enrichment and signature and provisional application of the Additional Protocol on Enhanced Safeguards pending ratification, broadening the investigative powers of the Agency. A complete suspension of uranium enrichment was adopted by Iran in November 2004 as temporary confidence building concession in order to proceed with negotiations for a long term solution. These negotiations saw Iran offer concessions such as non-permanent initial restrictions on uranium enrichment at Natanz, a proposal for 'optimized' monitoring of Natanz, importation of uranium conversion materials and the export of Uranium Hexafluoride which would curtail the stockpile of uranium available for enrichment to weapons grade.

The Iranian political climate took a turn in June 2005 with the election to President of former Mayor of Tehran and hard-liner Mahmoud Ahmadinejad. The EU3 in August 2005 issued a

counter-proposal to Iran, proposing assured supplier provision of low-enriched uranium, storage of nuclear fuel in a third state, return of spent fuel to the supplier and a commitment to conduct enrichment domestically for 10 years. The counter-proposals of the EU3 were rejected outright they failed to recognize the Iranian right to enrich. In response to what were perceived by Iran as unreasonable demands Ahmadinejad resumed uranium enrichment and removed IAEA seals<sup>9</sup> in numerous facilities.

The negotiations were later joined by the US, Russia, China and Germany, making together the P5+1, however the disagreement on the issue of Iranian enrichment proved to be irreconcilable. This led to a declaration of non-compliance by the IAEA under, purportedly Article XII.C of the IAEA Statute and Article III.4, followed by a referral of the situation to the Security Council in late 2006 under the orders of the Director of the Board of Governors. This finding of non-compliance was based on Iran's history of concealment of its nuclear program from the IAEA from the mid 1980's onwards, as well as more recent and ongoing failings in the areas of neglecting to report its uranium enrichment related activities, non-disclosure of design information for planned construction of new nuclear related activities.<sup>10</sup>

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<sup>9</sup> Comprising of metal discs and wires with unique identification codes to prevent counterfeit production, these seals are placed on nuclear sensitive equipment such as centrifuges as well as doors, file cabinets and containers related to nuclear sensitive material in order to enable the IAEA to confirm that these items have not been tampered with or altered without IAEA monitoring.

<sup>10</sup> International Atomic Energy Agency, "Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran," GOV/2003/75, 10 November 2003 at 9

The Council acting initially by issuing a non-binding Presidential Statement called for suspension of uranium enrichment, to which Iran responded with the production of 3.5% enriched reactor grade uranium in Natanz, as well as its suspension of its voluntary implementation of the Additional Protocol and Modified Code 3.1 of its Subsidiary Arrangement, both of which Iran had voluntarily agreed to implement as confidence-building measures up until this time. This led to the adoption of Security Council resolution 1696 issued under Chapter VII of the UN Charter. Acting under Article 40 the Council purported to make mandatory the demand on Iran to cease uranium enrichment and all other reprocessing activities including research and development.

Iranian refusal to comply with this resolution, based on claims of its dubious legality, led to the adoption of further resolutions 1737, 1747, 1803 and 1929 under Article 41. These resolutions again called for the suspension of uranium enrichment and imposed targeted sanctions on the Iranian nuclear program chain of supply and affiliated persons and entities. The US and EU further expanded upon the content of the measures authorized by the Council in adopting unilateral economic sanctions against various Iranian sectors, including an oil embargo. Iran's refusal to adhere to the demands of the Council to halt enrichment even in the face of extensive sanctions led the US and Israel to contemplate alternative measures to coerce Iran into compliance. The prospect of limited military action targeting Iranian nuclear facilities was repeatedly threatened and an unprecedented cyber-attack, the Stuxnet virus, was directed against the Iranian nuclear program in 2010, causing extensive damage to the targeted facilities.

It is against this background that the following chapters unfold, in attempting to unpack the relevant legal provisions and investigate whether or not the various responses to the Iranian nuclear crisis were actions taken in accordance with the applicable international law.

## Chapter 2: The Legality of the Response of the International Atomic Energy Agency

*“So they have to tell us exactly what provisions of the NPT they're speaking of which they believe we have not abided by. There's no such case. They are interested in getting more information. And we're ready to cooperate with them and provide them with all information within the framework of international law”*

Mahmoud Ahmadinejad<sup>11</sup>

While taken as a factual certainty by many, including the IAEA BoG that Iran was in 2006 in a state of non-compliance with its CSA, this point is far from incontestable. Speculation that the Agency has targeted Iran for various incursions which, when committed by other NPT NNWS have not constituted the basis of such harsh international scrutiny have been made. Furthermore, the issue of provision of design information has proved highly contentious, as the initial revelation of the Iranian nuclear program revolved around the discovery of nuclear facilities under construction which the IAEA maintained should have previously been declared. Finally, Iran has contended that the Agency has made no finding of diversion of nuclear material from peaceful purposes in Iran, which invalidates a declaration of non-compliance with its CSA *ab initio*.

In order to accurately understand the Safeguards situation today it is therefore necessary to examine the way in which the Agency has previously dealt with instances which relate to non-compliance by other NNWS as well as the way in which non-compliance is defined within the parameters of the IAEA constituent Statute and further illustrative documents such as the content of the Comprehensive Safeguards Agreements and the Additional Protocol. In seeking to contend that Iran is in fact in breach of its CSA, it will also be necessary to investigate the disputed

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<sup>11</sup> A. Cooper , “Ahmadinejad: Why Is the U.S. So Pro-Israel?” CNN Interview, September 21, 2006, available at <http://www.cnn.com/2006/WORLD/meast/09/21/cnna.ahmedinejad/index.html> last accessed: 13/11/12

applicability of the Additional Protocol and the Modified Code 3.1 of Subsidiary Arrangement to Iranian-IAEA relations as without ascertaining the extent of the Safeguards obligations applicable to Iran one cannot accurately assess whether or not a violation has occurred.

This dispute is often misunderstood and misinterpreted, frequently presenting situations where ‘NPT breach’ and actions ‘inconsistent with’ the CSA are viewed as synonymous and interchangeable<sup>12</sup>. While from a legal standpoint the former may be contingent on the latter in a ‘two-sides of the same coin’ analogy it must be understood that a violation of a CSA obligation does not automatically translate to a breach of the NPT. More specifically, difficulty arises in establishing the nature of the activities which must be proven to merit the production of a report on non-compliance by the Board of Governors against a NNWS with a CSA, as referenced by Article XII.C of the IAEA Statute. This quandary calls into question the definition of non-compliance as a concept in the CSA itself, as the bilateral agreement in place between Iran and the IAEA.

In the case of design information provision, Iranian suspension of a modification to its Subsidiary Arrangement known as Modified Code 3.1, has been justified by Iranian reliance on the absence of ratification of the provision. The Subsidiary Arrangement to Iran’s Comprehensive Safeguards Agreement INFCIRC/214<sup>13</sup> was concluded between Iran and the IAEA in 1974. Subsidiary

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<sup>12</sup> J. Shire & D. Allbright, ‘Iran’s NPT Violations – Numerous and Possibly Ongoing?’ Institute for Science and International Security Report, September 2009 – Safeguards breaches are treated as automatic NPT breaches without further analysis

<sup>13</sup> IAEA INFCIRC/214, The Text of the Agreement between Iran and the Agency For the Application of Safeguards in Connection with the Treaty on Non-Proliferation of Nuclear Weapons, 13 December 1974, available at <http://www.iaea.org/Publications/Documents/Infciircs/Others/infciirc214.pdf>

arrangements are envisaged by Article 39 of the INFCIRC/214 and serve as the primary mechanism for defining the specific measures available to the IAEA in order to carry out effective monitoring and verification of non-diversion of nuclear materials from peaceful applications.

Initially Code 3.1 of the Model Subsidiary Arrangement provided that NNWS were required to inform the IAEA of new nuclear facilities 180 days prior to the introduction of nuclear material into the facility. However this provision has since been modified in line with the IAEA's 93+1 amendments to the current safeguards system in 1992, and as Modified Code 3.1 it now requires that the IAEA receives preliminary design information as soon as the decision or authorisation to construct a new facility is taken, whichever is earlier. Iran agreed to implement this altered code in a letter to the Agency dated February 26 2003, meaning the modification took effect in 2003.

As of a 2006 letter to the IAEA , Iran has declared itself unbound by Modified Code 3.1, stating that its reporting obligations are now derived from the initial 1976 Code 3.1. This is a contentious point in the overall evaluation of Iran's legal position as Iran has been accused of breaching its Safeguards Agreement as a result of failure to provide design information in line with Modified Code 3.1. Iran states that its failure to ratify the Subsidiary Arrangement means it was never legally bound to employ the provisions of the new code but rather did so voluntarily. In Iran's case, alleged violations of its CSA form the foundation of the IAEA's contentious referral of the case to the UN Security Council. The referral was denounced by Iran and Non-Aligned Movement members claiming it was an illegal act on the part of the Agency.

This argument is one rarely engaged with as Iran's actions are generally classed as 'breaches' of its CSA without greater scrutiny of what such a classification entails. Moreover, these 'breaches' are more often than not alluded to but rarely enumerated and examined in the context of the treaty which contains the allegedly breached obligations, the CSA. Furthermore, the Agency's mandate and the powers granted to it by virtue of its constitutive document the IAEA Statute are rarely considered in order to evaluate the legality of its treatment of the Iranian case. These violations have formed the basis for the argument that Iran may have breached its obligations under the NPT which in turn elevated the situation into an issue on a global scale, with international repercussions.

The starting point for an examination of the international community's treatment of the Iranian nuclear case must therefore be the relevant treaties at issue, the CSA, the document which governs the relationship between Iran and the IAEA and the IAEA Statute which lays down the mandate of the Agency. This chapter therefore will be concerned with delineating the relevant provisions and examining the way in which they are implemented in order to ascertain whether or not Iran's actions are inconsistent with its obligations and whether or not the Agency acted within the bounds of its mandate in its treatment of the situation.

### **The Legal Status of Subsidiary Arrangements**

It has been stated in IAEA reports on Iran's Implementation of Safeguards<sup>14</sup> that Iran's failure to provide design information as soon as the decision to construct a new facility had been taken with

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<sup>14</sup> GOV/2009/74, available at <http://www.iaea.org/Publications/Documents/Board/2009/gov2009-74.pdf>



regard to Qom and Arak represent conduct on Iran's part which is 'inconsistent with'<sup>15</sup> Iranian obligations under its Comprehensive Safeguards Agreement. More specifically, this behaviour was claimed to be in violation of the stipulations of its Subsidiary Arrangement. Subsidiary Arrangements as mentioned above, are mandated by Article 39 of the Comprehensive Safeguards Agreement which also states that such arrangements can be extended or amended by agreement between the Government of Iran and the Agency, without constituting an amendment to the Comprehensive Safeguards agreement itself. This amendment procedure contrasts with the proscribed method for amending the actual Safeguards Agreement which is laid down in Article 24 as analogous with the way in which the Safeguard agreement enters into force, which is by notification to the Agency that Iran's statutory and constitutional requirements have been met, that is according to Article 77 of the Iranian Constitution by ratification by the Islamic Consultative Assembly, known as the Majles.

Ratification of the Comprehensive Safeguards Agreement by the Majles occurred in 1976 thereby giving legal force to the provisions therein. Iran's legal ability to denounce the applicability of the subsequent Subsidiary arrangement therefore rests on an analysis of the nature of such arrangements, meaning that before endeavouring to state whether Iran has committed a Safeguards Breach by not adhering to Modified Code 3.1, one's approach must necessarily include an inquiry into the legal status of Subsidiary Arrangements. If it can be argued convincingly that Subsidiary Arrangements do not constitute legally binding instruments then Iran will not be seen to have violated its safeguards obligations regarding its failure to provide the aforementioned design

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<sup>15</sup> *Ibid* at 4

information. This is so because the actual provision of such information to the IAEA would then be legally governed by the content of Article 42 of the Comprehensive Safeguards Agreement, stating that design information must be provided ‘as early as possible’ before the introduction of uranium into the facility, further clarified by the original code 3.1 of the Subsidiary Arrangement (to which Iran claimed to revert), which defines ‘as soon as possible’ as ‘no later than 180 days’ before introduction of uranium into the facility.

The question therefore is, are Subsidiary Arrangements capable of classification as binding agreements entitled to treatment as treaties, which would firmly place amendment issues within the bounds of the Vienna Convention on the Law of Treaties or are these arrangements mere technical and instructive documents agreed informally for the purposes of clarifying an existing treaty, in this case the Comprehensive Safeguards Agreement, between Iran and the IAEA, therefore being confined to the status of a non-binding agreement?<sup>16</sup>

### **Iran’s Disputed Legal Position regarding Modified Code 3.1**

In correspondence made by Iran to the Agency in March 2007, the legal situation Iran believed to be in existence at the time was outlined, alerting the Agency of the consequences of Iran’s dissatisfaction with its handling of the nuclear issue, namely the suspension of modified Code 3.1.

According to Iranian Embassy documents, the Iranian argument at the time of suspension was as follows:

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<sup>16</sup> D. H Joyner, ‘The Qom Enrichment Facility: Was Iran Legally Bound to Disclose?’ Jurist-Forum, March 5 2010, available at <http://jurist.org/forumy/2010/03/qom-enrichment-facility-was-iran.php>

‘As long as the full implementation of the provisions of the Non-Proliferation Treaty (NPT), specifically achieving the inalienable rights stipulated in Article IV of the Treaty and the cessation of perusing Iran’s nuclear dossier with the United Nations Security Council, its full disengagement, and thus the return of the dossier to the framework of the IAEA, in full, is not realized; and as long as potential military adventures are not removed from the table and threats to Iran’s security are not eliminated, further implementation of the modified code 3.1 of the Subsidiary Arrangements to the Safeguards Agreement, accepted in 2003, but not yet ratified by the parliament, aimed at enhancing Iran’s cooperation with the IAEA, shall be suspended and Iran reverts to implement the code 3.1 as reflected in the Subsidiary Arrangements on 12 February 1976.’<sup>17</sup>

Joyner opines<sup>18</sup> that Iran has not acted inconsistently with legal obligations incumbent upon it by virtue of its suspension of Modified Code 3.1 of the SA in favour of reversion to original Code 3.1. Joyner opines that Iran acted fully within the bounds of international law in suspending its cooperation with the new code, based on the contention that the code and the original SA are not binding agreements capable of producing legal obligations. Rather he contends that they are informal agreements between the IAEA and Iran. Cooperation with such informal agreements is based on the general international law principle of good faith but adherence is voluntary and subject to unilateral suspension at any given time at the will of either party without legal consequence.

This author agrees with Joyner’s classification of SAs as informal agreements which as stand-alone documents do not create legally binding obligations upon the parties. However it must be considered that failure to adhere to the provisions of such documents has legal consequences when

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<sup>17</sup> ‘Nuclear Activity – Basic Facts about Iran’s Nuclear Program’ - The Embassy of the Islamic Republic of Iran in Oslo, available at <http://iranembassy.ro/en/6.htm>

<sup>18</sup> D. Joyner, ‘The Qom Enrichment Facility – Was Iran Legally Bound to Disclose?’ The Jurist Forum, March 5 2010, available at <http://jurist.org/forumy/2010/03/qom-enrichment-facility-was-iran.php>

one considers the possible interpretive role played by SAs in relation to specific provisions of the CSA. The character and potential significance of SAs requires scrutiny in order to analyse whether or not departure from their provisions produces legally consequences.

### **Subsidiary Arrangements are not Treaties**

The Vienna Convention on the Law of Treaties<sup>19</sup> provides the foundation for any inquiry into treaty status and According to Article 2(1)(a)

“‘treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or two or more related instruments’.<sup>20</sup>

It is clear from this passage that informal agreements which do not purport to create legally binding obligations do not fall within the definition provided, as the phrase ‘governed by international law’ excludes the possibility of inclusion of such agreements. The drafting of Article 2 was subject to debate regarding the inclusion of reference to treaties as agreements specifically ‘intended to create legal rights and obligations’ as proposed initially by Lauterpacht<sup>21</sup> or ‘an international agreement...intended to create rights and obligations, or to establish relationships governed by international law’ as per Fitzmaurice.<sup>22</sup> This debate was seen to be settled by the exclusion of such phrases in the 1966 Draft Articles which alludes to the fact that ‘governed by international law’ has subsumed the issue and relates to the dominant intention of the parties to create legally binding relations. A lack of intention to enter into a legally binding agreement will mean the agreement will remain informal in the sense that the provisions therein will not bind the parties.

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<sup>19</sup> Hereinafter ‘VCLT’

<sup>20</sup> Article 2(1)(a) Vienna Convention on the Law of Treaties

<sup>21</sup> Yearbook of the International Law Commission, 1953 Volume II, p96

<sup>22</sup> YILC, 1959 vol II, p96

In order to ascertain the intention of the parties to be bound to an agreement numerous factors, none of which are dispositive alone, may be considered. These include the appellation of the instrument, the entry into force and amendment procedures proscribed for the instrument and whether or not the instrument is registered under Article 102 of the UN Charter, for example. Joyner relies on the former pair of indicators to contend that SAs lack legally binding force as the parties did not intend to enter into a legal commitment – first the title ‘Arrangement’ connotes an informal undertaking, this is supported by Aust<sup>23</sup> in pronouncing that British general practice at least in concluding agreements dictates that the term ‘Arrangement’ denotes an informal undertaking.

Furthermore, with regard to entry into force and modifications to SAs, Joyner notes a marked contrast between the detailed entry into force and amendment procedure for CSAs outlined in Articles 24 and 25 CSA, requiring constitutional requirements to be met regarding amendments to the treaty and its entry into force pursuant to ratification by Iran. In contrast there is a lack of precision present on the issue of entry into force of SAs in Article 39 CSA. Article 39 CSA briefly states that SAs may be extended or changed by agreement of the parties without constituting amendment of the CSA. The fact that the term ‘change’ is employed rather than amendment suggests that modifications to the SA are informal and it follows that if an agreement is an international agreement in the formally, binding sense then extension or modification of such an

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<sup>23</sup> A. Aust, ‘The Theory and Practice of Informal International Instruments’ 35 *International and Comparative Law Quarterly* 787 (1986)

agreement in itself constitutes a new international agreement, the possibility of which is excluded here.<sup>24</sup>

Moreover ‘changes’ to the SA may be made by agreement between the parties and entry into force procedures are not specified in Article 40 which states that SAs shall enter into force at the same time or as soon as possible after the entry into force of the CSA, therefore SAs do not require parliamentary approval to enter into force or for implementation of a change to the document. According to Article 77 the Constitution of the Islamic Republic of Iran ratification by the Islamic Consultative Assembly, the Majlis, is required to give legal effect to an international treaty. Usually in practice this process is extended by then submitting the treaty in question to the Council of Guardians for approval followed by signature by the President.<sup>25</sup>

Ratification of the CSA by the Majlis occurred in 1976 thereby giving legal force to the provisions therein and expressly evidencing the requisite intention to make legally binding commitments, an intention which is not evident in the case of SAs, which were not expressly required to be submitted for ratification by Article 39 CSA. Consent to be bound can be expressed in numerous ways, the least formal of which requires merely agreement of the parties but given the fact that Iran routinely submits agreements it intends to have legally binding effects for ratification the fact that Iran consented to the provisions of SAs without submitting them for parliamentary approval evidences a lack of intention to create a legally binding agreement.

On the basis of the above contentions Joyner opines that it is uncertain that the requisite intention to be legally bound by SAs or modifications thereto was present at least in Iran’s case, as is the

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<sup>24</sup> A. Aust, ‘The Theory and Practice of Informal International Agreements,’ 35 Int’l Comp. LQ 787 at 799 citing the International Agreement Regulations of the US State Department, 22 Code of Federal Regulations Part 181

<sup>25</sup> M. Akefi Ghazi, ‘Iranian Judiciary Facing Human Rights Norms or Islamic Criteria’ Journal of Middle Eastern and Islamic Studies (in Asia) Vol. 5, No. 3, 2011 at 48

paramount prerequisite for formation of a binding international agreement by virtue of the aforementioned Article 2(a)(1) VCLT and also embodied in Articles 11-17 of the Convention. It follows from this tentative conclusion that Iran has not breached any legal obligation incumbent upon it with regard to provision of facility design information as the only commitment Iran consented to be legally bound to is contained in Article 42 CSA, requiring the provision of design information ‘as early as possible before nuclear material is introduced into a new facility’. Given the fact that nuclear material has yet to be introduced into the Qom facility, Iran’s conduct would appear to be consistent with this vague and imprecise obligation.

### **Intention to be Bound and *Qatar v Bahrain***

Recent International Court of Justice jurisprudence has dealt with the objective ascertainment of intentions of the parties to enter into a legally binding commitment by emphasising the actual content of the document in question as well as the context in which it was drawn up when the binding nature of a document is unclear. As the text of the SA is not available for perusal, brief examination of this basis of contention that SA’s could be legally binding despite their lack of formality is warranted.

The possibility of documents which *prima facie* appear to be less formal in their nature and conclusion than treaties can amount to international agreements was explored in the International Court of Justice the *Case concerning Delimitation of the Aegean Sea Continental Shelf (Greece v. Turkey)*<sup>26</sup> and later in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* during the Jurisdiction and Admissibility proceedings.<sup>27</sup> In the latter case, Bahrain disputed Qatar’s contention that the minutes of a meeting (the Doha Minutes) between the two

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<sup>26</sup> I.C.J. Reports 3 [1978]

<sup>27</sup> I.C.J. Reports 7 [1994]

parties and Saudi Arabia acting as a mediator could constitute an international agreement as provided for by Article 36 ICJ Statute as the basis of the Court's jurisdiction.

The Court considered, *inter alia*, the appropriate weight to be attributed to the subjective intentions of each party to enter into a legally binding agreement as well as the substance of the act itself in coming to the conclusion that the Doha Minutes did in fact constitute an international agreement capable of attracting ICJ Jurisdiction and falling within Article 2 VCLT. This was a consistent progression from earlier dicta in the *Aegean Sea* case pronouncing that there was no rule in international law that would preclude an informal document such as a joint communiqué from being considered legally binding, establishing the binding nature of such instruments by having 'regard above all to its actual terms and the particular circumstance in which it was drawn up'.<sup>28</sup>

Klabbers opines that *Qatar v Bahrain* is an important case for two reasons, firstly it 'makes it clear that any commitment is a legal commitment' and secondly it 'establishes something of a methodology for ascertaining the true nature of an international instrument', the latter of which he posits is based primarily on the actual terms of the act and whether or not commitments can be extracted from the text rather than the mindset of the parties to the act.<sup>29</sup> Simply put, if the text allows for ascertainment of commitments then it is a legal text creating legally binding commitments.

In *Qatar v Bahrain* the Court classified the Doha Minutes as constituting an international agreement contrary to Bahrain's contention that the minutes merely represented a record of the negotiations which had just taken place between the parties and that the Bahraini Foreign Minister

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<sup>28</sup> *supra* n.22 *Aegean Sea* at 39 para. 96

<sup>29</sup> J. Klabbers, *The Concept of Treaty in International Law* (The Hague, Kluwer Law International) (1996) at 214



had no intention to create a legally binding agreement in signing the minutes.<sup>30</sup> The Court's finding was based, as Klabbers contends, on the fact that the text of the document enumerated commitments to which the parties had agreed within the negotiations rather than just merely recording the content of the discussion at the meeting. Furthermore within the broader context of its enactment, the agreement could be seen as a progression within the framework established by an earlier document, the 1987 Agreement based on an exchange of letters by the parties through the intermediary of Saudi Arabia, which both parties agreed constituted a binding legal agreement.

With regard to the former dominant concern of intention to enter into legal relations, 'a legacy of international law's voluntarist origins'<sup>31</sup> the Court appeared content to confine such concerns to an objective examination, satisfied that having signed such a text (reference to the actual content) the Bahraini Foreign Minister could not subsequently say he only intended to subscribe to a statement recording a 'political understanding' rather than an international agreement, thus excluding subjective intention from the equation. Finally the Court went as far as to state that the failure to seek parliamentary approval of the instrument by both parties was not indicative of a lack of intention to be legally bound and even if it were taken to be so, this still would not prevail over the actual content of the text to which the parties consented, which in Iran's case, would weaken arguments regarding unorthodox entry into force mechanisms prohibiting a finding of intention to create legally binding obligations. It can be deduced from this that a strict textual

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<sup>30</sup> which was apparently evidenced by the failure on the part of the Minister to seek parliamentary approval of the instrument, a state of affairs comparable to Iran's contention that it is not legally bound to Modified Code 3.1 as this change to the SA was not ratified

<sup>31</sup> M. Fitzmaurice and O.A Elias, *Contemporary Issues in the Law of Treaties* (Utrecht: Eleven International Publishing) (2005) at 5

interpretation is the order of the day with regard to seemingly informal instruments, a domain the governance of which before *Aegean Sea/Qatar v Bahrain* was somewhat uncertain.

The relevant argument to be extracted from *Aegean Sea* and *Qatar v Bahrain* therefore is that positive findings regarding the binding nature of international instruments have been made previously and the primacy of ‘actual content and context’ aids analysis of whether or not by employing the ICJ’s methodology SAs could arguably constitute international agreements accorded legally binding force. Drawing an analogy between the Doha Minutes and the SA permits the reasoning that if a commitment can be extracted from the latter instrument such a commitment is one to which the parties have consented, which then gives rise to rights and obligations in international law incumbent upon each party thus constituting an international agreement. The Doha Minutes were seen to lay down the commitment arrived at through negotiations which took place at the meeting, to submit the dispute to the ICJ after a defined period of time elapsed without resolution of the dispute between the parties. Each party consented to be bound to this commitment by signing the document.

In relation to the case at hand, the outcome of the negotiations regarding the finer technical points of the SA, as envisaged by Article 39 CSA, to define the measures necessary for effective implementation of the CSA is recorded in the SA itself. Furthermore, within these negotiations it could be argued that various commitments, such as the commitment to adhere to an agreed timeframe for provision of design information by Iran to the IAEA were established and that each party agreed to the provisions discussed in the negotiations. These agreed provisions gave rise to

commitments out of which obligations and rights in international law were created and this consent is evidenced by the exchange of letters bringing the international agreement into force. Iran, having consented to these commitments could not subsequently claim to have intended to merely conclude a ‘political understanding’.

If one accepts this reasoning, the possibility that SAs could constitute legally binding, stand-alone international agreements exists, if one imputes the requisite intention to be legally bound from the fact that commitments entailing obligations were consented to in concluding SAs. The principle of textual primacy and paramount consideration of the actual content and context of the agreement in question can only go so far in resolving the issue of whether or not an intention to create a legally binding agreement in the form of SAs is manifest in this situation due to the fact that SAs have not been published.<sup>32</sup> In this author’s view such an intention to be bound, despite the enumeration and agreement to procedural constraints in the SA, is more likely deliberately lacking in this instance in order to preserve the informal status of the agreement.

Taking into account the fact that SAs have not been published and take a notably less formal approach to terminology, these anomalies are arguable indicative of the intention of both parties to the SA to conclude an agreement which necessarily and intentionally lacks autonomous legally

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<sup>32</sup> A Model text of Codes 1-9 of Subsidiary Arrangements has been made publicly available and offers some basis for analysis, available at [http://www.iaea.org/safeguards/documents/Online\\_Version\\_SG-FM-1170\\_-\\_Model\\_Subsiary\\_Arrangement\\_Code\\_1-9.pdf](http://www.iaea.org/safeguards/documents/Online_Version_SG-FM-1170_-_Model_Subsiary_Arrangement_Code_1-9.pdf)

binding force but derives legal significance from the interpretive light it sheds on specific provisions of the CSA which envisaged its enactment initially.

### **The Relationship between Comprehensive Safeguards Agreements and Subsidiary Arrangements**

As noted above, CSAs undoubtedly constitute treaties comprising of legally binding obligations to which Iran consented upon ratification of the document in 1974. Article 39 CSA envisages the enactment of SAs to ‘specify in detail...how the procedures in this Agreement are to be applied’<sup>33</sup> as well as stating that changes to or extension of SAs require merely the agreement of the IAEA and Government of Iran and such changes will not constitute an amendment to the CSA itself, i.e. such changes will not require parliamentary approval. Iran’s SA was concluded in 1976 by exchange of letters between the IAEA and the Government of Iran without consulting the Majlis, and initially contained the standard Code 3.1 provision regarding provision of design information for new facilities, which in practice over the years proved ineffective and was subsequently replaced by Modified Code 3.1 which was consented to by Iran in 2003, as a confidence building measure following the MEK revelations. This consent again was expressed via exchange of letters between the IAEA and Iran without recourse to the ratification procedure. The text of Model Code 1-9 states that SAs ‘give effect to Article 39’ of the CSA, therefore their existence cannot be analysed in isolation from the CSA itself.

Non-legally binding agreements are frequently concluded with the purpose of ‘fleshing out’ vague provisions of a treaty in order to aid their implementation by the treaty parties<sup>34</sup>, meaning one must consider the precise relationship between SAs and CSAs, the latter of which undoubtedly compose

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<sup>33</sup> Article 39 INFCIRC/214

<sup>34</sup> H. Hillgenberg, ‘A Fresh Look at Soft Law’ 10 EJIL 499 (1999) at 506

treaties between the IAEA and NNWS parties to the NPT. In fact quite often this very type of agreement is employed in situations where the agreement requires great technical detail and/or involves confidential or sensitive subject matter, the type of which can be said to be found in SAs. It is necessary therefore to ascertain firstly the nature of SAs and secondly the interplay between the CSA and SA in order to assess what bearing provisions of the latter may have on the former.

### **Subsidiary Arrangements are Informal Agreements**

According to Aust simplicity, speed, flexibility and confidentiality, are the main procedural considerations which influence states and international organisations to enter into agreements which do not possess the hallmarks of legally binding agreements.<sup>35</sup> Particularly in rapidly developing highly technical fields such as nuclear energy production, such agreements find favour over formal instruments because of the ease of modification of an informal agreement as opposed to the time-consuming and costly amendment procedure required for treaties. Interestingly, Acton notes that on numerous occasions Iran has taken advantage of this expeditious informal modification procedure in relation to expansion of its facility at Natanz, executing such changes by exchange of letters with the IAEA.<sup>36</sup>

Further pointing to the possibility that SAs are designed as informal agreements to take advantage of the benefit of expeditious modification is the express reference to the fact that changes to SAs will not constitute amendments to the CSA. Article 39 states that SAs ‘may be extended or changed by agreement between the Government of Iran and the Agency without amendment of this

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<sup>35</sup> *supra* n.19 Aust at 807

<sup>36</sup> J.M. Acton, “Iran Violated International Obligations on Qom Facility,” Carnegie Endowment for International Peace Online (September 25,2009). Available at <http://www.carnegieendowment.org/2009/09/25/iran-violated-international-obligations-on-qom-facility/6u2>

Agreement'.<sup>37</sup> Such a reference suggests implicitly that the documents are related, if this were not the case then it would be superfluous to specify that changes to one do not amount to an amendment of the other.

More importantly such a provision could be designed to address a primary difficulty with the use of informal agreements enacted for the purpose of interpreting existing treaty provisions, which is that agreements which seek to amend rather than interpret or specify the correct application of a treaty provision may not qualify as a subsequent agreement for the purposes of Article 31.3.a of the VCLT<sup>38</sup> but rather would require recourse to the formal amendment process. The formal amendment process for the CSA requires ratification pursuant to Article 24 CSA.<sup>39</sup> Therefore the exclusion of the amendment procedure in relation to SAs in Article 39, coupled with the ostensible lack of intention to create a legally binding agreement suggests that such documents are designed to constitute informal agreements which interpret or specify how the provisions of the CSA are to be applied. The SA can be altered over time by agreement of the parties, both of whom have agreed that the extent of changes to SAs will not amount to an amendment of the CSA. This permits the parties to avail of an expeditious modification process which as stated above is desirable for such technical arrangements.

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<sup>37</sup> Article 39 INFCIRC/214

<sup>38</sup> See below

<sup>39</sup> Article 24 INFCIRC/214 states: (a) The Government of Iran and the Agency shall, at the request of either, consult each other on amendment to this Agreement.

(b) All amendments shall require the agreement of the Government of Iran and the Agency.

(c) Amendments to this Agreement shall enter into force in the same conditions as entry into force of the Agreement itself.

(d) The Director General shall promptly inform all Member States of the Agency of any amendment to this Agreement.

Furthermore, the element of confidentiality afforded to such informal agreements is highly desirable to states such as Iran seeking to protect detailed information relating to their nuclear facilities and installations, the kind of which is annexed to SAs. Informal agreements need not be published or registered under Article 102 of the UN Charter<sup>40</sup> therefore affords states such protection and it is noteworthy that SAs are neither published nor registered under the Charter. A useful precedent illustrating preference for an informal technical arrangement to implement an existing treaty is found in the 1963 UK/US Agreement on Polaris Missiles, the detailed provisions of which are contained in confidential technical arrangements envisaged by Article II.2 of the initial agreement.<sup>41</sup> It is worth noting however, that while the allure of confidentiality afforded by non-registration of SAs is understandable, according to paragraph 2 of Article 102

No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

This particular provision will necessarily require investigation later in this study and could have ramifications. As SAs are unregistered under the Charter meaning that the IAEA's referral to the Security Council regarding Iran's actions which are 'inconsistent with'<sup>42</sup> its SA obligations may be impermissible under the Charter.

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<sup>40</sup> Article 102 states that

1. Every treaty and every international agreement entered into by any Member of the United-Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

<sup>41</sup> U.K Treaty Series. No.59 of 1963 (Cmnd.2108)

<sup>42</sup> Security Council Resolution 1929 (2010) available at [http://www.iaea.org/newscenter/focus/iaeaيران/unsc\\_res1929-2010.pdf](http://www.iaea.org/newscenter/focus/iaeaيران/unsc_res1929-2010.pdf)

It was suggested above in line with Joyner's views that the terminology and procedures employed within SAs seemed to point towards a lack of intention to create a legally binding agreement. This lack of intention in Joyner's opinion meant that SAs were necessarily agreements giving rise to no legally binding obligation or legal consequence meaning that in suspending its adherence to Modified Code 3.1, Iran has not breached any legal obligation incumbent upon it and acted fully within its rights. He further states that the only legally binding obligation applicable to Iran regarding the provision of design information therefore is contained in Article 42 of the CSA. This contention stands in opposition to the views of Ford<sup>43</sup> and Persbo<sup>44</sup>, both of whom argue that breaches of SAs constitute breaches of the CSA. Joyner does not consider that a relationship exists between the binding CSA and non-binding SA which could have legal consequences and it is at this juncture that a divergence from Joyner's reasoning is endorsed.

This author contends that departures from traditional treaty language and procedures can produce a presumption that the parties intended to create a deliberately informal agreement so as to avail of the above listed advantages, rather than merely indicating a possible lack of demonstrated intention to create a binding agreement. Furthermore it is suggested that such informal agreements are not entered into in this context to relieve parties of any defined binding commitments extractable from SAs so as to render such documents merely exhortatory or political in nature. Rather it is opined that SAs constitute informal agreements which in and of themselves are not

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<sup>43</sup> C.A. Ford, 'Iran, Non-Proliferation and the IAEA: A Legal History', Security and Foreign Affairs Briefing Paper, Hudson Institute, November 2012, at 5, available at <http://www.hudson.org/files/publications/Ford--IranIAEAPaper1112.pdf>

<sup>44</sup> A.Persbo, 'Iran and the Bomb, the Legal Standards of the IAEA', Roundtable Debate, Bulletin of the Atomic Scientists, 10 November 2012, available at <http://www.thebulletin.org/web-edition/roundtables/iran-and-the-bomb-the-legal-standards-of-the-iaea?order=asc>



legally binding, the provisions of which gain legal significance through their interpretive relevance in relation to Article 42 of the CSA, by virtue of Article 31 of the VCLT.

### **Interplay between the CSA and SA – Interpretive Relevance and Article 31 VCLT**

The Oxford Dictionary defines the word ‘subsidiary’ as ‘less important than but related or supplementary to something’<sup>45</sup> from which one could impute the intention to enter into a less important or lesser status agreement, which would imply an informal or non-legally binding agreement which gains its purpose or importance through being related or supplementary to something, that something being CSAs in the case of SAs. Article 31 of the VCLT governs treaty interpretation and along with Articles 32 and 33 constitutes an accurate reflection of customary international law, meaning they bind signatories and non-signatories of the Convention alike.

Article 31 equips the treaty interpreter with the necessary tools to extract the correct interpretation from a treaty, focusing on the plain and ordinary meaning of the words therein, the context of the treaty and in addition, extrinsic means which although not constituting a part of the context of the treaty do not amount to supplementary means of interpretation. This distinction is worth noting as recourse to supplementary means of interpretation such as the *travaux préparatoires*, governed by Article 32 VCLT<sup>46</sup>, is permitted only when an Article 31 based inquiry yields an interpretation which is ambiguous or absurd. Article 31 is the standard interpretive clause of the VCLT, the

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<sup>45</sup> Oxford Dictionaries, available at <http://oxforddictionaries.com/definition/english/subsidiary>

<sup>46</sup> Article 32 VCLT : Supplementary means of interpretation states:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or  
(b) leads to a result which is manifestly absurd or unreasonable.

provisions of which are to be applied in a ‘holistic’ fashion which is pertinent because it blurs the distinction between the operational effect of documents which form part of the context of the treaty and documents and evidence which are extrinsic to the treaty but have a concrete bearing on its interpretation.<sup>47</sup>

This approach does not advocate picking and choosing a favoured provision of Article 31 but rather it suggests that each heading should be given consideration when relevant rather than the selection of one heading to the exclusion of all others. An examination of Article 31 in this context is required, as opined by Aust:

‘It is not usually necessary to determine the precise status of an informal subsidiary instrument which is in the nature of a statement of interpretation of a treaty. The rules relating to such instruments in Article 31 of the Vienna Convention on the Law of Treaties probably cover most cases adequately.’<sup>48</sup>

SAs are informal agreements enacted in order to clarify the correct interpretation and application of provisions of the CSA. As noted above the Convention dictates that the context of the treaty is to have a bearing on its interpretation, based on Article 31.2, which states:

The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.<sup>49</sup>

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<sup>47</sup> R.K Gardiner, *Treaty Interpretation*, (OUP 2008) at 225

<sup>48</sup> *supra* n.19 Aust at 804

<sup>49</sup> Article 31.2 VCLT available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)

Article 31.2 therefore covers the basic internal context to be considered in that it is comprised of the text, preamble and annexes as well as an extension of what is to be considered internal context in the form of agreements made in connection with the conclusion of the treaty. The basic internal context includes a consideration of the content of the text in that one may look to the interrelation between provisions of the treaty at hand and the wording of surrounding provisions or provisions pertaining to similar matters in attempting to ascertain the meaning of a given provision. It is worth noting that context in Article 31.2 refers strictly to the textual nature of treaty provisions to ensure harmonious interpretation of provisions as a whole rather than referring to an expansionist view of context which considers the broad context in which the treaty itself operates, for example the common-sense or political context surrounding the treaty.<sup>50</sup>

The International Law Commission clarified that in the case of Article 31.2.a and b agreements made in connection with the conclusion of the treaty, such as declarations of interpretation and annexes to the treaty made before or at the time of its conclusion ‘is to be regarded as forming part of the treaty’.<sup>51</sup> Therefore they could be regarded as forming the extended internal context of the treaty, in that they form a permissible extension to the initial basic preamble and text. It is clear that SAs, although envisaged in the text of the CSA at Article 39 are negotiated and concluded after the conclusion of the CSA itself. ‘Conclusion of the treaty’, in short, can be taken in this context to mean the date which the treaty was adopted and opened for signature, rather than the date of entry into force<sup>52</sup> therefore temporally SAs will not form part of the context of the treaty

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<sup>50</sup> A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, (OUP 2008) at 340

<sup>51</sup> YILC 1966, vol II, p221 at para 14

<sup>52</sup> *supra* n.25 Klabbers at 211

for interpretation purposes but must fall under the next category to carry definite interpretive weight.

### **SAs are Subsequent Agreements under Article 31.2.(a) VCLT**

Article 31.3 VCLT states that there shall be taken into account, together with the context,

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.<sup>53</sup>

The International Law Commission has clearly stated that such agreements regarding interpretation of a treaty made after its conclusion represent ‘an authentic interpretation by the parties which *must* be read into the treaty for the purposes of its interpretation.’<sup>54</sup> This passage was further cited with approval by the ICJ in the case of *Kasikili/Sedudu Island (Botswana/Namibia)*.<sup>55</sup> One must therefore consider what the necessary ingredients of a subsequent agreement for the purposes of Article 31.3.(a) are and whether or not SAs fit the mould. If SAs meet the requirements of Article 31.3.(a) then they must be read into the CSA and therefore failure to adhere to provisions of the SA will be tantamount to breaching the specific provisions of the CSA for which it provides the ‘authentic interpretation’.

It is here that the aforementioned blurred distinction between intrinsic and extrinsic context occurs, as we are directed by Article 31.3 to take subsequent agreements into account ‘*together* with

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<sup>53</sup> Article 31.3 VCLT available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)

<sup>54</sup> YILC 1966, vol II, p221 at para 14 emphasis added

<sup>55</sup> [1999] ICJ Reports 1045, 1076 at para 49

context.’<sup>56</sup> On this point Waldock opined that full weight should be given to this opening phrase of paragraph 3, as

...these words were intended by the Commission to put such interpretive agreements on the same level as the ‘context’ and to indicate that an interpretive agreement is to be taken into account as if it were part of the treaty.<sup>57</sup>

This is significant because although they are separated into distinct subsections, it is clear that in a practical sense agreements falling within context under article 31.2 and subsequent agreements under Article 31.3.a produce legally analogous consequences, the former to be considered as forming ‘part of the treaty’ and the latter to be ‘read into the treaty’, which according to Waldock amounts to forming part of the treaty itself.

The notion of ‘authentic interpretation’ has been described by Wolfrum and Matz as ‘a direct expression of the principle of consensus’<sup>58</sup> the result of which, according to Villigier is that such an interpretation more than merely reliable but also ‘endowed with binding force’.<sup>59</sup> The Permanent Court of International Justice in its *Advisory Opinion on the Question of Jaworzina*<sup>60</sup> stated that

It is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has the power to modify or suppress it.<sup>61</sup>

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<sup>56</sup> Article 31.3 VCLT

<sup>57</sup> YILC 1966, vol II, p95 at para 6

<sup>58</sup> R. Wolfrum and N. Matz, *Conflicts in International Environmental Law*, (Springer 2003) at 141

<sup>59</sup> M. Villigier, *Commentary on the Vienna Convention on the Law of Treaties*, (Leiden: Martinus Nijhoff 2009) at 429

<sup>60</sup> *Advisory Opinion on Question of Jaworzina*, P.C.I.J (ser. B) No.8 (Dec 6)

<sup>61</sup> *ibid* at 37

The Arbitral Tribunal in *ADF Groups Inc v USA*<sup>62</sup> concluded that the Free Trade Commission Interpretation of July 31 2001, having been accepted by all the parties, was reflective of the true intentions of the parties as to the correct interpretation of certain provisions of North American Free Trade Agreement<sup>63</sup>. As such, it was opined that ‘no more authentic and authoritative source of instruction on what parties intended to convey in a particular provision of NAFTA is possible.’<sup>64</sup>

This stance was also taken by the Arbitral Tribunal in *Mondev International Ltd. v USA*.<sup>65</sup> The above pronouncements are wholly consistent with the weight placed upon subsequent agreements by the ILC and evidence the fact that provisions of subsequent agreements have legal consequences. In the case of SAs, as with any other form of interpretive agreement, given the fact that parties are the masters of their own treaty, an express pronouncement on the exact meaning agreed by the parties themselves is necessarily authoritative and dispositive. The provisions contained within the SA represent the meaning which the IAEA and Iran agreed would constitute the correct interpretation of Article 39 CSA, therefore no more authentic interpretation of the provision is possible.

It must be noted that an analogy between the case law of the NAFTA Arbitral Tribunal and the bilateral relations between the IAEA and Iran is not wholly harmonious but provides applicable guidelines for reaching a conclusion that SAs could qualify as subsequent agreements as envisaged by Article 31.3.a. The divergence between the situations lies in the fact that the power to interpret provisions of NAFTA is vested in the Free Trade Commission, composed of the trade minister

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<sup>62</sup> *ADF Groups Inc v USA*, Award (Jan 9 2003)

<sup>63</sup> North American Free Trade Agreement, available at <http://www.nafta-sec-alena.org/en/view.aspx?x=343>

<sup>64</sup> *supra* n58 *ADF Groups* at 177

<sup>65</sup> *Mondev International Ltd v USA*, Final Award (Oct 11 2002) 120-125

from each NAFTA state, by virtue of Article 1131(2) of NAFTA. This article grants the Commission the power to issue interpretive declarations binding for the purposes of Chapter 11 arbitration, as it did in the form of the FTC Interpretation. Therefore there is a dedicated interpretive mechanism built into the NAFTA regime, which constitutes *lex specialis* on the issue.

There is no analogous free-standing interpretive organ in the bilateral relations between the IAEA and Iran which has the authority to issue binding interpretive declarations. However a parallel between the FTC Declaration and the SA as a subsequent agreement under Article 31.3.a can be made. The FTC Declaration derives its status as an ‘authentic interpretation’ from the fact that it is literally the pronouncement of the will of all the parties to NAFTA regarding its correct interpretation, as stated above in *ADF v USA*. The authenticity of the Declaration rests on the fact that Canada, the United States and Mexico all contributed to the interpretation, in the same way that SAs were negotiated between the two parties to the agreement, Iran and the IAEA, arriving at the agreed interpretation of Article 39 CSA as constituted by the contents of the SA. Given that the purpose of interpretation of a provision of a treaty is to derive the true meaning the parties to the treaty intended to convey therein, an agreement on such an interpretation as is present in SAs is necessarily authentic and authoritative.

Next the acceptable form of subsequent agreements must be considered, in order to ascertain whether the informal nature of SAs will hinder their applicability as subsequent agreements under Article 31.3.a. The parameters of such subsequent agreements were considered further in various other NAFTA disputes such as by the Arbitral Tribunal in *Methanex Corp v United States of*

*America*,<sup>66</sup> again regarding the status of the FTC Interpretation, which was held to be capable of constituting a subsequent agreement for the purposes of Article 31.3.a, which was therefore legal and binding. The tribunal concluded that with regard to the form of the subsequent agreement, the wording of Article 31.3.a provides that such agreements need not be concluded in the same formal manner as a treaty, (that is they can take the form of informal agreements) as to require a formal treaty would render the provision 'otious'.<sup>67</sup> This view is based upon by the ICJ decision in *Botswana/Namibia*, which placed more emphasis on the 'fact' of agreement than the form of the agreement.<sup>68</sup>

Article 31.3.a seeks out an express agreement between the parties which evidences the intention of the parties to lay down an agreed interpretation of a specific treaty provision. The requisite intention in the case of treaty interpretation under Article 31.3.a therefore is not to create a legally binding agreement as is the case when one is analysing whether or not an agreement is legally binding but rather what is required is an intention that the understanding of the parties will constitute the basis for agreed interpretation and/or agreement on how the provisions are to be applied. Therefore informal agreements such as SAs are capable of constituting subsequent agreements for the purposes of Article 31.3.a despite the fact that they do not produce autonomously binding obligations.

In the case of Iran and the IAEA, it cannot be disputed that the fact of agreement between the parties regarding interpretation of the CSA is identifiable as such agreement of the parties is

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<sup>66</sup> *Methanex Corp v USA*, Final Award (August 3 2005)

<sup>67</sup> *ibid* at 20

<sup>68</sup> *supra* n51 *Botswana/Namibia*



embodied by the SA and the consent of each party to the contents of the document as evidenced by the exchange of letters. If this fact of agreement was not abundantly obvious, one may look to Article 31.3.b regarding subsequent practice, which if found to be concordant, common and consistent<sup>69</sup> can evidence the fact of agreement of the parties to interpret a treaty provision in an agreed manner, but given the fact that an express agreement exists here in a concrete sense in the form of the SA, there is no need to identify practice which infers an agreement therefore an inquiry into the subsequent practice of the parties is not wholly necessary.

The final consideration in assessing whether or not SAs will qualify as ‘authentic interpretations’ as envisaged by Article 31.3.a is whether or not such agreements meet a certain ‘specificity threshold’ which serves as the mechanism which ensures that a sufficient nexus between the treaty in question and the agreement purporting to interpret it exists. What needs to be understood in this instance is that ‘agreement *per se*’ will not suffice, what is required is agreement regarding the correct interpretation or application of a specific provision. This requirement is evidenced in the case of *European Communities - Regime for the Importation, Sale and Distribution of Bananas* before the World Trade Organisation Appellate Body, in which it was confirmed that Article 31.3.a is intended to cover only ‘agreements bearing specifically upon the interpretation of a given treaty’ or ‘specifying how existing rules and obligations in force in a treaty are to be applied.’<sup>70</sup>

According to Van Damme there is little practice to aid analysis in this area due to the fact that in the multilateral context there are limitations on the effectiveness of this provision. This is due to

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<sup>69</sup> *Japan – Tax on Alcoholic Beverages II*, WTO Appellate Body Report (4 October 1996) at 13

<sup>70</sup> *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, Panel Report (19 May 2008) at paras 390-391

the fact that the larger the group of signatories the more difficult it is to prove an agreement was aimed primarily at interpreting particular meanings within a treaty.<sup>71</sup> This consideration is not such an obstacle in the Iran-IAEA context as SAs constitute bilateral agreements enacted with a specific purpose, which is to ‘give effect to’ Article 39 of the CSA, which provides that the SAs shall specify in detail how the procedures in the CSA are to be applied. As such, SAs are agreements specifically enacted in order to constitute the agreed ‘authentic interpretation’ of Article 39 of the CSA and the later provisions of the CSA which make reference to SAs, such as Article 42 on provision of design information which states:

..The time limits for provision of design information in respect of new facilities shall be specified in the Subsidiary Arrangements and such information shall be provided as soon as possible before nuclear material is introduced into a new facility.<sup>72</sup>

Modified Code 3.1 of the SA, stating that such design information shall be provided as soon as the decision to build a new facility is taken by Iran provides the authentic interpretation of this provision as it constitutes the agreed basis for the way in which Article 42 is to be applied by both parties as evidenced by agreement affected by exchange of letters.

Iran and the IAEA, as the parties to the original SA agreed that standard Code 3.1, that is the design information time frame for notifying the Agency set at 180 days before the introduction of nuclear material into the facility, was to be the correct interpretation of Articles 39 and 42 of the CSA. As the original SA was brought into force in conjunction with the ratification of the CSA as envisaged by Article 39, no ratification was sought. Article 39 states that modifications can be made to the

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<sup>71</sup> I. Van Damme, *Treaty Interpretation by the WTO Appellate Body* (OUP 2009) at 347-348

<sup>72</sup> Article 42 INFCIRC/214

SA's without the need for formal ratification. However a change or modification is a different animal to an amendment.

### **Conclusion on the Status of Subsidiary Arrangements**

The fact that SAs and the provisions therein arguably constitute the 'authentic interpretation' of Article 39 CSA means that if SAs qualify as subsequent agreements for the purpose of Article 31.3.a, the fact that SAs are not legally binding treaties themselves does not deprive the provisions therein of legal character. As they represent the agreed and authentic interpretation of Article 39, failure to adhere to the provisions of the SA could amount to actions which are not strictly in conformity with Articles 39 and 42 of the CSA, which are legally binding treaty provisions. However, performance of the explicit obligation contained in Article 42 rather than the revised interpretation as well as the fact that the issue is a minor one of procedural nature blurs the line between breach of treaty and actions inconsistent with the treaty.

The above enquiry is significant to this study in that it demonstrates one of Iran's grounds for contention that it has not breached the CSA and is therefore being subject to unduly harsh international measures at the hands of the IAEA and the Security Council. Furthermore it encourages scrutiny of the legal mechanisms available for modification of such agreements, the investigation into which will facilitate the arrival at a tentative answer to the question of whether or not Iran has in fact been targeted for breaches it did not legally commit. Given that identifying whether or not Iran is in breach of legal obligations is a paramount objective of this chapter, being

able to establish concrete Safeguards Agreement breaches and the correct classification of such breaches, on Iran's part will provide a solid foundation for such a line of inquiry.

A breach of a CSA obligation, as identified above is one thing. An act amounting to non-compliance may be another thing altogether. Authentic interpretation and what constitutes subsequent agreement is just as applicable to the issue of the extent of the IAEA's mandate, i.e the correctness and completeness debate, as it is to the SA issue. The issue of non-compliance and what factual basis is required to make a declaration of such all falls under the essential issue of the extent of the IAEA's mandate and the Agency's attempted expansion of this without the authority to unilaterally interpret it.

The IAEA contends, by virtue of its declaration of non-compliance despite verifying non-diversion of declared materials in Iran, that it is empowered and obligated to verify the absence of undeclared material in Iran. Iran counters this in stating that the authority granted to the IAEA by the provisions of the CSA does not extend to verifying the absence of undeclared material. This is the essence of the correctness and completeness debate, which was never adequately disposed of through a legal prism in the midst of the crisis, meaning it pervaded throughout, blurring the line between a legal dispute and political issue and allowing escalation.

In Iran's case, alleged breaches of its CSA formed the foundation of the IAEA's contentious referral of the case to the UN Security Council. The referral was denounced by Iran and Non-

Aligned Movement members claiming it was an illegal act on the part of the Agency. This argument is one rarely engaged with as Iran's actions are generally classed as 'breaches' of its CSA without greater scrutiny of what such a classification entails. Moreover, these 'breaches' are more often than not alluded to but rarely enumerated and examined in the context of the treaty which contains the allegedly breached obligations, the CSA. Furthermore, the Agency's mandate and the powers granted to it by virtue of its constitutive document the IAEA Statute are rarely considered in order to evaluate the legality of its treatment of the Iranian case. These violations have formed the basis for the argument that Iran may have breached its obligations under the NPT which in turn elevated the situation into an issue on a global scale, with international repercussions. This issue needs to be delineated in order to form a coherent picture of the legal landscape which existed at the time of referral.

Iran did breach its CSA. Prior to 2003 and if the above reasoning is accepted, in 2007 with the Code 3.1 issue of design information. However there is a distinction to be drawn between a breach of a treaty and the defined concept of non-compliance.

### **Provisional Application of Subsidiary Arrangements**

If not to represent the legal 'entry into force' of the Subsidiary Arrangement, one could suggest that Iran in its written correspondence sought to convey an intention to begin a voluntary or provisional implementation of the subsidiary arrangement pending ratification by the Majles, as envisaged by Article 25 of the Vienna Convention. This is not unprecedented conduct with regard to agreements of this nature, what is required of parties purporting to provisionally implement an agreement is that they do not in the interim between signature and ratification (or rejection by

Parliament) engage in behaviour which contradicts the object and purpose of the treaty. This line of reasoning holds up perfectly with regard to Iran's claimed 'voluntary' implementation of the Additional Protocol as a confidence measure, as upon the Iranian Government's refusal to ratify the Protocol it ceased to be in operation between Iran and the IAEA as Iran was merely implementing the Protocol on a provisional basis. Therefore legally Iran's renunciation of the Protocol's applicability was undoubtedly valid.

The distinction between the Protocol's provisional implementation and a possible provisional implementation of the modified code 3.1 to the Subsidiary Arrangement is the fact that the Protocol required ratification in order to come into force but the Subsidiary Arrangement came into force and was effectively amended by the type of process envisaged by Article 39, one which does not constitute amendment to the CSA (which would necessitate ratification) but rather an amendment which can be facilitated by agreement between the parties. This agreement occurred through Iranian correspondence to the IAEA on 26 February 2003 and represented the fulfilment of the necessary procedure to execute an amendment to the SA. Consequently, there could be no provisional application of the modification to the subsidiary arrangement as no ratification was required to begin with and therefore entry into force of the amendment legally was not pending ratification. Iran's contention that relevance can be attached to the absence of ratification of the Subsidiary Arrangement amendment which in turn enables unilateral suspension of the amendment seems therefore to be erroneous.

The above analysis notwithstanding, SA's in and of themselves are a form of "soft law", defined by Guzman and Meyer as 'nonbinding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct.'<sup>73</sup> This precise definition ensures the significance of soft law instruments and the consequences they can give rise to are not overlooked by tarring them as merely political understandings.

Meyer also notes that in cases where a soft law provision which lends specificity to a broad provision of a legally binding agreement is violated, international political fallout and reputational damage to the violating state is less severe than in the case of a breach of an indisputably binding provision<sup>74</sup>. This is due to the fact that some states will not perceive violation of the interpretive soft law provision as violation of the binding provision it seeks to clarify. With this in mind, whether or not a breach of a Subsidiary Arrangement amounts to a consequent breach of the binding provision it seeks to interpret is uncertain.

Subsidiary Arrangements cannot be dismissed as devoid of all legal significance and play an integral role in narrowing the broad provisions of the CSA in relation to design information provision.

### **Non-Compliance with the Comprehensive Safeguards Agreement**

The validity of the declaration of Iranian non-compliance by the IAEA within the framework of its mandate and against the background of general international law must be investigated at this

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<sup>73</sup> A.T. Guzman & T. Meyer, 'International Soft Law', 2 J. Legal Analysis 171 (2010) at 178

<sup>74</sup> T. Meyer, 'Soft Law as Delegation', 32 Fordham Int'l L.J. 888 (2008-2009)

juncture. This requires an examination of issues such as the substantive requirements for a valid declaration of non-compliance and addressing procedural matters such as whether or not the correct standard of proof has been applied and met by the IAEA the analysis.

### **The Legality of the IAEA Board of Governors Resolutions on the Iranian Nuclear Situation Referral**

The bilateral legal dealings between Iran and the IAEA regarding the former's alleged non-compliance with its Comprehensive Safeguards Agreement changed dramatically in November 2006 with the issuance by the United Nations Security Council of Resolution 1696(2006). This intervention was the result of the IAEA Board of Governors' utilisation of the IAEA Statute referral mechanism contained in Article XII.C. However Iran has contended that in referring its nuclear dossier to the Security Council the Board of Governors has not applied the required procedural and substantive steps in accordance with Article III.2 and Article XII.C of the IAEA Statute<sup>75</sup> as it relates to Article 19 CSA. Therefore before considering the involvement of the Council in the situation, this issue must be investigated and a conclusion reached on the legality of the treatment of the situation by the IAEA within its own mandate.

First the issue of what constitutes non-compliance capable of resulting in an Article XII.C referral by the Board of Governors to the Council is a bone of contention for Iran, which is adamant that the cohesive theme throughout the IAEA Director General's reports on its compliance in recent

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<sup>75</sup> INFCIRC/837, 'Communication dated 22 March 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', March 2012 pp. 18-20



years has been to find no evidence of diversion of declared nuclear materials in Iran.<sup>76</sup> Based on this reasoning Iran does not accept the legality of the referral to the Council and its involvement in the situation, in stating that the Agency as an independent organisation should carry out its mandate without interference.<sup>77</sup> The IAEA contended that Iran was found to be in non-compliance due to the inability to verify the absence of undeclared materials and has placed weight on previous safeguards violations committed by Iran in referring the issue to the Council. An investigation must therefore be made into the legal definition of non-compliance in the IAEA statute and the CSA which can legally give rise to the Article XII.C referral mechanism by the Board of Governors to the Council to ascertain whether or not the Agency has exceeded its mandate in its investigation and conclusions on the Iranian program.

### **Defining Non-Compliance**

The IAEA derives its duty and authority to monitor NNWS nuclear programs and verify the exclusively peaceful purposes of such programs from the nexus between the Non-Proliferation Treaty and the IAEA Statute, the former making the conclusion of bilateral agreements between member states and the IAEA mandatory in Article III.1, the latter of which contains the legal provision for safeguard-related activities in Article XII. The Agency is tasked under Article III.1 NPT with monitoring through the means of safeguards ‘all fissionable material in all peaceful nuclear activities within the territory’ and this task is concretised into a legal obligation in Article II of the Comprehensive Safeguard Agreements, modelled on INFCIRC/153, stating that

The Agency shall have the right and the obligation to ensure that safeguards will be applied, in accordance with the terms of this Agreement, on all source or special fissionable material in all peaceful nuclear activities within the territory of Iran, under its jurisdiction or carried

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<sup>76</sup> INFCIRC/724, ‘Communication dated 26 March 2008 received from the Permanent Mission of the Islamic Republic of Iran to the Agency’, 28 March 2008 at 3

<sup>77</sup> *ibid*

out under its control anywhere, for the exclusive purpose of verifying that such material is not diverted to nuclear weapons or other nuclear explosive devices.

This provision corresponds with Article I of Iran's CSA, INFCIRC/214, stating that Iran accepts such safeguards. In line with this mandate, the Board of Governors is obliged to account for all declared nuclear material in a State, the exclusive purpose of which is the accurately affirm that none of this nuclear material is being diverted to a nuclear weapons program.

In the event that the Agency exceeds the specific mandate granted to it by its Member states in its constituent Statute, the doctrine of scope of powers and the issue of *ultra vires* arises. Jennings enunciates the principle in stating that

‘all discretionary powers of lawful decision making are necessarily derived from the law and are therefore governed and qualified by the law. This must be so, if only for the authority of such decisions flows itself from the law. It is not logically possible to claim to represent the power and authority of the law, and at the same time, claim to be above the law’.<sup>78</sup>

An act of an international organisation can be described as *ultra vires*, or beyond the powers of, the organisation when there is no ascertainable legal power granted to the organisation to act in such a manner, implicitly or explicitly in its constitutive document. In the *Certain Expenses* case, with reference specifically to the UN Security Council, the ICJ concluded that there was a presumption of validity to be inferred when an international organisation was acting in furtherance of one of its enumerated purposes,<sup>79</sup> in addition to the broad pronouncement on implied powers made by the Court in the Reparations Case, stating that:

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<sup>78</sup> *Lockerbie* dissent Judge ad hoc Jennings ICJ reports 1998 99 et seq. 110

<sup>79</sup> *Certain Expenses of the United Nations*, Advisory Opinion, July 20th 1962 (1962) ICJ Reports 151

“Under international law, the Organisation must be deemed to have those powers which though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.”

What appears to be a relatively uncomplicated concept has attracted much debate in recent times between the IAEA the Iranian Government. This debate has raged on for a number of years and the Iranian Government is unrelenting in its argument that insofar as it is obliged to accept and implement safeguards it has done so and contending that the IAEA has identified no diversion of materials from peaceful purposes in Iran since Iran owned up to its past indiscretions in 2003. The crux of the dispute appears to rest on questions of the IAEA’s mandate in Iran by virtue of the CSA in place, namely what exactly must be verified by the IAEA in order to declare Iran is in compliance with its CSA.

In The questions therefore can be expressed as follows: what conduct constitutes non-compliance capable of forming the basis for a finding of non-compliance by the Agency’s Board of Governors? Do all violations of safeguards obligations amount to ‘non-compliance’ as a defined concept? What does the Agency have to prove in order to make such a finding, which it is authorised to do under Article XII.C of the IAEA Statute, as referenced in Article 19 CSA? In order to answer these particular queries it will be necessary to examine the relevant provisions of the INFCIRC/153 as employed in Iran’s CSA, and the IAEA Statute governing the Agency’s powers, as well as the associated divergences of interpretation therein.

### **Defining Non-Compliance as Non-diversion**

In seeking to establish the necessary components of a declaration of non-compliance which can trigger report to the Council under Article XII.C it is first imperative to differentiate and establish the relationship between the IAEA Statute and the CSA. In doing this, the content of the legal construct of non-compliance can be extrapolated from the treaty governing the relationship between the IAEA and Iran. The IAEA Statute, it must be noted, predates both the NPT and CSA, as it was enacted in 1957 in order to establish the free-standing body of the IAEA. Iran became a Member State of the IAEA in 1958. The purpose of the Agency at that point was to facilitate the sharing of nuclear technology and materials between states in a safeguarded manner in order to pre-empt the possibility of the spread of such technology resulting in a nuclear arms race. The salient detail for the purposes of this study is membership of the Agency did not in itself translate to the automatic obligation to conclude safeguards agreements with the IAEA, but rather required that safeguards be applied only to activities and facilities involving material provided by the Agency. The obligation to conclude a Comprehensive Safeguards Agreement became incumbent upon Iran with its signature and ratification of the NPT in 1972, via Article III.1 as noted above. The agreement resulting from this is the Iran's CSA, INFCIRC/214, which is the legal document governing the bi-lateral relationship between Iran and the IAEA.

The purpose of the IAEA Statute therefore is to statutorily create the Agency and delineate its purposes and operational mandate as an organisation. Member states then opt to adopt safeguards on their activities, and in the case of NPT NNWS, are obliged under Article III.1 NPT to conclude safeguards agreements with the Agency, which the Agency is empowered to conclude by virtue of the IAEA Statute. Article III.5 of the Statute facilitates the adoption of safeguards agreements with

member states. The provision also demonstrates the non-self-executing nature of safeguards by virtue of signature of the statute in stating that the safeguards function of the Agency is

5. To establish and administer safeguards designed to ensure that special fissionable and other materials, services, equipment, facilities, and information made available by the Agency or at its request or under its supervision or control are not used in such a way as to further any military purpose; and to apply safeguards, at the request of the parties, to any bilateral or multilateral arrangement, or at the request of a State, to any of that State's activities in the field of atomic energy;

The Statute provides for specific powers of the Agency in relation to the operation of the safeguards system, including guidelines for the application of safeguards in Article XII. With regard to compliance with safeguards, Article XII.C states broadly that

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.

The reference to ‘any non-compliance’ in the Statute could be construed as covering all failures to comply any safeguards obligations in place, including procedural and reporting obligations. Based on this provision, the contention of the Board of Governors that Iran’s ‘many failures and breaches of its obligations to comply with its NPT Safeguards Agreement, as detailed in GOV/2003/75, constitute non-compliance in the context of Article XII.C of the Agency’s Statute’<sup>80</sup> is accurate. However, the substance of the safeguards obligations as well as the scope of the Agency’s mandate and purpose of its activities in Iran is governed by the CSA, a bilateral treaty between the parties, and this can have a bearing on the interpretation of ‘non-compliance’ in this context.

The CSA executes the obligation to accept safeguards in Article III.1 NPT and specifies that the ‘exclusive purpose’ of these safeguards is to verify non-diversion in Article II. This exclusive purpose carves out a well-defined criterion for the Agency in its appreciation of the concept of

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<sup>80</sup> GOV/2005/77

compliance in the specific treaty at hand. If the exclusive purpose of the safeguards laid down in the CSA is to enable verification that declared nuclear material is not diverted to a nuclear weapons program then compliance with safeguards is achieved upon verification that no diversion of declared material has taken place. While the IAEA Statute grants the Agency the power to implement safeguards agreements, the agreements themselves govern the scope of the Agency's powers and activities in the state in question. In the context of non-compliance, this distinction between the content of the treaties is relevant. The correct application of Article XII.C, as it interacts with the CSA, is an important factor in establishing what non-compliance means in this context.

The ordinary meaning of the term is 'to not comply' or to be 'non-compliant' with a given obligation. In the context of Article XII.C therefore, failures to comply with safeguards obligations amount to 'non-compliance' in the general sense and are capable of activating the reporting procedure. However, Article 19 CSA is the provision which specifically governs the concept of non-compliance in the IAEA-Iran relationship. Article 19 states that

If the Board, upon examination of relevant information reported to it by the Director General, finds that the Agency is not able to verify that there has been no diversion of nuclear material required to be safeguarded under this Agreement, to nuclear weapons or other nuclear explosive devices, it may make the reports provided for in paragraph C of Article XII of the Statute of the Agency

This provision implies that diversion is the key to non-compliance with the CSA, which logically follows from the fact that the exclusive purpose of the treaty is to enable and empower the Agency to verify non-diversion. In linking the inability to verify non-diversion to Article XII.C, Article 19

in its specificity and enactment later in time than the IAEA Statute is *lex specialis* on the issue of non-compliance. Interpreting the provision in this way satisfies Article 31 of the VCLT in giving primary consideration to the plain meaning of the text, which links diversion to non-compliance by referencing Article XII.C. Furthermore, explicit reference to the ability of the Agency to make reports provided for under Article XII.C of the Statute in this specific circumstance would seem superfluous if the Agency could refer any safeguards failure to the Council as an act constituting non-compliance. Article 19 therefore suggests that non-compliance is a narrower concept in the context of the CSA than in the IAEA Statute and that diversion is the necessary component in making an Article XII.C report. The Agency's mandate extends only to the verification of non-diversion in Iran, as agreed by the parties in the CSA.

#### **All Materials or All Declared Materials**

A bone of contention appears to exist regarding the correct interpretation of the phrase 'all fissionable materials' contained in INFCIRC/153 Articles I and II. The dispute has arisen regarding whether or not the Agency is obligated to only investigate fissionable materials which it has declared or which are contained within declared facilities monitored by the CSA by Safeguards for the purposes of verifying non-diversion from peaceful purposes or if the Agency has the responsibility to seek to verify that no fissionable material declared or otherwise within the territory of the state is being diverted to non-peaceful purposes. Essentially a narrow interpretation suggests that only declared materials and facilities are the concern of the IAEA while a more expansive interpretation of the Agency's obligations encompasses the responsibility to not only verify non-diversion of declared materials but also to verify that there are no undeclared materials or facilities within the State in question..

This question of interpretation gains particular significance when one considers that the primary contention made by Iran in disputing the Board of Governor's finding of non-compliance is based on numerous reports on Iran's Implementation of Safeguards, most notably by the former Director General of the IAEA, Dr. El-Baradei, that the Agency 'has been able to verify the non-diversion of all declared material in Iran.'<sup>81</sup> If the IAEA is not legally obligated to confirm the existence and/or non-diversion of undeclared material in Iran then essentially the veracity of Iran's claims of victimisation at the hands of the Agency and Western powers would have to be conceded. Practice of the Agency in its treatment of non-compliance by other states is useful in identifying which interpretation of the verification obligation is correct in the Iranian context.

The North Korean safeguards situation in the 1990's provides an illustration of the Agency's non-compliance declaration mechanism and goes some way towards providing answers to the above query regarding what exactly the Agency is required to verify to be able to declare a state in compliance with its CSA. Essentially, the Agency discovered accounting discrepancies in North Korea's reports regarding spent fuel from its reactors, nuclear material which was required to be safeguarded due to its suitability for reprocessing for the purpose of nuclear weapons production.<sup>82</sup> The Agency was able to detect these discrepancies as a 'checks and balances' approach is precisely the way in which the verification task of the IAEA is carried out. Having been denied access to certain sites for inspection the Agency adopted a decidedly more proactive approach to its investigative mandate by first invoking utilising Paragraphs 18 and 19 of the INFCIRC/153,

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<sup>81</sup> GOV/2006/64

<sup>82</sup> M. Liles, Did Kim Jong Il Break the Law? 33 N.C.J. Int'l L. & Com. Reg. 103 2007-2008



applicable to North Korea by mirrored principles in its CSA. Articles 18 and 19 of the INFCIRC/153, in connection with Article XII.C of the Agency Statute permitted the IAEA a broad spectrum of options in dealing with suspected diversion of North Korean nuclear material which was required to be safeguarded.

Article 18 allows the Board of Governors to find that action by a state is ‘essential and urgent’ to verify non-diversion while Article 19 stipulates that

If the Board, upon examination of relevant information reported to it by the Director General, finds that the Agency is not able to verify that there has been no diversion of nuclear material required to be safeguarded under this Agreement, to nuclear weapons or other nuclear explosive devices, it may make the reports provided for in paragraph C of Article XII of the Statute of the Agency

Employing the interpretative guidelines provided by the VCLT in Article 31, the ordinary meaning of the text of this provision is that an inability to verify non-diversion is sufficient ground for a Board of Governors finding of non-compliance, reports of which are provided for by Article XII.C of IAEA Statute. Conversely, it can be stated that an ability to affirmatively verify non-diversion would dispose of a claim of non-compliance with the CSA.

In the North Korean case, faced with the inability to verify non-diversion, the Board found it necessary to request a ‘special inspection’ as provided for in paragraph 73 for the purposes of facilitating the ‘essential and urgent’ verification measures. These special inspections, when requested in connection with Paragraph 18 endow the Agency with sweeping investigative powers, meaning that if the Agency requests access and it is refused, or the state is dragging its feet, Articles 18 and 73 of the state’s CSA are violated. Simply put, refusal of access to undeclared sites is

tantamount to a breach of the legally binding safeguards agreements and therefore is illegal, the reverse meaning the state is legally bound to provide unfettered access when requested to do so under an invocation of Articles 18 and 73 of the applicable CSA. It is also worth noting that with regard to the phrase ‘essential and urgent’ the Board has broad discretion in identifying instances which constitute such urgency necessitated immediate access to facilities for inspection. Therefore a suspicion of diversion grants the Agency an array of verification options and if these expansive investigative powers fail to allay the suspicion, an inability to verify non-diversion is sufficient for a valid finding of non-compliance under Article XII.C.

The relevant information to be extracted from the treatment of the North Korean situation by the Agency is that a finding of non-compliance by the Board, as was made in relation to Iran in 2006, need rest only on an absence of ability on the part of the Agency to verify the *non-diversion* of nuclear material from peaceful purposes. The emphasis placed on the substantive requirement of non-diversion is affirmed by the Model Comprehensive Safeguards Agreement in laying down the sole and exclusive purpose of the Agency as verifying that nuclear materials ‘are not diverted to nuclear weapons or other explosive devices’.<sup>83</sup> Furthermore, it has been noted by Shaker that the purpose of the Article XII.C mechanism is to apply to situations in which ‘safeguards fail after all to deter

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<sup>83</sup> As mirrored by Iran’s CSA INFCIRC/214 – Article 1 – “The Government of Iran undertakes, pursuant to paragraph 1 of Article III of the Treaty, to accept safeguards, in accordance with the terms of this Agreement, on all source or special fissionable material in all peaceful nuclear activities within its territory, under its jurisdiction or carried out under its control anywhere, for the exclusive purpose of verifying that such material is not diverted to nuclear weapons or other nuclear explosive devices.”

diversion and if there are strong indication that diversion has taken place'<sup>84</sup> which attributes the status of the essential criterion in a finding of non-compliance to diversion.

The Agency, in every report on the Iranian situation since 2006<sup>85</sup> and in its most recent report dated August 28 2013 has declared that it 'continues to verify the non-diversion of declared nuclear material at the nuclear facilities and LOFs declared by Iran under its Safeguards Agreement'.<sup>86</sup>

The fact that the Agency has verified the absence of diversion of declared nuclear materials in Iran effectively distinguishes the situation from the North Korean investigation and provides a strong foundation for a contention that the Agency has acted *ultra vires* its mandate in declaring Iran to be in a state of non-compliance. The final issue on the point of diversion is therefore whether or not verification of non-diversion is required only for declared materials required to be safeguarded by the CSA or if an inability to verify non-diversion of undeclared materials amounts to non-compliance under the CSA.

### **Non-diversion under the Comprehensive Safeguards Agreement v Non-Diversion under the Additional Protocol**

As discussed in the previous Chapter, Iran is bound only by the terms of its CSA having provisionally applied the terms of the Additional Protocol pending ratification as a voluntary measure between 2003 and 2005. This provisional application was validly terminated in

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<sup>84</sup> M. I. Shaker, 'The Evolving International Regime of Nuclear Non-Proliferation' 321 *Recueil des Cours* (2006) 9 at 79

<sup>85</sup> Initially in GOV/2006/64 and maintained throughout all Board of Governors Reports thereafter.

<sup>86</sup> GOV/2013/40, 'Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council Resolutions in the Islamic Republic of Iran' 28 August 2013 at pp.8

accordance with Article 25(2) VCLT, meaning that Iran ceased to be bound by its provisions in 2005. Therefore, it is only if the CSA obligated the IAEA to verify the non-diversion of undeclared materials in a State that it would have been incumbent upon the Agency to rule out the existence of concealment of a possible nuclear weapons program in Iran, meaning that an inability to do so conclusively would qualify as non-compliance. The very existence of the Additional Protocol suggests that this is not the case, for the enactment of such an instrument would have been redundant had the Agency been provided with an effective mandate to investigate the presence of undeclared materials in the CSA.<sup>87</sup>

The Additional Protocol grants the Agency expanded inspection powers, meaning that inspectors can investigate any facility, including those which are not declared to be carrying out nuclear-related activities, so long as it deems the visit relevant for the purposes of verification of a state's declaration. This could be taken to mean that while the CSA permits the Agency the power to verify the 'correctness' of a state's declaration based on a quantitative system of accounting for declared activities and quantities of materials, the AP expands the mandate of the Agency to verify the 'completeness' of the state's declaration, that is to formulate a complete overview of the state's nuclear activities as a whole and necessarily includes the ability to confirm that there has been no concealment or possible clandestine nuclear weapons program.<sup>88</sup> Despite IAEA protestations that the CSA provides the basis for this 'correctness and completeness' mandate<sup>89</sup> such a contention

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<sup>87</sup> A view similarly endorsed by Joyner in D. Joyner, *The IAEA Applies Incorrect Standards, Exceeding its Legal Mandate and Acting Ultra Vires Regarding Iran*, Arms Control Law, September 13 2102

<sup>88</sup> *ibid*

<sup>89</sup> GOV/2012/55 fn.53 "The Board has confirmed on numerous occasions, since as early as 1992, that paragraph 2 of INFCIRC/153 (Corr.), which corresponds to Article 2 of Iran's Safeguards Agreement, authorizes and requires the Agency to seek to verify both the non-diversion of nuclear material from declared activities (i.e. correctness) and the absence of undeclared nuclear activities in the State (i.e. completeness)"

seems untenable in light of the perceived need for the adoption of the AP following failures of the safeguards system in North Korea and Iraq to detect concealment of nuclear weapons related activities. These events acted as the catalyst for the drafting and adoption of the AP as a result of the P3+5 talks which recognized the inadequacy of the safeguards system under the CSA in detecting clandestine nuclear weapons programs, a situation which prior to 1992 had not merited much concern.

It can be said therefore that the distinction between the obligations of the CSA and the obligations created by the AP lies in the fact that in latter case the state in question can be held to be non-compliant in the absence of proof of diversion. This is the case as all that is required under the AP is an inability to verify the absence of undeclared nuclear material or activities in a state. In other words, while under the CSA inability to verify non-diversion of declared material is required to constitute a finding of non-compliance, under the AP the concept of non-concealment gains significance and occupies the same position as a ‘trigger’ for non-compliance as ‘non-diversion’ does in the case of the CSA. Therefore the content of the Board of Governors report prior to the referral of the Iranian dossier to the SC in 2006 contains what would appear to be a misunderstanding of the legal obligations incumbent upon Iran at that time – equating its own verification obligation in this case to those contained in the AP which was not in force in Iran rather than the CSA:

While the Agency is able to verify the non-diversion of declared nuclear material in Iran, the Agency will remain unable to make further progress in its *efforts to verify the absence of undeclared nuclear material and activities in Iran* unless Iran addresses the long outstanding verification issues, including through the implementation of the Additional

Protocol, and provides the necessary transparency. Progress in this regard is a prerequisite for the Agency to be able to confirm the peaceful nature of Iran's nuclear programme.<sup>90</sup>

Dupont<sup>91</sup> points to the cases of Egypt and South Korea to illustrate the fact that the requirements for a finding of compliance under each instrument differ substantially. In the Egyptian case in 2004 there had been reporting discrepancies by Egypt regarding past nuclear related activities which were disclosed to the Agency, resulting in a verification process undertaken by the IAEA. The Agency felt able to declare that all declared nuclear material remained in peaceful activities and therefore concluded that there was no evidence of diversion in Egypt<sup>92</sup>, meaning that as no AP was in force in Egypt, the only verification concern of the Agency was that of 'non-diversion of declared nuclear material'. No mention was made of the need to verify the absence of undeclared material.

Conversely, when South Korea revealed it had engaged in undeclared activities previously and signed an AP, the Agency proceeded to take action to verify both the absence of undeclared material and activities as well as non-diversion of declared activities in order to conclude that South Korea was in compliance with its obligations.<sup>93</sup> This illustration of the divergence in practice of the Agency in dealing with non-compliance in CSA only states and CSA and AP states proves the fact that a 'completeness' verification is the domain of the CSA and a 'correctness'

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<sup>90</sup> GOV/2006/64 para. 21

<sup>91</sup> P.E Dupont, Compliance with Treaties in the Context of Nuclear Non-proliferation: Assessing Claims in the Case of Iran, 18 Journal of Conflict and Security Law (2013) at 35

<sup>92</sup> IAEA Safeguards Statement for 2008, para. 48

<sup>93</sup> IAEA Safeguards Statement 2007, para. 31

investigation is confined to states which have consented to a more intrusive and expansive safeguards regime under the AP.

It can be observed therefore that given the proscribed substantive criterion for non-compliance under the CSA, the only treaty in force between Iran and the Agency, is that of ‘diversion’ of declared nuclear material to non-peaceful purposes and the Agency has verified that there has been no diversion in Iran, in the absence of an Iranian AP, the Agency is exceeding its mandate in seeking to verify the absence of undeclared material. The IAEA was not required or empowered to verify the absence of undeclared material in Iran and therefore erred in declaring Iran in non-compliance with its safeguards obligations this basis and citing it as relevant in a declaration of non-compliance in its referral resolution<sup>94</sup> to the SC.

### **Findings Required to Make a Declaration of Non-Compliance with a CSA**

This is the primary referral mechanism for dealing with ‘any non-compliance *which it finds to have occurred*’,<sup>95</sup> which proscribes that established cases of non-compliance, rather than merely alleged cases are to be dealt with under this Article. As stated above, Articles 1 and 19 of the CSA attribute the status of the essential criterion for a finding of non-compliance to ‘diversion’. Therefore the question remains, what standard of proof is required to be met in order to satisfy the criterion of diversion and make the remedies under Article XII.C applicable?

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<sup>94</sup> GOV/2006/15 27 February 2006

<sup>95</sup> Article XII.C IAEA Statute INFCIRC/11, emphasis added

It must be noted at this juncture that the IAEA, while operating to an extent within its own framework, does not operate entirely outside of the confines of the normative structure of general international law. In many instances the IAEA Statute and CSA can be seen to represent *lex specialis* on the issues to which they pertain however lacunae in the system inevitably must be filled *lex generalis*. Given the fact that the CSA and IAEA Statute are missing an explicit burden of proof required to be satisfied by the Board of Governors before making a finding of non-compliance, one must look to procedural general international law to seek to extract an applicable standard for this situation.

First it bears consideration that the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts<sup>96</sup> regarding the existence of a breach states in Article 12 that

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

It follows that in order to establish a breach of an obligation, which is essentially what is alleged by the Agency in claiming that Iran is not in compliance, the breach in question must be of an obligation applicable to the state. Furthermore, Article 13 stipulates that the obligation must be incumbent upon the state at the time of the breach. The applicability of these principles to the case at hand is attested to by the classification of ARSIWA as representative of customary international

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<sup>96</sup> International Law Commission Draft Articles on the Responsibility of States for Internationally Wrongful Acts 2001



law. Confirmation of ARSIWA's status was provided by the ICJ in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v Serbia)*<sup>97</sup> and the *Gabcikovo-Naymoros Project (Hungary v Slovakia)*<sup>98</sup> case. Both of these Articles suggest that the standard of proof applied by the Agency, that is the need to be able to verify the absence of undeclared materials or nuclear activities in Iran was incorrect, given the fact that the obligation to adhere to such inspection standards was not binding on Iran at the time of the declaration of non-compliance, as the AP was not in force.

Therefore in order to declare Iran in non-compliance, the Agency was bound to prove the proscribed requirement for non-compliance as defined in the CSA which was that of diversion of declared materials. It is arguable that to prove the existence of such diversion to the satisfaction of procedural general international law, the Agency would have been required to satisfy a particularly high standard of proof. This argument stems from the fact that ICJ jurisprudence has alluded to the need for a strict standard of proof in cases where an allegation of a grave nature is in question and arguably the contention that a state is diverting nuclear material to military purposes in order to equip itself with an illegal nuclear weapons program (given the possible international repercussions of such behaviour) could qualify as such. The case of *Corfu Channel (United Kingdom v Albania)* highlighted that '...a charge of such exceptional gravity against a State would require a degree of certainty'<sup>99</sup>, a point endorsed in the *Bosnian Genocide Case*<sup>100</sup> in stating that

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<sup>97</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v Serbia)* ICJ Reports 2007 at p.43 para 209

<sup>98</sup> *Gabcikovo-Naymoros Project (Hungary v Slovakia)* Judgment, ICJ Reports 1997 at p.7

<sup>99</sup> *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment of 9 April 1949, ICJ Reports (1949) 4 at 17.

<sup>100</sup> Application for Revision of Judgment of II July 1996 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro)* Judgment of 26 February 2007, ICJ Reports (2007)

‘the Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive’.<sup>101</sup>

It is debatable whether or not a declaration of non-compliance is a charge of such exceptional gravity as to warrant the highest burden of proof. As there is an absence of a generally applicable standard of proof in the ICJ Statute and Rules, Kolb explains that the paramount consideration of the Court in deciding upon a standard of proof is entirely dependent on the nature of the norm at stake.<sup>102</sup> This is reflected in the *Bosnian Genocide Case* in which it was affirmed that what is required is the “level of certainty appropriate to the seriousness of the allegation.”<sup>103</sup>

O’Connell has identified the burden of proof to be satisfied in cases of Article 51 self-defence in response to an armed attack as one of ‘clear and convincing evidence’.<sup>104</sup> Based on the ICJ’s approach in *Nicaragua* which required the production of ‘sufficient proof’<sup>105</sup> it would appear that an intermediate burden exists, which is higher than ‘a preponderance of the evidence’ which is generally employed in civil cases and lower than ‘beyond reasonable doubt’ which can be likened to the above ‘fully conclusive’ standard for cases of exceptional gravity such as genocide or torture. A declaration of non-compliance when made in accordance with the definition of non-compliance in the CSA is a charge that the state in question has diverted materials to a nuclear weapons

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<sup>101</sup> *Ibid* at 91 para.209-210

<sup>102</sup> R. Kolb, General Principles of Procedural Law, in *The Statute of the International Court of Justice*, A. Zimmermann, K. Oellers-Frahm, C.J Tams Eds (OUP) (2012) at 793

<sup>103</sup> Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro) Judgment of 26 February 2007, ICJ Reports (2007) at para 210

<sup>104</sup> M.E O’Connell, ‘Evidence of Terror’, 7 J Conflict & Security Law 19 (2002) at 22

<sup>105</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)* 14 ICJ Reports 176 (1986) at 437 para 101

program. Commission of a large scale armed attack and development of an illegal nuclear weapons program, concretely proven, both represent subject matter which falls within the category actions likely to be classified as breaches of or threats to international peace and security, with the latter being denoted as a generic threat to peace in SC Resolution 1540.<sup>106</sup> Therefore conceptually, the allegations would seem to be of similar gravity and therefore require ‘sufficient’ or ‘clear and convincing’ evidence in order to discharge the burden of proof in each instance.

### **Conclusion on Non-Compliance**

It has been argued therefore that a finding of non-compliance by the Board of Governors which effectively activates the Article XII.C referral procedure to the Council needs to be based on a concrete finding of diversion of declared nuclear materials, as Article CSA 19 is *lex specialis* on the issue of non-compliance. As Franck has noted previously, past action has been used as evidence of future intent<sup>107</sup> and in the case of Iran the suspicion of deliberate cultivation of a clandestine nuclear program in the past has the Agency on alert to the possibility of future wrongdoing. However despite this suspicion, mere allegations of wrongdoing alone are not sufficient to satisfy the criteria for a finding of non-compliance. It must be conceded by the Agency in light of its own mandate under the IAEA Statute and the CSA in place with Iran that neither the substantive nor procedural criteria for non-compliance have been met in the case of the Iranian nuclear program, meaning that an ability to verify the non-diversion of declared material by Iran is enough to invalidate a finding of non-compliance.

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<sup>106</sup> S/RES/1540 (2004)

<sup>107</sup> T.M. *Franck*, ‘The Powers of Appreciation: Who Is the Ultimate *Guardian* of UN Legality?’ 86 A.J.I.L. 519 (1992)

Furthermore, even if *arguendo* the Agency had reported an inability to verify non-diversion, the remedial action it chose to undertake, namely referral of the Iranian nuclear dossier to the SC, would not necessarily have been a valid course of action within its mandate as will be explored below.

### **The Legality of the Board of Governor's Remedial Action**

While Article XII.C, as applicable to the situation insofar as it is referenced in Article 19 CSA does oblige the Agency to report any non-compliance which it finds to have occurred to the Security Council, it also provides the Agency with numerous remedial avenues of its own to combat non-compliance. These measures could be described as coercive and are to follow non-adherence to a 'call upon' the state in question to remedy the issue with fully corrective action within a reasonable time. The available measures according to Article XII.C are:

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.<sup>108</sup>

The existence of these measures possibly supports the contention that the drafters of the Statute did not envisage or desire a situation where the Agency abdicated all authority over non-compliance and transferred the issue to the Security Council before attempting to deal with the situation independently. The contents of this Article have been questionably applied to the Iranian

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<sup>108</sup> IAEA Statute, INFCIRC/11 Article XII.C

nuclear situation. Having alleged non-compliance on the part of Iran and communicating this to Iran in an attempt to induce cooperation, the Agency neglected to implement any of these coercive measures. The Agency also failed to implement the Article 18 and 73 special investigative provisions, as it did in the North Korean case, mentioned above.

Rather than utilise the mechanisms available to it under the CSA and IAEA statute, the Agency decided to issue a resolution<sup>109</sup> outlining steps it ‘deemed necessary’ for Iran to take to clarify outstanding issues. These included ratification and implementation of the provisions of the Additional Protocol, resumption of the voluntary suspension of uranium enrichment Iran had undertaken previously and implementation of various transparency measures which extend ‘beyond the formal requirements of the Safeguards Agreement and Additional Protocol’. Clearly none of these actions are mandated by the CSA or IAEA Statute as all fall outside the remedial measures available to the Agency under the latter in Article XII.C in cases of non-compliance and therefore were *ultra vires* the Agency and lack binding force.

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<sup>109</sup> GOV/2006/14 at 1. Underlines that outstanding questions can best be resolved and confidence built in the exclusively peaceful nature of Iran's programme by Iran responding positively to the calls for confidence building measures which the Board has made on Iran, and in this context deems it necessary for Iran to:

- re-establish full and sustained suspension of all enrichment-related and reprocessing activities, including research and development, to be verified by the Agency;
- reconsider the construction of a research reactor moderated by heavy water;
- ratify promptly and implement in full the Additional Protocol;
- pending ratification, continue to act in accordance with the provisions of the Additional Protocol which Iran signed on 18 December 2003;
- implement transparency measures, as requested by the Director General, including in GOV/2005/67, which extend beyond the formal requirements of the Safeguards Agreement and Additional Protocol, and include such access to individuals, documentation relating to procurement, dual use equipment, certain military-owned workshops and research and development as the Agency may request in support of its ongoing investigations;

## **The Relationship between the IAEA and UN**

Given an inability on the part of the IAEA to prove Iran was in a state of non-compliance or to exhaust remedial measures available to it as required by Article XII.C in order to validly refer the matter to the Council, one can investigate whether or not the involvement of the Council at the request of the IAEA can be legally justified instead by the parameters of the IAEA and UN Relationship Agreement, also known as INFCIRC/11 and the IAEA statute.

The IAEA, while not a subsidiary organ of the UN by virtue of creation by an SC Resolution (in contrast to, for example, the ad hoc tribunals) is specifically affiliated to the Council by virtue of the legal agreement INFCIRC/11. This agreement establishes that the Agency shall submit reports to the SC and notify the Council of questions which fall within its competence,<sup>110</sup> which is mirrored in the IAEA Statute at Article III.b.4. Furthermore the Agreement imposes a duty on the Agency to report to the General Assembly and the Council in the case of an Article XII.C<sup>111</sup> IAEA Statute governed situation of non-compliance by an NPT member state<sup>112</sup>. Article VI.1 provides for the ‘fullest and promptest exchange of information between the Agency and the UN’<sup>113</sup> which is somewhat qualified by the additions of Article II<sup>114</sup> and Article IX. The former places a confidentiality limitation on the provision of sensitive material by the Agency to the UN but this is broadened by the inclusion of ‘subject to Article IX’ which states that:

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<sup>110</sup> INFCIRC/11 Article III.1(b)

<sup>111</sup> Statute of the IAEA states “The Board shall report the non-compliance to all members and to the Security Council and General Assembly of the United Nations”.

<sup>112</sup> INFCIRC/11 Article 1.2

<sup>113</sup> Ibid Article VI.1

<sup>114</sup> Ibid Article II

The Agency shall cooperate with the Security Council by furnishing information at its request as may be required in its exercise of its responsibility for international peace and security.<sup>115</sup>

One can deduct from the above provisions that the IAEA and the UN, in particular the Council, are intended to be intricately linked. Therefore the importance accorded by the UN to the IAEA as the watchdog for the implementation of safeguards agreements to ensure adherence to the NPT is notable and this role is seemingly capable of effective discharge by the Agency due to its ability to seek Council assistance in situations ‘falling within its competence.’ Given the fact that the UN Charter confers upon the Council by virtue of Article 24.1<sup>116</sup> the primary responsibility for the restoration and maintenance of international peace and security generally issues falling within its competence will in many cases be those which threaten or have the potential to threaten international peace and security, the determination of which is governed by the broad and ‘open-textured’<sup>117</sup> Article 39. However it must not be forgotten that the Council also exercises a role which focuses on pacific dispute settlement.

This option can be seen as a secondary method for resort to the Council in less clear cut cases of derogation from legal obligations, as the aforementioned Article XII.C referral mechanism exists in cases of established non-compliance to be determined by the Board of Governors. Therefore as it has been contended above the involvement by the Agency of the Council in the Iranian nuclear

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<sup>115</sup> *ibid* Article IX

<sup>116</sup> UN Charter Article 24.1

<sup>117</sup> W.M.Reisman, ‘The Constitutional Crisis in the United Nations’, 87 Am. J Int’l L. 83 (1993) at 92

issue was not legally justified under Article XII.C as a result of a finding of non-compliance the alternative justification must be considered.

### **Report to Council via Article III.B.1 INFCIRC/11 and Article III.B.4 IAEA Statute**

While an established case of non-compliance as identified by the Board of Governors is one way of alerting the Council of the matter, there is an alternative route to engaging the SC in a situation being monitored by the Agency, which seems to extend the ability of the IAEA to involve the Council further. This is significant as it suggests that even if, as in the Iranian case, the Board of Governors had not validly referred the matter to the Security Council by virtue of Article XII.C a fall-back mechanism is available to bring an issue to the attention of the Council. The existence of such a mechanism could justify the resort to the Council by the IAEA.

The wording of both Articles III.B.1 of the Relationship Agreement and III.B.4 of the IAEA Statute permit the possibility of undefined situations prompting a report by the Agency to be transmitted to the Council regarding ‘questions falling within the Council’s competence.’ As mentioned above the Council has dual competence – both in pacific dispute settlement as governed by Chapter VI followed by the maintenance or restoration of international peace and security through threat determinations under Article 39 and the utilisation of enforcement measures under Chapter VII. The Council itself possesses the authority to determine which of its competences is required in order to deal with the issue presented to it.



Issues ranging from those concerning international peace and security and pacific dispute settlement of Chapter VI of the Charter would seem to permit a wide margin for SC involvement in situations likely to arise in the IAEA-Member State context. The Agency, as a technical body tasked solely with monitoring and verification obligations necessarily lacks the authority to define the nature of the issue in question as a ‘threat to international peace and security’ requiring enforcement action by the SC. The Council itself is the only organ capable of making such a determination. This does not preclude the fact that the IAEA may bring the Council’s attention to matters which relate to potential conflict if an evidentiary basis for such a contention exists. Similarly, in SC Resolution 1336 the Council welcomed the provision of information from external sources pertaining to potential conflicts in stating that it

Undertakes to keep situations of potential conflict under close review as part of a conflict prevention strategy and expresses its intention to consider cases of potential conflict brought to its attention by any Member State, or by a State not a Member of the United Nations or by the General Assembly or on the basis of information furnished by the Economic and Social Council.

The IAEA could in a similar manner furnish the Council with information in accordance with Article III.B.1 and III.B.4. In referring the Iranian dossier to the Council in resolution GOV/2005/77, the Agency made a declaration of non-compliance initially and proceeded to invoke Article III.b, claiming that

the history of concealment of Iran’s nuclear activities referred to in the Director General’s report [GOV/2003/75], the nature of these activities, issues brought to light in the course of the Agency’s verification of declarations made by Iran since September 2002 and the resulting absence of confidence that Iran’s nuclear programme is exclusively for peaceful purposes have given rise to questions that are within the competence of the Security

Council, as the organ bearing the main responsibility for the maintenance of international peace and security.<sup>118</sup>

There are issues with this aspect of the referral. Firstly, allegations regarding the peaceful nature of Iran's nuclear program again raise the issue of standard of proof, given the gravity of the charge of conducting a non-peaceful nuclear program.

### **The Legal Dispute between the IAEA and Iran**

It has been contended as a result of the foregoing analysis that the Agency's declaration of non-compliance in the case of Iran was invalid due to its inability to identify diversion of declared materials to non-peaceful activities, a contention which has been made by Iran on numerous occasions. It is evident therefore that a dispute exists between Iran and the Agency regarding the application of the CSA in Iran – with the latter claiming its inability to verify the absence of undeclared materials or activities in Iran precludes the possibility of declaring Iran in compliance with its obligations.

The definition of a dispute, according to the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions Judgment* (1924) as cited with approval by the ICJ in the *Case Concerning East Timor (Portugal v Australia)*<sup>119</sup> is 'a disagreement on a point of law or fact or a conflict of legal views or interests between two persons' in the context of the application or implementation of a treaty in force between the parties. In this case there is a conflict of legal

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<sup>118</sup> IAEA Board of Governors Report GOV/2005/77 September 24<sup>th</sup> 2005

<sup>119</sup> *Case Concerning East Timor (Portugal v Australia)* ICJ Reports (1999) 99, at 99 para.21

views in that the IAEA considers that it has made out a case for non-compliance whereas Iran has interpreted its CSA to require concrete evidence of diversion.

The possibility of such a ‘conflict of legal views’ was foreseen by the drafters of the IAEA Statute and Article XVII regarding settlement of disputes signifies that there was no intention to furnish the Agency with competence beyond the exclusive task of verification. Article XVII.A states:

Any question or dispute concerning the interpretation or application of this Statute which is not settled by negotiation shall be referred to the International Court of Justice in conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement.<sup>120</sup>

Clearly this Article precludes the possibility of the IAEA possessing the power to make a determination regarding a legal question pertaining to the application of the Statute. As this was a case of contested application of Article XII.C of the Statute and the breadth of the mandate accorded to the Agency by the Statute rather than a clear-cut case of diversion of declared materials it can be said that the correct arena for referral for the purposes of determination of the existent legal question was the ICJ. The IAEA has the status of an Agency within the UN Family meaning it can submit legal questions to the ICJ for an Advisory Opinion.

The dispute which was ongoing at the time of reporting to the Council can therefore also be seen to activate the dispute settlement procedures as envisaged by the CSA itself. Articles 20 and 21

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<sup>120</sup> INFCIRC/11 Article XVII

stipulate that disputes should be settled by discussions between the Board and the state in question, followed by Article 22 states that:

Any dispute arising out of the interpretation or application of this Agreement, except a dispute with regard to a finding by the Board under Article 19 or an action taken by the Board pursuant to such a finding, which is not settled by negotiation or another procedure agreed to by the Government of Iran and the Agency shall, at the request of either, be submitted to an arbitral tribunal...<sup>121</sup>

Based on this provision and the existence of a dispute between the parties it would appear that the Board failed to exhaust the measures under Article 22 of the CSA to seek resolution of the dispute regarding the divergence of views on the definition of non-compliance under the CSA. The qualification on Article 22's resort to arbitration referencing Article 19 does not invalidate the foregoing conclusion as Article 19 relates to an inability of the IAEA to verify non-diversion of materials required to be safeguarded which allows BOG to make finding of non-compliance pursuant to Article XII.C. As the Agency was able to verify non-diversion of declared materials in Iran this exception is inapplicable to the situation at hand which leads to the conclusion that, in accordance with the terms of the CSA, rather than issuing an invalid declaration of non-compliance the Board could have requested arbitration of the dispute. Iran, for its part, would have been wise to request the same.

It can be suggested therefore that at the time of the referral by the Board to the Council, the correct state of affairs could be described as a legal dispute over the implementation or application of the CSA rather than an established case of non-compliance. Involvement of the Council at this juncture, although not validly sought by way of the defective Article XII.C declaration could

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<sup>121</sup> INFCIRC/214 Article 22

arguably have been engaged under Articles III.B.1 of the Relationship Agreement and III.B.4 of the IAEA Statute regarding ‘questions within the competence’ of the Council, that is questions requiring the activation of the Council’s Chapter VI pacific dispute settlement function.

### **Conclusion on the Legality of the Board Referral to the Council**

Iran is not alone in its view that the IAEA has acted illegally in referring its file to the Security Council. In reiterating its Baku declaration of 2006, the Organisation of the Islamic Conference expressed that Iran’s nuclear issue should be settled by peaceful means and negotiations with no preconditions within framework of the IAEA, IAEA statute and NPT,<sup>122</sup> advocating the view that there is no basis for SC involvement. Similarly the Non-Aligned Movement, which notably is representative of the views of 120 states, at its Tehran Summit in 2012 reiterated its previously stated view that the IAEA was the ‘sole authority for verification of safeguards and there should be no undue pressure or interference with IAEA verification which would jeopardize the efficiency and credibility of the Agency’.<sup>123</sup> Furthermore in a transparent allusion to the Iranian situation it was opined that ‘ a clear distinction has to be made between the legal obligations of Member States under their respective safeguards agreements and their voluntary undertakings, in order to ensure that such voluntary undertakings are not turned into legal safeguards obligations.’ The prevailing view of the Movement therefore can be said to be in concurrence with the OIC in rejecting the validity of the transfer of the dossier to the Council and questioning the legality of the actions of the IAEA in the Iranian matter.

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<sup>122</sup> OIC/SUMMIT-11/2008/FC/Final at para. 83

<sup>123</sup> Final Document of the 16<sup>th</sup> Summit of Heads of State or Government of the Non-Aligned Movement, Tehran, August 26-31 2012, NAM 2012/Doc.1/Rev.2, at para.191

Finally it is noteworthy that in the debate which preceded the adoption of Resolution 1929 objections at the handling of the situation came from within the Council itself, in the form of dissent from then-members Brazil and Turkey. Having cooperated with Iran, these Council members prepared what was known as the Tehran Declaration<sup>124</sup>, aimed at reaching a negotiated settlement. However this declaration was not given due consideration and was swiftly followed by the intensification of sanctions, which was lamented by Brazil in stating that the declaration had not been given adequate ‘political recognition’ or time to ‘bear fruit’<sup>125</sup> This is a salient point as it proves that coupled with the sentiments of the OIC and NAM, there is widespread opinion that the IAEA has acted improperly and illegally in referring the Iranian file to the SC.

The above reasoning suggests that the Board’s declaration of non-compliance under Article XII.C was not legally sound and the correct course of action, given the existence of a dispute regarding the application of Article 19 of the CSA and Article XII.C of the IAEA Statute, would have been to initiate dispute settlement procedures as provided for by both treaties. It can be concluded therefore that the actions of the Board in transferring the Iranian nuclear dossier to the SC under the guise of non-compliance was in fact illegal and inconsistent with the mandate of the IAEA under the CSA.

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<sup>124</sup> Joint Declaration by Iran, Turkey and Brazil, 17 May 2010

<sup>125</sup> S/PV.6335, Brazil at 2-3

The transfer of the dossier to the Security Council marked a low-point in IAEA-Iranian relations and substantially hindered the progress being made as a result of confidence-building measures agreed to by Iran up to this point. As part of this attempt at transparency, Iran had agreed to implement a new, more stringent design information standard for new nuclear facilities, known as modified code 3.1 in 2003. Iran purported to suspend adherence to this modified code in February 2007 as a result of the transfer of the dossier. In reverting to its original design information obligation, Iran was reprimanded by the IAEA further for ‘actions inconsistent with’ its CSA, as this action was perceived as new and continuing violation of its obligations. Prior to this the violations under investigation had been confined to the period before the 2003 revelations of the extent of its nuclear program. The violations of Safeguard obligations incumbent upon Iran which occurred prior to 2003, were internationally wrongful acts amounting to breach of the CSA, which had been effectively remedied following calls of the Agency upon Iran.

### **Chapter 3: The Legality of the Security Council's Action in Response to the Iranian Nuclear Dossier**

In reaction to the referral of the Iranian nuclear dossier by the IAEA Board of governors, the Council has taken a number of measures endorsing the view of the Agency and intending to make mandatory the actions deemed necessary by the Agency. The first Chapter VII resolution was issued under Article 40, Resolution 1696(2006) was later followed by resolutions 1737(2006), 1747(2007), 1803(2008) and 1929(2010) and 1983(2011) which introduced sanctions to be imposed on Iran as a result of its failure to modify its behaviour pursuant to the initial demands contained in Resolution 1696. In justifying its continued disregard for SC demands, primarily the complete cessation of uranium enrichment, Iran has asserted, *inter alia*, that the involvement of the Council in this situation has been illegal *ab initio* due to the circumstances surrounding the referral and the absence of an Article 39 threat determination. The possibility that the transfer of the dossier to the Council for the purposes of pacific dispute settlement could be seen as valid will be explored below.

Iran moreover has submitted<sup>126</sup> that the treatment of the situation by the Council, for example the call for suspension of uranium enrichment is *ultra vires* the powers of the Council based on the privileged 'inalienable' status of the right to enrich uranium for peaceful purposes as

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<sup>126</sup> INFCIRC/847, 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



acknowledged by Article IV NPT. This section therefore seeks to evaluate the merits of the Iranian argument that the measures taken by the SC in this nuclear debate are defective from the point of view of international law based on the aforementioned arguments amongst others.

### **Security Council Mandate Under the UN Charter**

The Council in 2006 issued a Presidential Statement<sup>127</sup> which ‘called upon’ Iran to implement the measures contained in the opening operative paragraph of the Board’s referral resolution.<sup>128</sup> Presidential statements, while clearly exhortatory and not capable of imposing binding measures, are often preferable to the utilisation of Chapter VI dispute settlement measures according to White, as they can be issued quickly and signal the intention of the Council.<sup>129</sup> Issuance of a Presidential Statement does not preclude the implementation of Chapter VI measures however it is arguable that utilising such a mechanism before entertaining dispute settlement signals that the intention of the Council in this instance was to align itself with the views of one party to the dispute, namely the IAEA, with little consideration for the opposing argument. This theory is confirmed by the fact that in the absence of Iranian deference to the contents of the Presidential Statement, the Council moved swiftly to Chapter VII measures under Article 40.

It is the view of this author, in light of the above contention that a legal dispute existed at the time of the referral, that the pacific dispute settlement function of the Council under Chapter VI was the only justifiable arena which would validate the Council’s involvement. It must be conceded at

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<sup>127</sup> S/PRST/2006/15

<sup>128</sup> Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran Report by the Director General, GOV/2006/15

<sup>129</sup> N.D White, *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* (Manchester University Press) (1993) at 72

this point that the Council has discretion to employ Chapter VII measures without exhausting Chapter VI measures, however this discretion is accompanied by the caveat that an Article 39 determination of a ‘threat to international peace and security’ must be made. In the same vein, the Council can compound Chapter VI measures with Chapter VII measures in order to create binding settlement obligations, so long as an Article 39 determination has been made.<sup>130</sup>

As the Council can function to deal with the pacific settlement of disputes under Chapter VI as opposed to only adopting measures to restore or maintain international peace and security under Chapter VII, it is clear that the Council does operate in two different roles, each of which is governed in different ways by the wording of the Charter. The distinction between the powers of the Council acting under Chapter VI and acting under Chapter VII has been debated heavily over the years. The issue at hand stems back as far as the San Francisco Conference during the debates on the wording of Article 1(1) of the Charter. The debates resulted in the drafting of an Article which contains complexities beyond *prima facie* examination and could be interpreted as creating a division between actions of the Council which are subject to ascertainable limits and actions which are less clearly regulated by international law when read in connection with Article 24.2 which relates to the powers of the Council.

As the Security Council is a body created by the Charter, it naturally cannot possess powers beyond the scope of its constituent document. In creating the Council, the Charter also laid down the scope of its authority and placed necessary limits on this. As a body comprised of five permanent and

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<sup>130</sup> *Ibid* at 84

ten rotating members, endowing the Council with omnipotent power over the remaining states would never have passed muster with signatories in the developing world. Thus, to a degree, the Charter contains provisions which are designed to keep the Council's actions in line with the fundamental tenets of the Charter – that is the purposes and principles of the UN.

Article 24.2 states:

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.<sup>131</sup>

Ostensibly this Article merely states what could be seen as obvious – the Council must act in conformity with the principles and purposes of the UN, which are elaborated upon in Article 1(1) of the Charter. However this link between Article 1(1) and Article 24(2) possibly produces a more complex outcome.

Article 1(1) lists as the first purpose of the Organisation:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, *and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;*<sup>132</sup>

This provision, when read in conformity with Article 24.2, it has been argued, was worded in such a way as to ensure that only the dispute settlement function of the Council as exercised under Chapter VI would be regulated or limited by international law. As posited by the Rapporteur at San Francisco –

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<sup>131</sup> Article 24 UN Charter

<sup>132</sup> Article 1(1) UN Charter, emphasis added

the concept of justice and international law can thus find a more appropriate place in context with the last part of the paragraph dealing with disputes and situations...there it can find a real scope to operate, a more precise expression and a more practical field of application.<sup>133</sup>

As a result the wording has been taken to exclude the requirement that collective measures for the removal and prevention of threats by the Council are to be taken in conformity with the principles of justice and international law. Goodrich, Hambro and Simons opine that at San Francisco the major powers conceded the inclusion of the limitation on the dispute settlement to appease the less established states and to ensure that the hands of the Council on matters of crucial importance – those requiring collective measures governed by Chapter VII – would not be tied to an undesirable extent.<sup>134</sup> Gordon, in asserting that this deliberately ambivalent wording of the Article was necessary, opines that ‘the ambiguity of the document seems tied to a certain sleight of hand: if the grant of unbounded authority had been stated in such bald terms; no one would have consented’.<sup>135</sup>

Judge Schwebel, dissenting, in the International Court of Justice *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*<sup>136</sup> was of the opinion that the omission of ‘in conformity with principles of justice and international law’ from the former half of Article 1(1) was deliberate so as to ensure the Council would not have its ability to prevent and remove threats limited by existing law. This interpretation of the legal limitation or lack thereof placed on the Council acting under

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<sup>133</sup> M. Henri Rolin of Belgium, President of the Commission, UNCIO Vol. 6 at 452-453

<sup>134</sup> L.M. Goodrich, E. Hambro and A.P. Simons, *The Charter of the United Nations* (3rd ed.)(1969)

<sup>135</sup> J. Gordon, Is the Security Council Unbound by Law? 12 Chi. J. Int'l L. 605 (2011-2012) at 642

<sup>136</sup> *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v United Kingdom), Preliminary Objections, 37 ILM 586 (1998) at 627

Chapter VII is also endorsed by Kelsen in concluding that the Council is not bound to respect international law when acting under Chapter VII,<sup>137</sup> a view similarly subscribed to by Talmon.<sup>138</sup>

However it must be noted that Judge Schwebel was in the minority in *Lockerbie* and in practice the case has acted as a catalyst for a myriad of decisions affirming that the Council when acting in its enforcement function is bound by international law such as landmark cases *Namibia*<sup>139</sup> in the ICJ and *Tadic*<sup>140</sup> in the ICTY, thus the contrary view in light of this seems untenable. The international legal limits on the SC, namely *jus cogens* and the purposes and principles of the Charter, will be examined below.

The relevant extraction from this is, as affirmed by De Wet, that the drafters did not intend to leave the SC full and unlimited discretion in its actions for international peace and security however the wording of Article 1 could suggest that the primary function of the Council is afforded some 'leeway' with regards to the principles of justice and international law. The SC cannot deviate from international law in an 'unrestricted fashion' in carrying out its primary role but may limit it to an extent in order to be cognisant of the political overtones inherent in issues pertaining to international peace and security.<sup>141</sup> If this leeway does exist however, it is not to be extended to Chapter VI actions and is limited at best in context of Chapter VII.

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<sup>137</sup> H.Kelsen, *The Law of the United Nation*, (1950) (Frederick A. Praeger, 1<sup>st</sup> Ed) at 294-295

<sup>138</sup> S.Talmon, 'The Security Council as World Legislature', 99 AJIL 175 (2005) at 184

<sup>139</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970), 1971 I.C.J. 16, 53 (June 21)

<sup>140</sup> *Prosecutor v Tadic* (IT-94-I-AR72) Decision on Jurisdiction, Appeals Chamber, 2nd October (1995)

<sup>141</sup> E. De Wet, A. Nollkaemper & P.Dijkstra Eds, *Review of the Security Council by Member States* (Intersentia NV) (2003) at 8

In defence of a narrow conception of this leeway, encouraging subordination of international law in pursuit of peace and security seems paradoxical, as the two must not be seen as mutually exclusive but rather interrelated elements of a broad concept. Fundamentally, the Charter is a multilateral treaty the parties to which, in creating the Council in Chapter V, dictated its mandate. As the Council is an organ of the UN, itself an organisation existing in and governed by international law, it cannot have been delegated by the member states powers that the member states themselves did not possess, as embodied in the principle *nemo plus juris transfere quam ipse habet*.<sup>142</sup>

Finally based on Article 33<sup>143</sup> of the Charter, the Council may apply Chapter VI measures when it determines that the dispute at hand *could possibly* endanger international peace and security. When acting in its dispute settlement function the Council is bound to respect international law, meaning that it may not make mandatory or impose the terms of a settlement on the parties to the dispute as to do so would be violative of the basic requirement of consent in entering into legal relations or settlements affecting the legal rights and obligations of the parties in the sphere of international law.

If the function of pacific dispute settlement is the appropriate Council role in this case, the above reasoning dictates that the Security Council in seeking ‘adjustment or settlement of international

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<sup>142</sup> E. Papastavridis, ‘Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraqi Crisis’, 56 ICLQ (2007)

<sup>143</sup> Article 33 UN Charter: 1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

disputes or situations which might lead to a breach of the peace'<sup>144</sup>, that is one which does not cross the boundary of Article 39, cannot impose a settlement without the consent of the parties to the dispute. Put differently, the process towards settlement advised by the Council is a recommendation rather than a binding decision. This is consistent with Chapter VI of the Charter which is peppered throughout with allusions to the recommendatory nature of Council power in its dispute settlement role in Articles 33, 36,37 and 38. Gill affirms that the when acting in its dispute settlement function the Council

...has no powers to override or restrict the rights of States under international law. In particular, it has no power to impose the means of settlement on any State or other entity involved in the dispute. Its powers are recommendatory and therefore not capable in themselves of creating legal obligations.<sup>145</sup>

The questions therefore remains, which function of the Council was appropriate in this case after referring an issue for the Council's consideration? If a settlement of a legal dispute is the correct remedy rather than the resolution of a situation which can be categorized as presenting a threat to international peace and security then the Council would by virtue of Articles 24(2) and 1(1) be unable to alter the rights of the parties, in this case Iran and impose a settlement or obligations to which Iran does not consent.

As the Council was initially engaged in a situation requiring the settlement of the existing dispute between the parties it is argued that Chapter VI would have been a more appropriate vehicle for the recommendations for settlement sought from the Council. As the nature of the issue in this

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<sup>144</sup> Article 1(1) UN Charter

<sup>145</sup> T.D Gill, 'Legal and some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter', 26 Netherlands Y.B Int'l Law (1995) 33 at 67

particular instance, a legal dispute, can be characterized as pertaining to rather than a concrete threat to international peace and security recourse to Chapter VII is legally dubious.

The Council is unbound by the fact that measures available to it in Chapter VI and Chapter VII are graduated in their severity level<sup>146</sup> and is free to choose whichever weapon in its arsenal to deal with a situation, employing Chapter VII measures instead of exhausting Chapter VI measures so long as the issue at hand represents a genuine existing threat to international peace and security, capable of resulting in an Article 39 threat determination. The question therefore is whether or not the situation at the time of the referral was one which could legitimately be classed as a threat to international peace and security, and the limits imposed on the Council in making such a determination.

### **Legitimacy and Limits of the Council's Action**

Regardless of whether the attention of the Council is drawn to a particular situation involving the IAEA and a member state via Article XII.C of the IAEA Statute due to non-compliance or through a report prompted due to questions arising within the competence of the Council (under Articles III.B.1 and III.B.4 of INFCIRC/II and the IAEA Statute)<sup>147</sup> the individual circumstances of the case at hand will be indicative of what type of assistance constitutes an appropriate response by the Council. In this particular case it is imperative to reiterate that when the issue was referred to the Council the situation at hand was in reality a legal dispute between the IAEA and Iran. While it is for the Council alone to determine the classification of the situation it is presented with as one

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<sup>146</sup> E.De Wet, *The Chapter VII Powers of the United Nations Security Council*, (Hart Publishing 2004) at 184

<sup>147</sup> GOV/2005/75 mentions both Article XII.C and Article III.B.4 as grounds for referring the case to the Council



which is ‘likely to endanger’ international peace and security (the purview of Chapter VI) or one which represents an actual present threat for the purposes of Article 39, this determination must be definitively made based on facts and findings.

Resolution 1696 was adopted specifically under Article 40, located in Chapter VII of the Charter by the Council in response to the IAEA’s referral of the case. The Council based the resolution specifically on details contained in the referral in ‘noting with concern’ the outstanding issues the Agency had in the Iranian case as well as its inability to confirm the absence of undeclared materials in Iran. Essentially, the issue at hand was the IAEA’s complaint that its mandate was not broad enough to permit more intrusive investigation in Iran.

The resolution makes reference to various Board of Governors reports regarding Iran’s failure to comply with restrictive confidence-building measures requested by the Agency, including suspension of uranium enrichment. In light of the information provided by the Agency, the Council stated that it was

Concerned by the proliferation risks presented by the Iranian nuclear programme, mindful of its primary responsibility under the Charter of the United Nations for the maintenance of international peace and security, and being determined to prevent an aggravation of the situation.

The Council decided to utilize Article 40 in order to ‘make mandatory’ the suspension and measures required by the IAEA. The adoption of this resolution under Chapter VII is problematic for a number of reasons. First and most notably, the resolution fails to establish a threat to

international peace and security as required by Article 39, the gateway to Chapter VII powers, and if it does so by implication, the genuineness of the threat can be examined. Furthermore, Article 40 itself has textual limits which do permit suspension of a party's right to enrich uranium and encounters difficulty overcoming Article 2(7) protection of domestic jurisdiction. Finally, the possibility of the use of Chapter VII and demand for cessation of enrichment in this scenario calls into question the purposes and principles limitations on the actions of the Security Council.

### **Article 39 – Problems and Limits**

As the opening provision of Chapter VII of the Charter entitled 'Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression' Article 39 states that

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Simma denotes to Article 39 the title of 'the single most important provision of the Charter' in positing that

By defining the main prerequisites for the application of Arts. 40 to 42, Art. 39 opens the way for the use of the most powerful instrument of the UN, the adoption of enforcement measures in cases of threats to the peace, breaches of the peace or acts of aggression.<sup>148</sup>

It is beyond contention that imposition of Chapter VII measures, under Article 40 or enforcement measures under Article 41, require an Article 39 threat determination to be made. The presence of such a threat is the defining criterion of Chapter VII action.

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<sup>148</sup> J. Frowein and N. Krisch, 'Introduction to Chapter VII in 'B. Simma, *The Charter of the United Nations: A Commentary*, (2nd ed.) (Oxford University Press) (2002) at 718

### **To Determine a Threat: Investigative Powers**

The Article is often relied upon to justify broad discretion on the part of the Council as it confers the power ‘to determine’ the existence of a threat. As all treaty provisions, Article 39 must be interpreted in line with Article 31 VCLT. Orakhelashvili highlights the significance of the terms ‘exists’ and ‘determine’ in the provision. Taking into account the ordinary meaning of the words employed, the inclusion of ‘exists’ requires that the threat must be ‘real and present’, objectively ascertainable based on factors such as its scale, gravity or nature rather than subjectively perceived by the Council.<sup>149</sup> Similarly Fry maintains that the use of the word ‘exists’ in Article 39 means that the authority granted under Chapter VII is to be exercised only in response to an actual threat rather than preventatively.<sup>150</sup> The Council’s obligation to ‘determine’ the existence of a threat based on ascertainable facts and research can be evidenced with reference to Article 34 of Chapter VI which states that

The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

In this context, investigative powers are provided for in order to enable the Council to ‘determine’ whether the dispute could potentially have a bearing on international peace and security if left unchecked. The ordinary meaning of the verb ‘to determine’ in the context of the Council’s powers therefore is ‘to establish something by research or calculation’.<sup>151</sup> While ‘to determine’ can alternatively mean ‘to decide’, the context which is utilized by the Council in Resolutions to denote

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<sup>149</sup> A. Orakhelashvili, *Collective Security*, (OUP)(2009) at 150

<sup>150</sup> J. Fry, *Legal Resolution of Nuclear Non-Proliferation Disputes*, (CUP)(2012) at 58

<sup>151</sup> *ibid*

a decision, the drafters have allocated the former definition to the term in its employment in Chapter VI.

If investigation of an issue which could escalate and endanger international peace and security is provided for by the Charter in order to determine the nature of the situation, it would stand to reason that in order to sustain a determination of an actual threat as proscribed in Article 39 investigation would be necessary in order to confirm the objective existence of the threat in cases where the situation at hand encompasses factual debate. The verb ‘to determine’ in the context of situations threatening or likely to threaten international peace and security in Chapters VI and VII therefore can be interpreted as ‘to establish something by research or calculation’.

It is clear that the Council possesses an investigative mandate in making determinations regarding the maintenance of peace and security. Nasu points to the Article 34 based power of the Council to initiate *proprio motu* investigation of a situation in order to determine the existence of a threat, opining that Article 39 action by the Council

without an objective investigation in cases where factual or legal ambiguity remains would cast doubt on the legitimacy of the determination, giving rise to concern among small states about the possible abuse of power by the Security Council.<sup>152</sup>

While in this case the Council was not acting on its own initiative but rather in response to the IAEA’s referral, it can nevertheless initiate such investigations in order to make an informed and objective determination on the factual existence of a threat. Ambiguity existed regarding the genuine existence of the threat and as well as the proper course of action in dealing with the legal

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<sup>152</sup> H. Nasu, ‘Investigation *Proprio Motu* for the Maintenance of International Peace and Security’, Australian YBIL 105 (2004) at 117

debate which was ongoing at the time of adoption of Chapter VII measures in this case. While the existence of a legal debate does not in itself preclude the situation amounting to a genuine existing threat for the purposes of Article 39, the facts at hand require careful balancing by the Council in considering the classification of the situation as a threat.

Furthermore, the existence of Article 34 in Chapter VI endorses the notion of an investigative, inquisitive Council acting under both chapters, capable, if not obliged, to verify the existence of a threat in a situation which is mainly predicated on allegations. Fact finding is critical in these instances and the exercise of Council discretion in determining the existence of a genuine threat must be based on objective facts. The Council can exercise these powers when alerted by the IAEA or *proprio motu* but in each instance, the determination of the existence of a threat which is not clearly established in fact requires the use of investigative powers.

The IAEA in referring a case such as that of Iran has no authority to conclude that a threat exists, therefore the referral alone cannot form the basis of an Article 39 determination, especially in the absence of verification of diversion. In this case, the IAEA is mandated only to raise a red flag when diversion to non-peaceful purposes of nuclear material which it is tasked with accounting for is identified. The Agency then has the power and obligation to report to the Council under Article II.B.4 IAEA Statute and Article XII. The Council is responsible for the categorisation of the issue from this point onwards.

The Council must then on the basis of this initial evidence seek further details on the nature of the situation in order to ascertain whether or not a genuine threat exists. The findings of the Agency itself are preliminary and without further elaboration by the competent body, in this case the Council, incapable of constituting a genuine threat. The Council in this instance effectively took the IAEA's unqualified word for it that the suspicion of foul play on Iran's part amounted to a concrete threat. The absence of a fact finding investigation calls into question the legitimacy of the resolutions enacted.

In practice, the need for investigation and acquisition of facts to substantiate determination of a threat is highlighted by the existence of the *United Nations Mission to Investigate Allegations of the Use of Chemical Weapons*. This mission was established by SC Resolution 2235, creating by virtue of the Joint Investigative Mechanism of the United Nations and the Organization for the Prohibition of Chemical Weapons (OPCW). The Mission's purpose was endorsed by the Secretary General in stating that:

*“Where there are allegations of the use of chemical weapons, however, the international community looks to the United Nations for an impartial and objective determination whether, and to what extent, such allegations can be substantiated .”*<sup>153</sup>

Finally, being endowed with the primary responsibility and the obligation to act to ensure the maintenance of international peace and security necessarily entails a duty to act responsibly in its actions and determinations. Acting responsibly, O'Donnell explains, means “with peace and security as the central focus, not permanent members' particular interests. Action should also be based on objectively verifiable facts, conduct or threats, not speculation, and it should avoid being inconsistent or applying double standards.”<sup>154</sup>

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<sup>153</sup> Secretary General Ban-Ki Moon, *Report on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus on 21 August 2013*, United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic at para 5

<sup>154</sup> T. O'Donnell, 'Naming and Shaming – The Sorry Tale of Security Council Resolution 1520(2004)' 17 EJIL 945 (2006) at 951

### **Provisional Measures in Article 40 and Imposition of Dispute Settlement**

Provisional measures under Article 40 are not necessarily automatically binding, but they possess the potential to be based on whether the wording employed by the Council is indicative of an intention to bind the targeted state. In this case the Council ‘demands’ uranium enrichment cessation following the expression of the aim to make mandatory the suspension required by the IAEA’, which clearly indicates an intention to create a binding obligation. Had the intention of the Council been to issue a recommendation which was not binding on Iran it would likely have employed the terms ‘calls upon’ or ‘urges’. However, explicit inclusion of a qualification on the scope of provisional measures is made in Article 40 itself in stating that ‘such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned’<sup>155</sup> necessarily precludes the possibility of the Council being able to bind the parties to this proposed interim measure due to the fact that the imposition of the uranium enrichment halt on Iran would constitute prejudice to the right to peaceful uranium enrichment possessed by Iran.

The Council’s powers, as alluded to above, are not unfettered and find constraint in various Articles of the Charter, which governs the Council’s mandate. Despite protestations that SC powers were deliberately left broad and open ended by the drafters, Article 24.2 dictates that the principles of the Charter as contained in Article 1 and Article 2 are express limitation on the actions of the Council both in its dispute settlement and collective security functions. The parameters of this limitation will be explored below in the context of the legality of the specific measures imposed by the Council but it is worth noting at this point that Chapter VII action is not entirely

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<sup>155</sup> Article 40 UN Charter

uninhibited by all legal constraint and the invocation of this Chapter does not provide the Council with a *carte blanche* to take any action it deems suitable.

Chapter VI is the portion of the Charter designed to govern the Council's powers in situations which involve the categories enumerated by White as those 'likely to endanger peace and security', those which pose a 'potential threat' or those which are seen to be 'seriously disturbing international peace'.<sup>156</sup> 'Likely to endanger peace and security', 'potential threat' and 'seriously disturbing international peace' all fall short of the required Article 39 determination to invoke Chapter VII power, which is required in order to issue a resolution under Article 40. This author equates the terminology of the suite of Iranian resolutions with such phrases, as the term 'risks to international peace and security' is consistently employed throughout, which would imply that Article 39 determination criteria have not been met.

Resolution 1696, issued under Article 40, was employed in ostensibly a dispute settlement situation, with a view to imposing on Iran the terms of settlement proposed by the IAEA, most prominently the cessation of uranium enrichment. The Council however is, according to Gill, 'debarred from imposing a particular means, or the terms of a settlement upon the parties to a dispute by Article 1(1) and Chapters VI and VII of the Charter'.<sup>157</sup> This view is similarly endorsed by Schweigman.<sup>158</sup> As Article 25 ensures that the purposes and principles of the Charter represent

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<sup>156</sup> N.D White, *The United Nations and the Maintenance of International Peace and Security*, (Manchester University Press) (1990) at 39

<sup>157</sup> Gill, *supra* n141 at 71

<sup>158</sup> D. Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter* (Martinus Nihoff) (2001)



limits on SC action in maintaining and restoring international peace and security, a Council demand which explicitly imposes terms of settlement of a dispute on the parties concerned, in the absence of conformity with the principles of international law and justice, violates Article 1.

As De Wet correctly affirms, the Council may enforce the terms of a binding settlement handed down by the ICJ, the competent body in the case of legal dispute settlement, in accordance with Article 94(2).<sup>159</sup> But this is as far into legal dispute settlement as the Council is permitted to go by the principle limitation of Article 1's 'in conformity with the principles of international law and justice clause.' In the same Chapter, Article 92 assigns the function of primary judicial organ to the ICJ and Article 96(a) clearly dictates that the SC may request an advisory opinion on any legal question, confirming that legal disputes are not envisaged by the Charter drafters as the province of the Council.

This reasoning is compounded with the fact that the imposition of the measures demanded by the Council in resolution 1696 are contrary to the textual limitations of Article 40, stipulating that the measures ordered cannot prejudice the rights of the parties. In paragraph 2 of Resolution 1696, the Council

Demands, in this context, that Iran shall suspend all enrichment-related and reprocessing activities, including research and development, to be verified by the IAEA.<sup>160</sup>

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<sup>159</sup> E. De Wet, *The Chapter VII Powers of The United Nations Security Council* at 194

<sup>160</sup> SC Resolution 1696, SC/8792, 31st July (2006) at para 2

Clearly a mandatory suspension of uranium enrichment in Iran, termed as a demand, prejudices the rights of Iran in this case. In issuing Resolution 1696, the Council has demonstrated a clear preference for the IAEA's argument in the legal dispute and has sought to make mandatory the *ultra vires* measure the IAEA attempted to impose on Iran.

Furthermore, the issue of Article 2(7), a prominent principle of respect for the sovereign state and non-interference in matters essentially within its domestic jurisdiction, arises. This issue is investigated in greater detail in the following Chapter but at this juncture it is worth noting that this principle is subject to the exception of the Council acting in its enforcement function to restore or maintain international peace and security. It has been affirmed by the ICTY in *Tadic*<sup>161</sup> that Article 40 based provisional measures do not qualify as enforcement measures and therefore cannot avail of the exception in order to delve into issues within the domestic jurisdiction of the state. The domestic enrichment of uranium for the purposes of exercising the right to economic self-determination, it is argued, is one such matter which cannot be intervened in according to the limits of Article 40. Furthermore, sovereign decision-making, that is the decision to pursue an indigenous fuel cycle, is firmly within the realm of matters within domestic jurisdiction.

The suggested outcome therefore is that the Resolution 1696 does not provide a legal basis for the requirement that Iran suspend uranium enrichment. While Article 40 itself provides that the Council shall take account of failure to comply with provisional measures and act accordingly, this presupposes that such measures were derived from a valid resolution and this resolution in itself

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<sup>161</sup> *Prosecutor v Tadic* (IT-94-1-AR72) Decision on Jurisdiction, Appeals Chamber, 2nd October (1995) at para.33

did not legally bind Iran to suspend uranium enrichment as it was *ultra vires* the terms of the Article 40 of the Charter.

Resolution 1696 did nothing to persuade Iran to halt uranium enrichment and as contended above was a questionable legal basis for compelling Iran to comply, even before one considers the contentious issue of an Article 39 determination in these circumstances. However the Council's level of commitment to deterring Iran's nuclear ambitions, peaceful or otherwise, intensified when Resolution 1737 was issued. This resolution reinforced the demand for uranium enrichment cessation as well as imposing sanctions under Article 41 in response to the failure to comply with Resolution 1696. Enforcement action which includes coercive measures necessarily requires a clear and communicated threat determination under Article 39.

As will be seen below, Article 39 provides a very wide margin of appreciation to the Council in determining what constitutes a threat for the purposes of Chapter VII and the limitations placed on the Council's power to act are seemingly narrow and contested. However certain arguments to support Iran's position on the issue can be advanced and the legal merits of such arguments will be dealt with in the following section.

### Limitations on Article 39 Determinations

The International Court of Justice affirmed in *Certain Expenses of the United Nations*<sup>162</sup> that resolutions of the Council have a presumption of validity meaning that the decisions therein are presumed not to be *ultra vires* the powers granted to the Council by the Charter, whether specific or implied. The Court made conditional the application of the presumption of validity of SC resolutions, in limiting it to situations when

...the Organization took action which warranted the assertion that it was *appropriate for the fulfilment of one of the purposes of the United Nations* set forth in Article 1 of the Charter, the presumption was that such action was not *ultra vires* the Organization<sup>163</sup>

This pronouncement was supported by the Court again in *Namibia*,<sup>164</sup> although it is opined by Martenczuk that the presumption is more like a statement of judicial policy than a standard of judicial review, which gives the Council some assurance that pronouncement of invalidity of its decisions would not be taken lightly.<sup>165</sup> Either way, the existence of the presumption necessarily implies that although the Council is given the benefit of the doubt, doubt can in fact be cast on the validity of its resolutions, therefore affirming the existence of the Purposes and Principles of the Charter as limitations on the Council's power.

The Appeals Chamber in the ICTY case of *Prosecutor v Tadic* sought to lay down the parameters of the discretion the Council is said to enjoy in making an Article 39 determination first in stating

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<sup>162</sup> *Certain Expenses of the United Nations*, Advisory Opinion, July 20<sup>th</sup> 1962 (1962) ICJ Reports 151. See also Chapter III – Applicability of Article 103, p69-72, below

<sup>163</sup> *Ibid* at 168 emphasis added

<sup>164</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, I.C.J. Reports 1971

<sup>165</sup> B. Martenczuk, The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie? *European Journal of International Law* No. 3 (1999) at 539

that "It is clear that the Security Council plays a pivotal role and exercises a very wide discretion under this Article". However the Court established a clear boundary on the exercise of this discretion in affirming that

The situations justifying resort to the powers provided for by Chapter VII are 'a threat to the peace', 'a breach of the peace' or 'an act of aggression'. While the 'act of aggression' is more amenable to a legal determination, the 'threat to the peace' is more of a political concept. But the determination that there exists such a threat is not a totally unfettered discretion, as it has to remain, at the very least, within the limits of the purposes and principles of the Charter.<sup>166</sup>

It has already been established that the Council is subject to limitations when functioning in its dispute settlement role and its collective security role. In carrying out its latter function the Council is deliberately granted a great deal of latitude in its actions, but contrary to the Kelsenian view that such action is entirely unfettered, the past decade has seen the emergence of a prevailing opinion that the Council is subject to express limitations. As the oft-cited dicta from *Prosecutor v Tadic*<sup>167</sup> states,

The Security Council is subjected to certain constitutional limitations however broad its powers under the constitution may be, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus*.<sup>168</sup>

This is consistent with the opinion of Judge Lauterpacht in the *Bosnian Genocide Case* in which he opined

Nor should one overlook the significance of the provision in Article 24(2) of the Charter that, in discharging its duties to maintain international peace and security, the Security Council shall act in accordance with the purposes and principles of the United Nations<sup>169</sup>

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<sup>166</sup> *Prosecutor v Tadic* (IT-94-1-AR72) Decision on Jurisdiction, Appeals Chamber, 2nd October (1995) at para.29

<sup>167</sup> *Prosecutor v Tadic*, (IT-24-1) Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber (1995)

<sup>168</sup> *Ibid* at para. 28

<sup>169</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)* Provisional Measures, 1993 I.C.J. 439 (1993) separate opinion of Judge Lauterpacht at 440

Furthermore, the principle tenet to be extracted from *Lockerbie* in this regard has in recent years proven to be that which was enunciated by Judge Weeramantry in stating that

[t]he history of the United Nations Charter thus corroborates the view that a clear limitation on the plenitude of the Security Council's powers is that those powers must be exercised in accordance with the well-established principles of international law<sup>170</sup>

Iran claims however that certain provisions of the suite of Chapter VII resolutions issued by the Council in relation to its nuclear program are *ultra vires*<sup>171</sup> and therefore exercises of the Council's powers which need not be adhered to. It is arguable that the presumption of validity is rebutted in the case of the SC and Iran as although the Council purported to act in its maintenance of international peace and security purpose in accordance with Article 1, it took action which was not appropriate for the fulfilment of this purposes of the Charter because Iran's nuclear program arguably did not constitute a legitimate 'threat' to international peace and security, given all that the situation being considered was one of a legal dispute (as contended above) or one constituting the embryonic stages of a potential danger rather than an actual threat to peace.

### **The Existence of a Genuine Threat**

The Council, in making an Article 39 determination of a threat, is stating that the situation at hand has progressed beyond one which can be described as a 'potential threat to or 'likely to endanger' international peace and security, as these situations are governed by Chapter VI. To suggest that the SC is unlimited in its discretion to classify a matter as one requiring the employment of Chapter VII enforcement measures, that is, one which can yield an Article 39 determination, according to Martenczuk, would make the distinction between the powers of the Council under Chapter VI and

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<sup>170</sup> *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v United Kingdom) Provisional Measures, 1992 ICJ 114, 42 (April 14, 1992) at 175

<sup>171</sup> *supra* n.122 INFCIRC/847 at 4-5

Chapter VII obsolete.<sup>172</sup> As White has noted, these situations can escalate over time in severity or urgency and measures adopted under the aforementioned Articles can be coupled with Chapter VII in order to create binding obligations only if the Article 39 threshold has been passed.<sup>173</sup>

The notion of a Council unbound by any constraint in exercising this political discretion therefore is unfounded. What is required for an Article 39 determination therefore is not a wholly subjective assessment on the part of the Council but rather a situation which engages the primary purpose of the Council in the maintenance of international peace and security, that is, one which constitutes an actual existing threat to said peace and security rather than a potential or abstract one.

Reference can be made to the situation involving the 1946 ‘Spanish Question’, in which the SC established a sub-committee which found that Franco’s regime was ‘of international concern’ but not yet an actual ‘threat to peace’ and therefore a ‘potential menace to international peace and security’ which necessarily falls short of the Article 39 requirement and would qualify as a ‘likely to endanger peace and security’ under Article 34 of Chapter VI. Spain had no imminent intention to wage war, which places emphasis on the criterion of immediacy for an actual threat. The sub-committee maintained that there was a distinction between a potential and actual threat which undoubtedly would have a bearing on its ability to make a positive Article 39 determination. However this distinction established by a nascent Council wary of resorting to harsh measures

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<sup>172</sup> *supra* n.161 Martenczuk at 542

<sup>173</sup> *supra* n.152 White, *The United Nations and the Maintenance of International Peace and Security*, at 84

under a then under-developed Chapter VII has not survived unscathed the evolution of the Council into a more pro-active organ far more willing to engage in post-Cold War enforcement action.<sup>174</sup>

Doubtless if these criteria were considered pertinent to an Article 39 finding today the Iranian situation would have fallen far short of an actual threatening the Council would have confined itself to Article 34 recommendatory dispute settlement measures. Schott opines that the criteria of proximity and imminence of the threat should still be necessary components of a threat determination but notes the Council's disregard for such concerns in its determination of a threat in the Lockerbie situation.<sup>175</sup> Certainly the recognition of a requirement of such a distinction would ensure that the Council acts in a manner which is cognisant of the constraints of an Article 39 determination.

As the Council is constrained by the purposes and principles of the Charter, it is necessarily bound in making an Article 39 determination to respect the fundamental principles of international law from which the Charter's purposes and principles are derived. A principle of general international law which is likely to have a bearing on the Council's exercise of its Article 39 determination would be the principle of good faith as recognized in the ICJ *Nuclear Test Case* as "one of the basic principles governing the creation and performance of legal obligations, whatever their

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<sup>174</sup> *supra* n152 White at 37

<sup>175</sup> J. Schott, 'Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency', 6 North Western Journal of International Human Rights 24 (2008) at 42



sources.”<sup>176</sup> The specific application of such a principle to the actions of the Council is affirmed by Franck in stating that the Council’s broad discretion must be “exercised *bona fides*”.<sup>177</sup>

In the case of Iran however, the Council has failed to establish the existence of an actual threat to international peace and security as required by Article 39 to justify the imposition of Article 41 measures. In the text of each of its enforcement resolutions imposing sanctions on Iran, in place of an outright determination that a threat to international peace and security exists the Council has repeatedly stated that it is

‘Concerned by the proliferation risks presented by the Iranian nuclear programme and mindful of its primary responsibility under the Charter of the United Nations for the maintenance of international peace and security’<sup>178</sup>

This author is of the opinion that the term ‘risks’ falls short of the Article 39 ‘threat’ required to justify enforcement measures under Article 41. Furthermore it is noteworthy that this risk-based terminology of remains constant throughout the following Article 41 based resolutions. Orakhelashvili in a similar vein notes that the ‘Council’s rhetoric goes very near to the area covered by Article 39 but does not cross the boundary by specifying that these risks constitute a threat. The Council is thus conscious that this is not a valid case for using Article 39.’<sup>179</sup>

Cognisant of the malleability of Article 39 to cover situations which cannot be said to be genuinely threats to international peace and security, Fitzmaurice in *Namibia* stated that the SC ‘can act in

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<sup>176</sup> *Nuclear Tests Case* (New Zealand v. France), Judgment, I.C.J. Reports 1974 (1974), 253 at 268

<sup>177</sup> T.M. Franck, *The Bona Fides of Power, the Security Council and Threats to the Peace* (1993) Hague Recueil 189 at 191

<sup>178</sup> S/RES/1696, S/RES/1737, S/RES/1747, S/RES/1803 and S/RES/1929

<sup>179</sup> A. Orakhelashvili, *Collective Security* (Oxford University Press OUP) (2011) at 173

the preservation of peace and security, provided that the threat said to be involved is not a mere figment or pretext.<sup>180</sup> Continuing in the same vein, he further opined that:

Limitations on the powers of the Security Council are necessary because of the all too great ease which any acutely controversial international situation can be represented as involving a latent threat to peace and security, even where it is really too remote genuinely to be one.<sup>181</sup>

Judge Gros, dissenting in *Namibia*, expressed a similar sentiment in stating affirming that ‘To assert that a matter may have a distant repercussion on the maintenance of peace is not enough to turn the Security Council into a world government.’<sup>182</sup>

As for classifying a situation as a threat when doubt can be cast on its legitimacy, Judge Kooijmans raises an interesting point which is applicable to the issue at hand in stating that

... although the SC is completely free to decide whether a situation constitutes a threat to the peace, one may ask if it is fully in conformity with the spirit of the Charter to impose sanctions if the threat is not actual and efforts to resolve the dispute have not been completely exhausted.<sup>183</sup>

This raises two salient issues pertaining to the Council’s treatment of the Iranian file, firstly that the threat at hand must be an actual one, that is, one which is proximate and no longer merely potential and capable of resolution without resort to Chapter VII and secondly that to impose sanctions when a situation could still be defined as one governed by Chapter VI could violate the purposes and principles of the Charter. As Article 1 highlights peaceful dispute settlements as a

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<sup>180</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16, 53 (June 21) Dissenting Opinion of Judge Gerald Fitzmaurice, p 293 at para 112

<sup>181</sup> Ibid

<sup>182</sup> Ibid, Dissenting Opinion of Judge Gros at p 340, para 34

<sup>183</sup> P. Kooijmans, ‘The Enlargement of the Concept of “Threat to the Peace”’ in P.M Dupuy (ed.) *The Development of the Role of the Security Council* (Leiden, Martinus Nijhoff) (1993) at 117

primary purpose of the organization, actions which actively undermine this purpose such as recourse to enforcement measures in the absence of dispute resolution are legally questionable.

In other words such action could be indicative of action *male fides* on the part of the Council in possibly manipulating the strictures of Article 39 in the pursuance of political motives. The possibility of such an occurrence is all the more likely with the recent emergence in Council practice of what Reisman calls “parliamentary matryoshka” containing “ever-smaller ‘mini-Councils’ each meeting behind closed doors without keeping records and each making decisions secretly.”<sup>184</sup> Such practice decreases the likelihood that a resultant Article 39 determination will be amenable to legal scrutiny as the genuine reasoning which has facilitated its coming into being will remain between the members of the private faction, thus opening the door for actions taken absent *bona fides* considerations.

In tacitly asserting that the Iranian case constitutes a ‘threat’ to international peace and security as well as the possibility of disregard for the requirement of good faith it is arguable that the Council has engaged in an abuse of power. It is difficult given the discretion accorded to the Council to conclusively support this contention however there is certainly judicial support for inclusion of such a limitation. Judge Fitzmaurice in *Namibia* objected to the fact that in the case in the case in question there was ‘no threat to peace and security other than such as might be artificially created as a pretext for the realization of ulterior purposes’<sup>185</sup> which highlights the possibility of an abuse of power by the Council. On this issue Schweigman has argued that the Security Council could

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<sup>184</sup> W. M Reisman, *The Constitutional Crisis in the United Nations*, 87 Am. J. Int’l L. 83, 92 (1993) at 85-86

<sup>185</sup> *supra* n.176 Fitzmaurice at para. 116

not commit a manifest abuse of rights, which "would occur when its action was manifestly disproportionate or unnecessary as regards its aim, the restoration of international peace."<sup>186</sup>

In *Prosecutor v Tadic* Judge Sidhwa stated that 'It cannot be that in delegating their authority to the Security Council the states granted full powers to the Security Council to act according to its whims or purely capricious considerations.'<sup>187</sup> In applying this to the case at hand and finding that the establishment of the ICTY by the Council was a valid exercise of its Chapter VII power, he stated with approval that the decision was based on 'a proper appraisal of the evidence and was reasonable and fair and not arbitrary or capricious'.<sup>188</sup> Cryer opines that this is 'a very wide formulation as it seems to degree of procedural propriety' on the Council resulting in the requirement of a proper examination of the relevant evidence and a prohibition on arbitrariness.<sup>189</sup>

It is suggested that such a formulation should be necessary to assert the existence of a 'threat to peace' under Article 39. The inclusion of a requirement of a proper appraisal of the evidence to ensure the validity of the determination, that is, one which is not artificially created for ulterior purposes or based on arbitrary or capricious considerations may have resulted in an inability on the part of the Council to make a threat determination in the case of Iran. This would then have ensured that the situation was confined to Chapter VI dispute settlement rather than escalating to include unjustifiable Article 41 sanctions. Given the Council's 'rather nebulous treatment'<sup>190</sup> of whether the Iranian situation involved a threat to peace justifying resort Chapter VII measures it

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<sup>186</sup> *supra* n.154 Schweigman at 177

<sup>187</sup> *supra* n.162 Separate Opinion of Judge Sidhwa at para.21

<sup>188</sup> *Supra* n.162 Separate Opinion of Judge Sidhwa at para. 61

<sup>189</sup> R. Cryer, 'Article 39: A Threat to Coherence?', 1 J. Armed Conflict L. 161 (1996)

<sup>190</sup> *supra* n.175 Orakhelashvili at 173

can be contented that arbitrary and capricious considerations were perhaps at the forefront of Council reasoning the result of which would be an abuse of power on the part of the Council.

Given the consistent disregard by Iran for the demands contained in the relevant SC resolutions, the final consideration in an examination of whether or not the Article 39 threat determination in question was valid in the case of Iran is whether or not non-adherence to the demands of a Chapter VII resolution can be classified as a threat to international peace and security. It was opined, obiter, by dissenting Judge El-Kosheri in *Lockerbie* that ignoring a binding Chapter VII resolution would constitute a threat to international peace and security.<sup>191</sup>

The point is worth consideration in the case of Iran as the text of each SC resolution following Resolution 1696 makes reference to the Council's 'concern' emanating from 'Iran's continuing failure to meet the requirements of the IAEA Board of Governors and to comply with the provisions of Security Council Resolution 1696'<sup>192</sup> adding the fact that Iran has failed to comply with the preceding resolution in adopting new resolutions. Given the fact that it has been argued that the consistent risk-based terminology of the resolutions is insufficient to justify an Article 39 threat determination this non-compliance with Chapter VII resolutions could be taken to form the basis of the threat determination.

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<sup>191</sup> *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v UK) 1992 ICJ 3, Provisional Measures* Separate Opinion of Judge El-Kosheri at p.206

<sup>192</sup> S/Res/1737 (2006)

As noted above, situations which may begin as ‘potential threats’ can escalate and materialize into actual threats necessitating the compounding of recommendatory Chapter VI measures with Chapter VII to create mandatory obligations. Furthermore it is arguable that disregard for Chapter VII resolutions could legitimately form the basis of a threat to international peace and security as an inability on the part of the Council to effectively dispose of a threat using its Chapter VII powers would hinder its ability to ensure the maintenance of international peace and security. However the foregoing is based on the assumption that the preceding Chapter VII resolution with which the offending state has failed to comply is a valid resolution.

Resolution 1696 as noted above attempted to make mandatory measures under Article 40 of Chapter VII which had the effect of altering the rights of the parties involved and was therefore *ultra vires* the powers granted to the Council under that Article and invalid, meaning that Iran was not required to comply with its provisions. Therefore the implicit Article 39 determination in Resolution 1737 could not be based on the non-compliance with invalid Resolution 1696. Resolution 1737 reiterates the demands contained in Resolution 1696 but arguably fails to make a justifiable Article 39 determination to justify the sanctions imposed under Article 41, as investigated above. However, the Council makes demands upon Iran, such as the full suspension of uranium enrichment and adherence to the Additional Protocol, which prejudice the rights of one of the parties contrary to the text of Article 40.

Based not only on Article 25 of the Charter but also Articles 48 and 49 of Chapter VII, decisions of the Council, including those made in the text of the SC resolutions in this case are binding as

UN members have consented to carry out these decisions, a principle affirmed in *Namibia*.<sup>193</sup> Article 25 places a limitation on this obligation in referring to decisions ‘in accordance with the present Charter’ which can be interpreted to mean that if the Council makes a decision that is *ultra vires* members are permitted to disregard the decision and are not required to comply, that is members have only consented to carry out *intra vires* decisions.<sup>194</sup> If this contention is accepted then Iran’s failure to comply with the demands contained in each Chapter VII Resolution following Resolution 1737 could amount to a threat to international peace and security for the purposes of Article 39. This is the case unless it can be demonstrated that the content of the demands contained in the Iranian resolutions are *ultra vires* the powers of the Council or the content of the demands amounts to a decision by the Council which is not in conformity with the purposes and principles of the Charter, which shall be examined in Chapter III.

## Conclusion

It has been argued in this Chapter that many of the contentions made by Iran regarding the illegality of the treatment of its nuclear program at the hands of the IAEA Board of Governors and the Security Council are far from baseless allegations. It can be said rather that they represent compelling questions regarding the efficacy of the IAEA as well as the legitimacy of the Council’s actions under Chapter VII in this particular case, highlighting the potential for abuse of its broad but not incontestable discretion. As has been demonstrated, the IAEA appears to have greatly exceeded its statutory mandate in referring the issue to the Council rather than seeking dispute

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<sup>193</sup> *Supra* n.176 at para. 113

<sup>194</sup> A. Tzanakopoulos, *Disobeying the Security Council: Countermeasures Against Wrongful Sanctions* (OUP)(2011) at 165

settlement in the fora of either an arbitral tribunal or the International Court of Justice or in seeking to utilize remedial measures available to it within its authority.

The dubious validity of the IAEA referral was then compounded with questionable treatment of the issue before the Council in failing to treat the situation as one of a continuing legal dispute requiring Chapter VI measures or initiating an investigation to verify the actuality of the threat. Subsequently the Council consistently applying risk based terminology which fell short of the threshold required for an Article 39 threat determination has resulted in a scenario capable of convincing many that the Council has succeeded in this case in carrying out its functions in an entirely politically motivated fashion, *legibus solutus*.

Iran has contested the demands of the Council for a full suspension of uranium enrichment which it maintains are an invalid use of the Council's powers due to fact that the right to enrich uranium for peaceful purposes is, as acknowledged by the NPT in Article IV, 'inalienable' and by virtue of the limitations placed on the Council by the Charter incapable of valid suspension by the SC<sup>195</sup>. These issues will be analysed in the next Chapter in an attempt to examine the legality of the measures demanded by the Security Council and reach a tentative conclusion whether or not the Council has acted outside the strictures of international law in its handling of the Iranian nuclear issue.

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<sup>195</sup> INFCIRC/837 at p.9-11



## Chapter 4 – The Inalienable Right to Peaceful Nuclear Energy and *Ultra Vires* Demands of the Security Council

*The Security Council, even when acting genuinely for the preservation or restoration of peace and security, has a scope of action limited by the State's sovereignty and the fundamental rights without which the sovereignty cannot be exercised.*

Sir Gerald Fitzmaurice<sup>196</sup>

### Introduction

The foregoing chapter attempted to demonstrate that the referral of the situation by the IAEA to the UNSC and the Council's resort to Chapter VII enforcement measures in the absence of an Article 39 determination have dubious bases in international law. However, despite the Council's legal error in employing enforcement measures absent an Article 39 determination, it is lamentable that remedy for a decision which is made by the Council with primacy given to political considerations is politically unchallengeable, but susceptible to legal scrutiny nonetheless. As has been touched on previously, the Council in its actions is not permitted to act *legibus solubus*. The few restrictions applicable to the Council have much greater potency when applied to actions of the Council designed to maintain or restore international peace and security, as opposed to the initial political decision that a threat exists. Accordingly, the Council is not unbound by law and free to impose any measure it sees fit to deal with a declared threat, for if the contents of Chapter VII result in measures which are not in accordance with the Charter or in-keeping with the purposes and principles of the Charter then the matter of *ultra vires* arises.

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<sup>196</sup>*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16, 53 (June 21) Dissenting Opinion of Judge Gerald p. 226, para. 10

This chapter shall examine the Iranian contention that the Council has acted *ultra vires*, that is, it has exceeded or acted outside of its Charter based mandate in imposing Chapter VII based demands and sanctions. Primarily this chapter will focus on the issue of Iran's right to uranium enrichment for peaceful purposes, which the Council has at all junctures attempted to undermine with demands for suspension.

In order to fully comprehend the scope of this right, which Article IV of the Non-Proliferation Treaty describes as 'inalienable', the source, nature and context of the right must be examined. Furthermore the legal implications of Security Council suspension of the right will be examined, in particular to address the Iranian argument that the suspension demands violate the purposes and principles of the organisation, which the Council is bound to respect. Furthermore, Council demands for the ratification of the Additional Protocol shall be scrutinised from a legal perspective with consideration of the possible conflicts with the law of treaties and general international law norms.

### **The Applicability of Article 103 of the UN Charter**

There are those who outright deny the existence of the inalienable right to peaceful nuclear energy including the indigenous right to enrich uranium, with a prominent example being US Secretary of State John Kerry.<sup>197</sup> This section will argue that the proponents of such a view are failing to recognise that there is inherent legal ambiguity present in the issue, which cannot be neatly dismissed by politically based rationalisation. Staunch adherence to denial of its existence or the

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<sup>197</sup> A. Blake, "Kerry on Iran: 'We do not recognize a right to enrich'", The Washington Post, November 24<sup>th</sup> (2013)

valid suspension of the right by the Security Council barely scratches the surface of the issue at hand.

Some commentators such as Goodman<sup>198</sup> are satisfied that the mere utterance of the words ‘Article 103’ disposes of the right entirely, without consideration of the legal scope or purpose of said Article. Reliance on such an argument is arguably representative of quite a naive view of the acumen of Iran’s legal advisors. If anything, the arguments submitted by Iran are more concerned with international legal considerations than those put forward by opposing powers which have a propensity to gloss over the aspects of the legal situation which deserve consideration.

First, the validity of the argument that invocation of Article 103 can dispose of Iran’s right to enrich entirely will be examined. If it transpires that Article 103 cannot override the right to enrich, Iran’s position is strengthened considerably.

Article 103 of the UN Charter states that:

“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”<sup>199</sup>

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<sup>198</sup> R. Goodman, “Iran’s Purported Right to Enrich Uranium and Alleged Bias at the New York Times”, Just Security, November 24<sup>th</sup> 2014.

<sup>199</sup> Article 103 United Nations Charter 1945

Many opponents of Iran's right to enrich have been quick to cite the Charter's 'so-called supremacy clause'<sup>200</sup> as capable of rendering Iranian assertions of an inalienable right moot. Goodman is adamant that Iran's claim to a right to enrich uranium is 'unsustainable'.<sup>201</sup> Goodman further cites numerous concurring opinions, such as that of Reed, who asserts that 'Article 103 of the UN Charter clarifies this point without room for dispute'<sup>202</sup> and Glennon, who dismisses Iran's claim stating that "the obligations imposed by the UN Charter trump any inconsistent treaty, including the Nuclear Non-Proliferation Treaty."<sup>203</sup>

Article 103's applicability to the case at hand however is contestable on two different grounds pertaining to the Article's scope. The issue of the sources of obligations capable of being overridden by Article 103 and that of the rights vs obligations distinction must be examined. This will be followed by analysis of the source of the right to enrich and its 'inalienable' classification in order to arrive at a conclusion on whether or not the right can be disposed of by reliance on Article 103.

By virtue of its textual content, Article 103 applies only to inconsistent obligations contained in any other 'international agreement' and does not operate to the detriment of general international law. Support for this reading of the provision is ample in the *Case concerning Questions of*

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<sup>200</sup> N.D White, 'The Security Council, the Security Imperative and International Law' in *International Law in a Multi-Polar World* ( Ed: M. Happold) (Routledge)(2011) at 10

<sup>201</sup> R. Goodman, 'Expert Opinion on Iran's "Right" to Enrich Uranium in the Face of Security Council Resolutions', Just Security, November 20<sup>th</sup> 2013

<sup>202</sup> A. Reed, 'UN Resolution 1696 Moots Iranian Legal Claims', Proliferation Analysis, Carnegie Endowment for International Peace, August 6<sup>th</sup> 2006

<sup>203</sup> M. Glennon, Iran's Right to Enrich, Just Security, December 2<sup>nd</sup> (2013)

*Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v US).*<sup>204</sup> Due to the unorthodox circumstances of Libya's application for provisional measures in the previous hearing before the ICJ<sup>205</sup>, the Court was faced with either having to accede to Security Council dominance in its issuance of Resolution 748 or proceed to scrutinize the legality of the Chapter VII resolution, therefore creating a precedent of judicial review of a Security Council decision.

Avoiding this confrontation, the majority in the 1992 ruling denied Libya's application for provisional measures and opted to rely on the reasoning that both Libya and the UK were bound by Article 25 to carry out decisions of the Council, and Article 103 ensured that the obligations in Resolution 781 overrode those contained in the Montreal Convention. This left open the possibility that a more in depth examination of the issue could take place at a later date, with several separate and dissenting opinions indicating that the decision was far from uncontroversial.

Judge Rezek confirmed that "Article 103 is not designed to operate to the detriment of customary international law and even less so to the detriment of the general principles of the law of nations."<sup>206</sup> This echoes the sentiment of Judge Oda in the same case, in noting that had Libya

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<sup>204</sup> *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v US)* Preliminary Objections, ICJ Reports, 27 February 1998

<sup>205</sup> *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v UK)* 1992 ICJ 3, *Provisional Measures*

<sup>206</sup> *Ibid*, Separate Opinion of Judge Rezek at 152

asserted its rights under general international law rather than relying on Montreal Convention-based rights a different litigation would have ensued.<sup>207</sup>

Judge Bedjaoui later concurred with this view in noting that Article 103 does not apply to “rights as may have other than conventional sources and be derived from general international law.”<sup>208</sup>

Based on these opinions, Franck maintains that what he calls the “synergy of Articles 25 and 103” of the Charter would not “trump sovereign rights under general international law.”<sup>209</sup> Furthermore Orakhelashvili explains that

‘Article 103 makes the Charter prevail over international agreements, freeing states from legal liability for any non-performance of their other agreements due to compliance with UN coercive measures, but this is not the case for the general international law...The clear text does not support the opposite view, and those who wish to see Article 103 as making the Charter prevail over general international law cannot rely on evidence, but only on wishful thinking’<sup>210</sup>

Gasser goes further still in stating that Article 103 clarifies that there is “no way for the Security Council to disregard international obligations other than those enshrined in international treaties, i.e. general principles of law or customary law.”<sup>211</sup>

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<sup>207</sup> *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v US)* Provisional Measures, Declaration of President Oda, ICJ Reports, 14 April 1992 at 131

<sup>208</sup> *Ibid*, Order of 14 April 1992, Dissenting Opinion of Judge Bedjaoui at 157

<sup>209</sup> T. M. Franck, ‘The “Powers of Appreciation”: Who Is the Ultimate Guardian of UN Legality?’, 86 AJIL 519 (1992) at 522

<sup>210</sup> A. Orakhelashvili, ‘The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions’, 16 EJIL 59 (2005) at 69

<sup>211</sup> H.P Gasser, ‘Collective Economic Sanctions and International Humanitarian Law: An Enforcement Measure Under the United Nations Charter and the Right of Civilians to Immunity: An Unavoidable Clash of Policy Goals? 56 ZAÖRV 871 (1996) at 881

Therefore to dismiss the rights claimed by Iran on the basis of Article 103 one must rely on the view that a) Article 103 trumps general international law and customary international law and is not confined to ‘international agreements’ as is stated in the Article itself and b) that Article 103 overrides rights as well as obligations, a point which is far from incontestable.

If the inalienable right was conferred by and exists by virtue of Article IV NPT meaning a conflict between the two treaties exists, the Charter may override the NPT based on this ‘supremacy clause’, if Article 103 operates to override rights as well as obligations. However some, including this author, take the view that the ‘inalienable right’ is not a product of the NPT but rather is merely acknowledged by the NPT in Article IV. If this view can be convincingly shown to be true, then Article 103 will be toothless in the face of such a right as the issue will be one of the SC attempting to override general international law rather than an inconsistent treaty provision, which as demonstrated above is not the purpose of the supremacy clause. It is necessary therefore to examine whether or not Article 103 applies to rights as well as obligations and the source or foundation of the right to develop nuclear energy.

### **General International Law, Customary International Law and Sovereign State Rights**

International law has in recent times been subject to a process of fragmentation. While such developments are arguably indicative of the evolution of the international legal system, these ‘centrifugal tendencies’ according to Caflisch, are to be discouraged in so far as the specific frameworks overlook the general international law principles upon which they are founded when

dealing with disputes which could only be solved by reverting to these general rules.<sup>212</sup> It is necessary, therefore, to consider that non-proliferation law does not exist in an NPT-centric vacuum but rather forms part of and is informed by the normative system of general international law. In other words, the NPT was born into the system of general international law and cannot be detached from its principles, of which general international law rights form a part.

One aspect of general international law which is of specific relevance to this study is that of sovereign state rights. States, as subjects of international law, have the capacity to possess rights and be subject to duties or obligations. Sovereign rights are those inuring to a state by virtue of its statehood which have their foundations in general international law, a recognized source of law in Article 38(1)(c) of the ICJ Statute.<sup>213</sup> The wording of this provision, in stating that these principles are ‘recognized’ by civilised nations, implies that they are neither enacted nor consented to by states and therefore must exist independently of consent.<sup>214</sup> In explaining how such principles necessarily interact with conventional law, Hall uses an analogy of the craftsman and the legislator, the former is left a wide discretion in building a house but the element of usable doors is indispensable and must always be included, the same way in which the legislator in making positive law must ensure inclusion of the requirements of natural or general law so the end result qualifies as law.<sup>215</sup>

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<sup>212</sup> L. Caflisch, ‘International Courts and Tribunals – The Challenges ahead: The Law Substantive and Procedural Questions’, 7 *The Law & Practice of Int’l Courts and Tribunals* 289 (2008) at 297

<sup>213</sup> Statute of the International Court of Justice, Article 38(1)(c)

<sup>214</sup> S. Hall, *The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism*, 35 *EJIL* 275 (2001)

<sup>215</sup> *Ibid* at 295



Rights of states, which are possessed by states by virtue of statehood, have been recognised in treatise including the 1933 Montevideo Convention, Article 5 of which affirms that the fundamental rights of states are not susceptible to interference in any manner. While the Convention does not elaborate on the content of these fundamental rights it nevertheless indicates acceptance of the concept.

It will be contended that the wording of Article IV of the NPT reflects recognition of the pre-existing sovereign right of the signatory state to cultivate a nuclear program, the existence of which forms part of the spectrum of rights belonging to a state under the umbrella of sovereignty, a principle which has its roots in and forms the core of general international law. Judge Alvarez, in the *Corfu Channel Case*, summed up what is represented by the term ‘sovereignty’ in stating that ‘by sovereignty we understand the whole body of rules and attributes which a state possesses in its territory to the exclusion of all other states and also in its relations with other states.’<sup>216</sup>

The notion of rights inuring to states by virtue of their sovereignty in international law suggests that there is a body of rights, inherent in the state which enables the state to exercise fundamental functions on the international plane. Sovereignty encompasses numerous strands of subsidiary rights. Christopher Joyner has located within this group of rights the fundamental right to ‘sovereign decision making’ and argued that such a right

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<sup>216</sup> *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* ICJ Reports (1949) Separate Opinion of Judge Alvarez at para 43

‘entitles the state to exercise control over its policies domestic and foreign in order to reflect its best interests and work towards desired aims’ and ‘necessarily falls under the umbrella heading of sovereignty which along with independence forms the basis of such subsidiary rights as the right to negotiate treaties or to determine its own form of government.’<sup>217</sup>

Other such examples of sovereign rights which exist in general international law and not requiring state consent, according to Lowe include *pacta sunt servanda* as ‘without the rule it would not be possible to speak of an international legal system’.<sup>218</sup> These rights remain in existence as part of general international law, in a manner described by Gourgourinis as ‘residual’ meaning applicable ‘by default’ unless specifically derogated from *by lex specialis* contained in treaty law.<sup>219</sup>

An oft-cited example of a right which is seen as pre-dating and therefore existing independently of conventional instrument is that of the right to self-defence which Article 51 of the UN Charter describes as ‘inherent’. This right was recognised in the *Case Concerning Military and Paramilitary Activities in Nicaragua*<sup>220</sup> as being ‘inherent’ in the sense that it is a ‘natural’ right inuring in the state for the primary purpose of which is to support the sovereign rights of non-intervention and equality of states.<sup>221</sup> Recognition of the right as existing prior to the Charter is explained in Nicaragua on the basis of the wording of Article 51,

...this treaty itself refers to pre-existing customary international law ; this reference to customary law is contained in the actual text of Article 5 1, which mentions the "inherent right" (in the French text the "droit naturel") of individual or collective self-defence, which "nothing in the present Charter shall impair" and which applies in the event of an armed attack. The Court therefore finds that Article 5 1 of the Charter is only meaningful on the

<sup>217</sup> C.C Joyner, *International Law in the 21st Century: Rules for Global Governance*, (Rowman and Littlefield)(2005) at 50

<sup>218</sup> A.V Lowe, Do Rules of General International Law Exist? 9 Review of International Studies 207 (1983) at 211

<sup>219</sup> A. Gourgourinis, ‘General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System’, 22 EJIL 993 (2011) at 1004

<sup>220</sup> *Case Concerning Military and Paramilitary Activities in Nicaragua*, ICJ Reports [1986]

<sup>221</sup> M.C Alder, *The Inherent Right of Self-Defence in International Law*, (Springer)(2013) at 117

basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter'<sup>222</sup>

This passage points to the inclusion of the term 'inherent' and the qualification that 'nothing in the present Charter shall impair' as indicative of the right's existence, external and prior to the Charter's adoption. The Court in *Nicaragua* also rejected the US contention that codification in a treaty 'subsumes or supervenes' the same right in general international law or customary international law, confirming that the rights continue to exist alongside the conventional provision.<sup>223</sup> According to ICJ jurisprudence in the *North Sea Continental Shelf Case*<sup>224</sup>, treaties can be declaratory of existing customary rules, they can crystallise developing CIL or create a custom after the adoption of the treaty. Treaty rules creating customary international law rules must have a norm-creating character, that is, one which does not permit derogation or be subject to state reservation.<sup>225</sup>

The source of the right in *Nicaragua* is said to be customary international law rather than general international law, however this point is later engaged with by the ICJ in *Advisory Opinion on the Legality of the Use of Nuclear Weapons*. In the latter case the Court appears to view the right to self-defence as inherent in the general international law sense as representing a sovereign right of the state in linking it with the 'fundamental right of every State to survival.'<sup>226</sup> Furthermore, in articulating the view that 'the submission of the exercise of the right of self-defence to the

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<sup>222</sup> *Ibid* at 175

<sup>223</sup> *Nicaragua* (I.C.J. Reports 1984) 424 at para. 73

<sup>224</sup> *North Sea Continental Shelf (Germany v Denmark)* Merits, Judgment, ICJ Reports 3 (1969)

<sup>225</sup> *Ibid* at 71-72

<sup>226</sup> *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, 8 July (1996) at 96

conditions of necessity and proportionality is a rule of customary international law’ the Court appears, in using the word ‘submission’, to be confirming that the right itself is ‘inherent’ in the states as a sovereign right, which is then governed by customary international law conditions. This somewhat modified view to that of the Court in *Nicaragua* on the interpretation of the source of the inherent right has received support in the later cases of *Oil Platforms*<sup>227</sup>, *Armed Activities in the Congo*<sup>228</sup> and *Legal Consequences of the Wall*.<sup>229</sup> Each of these cases, Alder notes, result in ‘maintaining the distinction made in Nuclear Weapons between *the inherent right being vested in the state* and recognized by Article 51 and international customary law’s function of restricting its exercise.’<sup>230</sup>

It can be said therefore that there is precedent for treatment of a right as a sovereign right under general international law, the inclusion of which in a treaty text merely recognizes the right rather than confers it. The same argument can be made for the right to develop a nuclear program enshrined in Article IV NPT. Similar terminology to that of Article 51 is employed in stating that ‘Nothing in this Treaty shall be interpreted as affecting’ the ‘inalienable’ right rather than ‘nothing in this Charter shall impair’ the ‘inherent’ right. That said, inherent and inalienable are different terms in need of further examination, but from the perspective of ascertaining their source, they may be derived from sovereignty which Koskeniemi describes as ‘the starting point for

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<sup>227</sup> *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* ICJ Reports 6 November (2003)

<sup>228</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* ICJ Reports 1 July (2000)

<sup>229</sup> *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* ICJ Reports 9 July (2004)

<sup>230</sup> M.C Alder, *The Inherent Right of Self-Defence in International Law*, (Springer)(2013) at 119

international law’ likening it to personal liberty in domestic law in that it can only be curtailed by law enacted via the correct procedures.<sup>231</sup>

Declarative of customary international law according to the Court in *DRC v Uganda*<sup>232</sup>, the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*<sup>233</sup> notes the existence and importance of sovereign state rights in stating that:

No State may use or encourage the use of economic political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind

The Declaration further clarifies that “every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State”, using the terminology of inalienability to reinforce the status of these rights attributable to states. As Article 103 cannot override conflicting customary international law, the ‘supremacy clause’ argument in the context of the sovereign inalienable right to peaceful nuclear energy is unconvincing.

Examining the reasoning of the Court in *Nicaragua*, the qualification as well as categorization of the right to enrich as ‘inalienable’ by the drafters of the NPT draws similarities to the peculiar denomination of ‘inherent’, that is one which has its basis as a sovereign right of state. Joyner

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<sup>231</sup> M. Koskeniemi, *From Apology to Utopia; The Structure of International Legal Argument*, (CUP)(2014) at 256

<sup>232</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* ICJ Reports 1 July (2000) at 227

<sup>233</sup> General Assembly resolution 2625 (XXV), 24 October 1970

opines that both terms ‘convey a particular legal meaning’ and observes that ‘in both treaties, these unique descriptions appear to designate the right thus characterized as a right which is not created by the present conventional instrument, but rather as a pre-existing right with an existence independent of the treaty, and only recognized by its terms.’<sup>234</sup>

In practice, it must be noted that prior to the adoption of the NPT the Nuclear Weapons States developed nuclear programs, unimpeded by concerns of international law. Since the NPT came into force India, Pakistan and it is assumed Israel, all of whom deigned to remain outside of the NPT have successfully developed nuclear weapons programs. These NPT non-signatories armed themselves with nuclear weapons with little reproach from the Security Council and certainly a fraction of the attention garnered by the Iranian nuclear situation. It must be recognized that the US, UK, France, Russia, China, India, Pakistan and Israel all exercised some sovereign right in developing these programs and it is the same right which NPT NNWS chose to curtail, voluntarily, exercising its sovereign right to enter into treaties by signing the NPT.

A neat illustration of the external existence of this pre-existing right is the case of India’s nuclear program. India carried out its first nuclear test in 1974, after the adoption of the NPT. India was therefore left with the choice of remaining outside of the NPT framework or becoming a signatory and forfeiting the weapons arm of its nuclear program. India chose the former, indicating that states not signatories to the NPT have an ‘inherent’ or ‘free-standing’ sovereign right entirely unrelated to the NPT to develop a nuclear program, or indeed engage in any activity which is not prohibited.

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<sup>234</sup> D. Joyner, *Interpreting the Nuclear Non-Proliferation Treaty*, (OUP) (2011) at 80

This could include weaponisation if the state so chooses, as to do so was not contrary to international law, in the absence of a positive prohibition. This principle is commonly referred to as the Lotus principle after the earlier PCIJ enunciation of the rule in the *Case of the SS Lotus*,<sup>235</sup> examined below.

Support for the theory that the right to engage in the full spectrum of nuclear activities is one which was possessed by all states by virtue of sovereignty prior to the NPT can be found in the General Assembly Resolution 1576 (XV). The resolution called upon “powers not possessing such weapons, on a similar temporary and voluntary basis, to refrain from manufacturing these weapons and from otherwise attempting to acquire them.” Zhang highlights that ‘temporary’ and ‘voluntary’ evidences the fact that the states prior to the adoption of the resolution or later signature of the NPT, had the right to develop or acquire these weapons.<sup>236</sup> Similarly, Aiken, the Foreign Minister for the Irish Delegation responsible for the initial NPT proposal conceded that states possessed the right to develop nuclear weapons before the signing the NPT.<sup>237</sup>

Furthermore, the Permanent Court of International Justice made reference to this residual autonomy of sovereign states in noting the ‘discretion which international law leaves to every sovereign state’<sup>238</sup> and stating that ‘all that can be required of a state is that it should not overstep the limits which international law places on its jurisdiction within these limits, its title to exercise

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<sup>235</sup> *Case of the SS Lotus, France v Turkey*, Permanent Court of International Justice Series No.10 (1927)

<sup>236</sup> X. Zhang, ‘The Riddle of “Inalienable Right” in Article IV of the Treaty on the Non-Proliferation of Nuclear Weapons: Intentional Ambiguity’, 5 *Chinese Journal of International Law* 647 (2006) at 654

<sup>237</sup> F. Aiken, ‘Can We Limit the Nuclear Club?’ *Bulletin of Atomic Science* (September 1961) at 265

<sup>238</sup> *The Case of the S.S Lotus (France v. Turkey)* No.10, 7<sup>th</sup> September (1927) at 31

its jurisdiction rests in its sovereignty.<sup>239</sup> The right therefore being exercised by all nuclear weapons states sovereignty based and located in general international law rather than in a conventional source.

It cannot be said therefore based on the foregoing reasoning that the ‘inalienable’ right asserted by Iran is extinguished by invocation of Article 103 as the right is one of general international law rather than one contained in an ‘international agreement’ for the purposes of Article 103.

### **The Significance of the term ‘Inalienable’ – Interpreting Article IV NPT**

Article IV establishes, in my view, four things. The first is to acknowledge rights to nuclear development predated the Charter as part of sovereign rights of states. It does so by stating that ‘nothing in this Treaty shall be interpreted as effecting....’ what must therefore be a pre-existing right, as argued above. The second is that it lays down the substance of the right which is being preserved by the Treaty, or the scope of the right, which is the ‘right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes’, effectively stating that the purpose of the treaty is not to interfere with this right. Third it acknowledges that this remaining right is ‘inalienable’, meaning that such a right is guaranteed to be respected in all cases, ‘without discrimination’ and cannot be interfered with. The term is used to acknowledge that the right is not on the bargaining table and not susceptible to interference, on a case by case basis or otherwise.

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<sup>239</sup> *ibid* at 19



The ‘peculiarity of the term’<sup>240</sup> is also noteworthy, and this author believes its employment is deliberate to link the right to the sovereign bundle of rights inuring to each state, namely sovereign decision making and economic self-determination. Finally, the Article acknowledges that in Articles I and II substantive limitations on the previous right of the signatory states to nuclear development have been consented to and that a nuclear program which exceeded these agreed limitations would be violative of the agreed parameters of the treaty, in that ‘in conformity with’ merely acknowledges and reiterates the existence of these new limitations.

### **The Right is Non-Negotiable**

The NPT is a novel multi-lateral convention in that it creates two distinct groups with divergent obligations. States which had pre-existing nuclear weapons programs were given the status of NWS with varying levels of obligation regarding nuclear disarmament<sup>241</sup> while retaining their sovereign right regarding nuclear program development. The NNWS in contrast came to the table with only their sovereign right to develop a nuclear program to bargain with. The incentive given to these states was the promise of assistance in developing an exclusively peaceful nuclear program in return for the forfeiture of the right to develop a more expansive program including the option of weaponisation. The ability of the NNWS to develop any kind of nuclear program independently was limited by lack of technical research capacity as well as being cost prohibitive for many states. The prospect of nuclear assistance was therefore highly desirable for these states seeking to

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<sup>240</sup> D. Joyner, *International Law and the Proliferation of Weapons of Mass Destruction*, (OUP)(2009) at 45

<sup>241</sup> Article VI, NPT, 1968

develop technologically and economically and in some cases the ability to ‘master the atom’ was seen as a matter of prestige and a means of gaining regional influence. Recognition of the disequilibrium inherent in what has been termed ‘the grand bargain of the NPT’<sup>242</sup> is fundamental to any analysis of the Treaty’s terms. As Rathburn explains

Recognition of the inalienable right to the peaceful uses of nuclear energy is essential to this process. All states, regardless of their power or particular situation, retain the right to pursue peaceful nuclear programs that they have as sovereign states and gain the possibility of assistance with these programs to the degree that such cooperation is feasible.<sup>243</sup>

The term ‘inalienable’ is employed in Article IV in order to characterize the right to peaceful nuclear energy in a way which would entice the NNWS to agree to the broader provisions of the Treaty. One can look to the Treaty of Tlatelolco as an example of a non-proliferation treaty which contains a similar provision to Article IV in Article 17 which states:

Nothing in the provisions of this Treaty shall prejudice the rights of the Contracting Parties, in conformity with this Treaty, to use nuclear energy for peaceful purposes, in particular for their economic development and social progress.<sup>244</sup>

Article IV was drafted based on this provision but due to the disequilibrium of rights contained in the early proposals on the NPT,<sup>245</sup> the word inalienable is inserted and fortifies the provision’s protection of the right to nuclear energy for peaceful purposes. The inclusion of ‘inalienable’ arguably points to an intention on the part of the drafters to exclude the possibility of curtailment of the right under the terms of the Treaty. It has been noted by Sinclair that in the case of large

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<sup>242</sup> D. Joyner, ‘*Iran’s Nuclear Program and International Law*’, 2 Penn. St. J.L. & Int’l Aff. 237 (2013) at 291.

<sup>243</sup> N.S. Rathbun, ‘The Role of Legitimacy in Strengthening the Nuclear Non-Proliferation Regime,’ 13 The Nonproliferation Review 227 (2006) at 237

<sup>244</sup> Treaty of Tlatelolco, Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean, 1967

<sup>245</sup> See *supra* n.232 Zhang

multi-lateral conventions ‘a search for common intentions of the parties can be likened to a search for the pot of gold at the end of a rainbow.’<sup>246</sup> Given the notorious difficulty encountered in interpreting such conventions, the inclusion of such a distinct term would seem to signify an intention to ensure the right referred to remained unfettered and untouchable, acting as somewhat of a guarantee to the NNWS. Such an interpretation of the term would be commensurate with the magnitude of concession given by the NNWS in forfeiting their sovereign right to develop a full spectrum nuclear program. Considering the ‘*quid-pro-quo*’ nature of the NPT,<sup>247</sup> the inclusion of ‘inalienable’ arguably represented the removal of the right to a peaceful nuclear program from the bargaining table. As pointed out by Albin “arms control agreements can only be durable when they balance the essential concerns of all parties, avoiding enhancing the national security of some at the cost of others, and are mutually beneficial”<sup>248</sup> and the term ‘inalienable’ is essential to this integral balancing act in the case of the NPT.

The scope of the portion of the right which remains viable and is covered by the protection of ‘inalienable’ is defined in the Article as compromising of the right to ‘develop research, production and use of nuclear energy for peaceful purposes’.<sup>249</sup> It is noteworthy at this juncture that the term ‘production’ in order to be given adequate meaning, must encompass the ability to enrich uranium to low levels in order to fuel nuclear power reactors.

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<sup>246</sup> I. Sinclair, *The Vienna Convention on the Law of Treaties*, (Manchester University Press)(1984) at 130

<sup>247</sup> *supra* n.238 Joyner at 291

<sup>248</sup> C. Albin, *Justice and Fairness in International Negotiations* (Cambridge University Press) (2001) at 184

<sup>249</sup> Article IV NPT 1968

### The Plain Meaning of the term ‘Inalienable’

It is worth resorting to the plain meaning of the term ‘inalienable’ to attempt to ascertain what the rare and peculiar term may mean in the context of Article IV. The word ‘inalienable’, or *quod abalienari non potest*, is defined by the Oxford Dictionary as ‘not subject to being taken away from or given away by the possessor’. Synonyms in legal usage are listed as ‘imprescriptable’ and ‘indefeasible’, the latter of which, most commonly associated with rights-discourse, is defined as ‘not subject to being lost, annulled, or overturned’.<sup>250</sup> In order to give the term full weight it must be accepted that by definition it rules out the possibility of forfeiture. Logically, if a term is deemed to be ‘inalienable’ then it is not capable of being extinguished, meaning that to suggest that its enjoyment becomes conditional upon compliance with other terms renders the right ‘alienable’ and therefore nullifies the significance of the term.

This is the very argument being made when it is suggested that non-compliance with Articles I and II NPT results in the forfeiture of Article IV’s ‘inalienable right’. This argumentation is based on the reference to the term ‘in conformity with Articles I and II’ located in Article IV. Spies, amongst many others, has made such a contention in stating that

The "inalienable right" to technological development in Article IV only becomes forfeit for a NNWS party after a violation of Article... Further, violation and non-compliance with safeguards can lead to a forfeiture of Article IV rights only if those violations include diversion of materials to use in nuclear weapons.<sup>251</sup>

Therefore, it is seen as presenting no difficulty whatsoever to state that such actions render the right alienable. Linguistically the above interpretation of the article represents a *reductio ad*

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<sup>250</sup> Oxford English Dictionary

<sup>251</sup> M. Spies, ‘Iran and the Limits of the Non-Proliferation Regime’, 22 AM. U. INT’L L. REV 401 (2006) at 416

*absurdum*. However, bearing in mind the view of the Trial Chamber in *Tadic* that ‘arguments based upon *reductio ad absurdum* may be useful to destroy a fallacious proposition but will seldom provide a firm foundation for the creation of a valid one’,<sup>252</sup> further validation for such a contention is required. In order to arrive at a harmonious interpretation of Article IV it is necessary to consider what reading of the two terms at odds with each other will best satisfy the principle of effectiveness, which dictates that every treaty term should be interpreted so as to give it some meaning and exclude the possibility of a redundant provision. Linderfalk points to the need to read provisions with linguistic effect in mind when seeking to satisfy the principle of effectiveness in explaining that

if it can be shown that according to linguistics a meaning can be implicitly read into a treaty provision, and that such an implication is necessary to avoid a situation where, by applying the provision, another part of the treaty will be normatively useless, then this meaning shall be adopted.<sup>253</sup>

Based on this reasoning it must be examined whether the provision can be read in such a way as to make the terms compatible, which likely means that one term will emerge dominant. Joyner opines that a harmonious reading of the principle can be arrived at by focusing on a revised meaning of the term ‘in conformity’ which is at odds with the approach of many scholars who believe that it is the term ‘inalienable’ which should yield to ‘in conformity’.<sup>254</sup> Carlson claims that ‘this right is not unqualified, but must be in conformity with the Treaty – Articles I and II (non-proliferation)’ meaning the right is to be read as qualified by the latter provisions. Similarly, Ford is adamant that the inclusion of ‘in conformity’ serves to make the inalienable right

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<sup>252</sup> *Prosecutor v Tadic, Trial Chamber, Decision on the Defence Motion of Jurisdiction*, 10 August 1995 at para 19

<sup>253</sup> U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer) (2007) at 393

<sup>254</sup> *supra* n.230 Joyner *Interpreting the NPT* at 81

conditional upon adherence to Articles I and II, even though he does concede that the right is extra-conventional. Ford frames his argument in the following terms:

the best reading of Article IV(1) does not see that paragraph as conferring the “inalienable right.” Its phrasing seems merely to refer to some pre-existing right, though the “conformity” requirements (which refer to articles of the NPT itself) are obviously a new constraint accepted by all States Party by virtue of their agreement to the Treaty’s terms. The origin of such a pre-existing right, however, is unaddressed. Conceivably, it comes from no place more profound or more codified than the basic assumed “right” of any sovereign state, in a fundamentally anarchic international system, to do anything it wants in the absence of positive legal constraint. Since the NPT seems expressly to limit that very right, however – thereby providing just such a positive constraint – it adds little to the discussion to make this point.<sup>255</sup>

It is Ford’s opinion therefore that the employment of ‘inalienable’ serves little more purpose than to identify the right as pre-dating the charter and basing it in the sovereign bundle of rights. However, it is arguable that if this was the sole purpose of the term then the word ‘inherent’ as observed in Article 51 UN Charter would have better satisfied the principle of effectiveness, as a right may be inherent in a state but it is not necessarily inalienable, whereas an inalienable right of state is always inherent in the sovereignty of that state. Inalienable by definition points to a more definite legal meaning and such a meaning is incompatible with an interpretation which makes its exercise conditional and capable of forfeiture. In terms of effectiveness therefore, a reading of the provision which nullifies the effect of the word inalienable or renders it ‘normatively useless’ is not compatible with the principle.

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<sup>255</sup> C. Ford, ‘Nuclear Technology Rights and Wrongs: The NPT, Article IV, and Nonproliferation’, *Reviewing the Nuclear Nonproliferation Treaty*, Edited by H. Solkolski, (NPEC)(2010) at 58

This excerpt also demonstrates Ford's view that 'in conformity' extinguishes all issues related to the 'inalienable right' while simultaneously applying and dismissing the seminal principle from the *Case of the SS Lotus*.<sup>256</sup> Joyner's revised interpretation of Article IV's 'in conformity' clause is based on this very principle, the application of which yields in this author's view the only harmonious reading of the conflicting terms. However this line of reasoning is not without its difficulties as the decision has attracted disfavor in the ICJ in recent years which will be examined below, as will a possible reading of the Lotus principle which is commensurate with modern day perceptions of sovereignty as well as tailored to the specific case of arms control treaties.

### **A *Lotus* reading of Article IV**

Mentioned briefly above, the PCIJ in *Lotus* laid down a principle which has remained prominent, though not uncontested, over the years, in stating that

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between those co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the freedom of States cannot therefore be presumed.<sup>257</sup>

Furthermore the Court concluded that 'States are left with a wide measure of discretion which is only limited in certain cases by prohibitive rules' and 'as regards other cases every state remains free to adopt the principles which it regards as best and most suitable.'<sup>258</sup> Joyner neatly encapsulates the principle in explaining that it constitutes 'recognition that states have the original

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<sup>256</sup> *Case of the SS Lotus, France v Turkey*, Permanent Court of International Justice Series No.10 (1927)

<sup>257</sup> *Lotus Case* at para 18

<sup>258</sup> *Ibid* at para 19

or inherent or inalienable right to engage in any activity which is not prohibited to them by a positive source of international law.<sup>259</sup>

Applying this principle to the case at hand, an interpretation of Article IV which assigns a functional meaning to both terms and yields a harmonious reading is possible. A Lotus compatible reading of Article IV acknowledges the right to peaceful nuclear energy enjoyed by NNWS is protected and preserved, unimpeded by Articles I and II NPT, as those Articles serve the purpose of setting the prohibitive limits on how far a nuclear program can be developed rather than making the permissible existence of the program contingent upon compliance with the latter constraints. Article I and II are limits voluntarily adhered to by NNWS in exchange for the benefits associated with NPT membership in the field of assistance and as such exceeding such limits would result in violation of the NPT, the remedy for which cannot be the suspension of a right which is recognized as incapable of transfer or suspension by definition.

This reading assigns a functional purpose to both terms and therefore satisfies the criteria of the principle of effectiveness by allowing ‘inalienable’ to serve as an enunciation of the residual right and ‘in conformity’ can be read to mean that the inalienable right *exists* with a defined limit rather than is to be exercised in conformity with Articles I and II. This would mean that the cultivation of a nuclear program for peaceful purposes, which explicitly includes production of nuclear energy and use of the fuel cycle including enrichment, is fully commensurate in the eyes of the drafters with the parameters of the treaty. The treaty serves only to place a prohibitive limit on the extent to which the program can be expanded, specifically to the manufacture of nuclear weapons.

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<sup>259</sup> *Supra* n.230 Joyner at 84



Article IV therefore serves to ‘clarify that states retain all rights to engage in nuclear activities which are not clearly delineated by the conventional prohibitive obligation in Article II and by those terms forbidden to them.’<sup>260</sup>

It is not enough to merely apply *Lotus* however, as examination of the more recent trend of the ICJ to disfavor the principle is required in order to justify its application to this set of facts. *Lotus* reasoning has fallen from favour due to the perception of the Court that it is antiquated and archaic. In the *Nuclear Weapons Case*<sup>261</sup> numerous remarks deriding the principle were made which certainly cast doubt on modern day applicability of the principle.

In *Nuclear Weapons*, the question before the Court, as alluded to in the opening Chapter, was steeped in political undertones and concerns. Put to the Court by the General Assembly in accordance with Article 96(a), which permits the Assembly or Security Council to seek an advisory opinion on ‘any legal question’, the Court was faced with substantive questions relating to the legality of the use or threat of use of nuclear weapons. In finding unanimously that no specific authorization for the use of such weapons existed in international law, the Court ruled with 11 votes to 3 that no specific prohibition against the use of nuclear weapons could be identified in international law. On the latter point, the dissenting Judges Weeramantry, Koroma and Shahabuddeen expressed disdain towards what is essentially the *Lotus* principle.

Judge Weeramantry opined that such a principle in modern day context could not find application in the context of (nuclear) war as in peacetime, stated that to interpret the provision as giving states

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<sup>260</sup> Ibid at 82

<sup>261</sup> *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 226 (1996)

in both contexts a *carte blanche* to engage in that which is not prohibited ‘casts a baneful spell on the progressive development of international law.’<sup>262</sup> Judge Weeramantry instead favoured the considered application of international humanitarian law principles to the issue in the absence of a specific rule of prohibition.

Judge Koroma, arguing that the general principles of international law should have been applied in the place of a specific provision prohibiting the use of such weapons<sup>263</sup>, opined that "the futile quest for specific legal prohibition can only be attributable to an extreme form of positivism, which is out of keeping with the international jurisprudence- including that of this Court."<sup>264</sup> In dis-favouring reliance on the principle, Judge Koroma felt the absence of a specific prohibition did not mean there was no principle of international law “to which resort might be had.”

Judge Bedjaoui was keen to see the principle confined to its context and exclude its modern usage in opining that

no doubt this decision expressed the spirit of the times, the spirit of an international society which as yet had few institutions and was governed by an international law of strict coexistence, itself a reflection of the vigour of the principle of State sovereignty. It scarcely needs to be said that the face of contemporary international society is markedly altered.<sup>265</sup>

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<sup>262</sup> *Ibid*, Dissenting Opinion of Judge Weeramantry at 273

<sup>263</sup> Judge Koroma stated that “the absence of a specific convention prohibiting the use of nuclear weapons should not have suggested to the Court that the use of such weapons might be lawful, as it is generally recognized by States that customary international law embodies principles which are applicable to the use of such weapons.”

<sup>264</sup> *Ibid*, Dissenting Opinion of Judge Koroma at 575

<sup>265</sup> *Ibid*, Separate Opinion of Judge Bedjaoui at 270

In a similar vein, in the *Arrest Warrant Case*<sup>266</sup> Judges Higgins, Koojimans and Burgenthal agreed that the principle ‘represents the high water mark of laissez-faire in international relations, and an era that has been significantly overtaken by other tendencies.’<sup>267</sup>

However, there are arguably distinguishing features in the case of Iran which may be permit a successful application of *Lotus* as well as a reinterpretation of the principle which could apply to this situation within the parameters of modern ICJ opinion on *Lotus*. Firstly, the present situation is one concerning the regulation of arms, which could have a bearing on the application of the *Lotus* rule. Secondly, examining the true objection to the principle in ICJ decisions reveals a concern for the implications of permitting an expansive doctrine of sovereignty in the modern international legal system, a concern which under scrutiny does not apply to the Iranian situation. Finally, an examination of the principle following dissection by the ICJ yields a doctored principle which can arguably be applied to Article IV in order to reach the same conclusion above – that is that ‘in conformity’ represents a prohibitive limit not a conditional approach to the ‘inalienable right’.

### **The *Lotus* Principle and Arms Control Treaties**

It has been demonstrated above that inherent in each state by virtue of sovereignty is the right to develop a nuclear program including expansion of that program to nuclear weapons. It has also been contended that the NPT has placed limitations, consented to by NNWS, in the form of Articles

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<sup>266</sup> *Case Concerning the Arrest Warrant of the 11<sup>th</sup> April 2001*, (Belgium v Democratic Republic of the Congo) Merits, ICJ Reports (2002)

<sup>267</sup> *Ibid* Joint Separate Opinion of Judge Higgins, Judge Koojimans and Judge Burgenthal at para 52

I and II on the aforementioned right which has been recognized as ‘inalienable’ by Article IV. What must be shown now is that despite ICJ disparagement of the *Lotus* principle which permits the above conclusion, the principle retains relevance in the specific field of arms control treaties and therefore to the NPT. There is support for such a contention in ICJ dicta as well as from prominent legal scholarship.

First, examination of the *Nicaragua*<sup>268</sup> case allows for extrapolation of a relevant ICJ-approved principle regarding arms control, stated as follows

in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception.<sup>269</sup>

Arguably this formulation could support the continued application of *Lotus* specifically to arms control in that it states that in this discrete area only a consented to prohibition may place a limit on armaments, meaning that in the absence of such a consent-based prohibition, the right to develop armaments remains with the state. In other words, in arms control that which is not prohibited is permitted and restrictions are not to be presumed. This view is in harmony with a reading of Article IV which suggests that Articles I and II represent consent based limits on armaments in-keeping with *Lotus* and that the prohibition consented to does not serve to make the remaining right conditional.

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<sup>268</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)* 14 ICJ Reports 176 (1986)

<sup>269</sup> *Ibid* at 135

Fitzmaurice opines that when the field in question is one operated largely by a series of prohibitions and few permissive rules – the examples given being those of war crimes, crimes against humanity, illegitimate weapons of war and attack – then all that is required to be proven is that the prohibited behavior is not engaged in.<sup>270</sup> This is essentially a selective application of *Lotus* to certain scenarios which are generally governed by prohibitive rules in that it makes permissive that which is not forbidden by law.

The NPT, as an arms control treaty, operates as a prohibitive document as Articles II, III and IV operate to impose a prohibition on the manufacture of nuclear weapons or diversion of nuclear materials to a military purpose. It is these cases Fitzmaurice opines that it would be sufficient to allege that the action taken was a legitimate exercise of sovereign rights due to the fact that the prohibited behavior was not engaged in,<sup>271</sup> in this case diversion of nuclear materials or manufacture of nuclear weapons. It is sufficient in such a situation to claim that the exercise of a right is permissible because it is not contrary to a positive rule of international law, that is no prohibition exists – essentially reviving the *Lotus* principle in specific circumstances.

Judge Guilleme in the *Nuclear Weapons* highlights the pertinence of the fact that arms control treaties are formulated on the basis of prohibitive rules or limits. He cites numerous examples such as the 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America, the 1975 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological Weapons, the 1981 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons

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<sup>270</sup> G.G Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–1954: General Principles and Sources of Law', 30 British Yrbk Int'l L (1953) at 14

<sup>271</sup> *ibid*

which may be Deemed to be Excessively Injurious, or the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction.<sup>272</sup> Clearly the NPT speaks of prohibitions in that it seeks to ban nuclear weapons proliferation. He also notes the Court's recognition of the principle as customary, citing the statement "the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition."<sup>273</sup>

It is arguable therefore that due to the nature of arms control treaties such as the NPT and their general formulation, the result is that states forego that which is expressly prohibited while retaining the ability to exercise rights which are not affected by the prohibitive limits set by the applicable conventional document. In these specific cases it may be less objectionable to adhere to the Lotus principle and accept that that which is not prohibited is permitted. This has a bearing on the case at hand as it allows for a reading of Article IV commensurate with the aforementioned view that the 'in conformity clause' creates prohibitive outer limits for the exercise of the 'inalienable right' rather than making exercise of said right conditional upon adherence to Articles I and II.

### **Sovereignty Concerns and the Lotus Principle**

As illustrated above, ICJ objection to modern application of the Lotus principle has been abundant in recent years. The primary reason for the principle's lack of support appears to be the view that

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<sup>272</sup> *Advisory Opinion on the Legality of the Use of Nuclear Weapons* ICJ Reports 244 (1996) Separate Opinion of Judge Guilleme at 292

<sup>273</sup> *Advisory Opinion on the Legality of the Use of Nuclear Weapons* ICJ Reports 244 (1996) at para 52

such a rule represents an era of international law which was primitive in comparison to the current system, as fewer positive sources of law existed at the time of the *Lotus* decision. It appears that the Court has been keen to distance itself from antiquated doctrines of sovereignty which leave too great a measure of discretion to states in their activities at the expense of a functioning international system. In the *Fisheries Case*<sup>274</sup>, Judge Alvarez, dissenting, noted this point in stating that the principles was 'formerly correct in the days of absolute sovereignty' further articulating that

‘the sovereignty of States is henceforth limited not only by the rights of other States but also by other factors ... which make up what is called the *new international law*: the Charter of the United Nations, resolutions passed by the Assembly of the United Nations, the duties of States, the general interests of international society’<sup>275</sup>

Henkin too is skeptical of sovereignty's invocation to the detriment of an evolving international legal system in claiming that such a concept essentially represent reluctant states to accept that "we will engage in a *minimal* amount of cooperation, if we as sovereign states consent."<sup>276</sup> Jackson is cognizant of the need for a revised view of sovereignty which acknowledges modern realities in opining that

‘to cope with the challenges of instant communication, and faster and cheaper transportation, combined with weapons of vast and/or mass destruction, the world will have to develop something considerably better than either the historical and discredited Westphalian concept of sovereignty or the current, highly criticized, versions of sovereignty still often articulated.’<sup>277</sup>

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<sup>274</sup> *The Fisheries Case, (UK v Norway)* ICJ Reports 115 (1951)

<sup>275</sup> *Ibid*, Separate Opinion of Judge Alvarez at 152, emphasis added

<sup>276</sup> L. Henkin, 'That "S" Word: Sovereignty and Globalisation and Human Rights, et cetera' 68 Fordham Law Review (1999-2000) at 5

<sup>277</sup> J.H Jackson, 'Sovereignty-Modern: A New Approach to an Outdated Concept', 97 Am. J. Int'l L. 782-802 (2003) at 802

Such perceptions of sovereignty as a veil behind which states attempt to hide in order to justify broad freedom of action are understandable. Increasing state intercourse in various areas presupposes the need to reconsider traditional Westphalian views of sovereignty and accept that no state is a metaphorical island. However in certain cases the tendency to dismiss sovereignty concerns as archaic can lead to a blurring of the lines between that which is genuinely a matter of domestic jurisdiction and matters in which international involvement is desirable. As has been noted by Concado Trinadade, ‘domestic jurisdiction is undergoing a continuous process of reduction’<sup>278</sup> and this process is necessarily at odds with the *Lotus* principle which seeks to preserve the right to exercise sovereign prerogatives unless they have consented to prohibitive limitations.

In practice, the principle has been largely criticised by the ICJ as ‘outdated’ due to its tendency to ignore these modern exigencies of the international legal sphere which necessarily require a scaling back of absolutist sovereignty to facilitate globalisation. The *Fisheries Case* highlights this issue in illustrating that it is the lack of constraint the *Lotus* principle places on one state’s ability to infringe the rights of another state which represents the main issue with application of the principle to modern situations. Restrictions on sovereign rights previously were not to be presumed, hence the Norwegian contention that in carrying out an ‘act of sovereignty’ it was within its rights to claim that the absence of positive prohibition meant restrictions could not be presumed. However this particular line of reasoning did not find favour with the Court. Judge Read expanded on the point in stating

Here, we are not dealing with the exercise, by a State, of sovereignty within its domain. We are dealing with State action which extends its domain, and purports to exclude all other States from areas of the high seas. We are dealing with expansion of the maritime

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<sup>278</sup> A.A Concado Trinidade, ‘The Domestic Jurisdiction of States in the Practice of the UN and Regional Organisations’ 25 ICLQ (1976) at 765



domain designed to deprive other States of rights and privileges which, before the extension, they were entitled to enjoy and exercise, under the rules of international law.<sup>279</sup>

The exercise of such sovereign rights to the detriment of another state's rights in the modern system, therefore cannot be immunised from illegality or legitimised by invoking the veil of sovereignty, as Judge Read made clear in suggesting that such an encroachment could not be justified on the grounds that a restriction on sovereignty should not be presumed. It is true that allowing such a result would afford to each state a measure of independence incompatible with a modern international legal system based on interdependence of states. In the same case, Judge Dillard enunciated such a principle, which he noted was in-keeping with the views of Lauterpacht, stating that 'if the exercise of freedom trespasses on the interests of other States then the issue arises as to its justification'.<sup>280</sup> Handeyside sums up this revised view in explaining that 'conduct that negatively affects the interests of other States must be justified by permissive rule rather than merely the absence of a prohibitive rule.'<sup>281</sup> Therefore, what is required in situations which affect the rights of a third state is the proof of existence of a positive rule of international law permitting the behaviour engaged in, which is essentially anathema to the previous *Lotus* formulation.

The Iranian case can be distinguished from the above cases and the ICJ objections to the *Lotus* principle then would arguably not apply. The distinguishing factor at play is the fact that no right of a third state is impinged in a NNWS state's exercise of Article IV's 'inalienable' right to develop a peaceful nuclear program. This factor means that a *Lotus* compatible reading of the provision would mean that the 'in conformity' clause is included to demonstrate that Articles I and II

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<sup>279</sup> *The Fisheries Case*, Dissenting Opinion of Judge Read at 189

<sup>280</sup> *Ibid*, Separate Opinion of Judge Dillard, at 59

<sup>281</sup> H. Handeyside, 'The *Lotus* Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?', 29 Mich J Int'l Law 71(2007-2008) at 86

represent positive prohibitions or restrictions on the scope of the nuclear program. In other words such a reading would entail the view that the inalienable right is limited by specific prohibitions rather than made conditional upon compliance with Articles I and II.

The main objection to accepting that restrictions should not be presumed is, as detailed above, concern that the sovereignty of one state would be invoked to encroach upon rights of another however in the Iranian case such concerns are not present. Since the rights of other states are not prejudiced, there is no impediment to traditional *Lotus* reasoning. As posited Watson, ‘the validity of the admittedly positivistic *Lotus* reasoning lies in the fact that it recognizes the inherent limits on the prescriptive range of international law when faced with sovereign power.’<sup>282</sup> Consequently, the ‘in conformity’ clause can be interpreted as a delineation of the scope of the preserved inalienable right, or a positive prohibition consented to by the state rather than a statement of conditionality of the right’s exercise, as the right is designated as incapable of transfer.

### **The Link between Inalienable, Sovereignty and Self-Determination**

Ford describes Iranian protestations regarding the meaning of inalienable in Article IV as ‘rights-fetishism of what has now become Article IV’s conventional meaning’.<sup>283</sup> He further asserts that the insertion of ‘inalienable represented mere ‘colorful language on the part of the drafters for political reasons.’<sup>284</sup> However, the specificity of the term as well as its unique relation to the concept of an infeasible right could be viewed as deliberate in order to describe the nature of the

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<sup>282</sup> J.S Watson, ‘Auto-Interpretation, Competence, and the Continuing Validity of Article 2(7) of the UN Charter’, 71 AJIL 60 (1977) at 71

<sup>283</sup> C. Ford, ‘Nuclear Technology Rights and Wrongs: The NPT, Article IV, and Nonproliferation’, *Reviewing the Nuclear Nonproliferation Treaty*, Edited by H. Solkolski, (NPEC)(2010)

<sup>284</sup> *Ibid* at 57

remaining right to develop a peaceful nuclear program. Apart from defining the scope of the residual right and affording the right conventional protection against forfeiture, the use of such a rare term may be of worthy of further scrutiny.

A link to the term inalienable in human rights discourse can be made and in this context the term is traced back to Islamic law by Weeramantry in explaining that

‘Inalienable rights are generally distinguished from legal rights established by a State because they are moral or natural rights, inherent in the very essence of an individual. The notion of inalienable rights appeared in Islamic law and jurisprudence which denied a ruler “the right to take away from his subjects certain rights which inhere in his or her person as a human being” and “become Rights by reason of the fact that they are given to a subject by a law and from a source which no ruler can question or alter”<sup>285</sup>

Similarly in the human rights spectrum, all rights enumerated in the International Covenant on Civil and Political Rights are described in the Preamble as ‘inalienable’. Apart from these references usage of the term is scarce. However with regard to rights of states, it appears that the term is reserved to describe the nature of rights falling under the umbrella of state sovereignty and rights closely related to sovereignty.

Iran has expressed the view that a demand to halt uranium enrichment by the Security Council is contrary to the ‘right to development, the right to natural resources and the right to self-determination’<sup>286</sup> as well as stating that the principle of sovereign equality of all members has not been observed. While these appear to be sweeping claims, analysis of Article IV with these contentions in mind could give possible insight into the significance of the term ‘inalienable’ and

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<sup>285</sup> Judge C.G Weeramantry, *Justice Without Frontiers*, (Brill) (1997)

<sup>286</sup> INFCIRC/847, 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, at 16

the protection to be afforded to the right to a peaceful nuclear program. Examination of the use of ‘inalienable’ in an international law context points to an established link between the term and its actual relation to the principles of self-determination, in particular permanent sovereignty over natural resources and economic sovereignty. The term appears to be employed in this context in numerous documents.

General Assembly Resolution 1803 (XVII) on *Permanent Sovereignty over Resources* makes reference to the ‘inalienable right of all states to freely dispose of their natural wealth and resources in accordance with their national interests’ and examined this principle as a constituent element of self-determination while also highlighting the need for ‘respect for the economic independence of states.’<sup>287</sup> The GA further engages with the concept of economic self-determination in Resolution 3281 (XXIX), in which it adopts *Charter of Economic Rights and Duties of States*.<sup>288</sup> Chapter 2, Article I of this Charter employs the term inalienable in providing that

Every State has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever.

Furthermore, in the specific context of the right to peaceful nuclear energy, the Assembly has highlighted the great importance it places on developments in this field in the context of state’s economic development in Resolution 32/50 on *the Peaceful Use of Nuclear Energy for Economic and Social Development*.<sup>289</sup> Notably, preambular reference is made to the ‘legitimate right of States

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<sup>287</sup> General Assembly Resolution 1803 (XVII) on Permanent Sovereignty over Resources 1962

<sup>288</sup> A/Res/29/3281

<sup>289</sup> A/Res/32/50 (1977) Peaceful Use of Nuclear Energy for Economic and Social Development

to develop or acquire technology for the peaceful use of nuclear energy in order to accelerate their economic development'. This is followed by a declaration in Article I(b) that

All States have the right, in accordance with the principle of sovereign equality, to develop their programme for the peaceful use of nuclear technology for economic and social development, in conformity with their priorities, interests and needs.

Inalienable is a term often employed to describe the right to self-determination. For example, the constitutive document of Croatia<sup>290</sup> describes the right to self-determination as 'inalienable, indivisible, non-transferable, inalienable'. The Charter of the Organisation of African Unity<sup>291</sup>, provides that member States must adhere to the 'principles of non-interference in the internal affairs of States; respect: for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence.' Furthermore the document employs the synonymous term 'unquestionable' in Article 20 and elaborates that self-determination encompasses the right to 'pursue economic development freely chosen.' In the context of self-determination the concept of inalienability of the right is the prevailing theme.

Documents such as the aforementioned support the suggestion that 'inalienable' is a term which is reserved for designation of a bundle of rights inherent in sovereignty and those with a strong correlation to the concept of sovereignty such as self-determination. In the specific context of the NPT, Iran has highlighted that these rights are 'the fundamental rights of nations' and has linked violation of these rights to a breach of principles of non-interference in internal state affairs.<sup>292</sup> An

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<sup>290</sup> Constitution of Croatia Article 2

<sup>291</sup> Articles 3(2) and 3(3) of the Charter of the Organisation of African Unity (1963)

<sup>292</sup> INFCIRC/837 at 10

allegation of violation of the principle of self-determination however is not easily sustained in these circumstances.

The right to self-determination is defined as one of the purposes of the UN in Article 1(2) of the Charter:

To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;<sup>293</sup>

This right, widely recognized as forming part of *jus cogens*,<sup>294</sup> is much evolved in its modern state from the post-colonial, former secession-centric interpretation. In recent times this interpretation has expanded to arguably represent a universal right, applicable to ‘all peoples’ meaning not confined to those under external domination. It can also be viewed as a right which is permanent rather than prospective in nature, meaning it is a continuing right of peoples of a nation state to exercise political and economic control over their own territory free of external interference<sup>295</sup> in the context of external self-determination, rather than in the context of internal self-determination which relates to the right of peoples within a territory to choose their own mode of governance.

If it could be argued successfully that the Council had violated this right in its demands of Iran, the hierarchy of norms which dictates that self-determination is peremptory would mean that the Council actions were *ultra vires* and void for incompatibility with a principle of *jus cogens*. Iran’s

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<sup>293</sup> United Nations Charter Article 1(2)

<sup>294</sup> *The Case Concerning East Timor (Portugal v Australia)* ICJ Reports (1995) at 102, ; A. Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (1995) at 320, I. Brownlie, *Principles of Public International Law* (5th ed.)(OUP) (1998) at 515

<sup>295</sup> D. Raič, *Statehood and the Law of Self-Determination*, (Martinus Nijhoff)(2002) at 228-232

refusal to comply with the offending demands would therefore be legally justified. However, despite the aforementioned expansion of the right to a certain degree, it is difficult to allege that the Council has acted in a manner contrary to the principle in demanding uranium enrichment cessation in Iran. It would have to be established that Council interference with a chosen economic policy of Iran, for example the decision to develop a peaceful nuclear program for the purpose of becoming less reliant on oil exports financially, amounts to inhibition of the exercise of the right to self-determination.

While the principle of self-determination as a human right afforded to ‘all peoples’ or individuals is generally accepted within the context of internal self-determination, it is less clear that such a right can be framed as one inuring to a state as a sovereign right. Raič advocates a view of self-determination as a right which is vested in groups of people as subjects of international law rather than one which is merely elemental to the principles of state sovereignty and non-intervention, the holders of which are states.<sup>296</sup> Rosas takes a similar view positing that to amalgamate the aforementioned rights makes the principle of self-determination ‘standing on its own merits, almost meaningless.’<sup>297</sup> The ICJ in the *Case Concerning East Timor* supported this view in opining that it is peoples and not states that possess a right to self-determination.<sup>298</sup> This view is not uncontested, as Kapitan opines that the ‘obvious holders of self-determination are states’, agreeing with Copp in preferring to view the beneficiary of the right as ‘the organized political community

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<sup>296</sup> Ibid at 233

<sup>297</sup> A. Rosas, ‘Internal Self-Determination’ in C. Tomuschat (Ed), *Modern Law of Self-Determination* (Martinus Nijhoff)(1993) at 225

<sup>298</sup> *The Case Concerning East Timor (Portugal v Australia)* ICJ Reports (1995)

possessing control over its territory.<sup>299</sup> Similarly, Higgins has explicitly stated that she perceives the right to self-determination as resting with the state rather than the peoples in stating that

Article I and 55 of the UN Charter mention self-determination and in each context it was clearly the rights of peoples of one *state* to be protected from interference by other *states* or governments. It is revisionism to ignore the coupling of self-determination with equal rights and it was the equal rights of states that were being provided for, not individuals.<sup>300</sup>

Saul however is of the opinion that the concept of self-determination is subject to deliberate indeterminacy by states.<sup>301</sup> Whether deliberate or not, the determinacy-deficiency which can be observed in the concept means it is perhaps not sufficiently clear that self-determination can be definitively classed as a right of statehood in itself.

Brownlie opines that self-determination informs other general international law principles such as state sovereignty and notes that the right finds application in various different contexts, notably that of economic self-determination, which he describes as a corollary of self-determination.<sup>302</sup> Farmer describes economic self-determination as a people's right to freely choose how natural resources are used,<sup>303</sup> therefore linking the right to that of permanent sovereignty over natural resources. Orakhelashvili states that 'permanent sovereignty over natural resources forms a part of the "normative core" of the principle of self-determination, which undoubtedly constitutes *jus cogens*.'<sup>304</sup> There is therefore support for the proposition that self-determination extends to include

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<sup>299</sup> T. Kapitan, 'Self-Determination and International Legal Order,' 89(2) *The Monist* 356 (2006) at 359

<sup>300</sup> R. Higgins, Comments in Brolman et al, *People and Minorities in International Law* (Springer, 3<sup>rd</sup> Ed)(1993)

<sup>301</sup> M. Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?' 11 *HRLR* 609 (2011)

<sup>302</sup> I. Brownlie, *Principles of Public International Law*, (5<sup>th</sup> Ed)(OUP)(1998) at 600

<sup>303</sup> A. Farmer, 'Towards a Meaningful Rebirth of Economic Self-Determination: Human Rights Realisation in Resource-Rich Countries' 39 *International Law and Politics* 417 (2007)

<sup>304</sup> A. Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions', 16 *EJIL* 59 (2005)



freedom of peoples to dictate economic policy relating to the disposal of natural resources in their territory. However, going further with the Iranian claim to a violation of the right to self-determination, given the difficulties of attributing the right to a state and the strained reasoning required to allege a breach of economic sovereignty, may be untenable. Therefore only a brief examination of such an argument is warranted.

It has been claimed by numerous commentators that Iran, as an oil-rich nation, has no economic need to develop a nuclear program and such allegations have been linked to suggestions that Iran's program must necessarily have a clandestine weapons element.<sup>305</sup> However, a recent study by the National Academy of Sciences has revealed that 'Iran's energy demand growth has exceeded its supply growth,' and therefore, 'Iran's oil export will decline,' or even 'could go to zero within 12-19 years.' These statistics indicate that Iran's claims to require a nuclear program for energy production are 'genuine, because Iran relies on...proceeds from oil exports for most revenues, and could become politically vulnerable if exports decline.'<sup>306</sup> This indicates that a nuclear program for the production of energy would free up more petroleum for export as it would not be used for domestic energy production and as such would generate revenue for the state. It could be argued therefore that by seeking to suspend the enrichment of uranium, the result of the Council's demands, if adhered to, would be an interference with the ability of the Iranian people to freely choose the method of disposal of their natural resources, in this case the increased export of oil reserves for revenue to benefit the peoples economically rather than for domestic energy production.

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<sup>305</sup> A.H Cordesman, *Iran's Weapons of Mass Destruction: The Real and Potential Threat*, (Centre for Strategic and International Studies)(2006) at 235

<sup>306</sup> M.J Zarif, 'Tackling the Iran-US Crisis: The Need for a Paradigm Shift' 60 *Columbia Journal of International Affairs* 73 (2007) citing R. Stern, "The Iranian Petroleum Crisis and United States National Security," *PNAS* (Proceedings of the National Academy of Sciences) 104, no. 1377 (2 January 2007)

Therefore while the term ‘inalienable’ appears to be employed in the context of self-determination in numerous instances it is not abundantly clear that the principle of self-determination is being alluded to in the context of Article IV’s reference to ‘inalienable.’ It is more likely in this author’s opinion that the peculiarity of the term and its use extensively in the context of sovereign rights suggests that the ‘inalienable’ right is so designated to ensure that the right to a peaceful nuclear program remains strictly within the realm of domestic jurisdiction of the state. The significance of this in the current case is that the right would not then form part of the bundle of rights which a state relinquishes from its sovereign control in signing the NPT as a NNWS. The argument being made by Iran is that the right, as one designated as inalienable is therefore not subject to Security Council interference and in seeking to impose a ban on uranium enrichment the Council is acting *ultra vires* in making impermissible encroachments on its sovereignty and fundamental rights contained therein.

### **Conclusion on the Significance of ‘Inalienable’**

The term ‘inalienable’ therefore is of considerable significance. It could signify that the right to peaceful nuclear energy was not on the bargaining table in negotiating the NPT and remains unfettered by the provisions of the treaty, as is the plain meaning of the phrase “Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes...” In line with this, the purpose of the inclusion of ‘in conformity’, it has been argued, is that Articles I and II have established limits which the signatories cannot now exceed, but the right to develop a peaceful nuclear program which does not exceed the limitations of Articles I and II remains with the NNWS,

incapable of transfer. Finally, the peculiarity of the term indicates recognition of the location of the right to a peaceful nuclear program within the domestic jurisdiction of a state and protected by the shield of sovereignty, subject to interference by the Council only in certain circumstances, as will be examined below.

### **Has the Council Acted *Ultra Vires* in its Demand to Suspend Uranium Enrichment?**

#### **The Purposes and Principles Limitation**

As discussed in the previous Chapter, the purposes and principles of the organisation represent limits on the Council's discretion in acting to maintain international peace and security. Gowlland-Debbas states that '[t]he substantive limits are to be found in Article 24(2), according to which the Council is bound to act in accordance with the purposes and principles of the United Nations.'<sup>307</sup> Such a view is explicitly endorsed by Judge Lauterpacht in *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*.<sup>308</sup>

The purposes and principles of the organisation are enumerated in Articles I and II and undoubtedly encompass respect for state sovereignty, with reference in Article 2(1) to sovereign equality and non-interference in domestic affairs of states enshrined as a principle in Article 2(7). Great emphasis therefore is placed on these fundamental rights of statehood, which as examined above tend to be the body of rights granted the title of 'inalienable'.

Article 25, as previously stated, places a further limitation on actions of the Council, specifying that UN members shall carry out all decisions of the Council 'in accordance with the present

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<sup>307</sup> V. Gowlland-Debbas, 'UN Sanctions and International Law: an Overview', in V. Gowlland-Debbas (Ed.), *United Nations Sanctions and International Law* (2001) at 74

<sup>308</sup> (*Bosnia and Herzegovina v Serbia and Montenegro*) ICJ Reports (1993), Separate Opinion of Judge Lauterpacht at 440

Charter'. This provision is the basis for the binding nature of Council decisions, including those which can effectively suspend rights which are conventional, customary or general in nature. However it can do so only when said decisions are, in line with Article 24(2)'s requirement that the principles and purposes of the Charter are respected and Article 25's aforementioned limitation – in accordance with the Charter. It can be suggested therefore that a decision which is taken by the Council which can be found to be not in accordance with the Charter or incompatible with the purposes and principles as enunciated in Articles I and II would qualify as *ultra vires* acts of the Council.

It should be noted that the possibility of a Security Council resolution being contrary to the purposes and principles of the Charter *prima facie* is unlikely, more probable is a scenario where decisions taken by the Council would result in a violation of a fundamental norm of international law listed in Article 1(1) in their implementation by member states. An example of this in practice would be the arms embargo imposed on both sides of the Bosnian conflict which, implemented by states, resulted in the promulgation of genocide making the compliant states accessories. Based on this, Judge Lauterpacht opined that SC Resolution 713 which demanded such measures was contrary to *jus cogens* and ceased to be valid or binding meaning that member states could disregard it.<sup>309</sup>

Similarly, Tzanakopoulos argues that Article 25 simply does not oblige states to carry out Chapter VII measures that are *ultra vires* in stating that

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<sup>309</sup> Ibid

[O]nly those decisions taken in accordance with the Charter, namely *intra vires* decisions, are to be accepted and carried out. *Ultra vires* decisions, conversely, can lay no claim to binding force. States have specifically agreed to carry out only those decisions that are in accordance with the Charter. This may seem trite; it would make little sense if States agreed to be bound by decisions that are not in accordance with the Charter.<sup>310</sup>

The previous Chapter examined the absence of an explicit Article 39 threat determination throughout the suite of Council resolutions regarding the Iranian nuclear situation. It was argued that the failure of the Council to make such a determination could cast doubt on the validity of the resolutions, but difficulty in attributing legal standards of scrutiny to a determination of essentially political nature was recognised. However when one examines the steps required to be taken by the Council in acting in its primary function it is apparent that three steps can be distinguished. Kittrie describes the process as follows

First, Council must determine that a threat to peace exists. Second, the Council has to “decide what measures shall be taken . . . to maintain or restore international peace and security.” Third, the Council must decide what measures are “to be employed to give effect to [the Council’s] decisions.”<sup>311</sup>

What can be taken from the separation of the process into three steps is that the Council is unregulated by legal considerations to a large extent in the first step, the political and subjective determination that a threat to peace under Article 39 exists. However, this broad discretion does not carry through to the next two steps of the process unhindered by Charter-based constraints. It is at these stages when certain constitutional checks can be placed on decisions of the Council. It is possible therefore to examine whether or not the Council’s demands for uranium enrichment

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<sup>310</sup> A. Tzanakopoulos, *Disobeying the Security Council: Countermeasures Against Wrongful Sanctions* (OUP) (2011) at 165

<sup>311</sup> O. Kittrie, ‘Averting Catastrophe: Why the Nuclear Nonproliferation Treaty is Losing Its Deterrence Capacity and How to Restore It,’ 28 *Michigan Journal of International Law* 337 (2007) at 362

cessation, or the content of the measures contained in the resolutions enacted, have been made in accordance with the purposes and principles of the Charter. If the effect of the measures or adherence to the measures is a resulting situation which conflicts with the purposes and principles, then the Council will have acted *ultra vires*.

### **Sovereign Rights, Article 2(7) and Enforcement Action**

Article 2(7) of the Charter, or the jurisdictional or non-intervention clause, reads as follows

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

This Article is the constitutional embodiment of respect for state sovereignty and recognition of the fact that the Council is restricted in its ability to intervene in matters which remain inside the bundle of rights inuring to a state by virtue of its sovereignty as discussed above. The inalienable right to peaceful nuclear energy forms part of this bundle of rights and constitutes an exercise in sovereign decision making which generally is not subject to interference by the Council. However, as is clear from the text of the provision, enforcement measures by the Council benefit from an exclusion to this principle, meaning that member states have consented to the veil of sovereignty being pierced in one scenario only. If the Council determines that a threat to peace exists within the definition of Article 39 and pursues enforcement measures to maintain or restore international peace and security, these sovereign rights will not act as an effective shield to incursion into domestic jurisdiction.

It is noteworthy that initially Article 2(7) was proposed as encompassing all Chapter VII measures, however an Australian Amendment specifying that the exception would apply only to enforcement measures was adopted at the insistence of smaller states in order to ensure a measure of protection for their sovereign rights.<sup>312</sup> This amendment illustrates the fact that not all measures under Chapter VII qualify as enforcement measures, as if this were the case the amendment to include the term enforcement measures would have been superfluous.

The ICTY Appeals Chamber in *Tadic* confirmed that Article 40 provisional measures do not qualify as ‘enforcement measures’ in clarifying that

...not being enforcement action, according to the language of Article 40 itself ("before making the recommendations or deciding upon the measures provided for in Article 39"), such provisional measures are subject to the Charter limitation of Article 2, paragraph 7...<sup>313</sup>

Resolution 1696, examined in the previous Chapter, called for the full suspension of uranium enrichment in Iran under Article 40. Due to the textual limitation of Article 40 which states that ‘such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned’ and the classification as such measures as falling outside the category of ‘enforcement measures’ it is clear that resolutions adopted under this provision are incapable of encroachment

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<sup>312</sup> R. Sonnenfeld, *Resolutions of the United Nations Security Council*, (Martinus Nijhoff) (1988) at 110

<sup>313</sup> *Prosecutor v Tadic* (IT-94-I-AR72) Decision on Jurisdiction, Appeals Chamber, 2nd October (1995)

upon matters of domestic jurisdiction. It can be said therefore that enforcement measures connotes measures taken under Article 41 and 42.

The inalienable right, as investigated above, is so designated to ensure that it is categorized as a right which benefits from the protection of sovereignty and remains within the domestic jurisdiction of the state. It can be concluded therefore that an SC demand to suspend uranium enrichment as an Article 40 provisional measure attempts to interfere with a matter within the domestic jurisdiction of the state and is legally prohibited from doing so by virtue of Article 2(7). The resolution is therefore contrary to an Article 2 principle of the Charter meaning it is not taken ‘in accordance with the present Charter’ for the purposes of Article 25. It can be concluded therefore that the measures called for in Resolution 1696, demands for uranium enrichment suspension, constitute *ultra vires* action by the Council.

The remaining issue therefore is whether or not the Council, in issuing resolutions 1737-1929 under Article 41, which qualifies as enforcement action activating the Article 2(7) exception, serves as an incontestable legal basis for the demand to suspend uranium enrichment. As has been discussed in the previous chapter, employment of Article 41 requires a prior Article 39 threat determination. Manusama clarifies that Article 39 is governed by jurisdictional provision of Article 2(7) which illustrates that ‘certain core, substantive sovereign rights...remain untouchable by the powers of the Council’<sup>314</sup>

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<sup>314</sup> K.Manusama, *The United Nations Security Council in the Post Cold War Era; Applying the Principle of Legality* (Martinus Nijhoff)(2006) at 303



The required Article 39 threat determination is notably absent in each resolution issued on the subject of the Iranian nuclear program and Iran has cited this discrepancy in alleging that the Council has acted outside the parameters of its mandate in demanding uranium enrichment.<sup>315</sup> Without such a determination the Council is prevented by virtue of Article 2(7)'s jurisdictional limitation from employing enforcement measures against Iran.

In practice, there appears to be a scenario in which the Article 2(7) limitation can be disregarded or overcome without an Article 39 determination, where the government of the state subject to measures which intervene in matters within domestic jurisdiction consents to such involvement. In the *Case Concerning Certain Expenses of the United Nations*,<sup>316</sup> the action undertaken in the Congo by the ONUC mission and that of the UNEF in Egypt undoubtedly constituted encroachment on matters within the domestic jurisdiction of each state. However both were both carried out at the request of the respective state governments and in support of those governments, which due to the consensual nature of the arrangement was deemed by the Court not to constitute enforcement action.<sup>317</sup> Iran has not consented to Council involvement or the suspension of uranium enrichment and therefore does not fall within this category.

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<sup>315</sup> INFCIRC/837 at p.11 (h)

<sup>316</sup> *Case Concerning Certain Expenses of the United Nations*, ICJ Reports (1962)

<sup>317</sup> Ibid at 164

## Conclusion

It would appear therefore that the resolutions enacted under Article 41 demanding the suspension of uranium enrichment are not in accordance with the Charter as they contradict one of the explicit principles of the Charter, Article 2(7) dictating that matters within the domestic jurisdiction of a state may be only be subject to interference when the Council is acting under Chapter VII employing enforcement measures to maintain or restore international peace and security. As no Article 39 threat has been determined in the case of Iran, Resolutions 1737, 1747, 1803, 1835 and 1929, in purporting to apply enforcement measures against Iran, are *ultra vires*. As these resolutions have not been taken in accordance with the Charter as required by Article 25, the binding nature afforded to Security Council resolutions by Article 25 is not present. Iran's refusal to comply with the demands for the cessation of uranium enrichment therein is therefore legally justified, as such a matter remains within the realm of Iran's domestic jurisdiction.

The inalienable right to nuclear energy for peaceful purposes as recognized by Article IV NPT based on the foregoing reasoning therefore remains intact, as neither Article 25 or 103 of the Charter serve to legally override the right in this case. This conclusion bolsters the case Iran presented in its defence throughout the duration of the crisis and is vindicated by the end result of the Iran deal, which preserved the right to enrich as a key cornerstone of agreement.

## **Chapter 5: The Legality of Unilateral Responses to the Iranian Nuclear Situation – Sanctions, Countermeasures and State Responsibility.**

### *Introduction*

Frustration regarding the perceived ineffectiveness of IAEA and UN responses to the Iranian nuclear situation throughout the crisis led to regional organisations taking measures into their own hands in order to coerce Iranian compliance. Having examined the response of the IAEA and the UN Security Council to the Iranian nuclear situation, investigation into the unilateral measures taken by regional organisations such as the European Union against Iran is therefore necessary to gain comprehensive understanding of the issue. The extensive sanctions regimes employed by the United States and the EU will be analysed in this Chapter, in terms of both compatibility with applicable international law and effectiveness in dissuading Iranian nuclear ambitions. Reference will also be made to the response of other regional organisations such as the Gulf Cooperation Council, the Non-Aligned Movement and the Organisation of the Islamic Conference.

The existing sanctions regimes will be investigated first with compatibility with actions of the Security Council in mind, considering the legality of their extensive expansion of Council resolutions on the issue, the propriety of adopting measures when the Council is actively seized of a matter and analysing the role of Article 53 of the Charter in this situation. This line of inquiry will be followed by an examination of the status of the unilateral measures through the prism of the law on state responsibility as possible countermeasures. Having determined that these sanctions amount to countermeasures, the legality of these measures will be considered In light of issues

such as standing to enact such measures and the proportionality of the measures imposed. Based on these considerations, a determination on whether or not the countermeasures taken against Iran satisfy the necessary conditions under the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts 2001 can be made.

### **Extraterritorial Sanctions**

The adoption of certain pieces of US legislation authorising sanctions targeting Iran has caused much debate in the international legal field. While the legality of the sanctions imposed directly by the US on Iran is subject to dispute, certain aspects of various US Acts authorising extraterritorial sanctions appear to be incapable of validation in terms of international law. Extraterritorial sanctions, also known as secondary boycotts, are measures which permit the state in question to penalise third party states retaining economic ties and trade relations with the target state. For illustrative purposes, in the case of a US imposed embargo targeting Cuba, such measures would operate to boycott any state which continues to trade with Cuba.

Extraterritorial sanctions are not a new tool in US foreign policy. During the Cold War period, extraterritorial sanctions were employed by the US in its dealings with Cuba with the adoption of the *Cuban Assets Control Regulations* (CACR).<sup>318</sup> These regulations ban Cuban trade and investment with 'any person subject to the jurisdiction of the United States', which includes foreign companies under the ownership or control of US citizens.

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<sup>318</sup> *The Cuban Assets Control Regulations*, 31 C.F.R. 515 US Department of the Treasury's Office of Foreign Assets

In the case of Iran, Congress first sought to impose such measures on states cooperating with Iran by enacting the *Iran-Libya Sanctions Act* 1996 (renamed the Iran Sanctions Act), followed by the *Comprehensive Iran Sanctions, Accountability and Divestment Act* 2010 (CISADA), the *National Defense Authorisation Act* 2012 (NDAA), the *Iran Threat Reduction and Syria Human Rights Act* 2012 (ITRA) and finally *Iran Freedom and Counter-Proliferation Act* 2012.

While the initial Iran Sanctions Act had provision for the imposition of secondary sanctions, none were imposed under the authority of this Act. O’Sullivan cites the failure of this aspect of the Act as being due to friction created by the efforts of the US to use its economic superiority to influence the foreign policy of third states via sanctions, to achieve results which diplomacy had failed to produce,<sup>319</sup> referring to then-President Clinton’s issuance of waivers to EU members who vehemently objected to the legality of the sanctions. “Blocking Legislation” in the form of Council Regulation 2271/96<sup>320</sup> was enacted by the European Council in denouncing the enforceability of the ILA and prohibiting compliance with its extraterritorial laws.<sup>321</sup> These waivers were procured on the understanding that the EU would refrain from its threatened action of referring the issue to the WTO and in exchange for cooperation on various other issues.<sup>322</sup> The relevance of US reluctance to have the issue referred to the WTO Dispute Settlement mechanism will be further discussed below.

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<sup>319</sup> M. O’Sullivan, ‘The Great Iran Sanctions Debate’, 33 Washington Quarterly 7 (2010) at 14

<sup>320</sup> Council Regulation 2271/96, Protecting Against the Effects of the Extraterritorial Application of Legislation Adopted by a Third Country, 1996

<sup>321</sup> C. De Francia, ‘Enforcing the Nuclear Non-Proliferation Regime: The Legality of Forcible Measures’ 45 Vanderbilt Journal of Transnational Law 705 (2012) at 754

<sup>322</sup> R. Patterson, ‘EU Sanctions on Iran: The European Political Context’, Middle East Policy Council (2013)

This ostensible EU curtailment of extraterritorial effects of US sanctions however has not carried through to the implementation of CISADA. This act expanded upon ILA provisions by including sanctions to cover refined petroleum products and notably expanding sanctions to cover a wider range of financial transactions with little or no protest from the EU,<sup>323</sup> a change of heart which can likely be attributed to heightened international concern regarding Iran's nuclear ambitions in recent years. This re-evaluation is also evidenced by the extended sanctions regime the EU has itself since imposed upon Iran, meaning former EU member states reliant on Iranian imports will already have employed a boycott on such transactions.

In practice, the extraterritorial effects of CISADA, complemented by Section 1245 of the NDAA, have been employed by way of adding certain entities to a list entitled 'Specially Designated Nationals'. Recent additions this list include the Bank of Kunlun of China and Elaf Islamic Bank of Iraq, both of which are alleged to have 'knowingly facilitated significant transactions' to entities already on the SDN list and providing financial services generally to these entities.<sup>324</sup> This comes after certain Chinese and UAE entities were targeted in January 2012 for alleged activities regarding import of Iranian refined petroleum. Targeting China and UAE based entities could have far-ranging effects on the already substantially damaged Iranian petrochemical economy, as both China and the GCC states have sought to fill the gap left in the Iranian oil export market since the 2004 EU trade decline began.<sup>325</sup>

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<sup>323</sup> *ibid*

<sup>324</sup> Dentons LLP, 'Insight: Iran Sanctions: New Executive Order Expands US Extraterritorial Sanctions on Iran's Petroleum Sales', August 2012

<sup>325</sup> N. Habibi, 'The Impact of Sanctions on Iran-GCC Economic Relations', 45 Middle East Brief, Crown Centre for Middle East Studies (2010)

Further strengthening of the already crippling extraterritorial sanctions regime came in the form of the ITRA, which is aimed at the expanding the sanctions criteria previously contained in the Iran Sanctions Act regarding the range of activities which non-US persons and entities can be sanctioned for. The stated goal of the ITRA is to essentially sever Iranian access to the international energy market and global financial sector.<sup>326</sup> The act also expands the range of possible sanctions targeting the Iran Revolutionary Guard Corps, which has long been suspected of operating ‘front’ companies in order to circumvent sanctions contained in the previous US statutes,<sup>327</sup> therefore representing an addition which results in a comprehensive sanctions regime which leaves little breathing room for Iranian entities and their remaining trade partners globally.

The final expansion of the US extraterritorial sanctions reach came in the form of the Iran Freedom and Counter-Proliferation Act 2012, which can be seen to complete the execution of a comprehensive sanctions strategy in placing further restrictions on foreign companies involved in Iran’s shipping, ship-building, ports and metal trade sectors, as well as expanding the scope of the regime by making sanctionable those companies providing insurance and underwriting for sanctioned activities.<sup>328</sup>

### **The Illegality of Extraterritorial Sanctions**

While the extraterritorial element of the US sanctions regime has been successfully utilised in recent years, secondary sanctions represent measures the nature of which are difficult to reconcile

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<sup>326</sup> Dentons LLP, ‘The Iran Threat Reduction Act’, August 2012

<sup>327</sup> *ibid*

<sup>328</sup> R. Melzer and D. Ross, ‘US Sanctions: Sanctions without Borders’, *International Financial Law Review* (2013)

with international law. The use of these measures has attracted international condemnation and widespread disapproval due to their dubious legality.

The United Nations General Assembly has condemned the practice of secondary boycotts by issuing numerous resolutions under the title of ‘Elimination of Coercive Economic Measures as a Means of Political and Economic Compulsion’.<sup>329</sup> In these resolutions the prevailing view of the illegality of these measures is highlighted with reference to

the negative impact of unilaterally imposed extraterritorial coercive economic measures on trade and financial and economic cooperation, including at the regional level, because they are contrary to recognized principles of international law and pose serious obstacles to the freedom of trade and the free flow of capital at the regional and international levels.<sup>330</sup>

Furthermore the Assembly calls upon states not only to refuse to recognize these measures but also to take positive measures to counteract their effects, by taking administrative or legislative action.<sup>331</sup> Clearly recognized principles of international law impinged upon by such measures include sovereign equality of states, the principle of self-determination of peoples, the principle of non-interference in the sovereign affairs of states, the principle of peaceful settlement of international disputes and the principle of fulfilling obligations in good faith, disregard of which would represent violation of the purposes and principles of the Charter as enunciated in Article 2.

In-keeping with the trend of international disapproval towards extraterritorial measures, at the regional organisation level, the Non-Aligned Movement (NAM) has previously denounced these

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<sup>329</sup> Resolutions of the United Nations General Assembly, A/RES/51/22 (Dec. 6, 1996), A/RES/53/10 (Nov. 3, 1998), A/RES/57/5 (Nov. 1, 2002)

<sup>330</sup> A/RES/57/5 (Nov. 1, 2002)

<sup>331</sup> Human Rights and Unilateral Coercive Measures, Resolution of the United Nations General Assembly, A/RES/61/170 (Feb. 27, 2007)



measures as illegal and called upon its members to withhold cooperation with them.<sup>332</sup> Similarly, the Organisation of the Islamic Conference (OIC) has condemned extra-territorial measures and declared them to be null and void due to incompatibility with fundamental principles of international law.

### **Extraterritorial Sanctions and WTO Law**

Apart from obvious incompatibility with the UN Charter, US extraterritorial sanctions are likely also illegal under WTO law, as contended by Leverett.<sup>333</sup> Article XXI of the General Agreement on Tariffs and Trade (GATT)<sup>334</sup> permits WTO Member states such as the US to restrict trade with other states if such action is considered to be “necessary for the protection of its essential security interests”. While this Article does enumerate certain scenarios which could qualify for this exception, the list is not exhaustive. The desire to leave discretion to member states in interpreting ‘essential security interests’ was explained at the Geneva session of the Preparatory Committee by one of the Drafters of the original Charter in stating that

We gave a good deal of thought to the question of the security exception which we thought should be included in the Charter. We recognized that there was a great danger of having too wide an exception and we could not put it into the Charter, simply by saying: ‘by any Member of measures relating to a Member's security interests,’ because that would permit anything under the sun. Therefore we thought it well to draft provisions which would take

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<sup>332</sup> Twelfth Conference of the Foreign Ministers of the Non Aligned Countries, New Delhi, 1997  
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<sup>334</sup> General Agreement on Tariffs and Trade 1994, Article XXI: Article XXI  
Security Exceptions

Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

care of real security interests and, at the same time, so far as we could, to limit the exception so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance. ... there must be some latitude here for security measures. It is really a question of balance. We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose<sup>335</sup>

The resulting provision is does not provide a carte blanche to states to impose sanctions of any conceivable kind but it does allow the member state to adjudge their own definition of what is necessary for protection of their essential security interests. This broad discretion will not always necessarily go unchecked as recourse to the WTO dispute settlement mechanism by an aggrieved state can be had in order to clarify the compatibility of sanctions with the parameters of the article. Therefore this article permits member states in certain circumstances to impose embargoes and boycotts in order to directly sanction target states in a bilateral fashion. This provision however cannot reasonably be construed to extend to the imposition of secondary boycotts or extraterritorial measures.

In practice, illustration of the fact that this provision likely cannot extend to extraterritorial measures can be found by examining the threatened WTO action by the EU against the US regarding the extraterritorial elements of the *Helms-Burton Act* 1996 and US targeting of Cuba by virtue of its provisions. The EU initiated WTO dispute settlement proceedings arguing that US measures violated the GATT-based rights of the EU to engage in trade with Cuba, the same stance it took but did not pursue in the case of the Iran Sanctions Act, as mentioned above. The US countered by seeking discontinuance of the action on the grounds that GATT was not applicable to the foreign policy and national security issues covered by the act. When the EU did not concede,

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<sup>335</sup> *WTO Analytical Index* (World Trade Organisation: Geneva) (1995) at 600

the US threatened reliance on the Article XXI security exception to justify its extraterritorial measures. However, the US then refused to participate and withdrew from the proceedings, instead choosing to negotiate with the EU outside of the WTO dispute settlement mechanism which resulted in an ‘understanding’ being reached by the two parties which included tougher measures on Cuba by the EU and a suspension by the EU of the WTO case in exchange for a waiver from the effects of the Act.

The outcome of the threatened WTO case regarding the Helms-Burton Act therefore was the same as the result of EU protestations against the ILA but the salient point to be taken from this encounter is possibly that the US was not confident in its argument that Article XXI could extend to justify its extraterritorial measures and anticipated an unfavourable WTO panel outcome. This has led commentators such as Leverett to assert that the current US legislation mandating extraterritorial sanctions against entities cooperating with Iran would not withstand WTO panel scrutiny and represent measures violative of WTO law.

On a textual level it would be difficult to construe the discretion left to states in Article XXI to as capable of extending to extraterritorial measures which are so widely viewed as incompatible with the UN Charter. Subsection (c) of the Article states that

[N]othing in the Agreement shall be construed...to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

It would be difficult therefore to argue that the correct interpretation of the security exception contained in the same provision would plausibly permit violation of the Charter. Given the fact that the obligations mentioned for the maintenance of international peace and security are imposed on member states by virtue of Article 25 which requires that such decisions must be in accordance with the purposes and principles of the Charter, a suggestion that this provision simultaneously permits violation of several of these principles is problematic.

Article 31(1) of the Vienna Convention on the Law of Treaties highlights the need to bear the object and purpose of the treaty in mind in seeking to interpret the meaning of provisions. One object or purpose of GATT is to liberalise and regulate trade<sup>336</sup> meaning that the substance of Article XXI is quite a concession given it runs counter to the *raison d'être* of the regime to permit sanctions which broadly restrict trade. The WTO Appellate Body in *EC-Computer Equipment*<sup>337</sup> confirmed that an object and purpose of the GATT is 'the security and predictability of the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other trade barriers to trade'.<sup>338</sup> A broad interpretation of Article XXI permitting extraterritorial sanctions if deemed necessary for the protection of essential security interests by the member state is incompatible with this purpose of GATT, as it would introduce insecurity and unpredictability into trade arrangements involving the targeted state and its various trading

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<sup>336</sup> F. Ortino, *Basic Legal Instruments for the Liberalisation of Trade: A Comparative Analysis of EC and WTO Law*, (Hart Publishing) (2004)

<sup>337</sup> *European Communities - Customs Classification of Certain Computer Equipment*, WTO Appellate Body Report, 5 June 1998

<sup>338</sup> *Ibid* at para 82

partners based on the latter's susceptibility to US secondary sanctions and willingness to comply with the extraterritorial elements of US legislation.

Furthermore, preambular reference is made to the purpose of 'eliminating discriminatory treatment in international commerce'.<sup>339</sup> While both Articles XX and XXI envisage scenarios where trade can be restricted in certain circumstances, this object would arguably be undermined in any scenario permitting extraterritorial sanction as such measures inherently involve the promotion of trade discrimination against the targeted state based on the will of the state implementing the measures. While the targeting state may claim that its essential security interests require the restriction of its own trade with the targeted state, extraterritorial sanctions represent a demand that third states accept this subjective assessment of the targeting state and discriminate against the target state in their trading policies, even if the third state has not assessed that the targeted state represents a threat to its own security interests. The third state is therefore left with the choice of either discriminating against the target state itself or facing discrimination at the hands of the targeting state which will impose secondary sanctions as a penalty. Either way, a reading permitting extraterritorial sanctions runs contrary to this object and purpose of the GATT/WTO Agreement and therefore an interpretation of Article XXI which would permit this would appear to be incompatible with the treaty as a whole.

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<sup>339</sup> Preamble, General Agreement on Tariffs and Trade 1994

## **Attempts to Expand Upon Security Council Resolutions**

While the EU has not adopted the US practice of secondary boycotts in its own Iran sanctions regime, both regimes contain measures which clearly exceed the scope of the actions envisaged and mandated by the Security Council in its various Article 41 based resolutions. According to Dupont, this auto-interpretation of Council resolutions which results in extensive expansion on the original mandate constitutes an impediment to the legality of the sanctions imposed by the EU and in the same manner, the US,<sup>340</sup> both of which have imposed embargoes on Iranian oil and gas industries. The legal basis for such action will be examined in this section, taking into account the text and scope of Resolution 1929, the effect of the ARSIWA and the ability of states and regional organisations to engage in auto-interpretation of Security Council resolutions.

### **The Text of Resolution 1929**

#### **The Preamble**

Notably, the text of Resolution 1929, adopted under Article 41, does not contain measures on the oil and gas industry of Iran, rather it notes the possible connection and refrains from including an operative paragraph regarding sanction of those sectors, confining the reference to a preambular paragraph. This paragraph goes only as far as noting the 'potential connection between Iran's revenues derived from its energy sector and the funding of Iran's proliferation-sensitive nuclear activities'. Ahlstrom clarifies that preambles of Security Council resolutions may act as aids in interpretation but carry no operative force meaning they cannot provide justification or

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<sup>340</sup> P.E Dupont, 'Countermeasures and Collective Security: The Case of the EU Sanctions Against Iran' 17 (3) J Conflict Security Law 301 (2012) at 9

authorisation for a given action.<sup>341</sup> A ban on Iran oil imports is contained nowhere in the operative body of the resolution.

The EU however adopted an expansive interpretation of the resolution in singling out ‘key sectors in the oil and gas industry’, purportedly in order to implement resolution 1929. This expansion was seemingly justified by reliance on the aforementioned preambular paragraph by the ECJ in the case of *Manufacturing Support & Procurement Kala Naft v Council*.<sup>342</sup> The ECJ notably set aside General Court’s earlier decision<sup>343</sup> regarding the annulment of restrictive measures targeting the applicant, an Iranian oil company, stating that:

In the light of that Security Council resolution [...], the European Council Declaration and Decision 2010/413, which mention the revenues derived from the energy sector and the risk attached to material intended for the oil and gas industry, Article 7(2) of Regulation No 423/2007 had to be interpreted [...], as meaning that trading in key equipment and technology for the gas and oil industry was capable of being regarded as support for the nuclear activities of the Islamic Republic of Iran.<sup>344</sup>

Dupont opines that the ECJ erred in its reasoning in placing weight on an inoperative preamble-based reference<sup>345</sup> and this is consistent with the Wood’s view that the preamble often represents a ‘dumping ground for proposals that are not acceptable in the operative paragraphs’.<sup>346</sup> That said, while the content of the preamble is not in itself binding, Wood notes that preamble-based

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<sup>341</sup> Ahlström, ‘United Nations Security Council Resolution 1540: Non-Proliferation by Means of International Legislation’, SIPRI Yearbook (Oxford University Press) (2007) at 464-465

<sup>342</sup> Case C-348/12 P, ECJ Appeal

<sup>343</sup> Case T-509/10, General Court

<sup>344</sup> Case C-348/12 P, ECJ Appeal at para. 83

<sup>345</sup> P.E Dupont, ‘The ECJ and (Mis)interpretation of Security Council Resolutions: The Case of Sanctions Against Iran’ EJIL Talk, December 23rd (2013)

<sup>346</sup> M. Wood, ‘The Interpretation of Security Council Resolutions’ 2 Max Planck Yearbook of United Nations Law 73 (1998) at 87

references may aid in the exercise of ascertaining the correct interpretation of the content of the operative paragraphs which follow and therefore can carry interpretive weight.<sup>347</sup>

Both China and Russia as permanent members denounced additional unilateral sanctions as illegal<sup>348</sup> and the relevance of this has been highlighted by the ICJ. The *Namibia* case is the authority on interpretation of resolutions, enumerating the relevant criteria to be considered by the interpreter as i) the terms of the resolution to be interpreted, ii) the discussions leading to it, iii) the Charter provisions invoked and iv) all the general circumstances that might assist in determining the legal consequences of the resolution of the Security Council.<sup>349</sup> This approach to interpreting SC resolutions departs from treaty law interpretation principles as contained in VCLT Articles 31 and 32 as it suggests extrinsic evidence will be pertinent to the interpretation of resolutions in the first instance. The Court in the *Kosovo Advisory Opinion*<sup>350</sup> concurring, stipulated that the extrinsic evidence of the intentions of permanent members is a relevant aid in interpreting Council resolutions taking into account

‘statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions’.<sup>351</sup>

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<sup>347</sup> *ibid*

<sup>348</sup> V. Churkin, Representative of the Russian Federation, Resolution 1929 Security Council Meeting Record, Voltaire Network, 9<sup>th</sup> June (2010)

<sup>349</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16, 53 (June 21)

<sup>350</sup> Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo (Request for Advisory Opinion) ICJ Reports, 22nd July (2010)

<sup>351</sup> *Ibid* at para. 94



With these criteria in mind, in seeking to evaluate the intentions of the Security Council in drafting resolutions both Calamita<sup>352</sup> and Frowein<sup>353</sup> advocate a cautious approach, remaining cognisant of member state sovereignty so as to ensure that broadened unilateral interpretation is unlikely. Emphasis must therefore be placed on the view of both China and Russia that expansion beyond the agreed text of the resolution to include unilateral sanctions would constitute illegal action when considering the placement of the reference to the oil and gas industries of Iran in the preamble rather than the operative text of the resolution. It is submitted that in this instance the confinement of the reference to the preamble represents an inability of the Council to reach consensus on the issue of an oil and gas embargo.

The inclusion of such measures in the body of the resolution would have run counter to the stated goal of the Russian delegation in negotiating the terms of the resolution, which according to representative Churkin was ‘ensuring that the Council’s decision aimed exclusively at bolstering the non-proliferation regime and contained no provision that would harm the well-being of the Iranian people’.<sup>354</sup> Exclusion of operative measures targeting Iranian oil and gas sectors, as the lifeblood of the Iranian economy, was therefore paramount for Russian acquiescence with the operative terms of the resolution. Russian opposition to measures which exceed the stated scope of the resolution is further evidenced by a statement issued by the Russian Ministry for Foreign

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<sup>352</sup> N. Jansen Calamita, ‘Sanctions, Countermeasures, and the Iranian Nuclear Issue’, 42 *V and J Transnational Law* 1393 (2009) at 1415

<sup>353</sup> J.A Frowein, ‘Unilateral Interpretation of Security Council Resolutions-a Threat to Collective Security?’ in *Volkerrecht - Menschenrechte – Verfassungsfragen Deutschlands Und Europas : Ausgewählte Schriften* (2004) at 149

<sup>354</sup> V. Churkin, Representative of the Russian Federation, Resolution 1929 Security Council Meeting Record, Voltaire Network, 9th June (2010)

affairs stating its view that ‘nothing in this resolution compels States to take measures or actions exceeding the scope of this resolution’.<sup>355</sup>

Negative Chinese sentiment towards extensive measures such as the inclusion of an operative paragraph authorizing crippling measures such as an oil and gas embargo is expressed by Representative Li Baodong, stating that action taken by the Council in relation to the Iranian issue ‘should help to promote the current momentum towards global economic recovery and not affect the day-to-day lives of the Iranian people or normal international trade and transactions.’<sup>356</sup>

It is clear that a reading of the preambular reference to a possible link between revenue from the Iranian energy sector and its nuclear program as authorizing the adoption of sanctions on such industries is therefore difficult to sustain on an interpretative level. Orakhelashvili has opined that

Unilateral interpretation of UN Security Council resolutions takes place where, due to political considerations of the day, one or more States attempt construing the resolution in question as falling short of, or exceeding, the agreement between the Council's Member States that the resolution on its face suggests.<sup>357</sup>

It would appear therefore that EU and US resort to unilateral measures targeting the oil and gas sectors of Iran is a classic attempt to construe the terms of the resolution in an expansive manner which is neither reflective of the textual content of the operative body of the resolution nor the statements made by fellow permanent members China and Russia.

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<sup>355</sup> Russian MFA Press and Information Department Commentary: UN Security Council’s Adoption on June 9 of Resolution Regarding Iran, 797-09-06-2010

<sup>356</sup> Li Baodong, Representative of China, Resolution 1929 Security Council Meeting Record, Voltaire Network, 9th June (2010)

<sup>357</sup> A. Orakhelashvili, ‘Unilateral Interpretation of Security Council Resolutions: UK Practice’, 2 Goettingen Journal of International Law 823 (2010) at 824

## Operative Paragraphs

While the aforementioned preambular reference is not capable of independently authorizing measures to target the energy sector, the inclusion of such a reference in an operative paragraph of the resolution would have given the EU and US much greater scope upon which to expand. However, nowhere in the operative paragraphs is the Iranian energy sector and its possible link to the funding of Iran's nuclear program mentioned. The operative body authorizes measures which *inter alia* comprise a conventional arms embargo and a ban on ballistic missile activity but contains an important restriction on the expansion of these measures in paragraph 37.

In operative paragraph 37 the Security Council makes clear that additional sanctions upon Iran based on the authority of this resolution would have to be agreed upon by the Council in stating that

it shall, in the event that the report shows that Iran has not complied with resolutions 1737 (2006), 1747 (2007), 1803 (2008) and this resolution, adopt further appropriate measures under Article 41 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.*<sup>358</sup>

This provision leaves no room for suggestion that the measures enumerated by the Council are in their implementation subject to unilateral expansion by Member States. In this case, resolution 1929 rounds out a comprehensive suite of resolutions which take into account the views of all SC members and are tailored to reflect this. Guidance is given to states regarding the extent of measures which should be adopted in order to comply with the resolution but this is accompanied by the statement that in the event of Iranian non-compliance the Council shall take further measures under Article 41. The alternative, had the Council intended to grant to states broad

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<sup>358</sup> SC/RES/1929 at para. 37 *emphasis added*

discretion under the resolution in taking enforcement action against Iran, would have been to mimic SC/Res/253 on Rhodesia,<sup>359</sup> which provided an expansive basis, often referred to as a ‘blanket authorisation’<sup>360</sup> to take action. The Resolution authorized action to the fullest extent possible under Article 41, encouraging states to “take all possible further action under Article 41”<sup>361</sup> of the UN Charter, which can be interpreted to mean that discretionary expansion upon the measures adopted by the Council was therefore authorized. Such a sweeping authorisation is notably absent from Resolution 1929, which instead focusses on carving out the necessary sectors to be targeted rather than leaving broad discretion to states.

The question of whether or not states may indulge in such extensive auto-interpretation of Council resolutions, as appears to be the case in EU and US interpretation of Resolution 1929, seemingly must be answered in the negative. Having examined the above line of enquiry, Sicilianos concludes that

[t]he recognition of a large power of auto-interpretation on the part of States of mandatory decisions of the Security Council enacting sanctions under Chapter VII does not find any support in the UN Charter and would risk distortion of Chapter VII<sup>362</sup>

Permitting member states to utilise broad powers of interpretation in the case of Security Council resolutions regarding issues pertaining to the maintenance of international peace and security would appear to undermine the primacy of the Council in this area as established by Article 24. Acceptance of broad unilateral interpretation of such measures, in this case on the basis of a mere

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<sup>359</sup> SC/RES/253

<sup>360</sup> J. Schott, ‘Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency’, 6 North Western Journal of International Human Rights 24 (2008)

<sup>361</sup> SC/RES/253 at para.9

<sup>362</sup> L. Sicilianos, ‘The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility’, 13 EJIL 1127 (2002) at 1144

preambular reference, essentially disregards the stated will of the competent organ of the international community and puts into jeopardy the effectiveness of Chapter VII as well as Chapter VII, the latter of which will be examined further in the context of sanctions as countermeasures.

The above reasoning points to the conclusion that Resolution 1929 does not provide legal authorisation for the employment of far-reaching, ‘crippling’ sanctions targeting the Iranian energy sector. Nor can previous resolutions 1737, 1747, 1803 be said to authorize such comprehensive measures, as noted by Calamita in stating that based on these resolutions, despite ‘broad perambulatory statements of purpose, the Council has not decided to impose a comprehensive economic embargo on dealings with Iran.’<sup>363</sup> Therefore, in order to justify in international law the extensive measures taken against Iran, it is necessary to consider US and EU sanctions as acts of self-help operating in the law of state responsibility, either retorsion or countermeasures, and to assess the legality of the measures within that legal framework.

### **EU and US Sanctions and the Law on State Responsibility**

From the above reasoning it can be deduced that alternative legal justification is required for measures adopted by the EU and US which undeniably exceed the authorisation granted by the Council in Resolution 1929. Calamita clarifies that in cases where the discretion to expand upon sanctions remains with the Council, as was established above with reference to paragraph 37 of Resolution 1929, member states taking unilateral measures which exceed decisions of the Council are not afforded the protection of Articles 25 and 103 to legally legitimise their actions or shield

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<sup>363</sup> N. Jansen Calamita, ‘Sanctions, Countermeasures, and the Iranian Nuclear Issue’, 42 V and J Transnatl Law 1393 (2009) at 1417

against consequences arising out of unilateral action taken against Iran.<sup>364</sup> Legal justification for resort to unilateral measures against Iran can therefore be sought in the context of the law on state responsibility which seeks to regulate legal responses to wrongful acts of states.

Governed by the *Articles on the Responsibility of States for Internationally Wrongful Acts* 2001 (ARSIWA), the law on state responsibility presents a legal framework permitting injured states<sup>365</sup> to seek recourse against wrongful acts of third states. Calamita explains that

In the absence of a centralized enforcement authority or a universal mechanism for dispute resolution, countermeasures fill, albeit imperfectly, a legal lacuna and provide a tool of "self-help" for encouraging compliance with international law.<sup>366</sup>

The Security Council can be viewed as centralized enforcement mechanism, however the susceptibility of Council resolutions to auto-interpretation as seen above one cannot be disregarded. In these circumstances, one must consider the parameters of the law of state responsibility when seeking to evaluate the legality of measures greatly exceeding the exercise of Council's enforcement mechanism. White and Abbas contend that centralized and decentralized enforcement mechanisms of countermeasures can exist concurrently.<sup>367</sup> If this is the case, the EU and US could act as decentralized enforcement bodies to fill these compliance lacunae, if their measures satisfy the conditions required in ARSIWA to constitute legal countermeasures, without impinging upon the authority of the Council. The ability of states and international organisations

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<sup>364</sup> *Ibid* at 1406

<sup>365</sup> Resort to self-help by International Organisations is governed by the largely analogous Draft Articles on Responsibility of International Organisations.

<sup>366</sup> *Supra* Calamita n346 at 1418

<sup>367</sup> N.D. White & A. Abbas, 'Countermeasures and Sanctions' in M. Evans (4<sup>th</sup>ed), *International Law*, (OUP)(2014) at 542

to resort to countermeasures when the Council is actively seized of a matter however is subject to contention, as will be examined below.

### **The Law of State Responsibility, Countermeasures and US/EU Sanctions**

The ARSIWA stipulates that in order to engage the law on state responsibility, a) the state being targeted must have committed an unlawful act and b) the state or organisation seeking to resort to self-help must have standing to take these measures by qualifying as injured state, subject to various variations of the term. Furthermore, countermeasures may in themselves constitute behaviour which without the initial wrongdoing would be unlawful, however the countermeasures must be proportionate to the initial injury suffered.

In this case, the EU and US are reacting to an alleged breach of international law by Iran, in the form of either a breach of its international obligations contained in the NPT and its relation to obligations in Iran's Safeguards Agreement. It has been argued previously in this study that the alleged breaches of each of these obligations by Iran have dubious foundations. However, as the issue of whether or not Iran has breached obligations owed under these treaties is subject to debate, the consequences of these breaches in the law of state responsibility will be investigated. It will be necessary to investigate whether or not the EU and US have *locus standi* to take such measures as injured or indirectly injured states, or as members of a group owed an obligation in the collective interest. If standing cannot be established under the various Articles pertaining to title to take countermeasures legitimately then it is unlikely the measures will withstand legal scrutiny and the issue of Security Council primacy over the matter will be re-engaged. The measures taken by the

EU and US which will be subject to analysis as countermeasures are those which exceed the mandate provided by Resolution 1929, namely the embargo placed on the Iranian energy sector.

Before considering whether the measures adopted by the EU and US amount to countermeasures, the possibility that they represent retorsions must be ruled out. Retorsion is defined by Oppenheim as 'the technical term for the retaliation for discourteous, or unkind or unfair or inequitable acts with acts of the same or of a similar kind.'<sup>368</sup> Klabbers lists the cutting of diplomatic ties or recalling of consular staff as examples of retorsion.<sup>369</sup> The essence of acts of retorsion therefore is that they do not amount to unlawful conduct themselves but rather are utilised as a political tool in response to similarly unfriendly but lawful acts. It is clear that in imposing an embargo on the Iranian energy sector, the EU and US have engaged in more than a mere unfriendly act, as if these measures were to be taken outside of the context of response a breach of international obligations by Iran they would be violative of international trade law.

Given the fact that the imposition of an embargo goes beyond an act of retorsion, justification for resorting to illegal conduct must be established and the measures must qualify as countermeasures. Countermeasures, as violations of international law in themselves, are necessarily reserved for exceptional circumstances and are, as a result, prone to abuse and therefore subject to a l l l number of ARSIWA based conditions, conditions which are not necessary in the case of retorsion.<sup>370</sup>

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<sup>368</sup> L. Oppenheim, *International Law*, Vol II, 7<sup>th</sup> Ed (1952) at p.134

<sup>369</sup> J. Klabbers, *International Law*, (Cambridge University Press) (2013) at 168

<sup>370</sup> P.E Dupont, 'Countermeasures and Collective Security: The Case of the EU Sanctions Against Iran' 17 (3) J Conflict Security Law 301 (2012) at 324



## **EU and US Sanctions as Countermeasures**

Having established that the measures employed by the US and EU exceed the scope of Resolution 1929 and are not capable of classification as retorsion, the possibility of these measures qualifying as countermeasures must be explored. Countermeasures are employed for the purpose of coercing the target state into cessation of the breach at issue rather than for punitive reasons and these measures must conform to the ARSIWA in order to be legally justified. Should these measures fail to satisfy the ARSIWA criteria, they can, as measures which are not taken for the implementation of a stated measure of the Council, be classified as ‘unilateral coercive economic measures’, which are not shielded from illegality.

In order to lawfully engage in countermeasures states must qualify as ‘injured’ by the initial breach of obligation for the purposes of Article 42, which necessitates examination of the nature of the obligation breached in order to establish standing. If standing cannot be established under this provision, Article 48 acting in tandem with Article 54 could possibly provide an alternative basis for the employment of countermeasures in certain circumstances. In the case of EU and US countermeasures targeting Iran, it will be demonstrated that the Article 42 conditions are not satisfied due to the nature of the obligations allegedly breached. The possibility of the EU and US relying on Articles 48 and 54 will then be examined.

### **Article 42**

In cases involving bilateral relations, Article 42(a) simply ensures that if State A breaches an obligation owed to State B, State B as an individually injured state may take countermeasures. More complex and directly relevant to the current analysis is Article 42(b) which governs the

consequences of a breach of an obligation owed either to a group of states of which one is the state claiming injury or the international community as a whole. Subsection (1) stipulates that breach of an obligation owed to the group as a whole allows a member state to take measures if it is specially affected by the breach and 42(b)(ii) refers to the breach of obligation radically changing the position of all other states to which the obligation is owed with regard to their future performance of that obligation.

In the case of EU/US sanctions targeting Iran, as the obligations in question are owed to a group of states and possibly the international community at large, Article 42(b) is the relevant provision concerning the alleged breaches of the NPT, Safeguards Agreement and UN Charter. We shall look first to the issue of breach of the NPT by Iran and whether or not this would provide the EU or US with standing under this provision.

In order to legitimately claim title as an injured party, each EU member, all of which are party to the NPT (with Britain and France as Nuclear Weapons States) would have to consider themselves injured parties under Article 42(b)(ii). While Article 43 DARIO provides for the possibility of international organisations having injured status and could be applied by analogy here, the EU is not a signatory of the NPT but rather its constituent states are. The NPT obligation arguably breached by Iran is Article III regarding the acceptance of safeguards and in order to ascertain whether or not EU member states have standing based on this breach, the nature of the obligation must be explored.

### **Article III NPT - Consequences of Breach in State Responsibility**

Article III NPT requires NNWS to conclude Safeguards Agreements with the IAEA in order to facilitate monitoring and verification of adherence to the Article II NPT, which prohibits the state from the manufacture or receipt of nuclear weapons or the acquisition of assistance in their manufacture. It is to be noted at this juncture that while the IAEA found Iran to be in non-compliance with certain safeguards obligations, it has never been conclusively proven that Iran engaged in the manufacture of nuclear weapons. Standing on the grounds of a violation of Article III is therefore more likely. Interestingly, breach of safeguards obligations contained in the Comprehensive Safeguards Agreement, in force bilaterally between the IAEA and Iran, does not necessarily amount to a breach of Article III NPT.

It has been maintained by certain commentators<sup>371</sup> that Article III.1 in its stated requirement of ‘acceptance of safeguards’ reflects the fact that breach of a safeguards agreement provision amounts to a breach of Article III and therefore the NPT. However, the Article goes on to stipulate in subsection 4 that ‘Non-nuclear-weapon States Party to the Treaty shall conclude agreements with the International Atomic Energy Agency to meet the requirements of this Article’, which effectively states that issues relating to the functioning (and consequently the breach of) these safeguards will be governed by the envisaged future agreement, rather than by the Article in question. The earlier reference to ‘acceptance of safeguards’ therefore relates to the obligation to

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<sup>371</sup> C.A. Ford, ‘Nuclear Technology Rights and Wrongs: The NPT, Article IV, and Nonproliferation’, Nuclear Abolition Forum at 3

enter into an agreement which meets the requirements of sections 1, 2 and 3 and governs safeguards-related issues.

In support of this point, one can look to the analysis of Joyner, who contends that the only substantive obligation present in Article III is in subsection 4 which stipulates that all member states must conclude agreements with the IAEA which are in accordance with the present Article. Sections 1,2 and 3 of the Article describe what type of agreement should be entered into in order to fulfil the substantive obligation in Article III.4. What the preceeding subsections do not stipulate is an obligation to comply with the terms of the future agreement to be made between the IAEA and Member State.<sup>372</sup> To suggest that the article contains an obligation to conclude such an agreement and an obligation to comply with this agreement, according to Joyner, basically reiterates the customary international law principle of *pacta sunt servanda*, applicable to all treaties. Reading Article III.1 as a substantive obligation to comply with the future agreement in addition to the omnipresent principle of ‘treaties are to be observed’ would appear to make Article III.1 a superfluous provision.<sup>373</sup>

Meyjr and Harbuch contend that the aforementioned line of reasoning is supported by the NPT Review Conference Final Document 2010,<sup>374</sup> in which it is stated that ‘The Conference welcomes that 166 States have brought into force comprehensive safeguards agreements with IAEA in

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<sup>372</sup> D.H Joyner, ‘Interpreting the Nuclear Non-Proliferation Treaty’ (OUP) (2011) at 89

<sup>373</sup> *Ibid* at 90

<sup>374</sup> E. Meyjr & J. Harbuch, ‘Violation of Non-Proliferation Treaties and related Verification Treaties’ in *Non-Proliferation Law as a Special Regime: A Contribution to Fragmentation*, (eds Joyner & Roscini) (Cambridge University Press)(2012) at 129

compliance with article III, paragraph 4, of the Treaty'.<sup>375</sup> This provision indicates that in the view of the NPT conference delegates, the ultimate interpreters of the scope and content of the NPT, the substantive obligation of Article III.4 is the entry into force of a CSA, fulfilment of which is achieved upon the date of entry into force of such an agreement.

The relevance of this point is that NPT Article III, according to this analysis, cannot be said to be breached by Iran. The monitoring and verification obligations contained in Iran's CSA find their only nexus to other NPT member states through this provision and therefore Iran's obligation owed to fellow NPT states under this provision is fulfilled, as Iran has not failed to bring into force a CSA. Neither has Iran engaged in activity amounting to a breach of Article II, therefore no obligations owed by Iran in respect of its fellow NPT member states have been broken entitling them to standing under Article 42(b)(ii).<sup>376</sup> Iran's alleged breach is of the CSA for monitoring and verification issues, the breach is of a bilateral agreement between the IAEA and Iran, the injured party therefore is the IAEA which resorted to non-compliance procedures as contained in the IAEA statute in order to attempt to remedy the breach, as will be examined below.

It is worth examining, *arguendo*, the consequences that could arise out of an Article III breach by Iran. Firstly, classification of the Article III obligation is integral to any analysis regarding the outcome of its breach in the law of state responsibility. Fitzmaurice considered that 3 types of

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<sup>375</sup> NPT/CONF/2010/50 – NPT Review Conference Final Document 2010 at para.14

<sup>376</sup> Article 42(b)(ii) provides that a state may treat itself as an "injured State" where the obligation breached is owed either to a group of states of which the "injured State" is a part or to the international community as a whole, and the breach "is of such a character as radically to change the position of all the other States to which the obligation owed with respect to the further performance of the obligation."

obligations were to be found in treaties –reciprocal, self-existent and interdependent<sup>377</sup>. Interdependent obligations, as defined by Singh are those which establish a ‘performance-related co-dependency between parties,’<sup>378</sup> meaning that breach of such an obligation by one party would render performance of the same obligation by the injured party impossible. Sicilianos defines interdependent obligations as obligations the ‘scrupulous performance of which constitutes a condition sine qua non for the functioning of the system they set up’, meaning they are integral in nature, and uses disarmament and denuclearization treaties as examples of treaties comprised mainly of such obligations.<sup>379</sup> The NPT is comprised of a majority of interdependent substantive obligations with procedural obligations for their implementation and interspersed throughout.

An undisputable example of a substantive interdependent obligation would be the obligation not to manufacture or acquire a nuclear weapon as contained in Article II. Breach of this obligation, by virtue of its representation of the grand bargain of the NPT and the embodiment of the collective interest of the parties, would plausibly amount to an inability of the injured state to continue performance of its obligation not to manufacture, due to the security implications involved in a breach of this substantive obligation. Singh has observed that the prevalence of substantive obligations which qualify as interdependent in the NPT makes resort to decentralized enforcement mechanisms more likely as such breaches grant all states owed the obligation standing to take

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<sup>377</sup> Third Report on the Law of Treaties by Mr. G.G. Fitzmaurice, Special Rapporteur, A/CN.4/115 and Corr.1, (1958) Vol. II Yb ILC 20

<sup>378</sup> S. Singh, ‘Non-Proliferation Law and Countermeasures: Their Function and Role in Determining the Status of A Special Regime’ in D. Joyner and M. Roscini, *Non-proliferation Law as a Special Regime* (Cambridge University Press)(2012) at 208

<sup>379</sup> Supra n.356 Sicilianos at 1134

countermeasures.<sup>380</sup> Therefore, the higher proportion of interdependent obligations contained in the NPT, the larger the prospective pool of parties with standing to take countermeasures becomes.

Interestingly and of direct relevance to the current analysis, it has been contended that the concept of interdependent obligations and the consequences of their breach are not identical in the ARSIWA and the VCLT.<sup>381</sup> These subtle disparities have an impact in the outcome of any analysis of standing under Article 42(b)(ii). Regarding such obligations in treaty law, an obligation is interdependent if it is of such character that according to article 60(2)(c) VCLT ‘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.’<sup>382</sup> According to this reasoning, a material breach of such an obligation can produce consequences if it changes the position of the parties with respect to performance of any obligation under the treaty and this results in a broad category of obligations being classed as interdependent and capable of giving rise to standing of all parties.

However, in the law of state responsibility, this is arguably not the case. In Article 42(b)(ii) ARSIWA the condition required in order to grant the various parties to the treaty standing to take countermeasures is the breach of an obligation which radically changes the position of all parties with respect to performance of the same specific obligation breached. This dichotomy is neatly encapsulated by Gaja in stating that

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<sup>380</sup> Supra n.58 Singh at 23

<sup>381</sup> G. Gaja, ‘The Concept of the Injured State’ J. Crawford, A. Pellet & S. Olleson (eds.), *The Law of International Responsibility* (OUP)(2011) at 945

<sup>382</sup> Article 60(c)(2) Vienna Convention on the Law of Treaties

For ARSIWA, at issue is a modification which affects the future performance of the specific obligations in question. The Vienna Convention, on the other hand, concerns a modification which affects the totality of obligations deriving from the treaty.<sup>383</sup>

This definition of an interdependent obligation in the law of state responsibility satisfies the stated need to ensure that action under Article 42(b)(ii) is confined to a specifically narrow type of breach, rather than being capable of activation in response to a broad spectrum of breaches. This requirement is noted in the Commentary to Article 42 in stating that

In practice, interdependent obligations covered by paragraph (b)(ii) will usually arise under treaties establishing specific regimes. Even under such treaties it may not be the case that just any breach of the obligation has the effect of undermining the performance of all the other states involved, and it is desirable that this subparagraph be narrow in scope<sup>384</sup>

The Commentaries further elucidate the fact that in order to qualify as an injured state under paragraph (b)(ii) the states invoking responsibility must have their enjoyment of rights accruing from the obligation in question radically affected and/or have their ability to perform the same obligation radically affected. This means that a breach must, without embracing the identical concept of ‘material breach’ from Article 60 VCLT, be of significance and represent more than a minor impediment to the performance of the obligations of the affected states.<sup>385</sup>

In order to represent a breach capable of definition as interdependent according to this view, the breach must render the injured state incapable of performing the same obligation as the one which has been breached. It follows therefore, that the injured state must be owed the obligation in question but must also be required to carry out that same obligation. Herein lies the difficulty in stating that the EU and indeed the US, has standing based on the breach of an interdependent

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<sup>383</sup> *Supra* n.61 Gaja at 946

<sup>384</sup> Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, Yearbook of the International Law Commission, 2001, Vol. II, Part Two (2001) at 119, para. 15

<sup>385</sup> *ibid*



obligation under this narrow provision. EU member states France and the UK are NWS to the NPT as is the US. Given the complex multidimensional structure of the NPT, a duality of obligations are owed by and to the NWS and NNWS. Based on this, the acceptance of safeguards required of NNWS such as Iran under Article III is an obligation which cannot be classed as interdependent for the purposes of granting NWS standing to take countermeasures, as breach of this obligation cannot affect NWS performance of the same obligation as the identical obligation is not owed by NWS.<sup>386</sup>

Furthermore, it is not clear that the nature of the alleged breach in question would feasibly radically affect the ability of NNWS to carry out their obligation to adhere to safeguards agreements as required by Article III. According to Singh, analysis of interdependent obligations is to be divided into two schools of thought – the narrow and the broad, based on what degree of emphasis is placed on differentiating the concept in the contexts state responsibility and the law of treaties. The narrow approach represents a state responsibility-based interpretation of interdependent obligations, the breach of which must affect the performance of the same specific obligation, as discussed above. It can be observed that the majority of substantive obligations would qualify as interdependent and therefore capable of granting standing whereas procedural obligations would qualify, in the cases of those with a strong link to a substantive obligations only within the broad, treaty-based approach and in that case only a significant breach of such an obligation would result in the ability to resort to countermeasures.<sup>387</sup>

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<sup>386</sup> *Supra* n.58 Singh at 24

<sup>387</sup> *ibid*

The narrow approach would not result in the classification of Article III's verification obligations as interdependent obligations the breach of which would entitle the injured states to resort to countermeasures. Even adopting the broad approach and construing the breach in question to be of an obligation which could be classed as a procedural obligation which is strongly linked to the substantive obligation contained in Article II (in that it facilitates monitoring of adherence to Article II) would still need to meet a threshold of significance.<sup>388</sup> Arguably, a technical breach such as Iran's failure to submit design information within a certain timeframe (owing to Iran's refusal to adhere to modified Code 3.1) would not amount to a breach significant enough to grant standing to take countermeasures under the limited scope of Article 42(b)(ii).

Standing of EU member states and the US to take countermeasures against Iran under Article 42 is therefore not clearly established due to the questionable classification of verification obligations as interdependent in the context of state responsibility. Gaja confirms that 'where the breach is not significant, the states affected will have legal entitlements, but only so far as provided by Article 48'<sup>389</sup> therefore the possibility of rights to take measures under this provision must be examined. Article 48 refers to obligations owed to a group for the collective interest of this group of states, or to the international community as a whole, commonly known as *erga omnes* obligations. It will be demonstrated that considerable ambiguity exists in the text of ARSIWA regarding the

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<sup>388</sup> Supra n.58 Singh at 23

<sup>389</sup> Supra n.61 Gaja at 945

availability of countermeasures to states qualifying under this Article, based on the provision itself and its interrelation with Article 54.

## Article 48

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

(b) the obligation breached is owed to the international community as a whole.

Article 48 is designed to permit states in a group which are not directly injured by the wrongful act in question to take specific available measures based on their collective interests in the performance of the breached obligation. The provision also seeks to provide a remedy for the breach of obligations owed to the international community as a whole and as such it operates to grant indirectly injured states standing to take certain measures. The expressly limited nature of the measures and the type of breach required to grant standing to take these measures must therefore be considered.

Paragraph (a) refers to obligations *erga omnes partes*, which are generally special regime specific or treaty-based obligations owed to each member of a group by virtue of their signatory status to a treaty enacted to protect a collective interest. The ICJ in *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*<sup>390</sup> described the concept as one which

...implies that the obligations in question are owed by any State party to all the other States parties to the Convention. All the States parties “have a legal interest” in the protection of the rights involved. These obligations may be defined as “obligations *erga omnes partes*”

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<sup>390</sup> *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* Judgment, I.C.J. Reports 422 (2012)

in the sense that each State party has an interest in compliance with them in any given case.<sup>391</sup>

Examples of treaties containing such obligations are enumerated in the Commentaries to the Article and notably include treaties regarding ‘nuclear-free zones’.<sup>392</sup> It would appear therefore that a treaty such as the NPT would fall within this category, as both NWS and NNWS have collective legal interests in state party adherence to its various provisions, in this case Article III.

Paragraph (b) is concerned with the breach of obligations owing to the international community at large, or obligations *erga omnes*. The existence of such norms was clarified by the ICJ the *Barcelona Traction* case<sup>393</sup> in which it was stated that

[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*<sup>394</sup>

While the term *erga omnes* is not included in the text of the Article, the Commentaries confirm that breaches of obligations of a peremptory character are within the purview of Article 48. The Commentaries refer again to *Barcelona Traction*, extracting from the judgement that the status of *erga omnes* is derived from the importance of the rights involved, meaning that all states have a legal interest in their protection.<sup>395</sup> Accepted examples of *erga omnes* obligations are noted, such as the obligation to outlaw genocide and acts of aggression, in parallel to non-derogable norms of peremptory character as contained in Article 53 VCLT. This point is clarified in Crawford’s Third

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<sup>391</sup> *Ibid* at para. 68

<sup>392</sup> ILC Commentaries at p. 126 para.7

<sup>393</sup> *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports (1970)

<sup>394</sup> *Ibid* at para. 32

<sup>395</sup> *Ibid* at para. 33

Report which states that the category of obligations owed to the international community as a whole consists of those obligations which are classed as peremptory or non-derogable, such as resort to force or genocide.<sup>396</sup> Clearly therefore, a breach of Article III NPT does not entail the violation of an obligation *erga omnes*, as the obligation is not one which is accepted as owed to the international community as a whole by virtue of the importance of the rights it seeks to protect.

NPT state parties will therefore have standing to take measures under Article 48(1)(a) to protect the collective interest in seeing Article III's provisions observed by Iran. However, section 2 of Article 48 presents difficulties for the EU or US in asserting collective interest based standing to take economic countermeasures under this provision. Section 2 details the measures available to indirectly injured parties, the pursuit of cessation of the wrongful act or assurances of non-repetition or acts of reparation. Furthermore, the Commentaries confirm that 'the list given in the paragraph is exhaustive, and invocation of responsibility under Article 48 gives rise to a more limited range of rights as compared to those of injured States under Article 42'.<sup>397</sup>

Furthermore it is clarified that 'at present, there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest', a statement which would seemingly exclude the possibility of EU or US reliance on the provision to legally justify their measures targeting Iran in the law of state responsibility. However, this particular provision is subject to a clause in Article 54, which effectively blurs the distinction between Article 42's

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<sup>396</sup> UN/DOC/CN.4/507/ADD.4 at paras 368-374

<sup>397</sup> ILC Commentaries at p.127 para.11

directly injured states and Article 48-based indirectly injured states with regard to standing to take countermeasures in response to a wrongful act.

## Article 54

Calamita has opined that by virtue of Article 48, all NPT state parties could qualify as injured for the purposes of taking measures.<sup>398</sup> This observation is based on the expansion upon the textually limited provision of Article 48, found in Article 54. Article 54 states, ambiguously, that

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

The crux of the issue appears to be the interpretation to be accorded to the term ‘lawful measures’ in ascertaining how much this provision effectively broadens the scope of measures available to Article 48’s indirectly injured states. Sicilianos argues that a reading of Article 54 which interprets ‘lawful’ as meaning acts of retorsion would seem incongruous with the overall purpose of ARSIWA which is to regulate the use of countermeasures and their ability to preclude wrongfulness.

The Articles do not govern the use of measures which by their nature are not wrongful or illegal i.e retorsion and the placement of Article 54’s proviso in the Chapter governing countermeasures would appear to suggest that the measures envisaged will have the characteristics of countermeasures.<sup>399</sup> While it is difficult to see how ‘lawful measures’ would reasonably be

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<sup>398</sup> *Supra* n.346 Calamita at 1423

<sup>399</sup> *Supra* n.356 Sicilianos at 1143

construed as meaning retorsion given the fact that no justification is required for recourse to such measures, this author would tend to agree with Alland in struggling to see how this term could be interpreted not to prejudice resort to countermeasures which are intrinsically unlawful.<sup>400</sup>

However the provision, described as ‘agnostic’ by Dawidowicz<sup>401</sup>, is representative of a lack of ILC consensus on the issue of third party countermeasures, which after lengthy debate led to the insertion of a deliberately ambiguous Article which neither definitively authorizes nor prohibits third party countermeasures. A definitive authorisation in Article 54 to take countermeasures under Article 48 would arguably expand the scope of parties capable of lawfully engaging in such measures beyond acceptable levels, granting standing to masses of states to resort to strong measures in a multitude of situations. Alland notes that primary objections to permitting third party countermeasures revolved around the potential for their abuse given that the basis for taking countermeasures is the subjective assessment that a wrongful act has occurred made by the targeting state. He further clarifies that the reasoning behind the ambiguous provision regarding third party countermeasures was that it was felt that practice on the issue ‘has not attained a sufficient level of maturity on this point to be codified’.<sup>402</sup>

A contention that the independent finding of the IAEA on which the third party countermeasures are based ameliorates concerns of abuse in this area, as propounded by Calamita, is not entirely

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<sup>400</sup> D. Alland, ‘Countermeasures of General Interest’, 13 EJIL 1221 (2002) at 1233

<sup>401</sup> M. Dawidowicz, ‘Public Law Enforcement without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and their Relationship to the UN Security Council’, 77 British Yearbook of International Law 333 (2006) at 347

<sup>402</sup> Supra n.394 Alland at 1236

convincing when one considers the debate surrounding the legitimacy and propriety of the declaration of non-compliance made by the IAEA. He further stated that

Article 54 could also provide the basis for countermeasures even If the state is not an injured state as an ‘independent’ monitoring body has confirmed the wrongdoing rather than a case in which the state engaging in self-help has autonomously assessed the situation as wrongful.<sup>403</sup>

In making this argument, Calamita is primarily concerned with the fact that the assessment had been made by the IAEA rather subjectively by states taking countermeasures. In order to fully assuage concerns of subjectivity and bias in ascertaining the existence of a breach of an obligation it is arguable that such a pronouncement would have to come from a judicial authority such as the ICJ or an arbitral tribunal. The notion of submitting state assessments of wrongful acts to a body for verification before engaging in countermeasures was raised by Special Rapporteurs Riphagen and Arangio-Ruiz, the former of whom placed emphasis on reliance on the existing mechanisms of the Security Council and the latter suggesting a two-step determination, first a political assessment from the Council, followed by a legal judgement from the ICJ. This eagerness to include institutional mechanisms in the assessment of the existence of a wrongful act to eliminate the prospect of abuse did not find its way into the final text and was instead replaced by deliberate ambiguity, which results in the conclusion that the Articles only grant definitive standing to take countermeasures to directly injures states according to Article 42, with a decidedly grey area being created by Articles 48 and 54 acting in concert.

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<sup>403</sup> N. Jansen Calamita, ‘Sanctions, Countermeasures, and the Iranian Nuclear Issue’, 42 V and J Transnatl Law 1393 (2009)



However, the ILC left this area to develop with state practice rather than defining a concrete rule, opting to insert Article 54 as a ‘saving clause’<sup>404</sup> to facilitate this gradual growth. The Commentaries reveal that this view was taken due to the sparse practice by a limited number of states available for examination regarding resort to third party countermeasures and references to the area being in the ‘embryonic’ stages of development.<sup>405</sup> Therefore based on the text of ARSIWA and the Commentaries it is not clear that the synergy of Articles 48 and 54 can produce standing to take countermeasures. The decision to permit development of the area rather than codification at the time of adoption of the Articles is however not without criticism, not least because it appears that practice in the area is more widespread than appreciated by Crawford in designing the Article 48/54 nexus.

While the Commentaries make reference to six instances of third party countermeasures in practice, it is noted that such cases are controversial.<sup>406</sup> Dawidowicz, on the other hand, identifies 22 cases displaying the characteristics of third party countermeasures taken in the collective interest. Each case noted appears to fall into the category of Article 48(1)(b) regarding responses to breaches of peremptory norms or obligations *erga omnes*, covering violations of the prohibition on aggression, fundamental human rights breaches, genocide, slavery and denial of self-determination and principles of democracy.<sup>407</sup> The profusion of practice in this specific area is similarly noted by Tams who furthermore suggests that the requisite *opinio juris* may also be present to suggest the existence of a norm of customary international law permitting resort to third party countermeasures in cases of systematic violations of *erga omnes* obligations.<sup>408</sup> Based on

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<sup>404</sup> ILC Commentaries at 138 para. 3

<sup>405</sup> Ibid at 138-139, paras. 3 and 6

<sup>406</sup> Ibid at 129 para. 8

<sup>407</sup> Supra n.395 Dawidowicz generally

<sup>408</sup> C. Tams, *Enforcing Obligations Erga Omnes in International Law*, (Cambridge University Press)(2005) at 241

this practice it would appear that Article 54 may be developing to preclude the wrongfulness of responses by non-directly injured states to breaches of obligations *erga omnes*. It could be contended based on this that the character of non-derogability of the breached obligation legally justifies measures taken in pursuit of its cessation and makes them ‘lawful measures’ for the purposes of Article 54.

The above analysis notwithstanding, the availability of resort to countermeasures for third parties claiming a breach of an obligation *erga omnes partes* as regulated by Article 48(1)(a) is not supported in practice. As a result of this, Article 54’s applicability to these situations seems uncertain, as the underlying rationale of intervening to protect against violations of peremptory norms is not present to justify the preclusion of wrongfulness in these cases. It is submitted therefore that the ability of the EU and US to take countermeasures on the basis of Article 48(1)(a) is not altered by Article 54’s ambivalence and as such the remedies available under this provision remain those contained in Article 48(b) namely call for cessation and the seeking of reparation, to the exclusion of countermeasures.

In support of the conclusion that the EU and US are not entitled in this situation to resort to countermeasures against Iran, another possible perspective on the interrelation between Article 48 and 54 shall be examined. This analysis will be cognisant of the tension between third party resort to unilateral coercive measures and the centralized enforcement mechanism of the Security Council and the issue of primacy of the Council in this area.

## The Security Council and the Protection of Collective Interests

In the case of both directly and indirectly injured states, resort to countermeasures becomes controversial when the Security Council is actively engaged in the matter. With regard to countermeasures taken by indirectly injured states or international organisations, Frowein opines that 'title' is present to take measures in cases of breach of *erga omnes* obligations and the law of state responsibility is therefore engaged and can act as the basis for countermeasures. Without such title, in the case of regional organisations, enforcement measures must be approved by the Security Council, as the primary organ responsible for the maintenance of international peace and security.<sup>409</sup> The relationship between centralized and decentralized enforcement mechanisms is referenced in Article 53 of the UN Charter in stating that

The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.<sup>410</sup>

Approval of the primacy granted to the Council in issues of enforcement action is contained in the *Declaration on the Enhancement of Cooperation between the United Nations and Regional Arrangements or Agencies in the Maintenance of International Peace and Security* in stating that

The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority, but no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Council;<sup>411</sup>

Regional organisations are endowed with the power to sanction their own member states, that is, to take coercive measures which go beyond the parameters of countermeasures in their purpose,

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<sup>409</sup> J.A. Frowein, 'Reactions by Not Directly Affected States to Breaches of Public International Law' 248 *Recueil des Cours* 345 (1994) at 388

<sup>410</sup> Article 53 UN Charter

<sup>411</sup> A/RES/49/57 1994 Declaration on the Enhancement of Cooperation between the United Nations and Regional Arrangements or Agencies in the Maintenance of International Peace and Security

in so far as member states have agreed in the constitutive treaty of the organisation to be subject to enforcement measures in the certain circumstances. Measures designed to punish the targeted state or bring about regime change for example, arguably are not illegal in these cases although they exceed the purpose of countermeasures, as was demonstrated in the case of ECOWAS sanctions targeting Togo. In such cases, Security Council authorisation under Article 53 does not appear to be required.

White and Abass contrast the above scenario with one in which a regional organisation takes coercive measures against a non-member for similar purposes without SC authorisation, stating that it would appear to be a departure from Article 53<sup>412</sup>. However in practice a norm seems to have emerged, which negates the need for prior SC authorisation under Article 53 in cases where the regional organisation in question is employing non-forcible coercive measures, such as acts of economic coercion, in response to violations *erga omnes*. An example of this in practice would be the EU's targeting of Zimbabwe with coercive measures,<sup>413</sup> which were taken in response to violations *erga omnes*, therefore categorizing the EU as indirectly injured for the purposes of Article 48(1)(b). The residual power of the Council in these scenarios would appear to permit condemnation of autonomous measures in the event of their incompatibility with the purposes and principles of the Charter.

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<sup>412</sup> Supra n.361 White and Abbas at 551

<sup>413</sup> *ibid*

While Article 53 has in practice been interpreted as not requiring Council authorisation for non-military enforcement measures such as sanctions, this is arguably only the case when the Council has remained silent on the matter or failed to achieve the procedural requirements to take Chapter VII action. Before SC involvement, practice seems to indicate that regional organisations do not feel compelled to seek authorisation under Article 53 for non-forcible measures. This is evident, for example, in the practice of the Organisation of American States which took action against Cuba and Venezuela in 1960's and Haiti in the 1990's and non-forcible EC measures against Yugoslavia in the 1990's.

However once the SC is seized of the matter it would appear that Article 25 dictates that states may not take action beyond what has been decided and mandated by the Council as they are bound to respect and implement such decisions in accordance with the Charter. Cassese describes this as the Council taking over the matter which results in states only being permitted to take action to the extent allowed by the Charter.<sup>414</sup>

Therefore, while justification for third party countermeasures for breaches of *erga omnes* obligations would appear to be possible based on the saving clause of Article 54 as above, such measures, which are not authorised by the Council under Article 53 may conflict with Article 59 ARSIWA when the Council is also engaged in the matter. Article 59 specifies that the Articles are 'without prejudice to the Charter of the United Nations.' Sicilianos interprets this to mean that should the Security Council decide to take sanctions against the breach of international law, the

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<sup>414</sup> M. Evans, *International Law*, (4<sup>th</sup> ed)(OUP)(2014) at 275

subsidiary competence of indirectly affected third states to take action is subordinated to the constitutional instrument of the international community and such states right to countermeasures ‘fades away’.<sup>415</sup> He further notes that:

*A fortiori*, the States in question should not adopt 'collective' countermeasures after the pronouncement of mandatory sanctions, but only measures which are necessary and sufficient for the execution of those mandatory sanctions<sup>416</sup>

Sicilianos favoured removing ambiguity from the Articles by inserting clarification, in the commentaries or in Article 54 itself, on the issue of extinguishment of non-directly affected states in situations being dealt with by the Council under Chapter VII.<sup>417</sup>

In the case of the Iranian nuclear issue, the EU and US are neither responding to a violation *erga omnes* per se nor targeting a member state, they are however employing non-forcible coercive economic measures on the basis of a breach of an obligation *erga omnes partes*. Given the composition of the permanent 5 of the Security Council it is not plausible to argue that the Council would condemn these measures if they were found to be incompatible with the Charter, therefore virtually dispensing with the accountability mechanism of Article 53 and enabling unchecked unilateral action by these organisations.

A reading of Article 48 and 54 in light of the above tension between regional organisations and the Council in cases where the former is not acting in response to a violation *erga omnes per se* is as follows. In this author’s view, ‘lawful measures’ could be taken to refer to permission to take

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<sup>415</sup> L.A Sicilianos, 'Countermeasures in Response to Grave Violations of Obligations owed to the International Community' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP)(2010) at 1141

<sup>416</sup> *Ibid* at 1142

<sup>417</sup> *Ibid*

measures in line with Security Council decisions, an extraneous ground for legality of measures in response to a wrongful act, in cases where third parties have standing under Article 48(1)(a). These measures are based on the authority of the Council acting under Chapter VII and therefore within the bounds of the law.

Arguably this reading of the provisions in tandem would clarify that wrongfulness is precluded even in the event of the state in question not being ‘injured’ and entitled to take countermeasures under Article 42 because the measures are lawful under the Charter for the protection of the collective interest of the group. Secondly this would be compatible with Article 59 ARWISA in its reference to ‘without prejudice to the Charter’.

Article 48(1)(a) would therefore clarify that non-directly injured states responding to breaches of obligation *erga omnes partes* may under the authority of ARSIWA ‘invoke responsibility’ by calling for cessation of the internationally wrongful act, and assurances and guarantees of non-repetition and for performance of the obligation of reparation, in the interest of the injured State or of the beneficiaries of the obligation breached. Article 54 would then clarify that while ARSIWA only permits Article 48(1)(a) states to call for cessation/reparation, this does not affect the right of those states to implement decisions of the Council which pertain to the breach in question – by taking countermeasures in line with relevant resolutions which, meaning such measures lawful and based outside of the ARSIWA framework. A reading of the provision in this way is also compatible with Article 53 of the Charter, which in turn satisfies the requirement of Article 59 ARSIWA.

The above reasoning would result in the conclusion that the measures taken by the EU and US against Iran are not justified under Article 48(1)(a) despite Article 54's saving clause. Even without employing such reasoning and postulating that the EU and US had standing under Article 48 to take measures which expand to include countermeasures by virtue of Article 54, it would appear that such measures would fail to meet the Article 51 ARWISA requirement of proportionality.

### **Article 51 – Measures must be Proportionate to the Injury Suffered**

Article 51 dictates that 'countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question', in order to prevent resort to crippling countermeasures in unwarranted circumstances and reduce the possibility of abuse in their employment. The seminal case on the point of proportionality is the *Naulilaa Arbitration* in which it was stated that

even if one were to admit that the law of nations does not require that the reprisal should be approximately in keeping with the offence, one should certainly consider as excessive and therefore unlawful reprisals out of all proportion to the act motivating them<sup>418</sup>

This dictum indicates that while a precise formulaic evaluation of the proportionality of measures taken in response to an unlawful act is not necessarily required, a certain degree of equivalence between the injury and response is necessary in order to satisfy Article 51's requirement. It was noted in *the Air Services Arbitration* that the establishment of proportionality of measures is 'not an easy task and can at best be accomplished by approximation.'<sup>419</sup> This approximation is made more

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<sup>418</sup> Naulilaa Case (Portugal v. Germany), 2 UN Reports Of International Arbitral Awards 1012 (Portuguese-German Mixed Arbitral Tribunal, (1928) At 1028

<sup>419</sup> *Case Concerning the Air Service Agreement of 27 March 1946 (United States of America and the French Republic)* Arbitral Award of 9 December (1978) at para. 83



difficult by the indeterminacy of the concept however the principle is not unworkable, and certain cases appear more clear-cut than others.

In the *Gabcikovo-Nagymaros* case<sup>420</sup>, the ICJ was of the opinion that the countermeasures resorted to were not proportionate to the injury in stating that ‘the *effects* of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question’,<sup>421</sup> meaning that due regard must be had for the forecasted consequences of a countermeasure and the gravity of the effects of the response on the target state, ensuring that it does not exceed the initial injury. Franck noted that this case was a missed opportunity to elucidate the doctrine of proportionality in the application of non-military countermeasures, opining that the Court should have elaborated on criteria for the evaluation of the proportionality of Czecho-Slovakia’s actions or at least sought to develop the theory of ‘retributive restraint’ regarding the concept of ‘least intrusive means’ to ‘narrow the indeterminacy’ of the principle.<sup>422</sup> Accepting the inherent indeterminacy of proportionality, Cannizarro still considers the principle to represent a ‘key element for controlling the exercise of decentralized power conferred on states to react individually to internationally wrongful acts’.<sup>423</sup>

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<sup>420</sup> *Gabcikovo-Nagymaros Project, Hungary v Slovakia*, Judgment, Merits, ICJ No 92, (1997) ICJ Rep 7,

<sup>421</sup> *ibid* at para 85

<sup>422</sup> T. Franck, ‘On Proportionality of Countermeasures in International Law’, 102 Am J Int’l Law 715 (2008) at 739

<sup>423</sup> E. Cannizarro, ‘The Role of Proportionality in the International Law of Countermeasures’, 12 EJIL 889 (2001) at 916

With the above in mind, questioning whether or not the principle of proportionality has been observed in the EU and US countermeasures taken against Iran would seem to demand an answer in the negative. Dupont illustrates this point in stating that there is likely

a significant disproportion between the 'wrongful act' (the alleged, as yet unproven, non-compliance by Iran with some of its obligations under its Safeguards Agreement with the IAEA and/or the NPT) and the 'countermeasures' taken (the oil embargo and the freeze of assets of the Iranian central bank).<sup>424</sup>

In support of this point, one can look again to the case of the *Air Service Arbitration*, in which the fact that the measures resorted to targeted the same subject matter and policy as the initial breach was found to have relevance in determining their proportionality. As illustrated by Dupont, there is quite a disparity between the subject matter of the alleged breach, a safeguards obligation and the response, widespread embargos targeting both the energy and financial sectors. The crippling effects of these embargoes, in particular those focussed on oil exports cannot be said to be proportionate to a breach of a verification obligation in Article III NPT.

## **Conclusion**

It has been demonstrated above that the measures enacted by the EU and US, in so far as they exceed the mandate of Resolution 1929 and represent unlawful measures taken in response to alleged breaches of obligations by Iran, represent countermeasures for the purposes of the law on state responsibility. These measures must therefore be in conformity with the governing provisions of the ARSIWA, notably those pertaining to standing (Articles 42 and 48) and those regulating conformance with international legal principles in general (Article 51, 54 and 59). It has been argued that the measures taken by the EU and US do not find justification in the aforementioned

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<sup>424</sup> P.E Dupont, Compliance with Treaties in the Context of Nuclear Non-proliferation: Assessing Claims in the Case of Iran, 18 Journal of Conflict and Security Law (2013) at 16

Articles as there is difficulty establishing standing to take measures amounting to countermeasures based on the characterisation of the EU and US as indirectly injured. Article 54 leaves unclear the ability of such states to take countermeasures for violations *erga omnes partes* and Article 59 introduces a tension between the primacy of the Security Council measures taken in this situation. Finally, the measures taken appear to exceed the limits of the principle of proportionality and represent unlawful ‘unilateral economic coercive measures’.

Based on the foregoing conclusions, it can be stated that the measures taken by the EU and US can be classified as ‘unilateral economic coercive measures’. According to the *1970 Declaration of Principles of International Law Concerning Friendly Relations* as adopted by the General Assembly

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind<sup>425</sup>

This view was reaffirmed in the General Assembly’s Resolution on *'Unilateral Economic Measures as a means of Political and Economic Coercion against Developing Countries'* in highlighting the need for

urgent and effective measures to eliminate the use of unilateral coercive economic measures against developing countries that are not authorized by relevant organs of the United Nations or are inconsistent with the principles of international law as set forth in the Charter of the United Nations and that contravene the basic principles of the multilateral trading system.<sup>426</sup>

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<sup>425</sup>UNGA 1970 Declaration of Principles of International Law Concerning Friendly Relations

<sup>426</sup> A/RES/66/186 *Unilateral Economic Measures as a means of Political and Economic Coercion against Developing Countries*

This resolution was notably adopted by 122 votes to 2 against, the dissenting voices coming from the US and Israel, with 53 states abstaining. This represents a prevailing view in the international community that such measures are illegal and must not be tolerated under any circumstances. To permit such unilateral measures based on the will of states and regional organisations acting beyond the ambit of Council authorisation 'risks calling the already shaky edifice of Chapter VII of the Charter into question'.<sup>427</sup> It can scarcely be denied that such disregard for the will of the centralized enforcement organ in the context of state responsibility, left unchecked, undermines both the effectiveness and relevance of the Council and the function of the law on state responsibility as embodied by the *Articles on the Responsibility of States for Internationally Wrongful Acts*.

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<sup>427</sup> A Sicilianos, 'Countermeasures in Response to Grave Violations of Obligations owed to the International Community' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP)(2010) at 1141

## **Chapter 6 – Remaining Policy-Based Options, Cyber-Attacks as Counter-Proliferation Tools and Multilateral Diplomacy**

Having examined the implementation of widespread sanctions and their impact on Iranian nuclear ambitions, it is necessary to look to the remaining options under consideration by states such as the US to limit Iran's progress with its nascent nuclear program. Remaining in the arsenal of such states are negotiation strategies, which have been the preferred means of deterring Iran in conjunction with sanctions relief, and on the extreme end of the scale, but still 'on the table' - military and forcible options.

The first part of this Chapter will examine means of possible forcible counter-proliferation, the most novel of which is the employment of cyber-attacks. Such attacks, as yet unregulated specifically by international law, will have to be reconciled with the current Charter framework regarding the use of force in order to assess their legality as a counter-proliferation option. With regard to the possibility of conventional military action to forestall Iranian nuclear progress, the precedent of surgical strikes on nuclear facilities by Israel will be noted to ultimately remove this option from the table from an international law-abiding perspective.

This Chapter will conclude with an examination of the 2015 diplomatic breakthrough in the form of the Joint Comprehensive Plan of Action negotiated P5+1, EU and Iran. The way in which what has come to be known as the Iran Deal works towards reasoned engagement with the legal issues noted throughout this thesis and grounds the situation firmly within the existing legal framework

is explored. From the investigative mandate of the IAEA debate and the enrichment question to the issue of UN sanctions and their termination, the JCPOA in effect engages with the disputes examined throughout this thesis and paves the way for a non-proliferation system cognisant of such strictures.

### **Cyber Attack as a Counter-Proliferation Tool**

With emergent contemporary threats inevitably comes novel and modernised means of disposing of them. In the context of nuclear weapons programs, the development of sophisticated and less intrusive means of sabotage is highly desirable for states seeking to prevent admission of new states to the ‘nuclear club’. With this in mind, use of conventional means of attack has become a hazardous last resort with preference given to the use of cyber capabilities in attempts to derail nuclear ambitions. Cyber conflict is, after all ‘war on the cheap’<sup>428</sup> both economically and in terms of commitment. Thanks to their somewhat ambiguous position in the international law arena, cyber operations could represent a legal grey area, as a means of achieving concrete results without the implications associated with traditional uses of force.

While the Charter framework predates the notion of an attack carried out purely via technological means, it is nevertheless necessary to reconcile these operations with Article 2(4) of the Charter if their use as counter-proliferation tools is to be accepted. It must be considered whether cyber-operations fall within the same category as economic or political coercion as policy tools or amount to a ‘use of force’ as prohibited by Article 2(4). If such operations are to be classified as uses of

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<sup>428</sup> M. Schmitt, ‘Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework’, 37 Colum. J. Transnat’l L. 885 (1998) at 898

force, this would give rise to violation of Article 2(4) with various accompanying legal consequences. Furthermore, the denomination of peremptory norm accorded to Article 2(4) means such operations, if classed as uses of force, would be difficult to defend as a legitimate means of counter-proliferation. Finally, the possibility of a cyber-attack constituting an ‘armed attack’ for the purposes of Article 51 must be examined in order to determine whether or not such attacks are consonant with the Charter and to demonstrate the undesirable nature of these attacks due to their potential to rapidly escalate conflict.

Specifically in the context of nuclear counter-proliferation, the employment of a highly sophisticated and destructive virus designed to target Iranian centrifuges at the Natanz facility provides an instructive illustration of the legal lacunae present in the cyber-warfare context. It is therefore useful to take the Stuxnet virus as a case study to examine the legality of cyber-operations as counter-proliferation tools, both in the context of the Iranian nuclear situation and more broadly as a possible option in potential future attempts to deter proliferation.

### **Defining Cyber-Attacks**

While there is no universally accepted definition of a cyber-attack, the United States Department of Defense defines a cyber-attack as one which is designed to ‘disrupt, deny, degrade or destroy information resident in computers or computer networks, or the computers or networks themselves’.<sup>429</sup> As observed by Roscini, this definition does not make reference to attacks which seek to manipulate a computer network in order to produce effects extrinsic to the device.<sup>430</sup> This

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<sup>429</sup> *National Military Strategy for Cyber-Space Operations*, United States Department of Defence (2006)

<sup>430</sup> M. Roscini, ‘World Wide Warfare: Jus ad Bellum and the Use of Cyber Force’, 14 Max Planck UNYB 86 (2010) at 93

oversight is avoided in the *2009 Manual on International Law applicable to Air and Missile Warfare*<sup>431</sup> which considers manipulation of a computer network in order to gain control over such a network to fall within the definition of an offensive cyber-attack. This more expansive definition is cognisant of the wide range of potential damage a cyber-attack can cause beyond kinetic consequences and is therefore preferable to the narrow DoD conception.

It is important at this juncture to note that a cyber-attack or computer network attack (CNA) is an action distinct from that of crime perpetrated by targeting a computer or computer network. The United Nations Office on Drugs and Crime in its *Comprehensive Study on Cybercrime* noted that the characteristics of cybercrime generally include ‘acts against the confidentiality, integrity and availability of computer data or systems.’<sup>432</sup> Examples of cybercrime would therefore include identity fraud, data-espionage and cyber-laundering. The prominent distinction for the purposes of this investigation is highlighted by Hathaway et al<sup>433</sup>, who suggest that cyber-crime should be differentiated from cyber-attack based on the underlying motive or purpose of the latter.

It is submitted that an appropriate definition of a cyber-attack is an attack which ‘consists of any action taken to undermine the functions of a computer network for a political or national security purpose.’<sup>434</sup> This definition ensures that the focus of an inquiry into cyber-attack remains to a large extent upon interstate attacks and those which are to be regulated by international law rather than

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<sup>431</sup> *Manual on International Law applicable to Air and Missile Warfare*, Program on Humanitarian Policy and Conflict Research, Harvard University (2009)

<sup>432</sup> United Nations Office on Drugs and Crime, ‘Comprehensive Study on Cybercrime’ (Vienna) (2013)

<sup>433</sup> O. Hathaway, R. Crootof, P. Levitz, H. Proctor, A. Nowlan, W. Perdue and J. Spiegel, ‘The Law of Cyber-Attack’ 100 California Law Review (2012) 817

<sup>434</sup> *ibid* at 827



domestic legislation but can still include attacks by non-state actors so long as they are perpetrated to interfere with the political climate or national security of a state. Stuxnet, as will be explored below, is believed to have been the product of Israeli-US cooperation<sup>435</sup> in an effort to disrupt the Iranian policy of nuclear energy production and therefore falls within this definition.

### **Cyber-Attacks, Stuxnet and Article 2(4) UN Charter**

Article 2(4) of the Charter stipulates that

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.<sup>436</sup>

In order to situate cyber-attacks in their correct legal context, it must be ascertained whether or not they are capable of amounting to an act of force therefore violating Article 2(4). In the case of cyber-attacks, the main issue in debate regarding their classification as a use of force centres around the nature of such attacks, specifically their ability to operate in a physically intangible manner which stretches the boundaries of the traditional conception of ‘force’. The Charter drafters obviously could not have envisaged such sophisticated means of attack when contemplating the parameters of the prohibition, therefore can Article 2(4) form the basis of workable regulation of modern cyber-threats?

### **Case Study: Stuxnet**

Brought to the attention of the public in 2010, the Stuxnet virus targeted the Iranian uranium enrichment facility at Natanz over a period of months in 2009 and 2010 and was initially believed to have been of US and/or Israeli origin, due its highly sophisticated *modus operandi*. This

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<sup>435</sup> E. Nakashima and J. Warrick, “Stuxnet was work of U.S. and Israeli experts, officials say” Washington Post, June 2<sup>nd</sup> (2012)

<sup>436</sup> Charter of the United Nations, Article 2(4), (1945)

suspicion appears to have been confirmed by Sanger in a revelatory investigative publication<sup>437</sup> in asserting that the NSA and CIA cooperated with Israel on the development and deployment of the virus. Stuxnet covertly interfered with the operation of Supervisory Control and Data Acquisition software, causing centrifuges to malfunction, which went undetected by the compromised software.<sup>438</sup> The attack can therefore be described as semantic in nature, meaning the virus surreptitiously causes system to malfunction while reporting regular functioning a particular information.<sup>439</sup> Reports of the Institute of International Science and Security suggest that approximately one thousand centrifuges were destroyed as a result of the attack<sup>440</sup> which has resulted in estimates that the Iranian nuclear program suffered a three year set back.<sup>441</sup>

Stuxnet appears to have been designed to specifically target the physical functioning of centrifuges, rather than widespread derailment of financial or security sectors as displayed in past cyber-attacks such as the expansive attack on Estonia in 2007, allegedly of Russian origin.<sup>442</sup> Former CIA Chief of Staff Michael Hayden acknowledged that Stuxnet was a revolutionary cyber-weapon in highlighting that it was the first virus to accomplish physical destruction rather than mere interference with computer system operations.<sup>443</sup> In this respect, its utility as a counter-proliferation tool is confirmed, however this does not excuse potential conflict with international

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<sup>437</sup> D. Sanger, *Confront and Conceal: Obama's Secret Wars and Surprising Use of American Power* (RandomHouse)(2012)

<sup>438</sup> Gregg Keizer, Is Stuxnet the 'Best' Malware Ever?, Computer World

<sup>439</sup> Supra n.427 Hathaway et al at 828

<sup>440</sup> D. Albright, P. Brannan, C. Walrond, 'Did Stuxnet Take Out 1,000 Centrifuges at the Natanz Enrichment Plant? Preliminary Assessment' ISIS Reports (2010)

<sup>441</sup> W. Broad, J. Markoff, D. Sanger, 'Israeli Test on Worm Called Crucial in Iran Nuclear Delay' NY Times, January 15<sup>th</sup> (2011)

<sup>442</sup> I. Traynor, 'Russia Accused of Unleashing Cyberwar to Disable Estonia', The Guardian, May 17<sup>th</sup> (2007)

<sup>443</sup> D. Sanger, 'Obama Order Sped Up Wave of Cyberattacks Against Iran', New York Times, June 1<sup>st</sup> (2012)

law associated with the use of such malware which if confirmed would erode the legitimacy of resort to use of cyber-attacks.

### **Article 2(4) – The Armed Force Debate**

Any assessment of cyber-attacks in relation to their conformity with Article 2(4) will necessarily focus a great deal on the debated content of the provision. The main contentious issue regarding Article 2(4), particularly in the context of cyber-attacks, is whether or not a prohibited ‘threat or use of force’ implicitly requires the use of ‘armed’ force. If the adjective ‘armed’ is to be included in the interpretation, an examination of whether or not cyber-attacks carried out without traditional conventional weaponry are capable of description as ‘armed’. There are persuasive arguments for and against the conclusion that Article 2(4) refers to uses of armed force, and the final determination of whether or not a cyber-attack is to be classed as armed appears to rest upon the production of physical effects by the attack in question.

It must be noted at this juncture that the ICJ in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)* case<sup>444</sup> made a distinction between a ‘use of force’ in Article 2(4) and an ‘armed attack’ for the purposes of Article 51. The Court noted that there are ‘measures which do not constitute an armed attack but may nevertheless involve a use of force’<sup>445</sup> and acknowledged that acts of force can be viewed across a spectrum of gravity, the most severe of which would qualify as ‘armed’ as required by Article 51.<sup>446</sup> Therefore it can be said that all armed attacks fall within the definition of Article 2(4) as a ‘use of force’ but not all uses of force

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<sup>444</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)* 14 ICJ Reports 176 (1986)

<sup>445</sup> Ibid at 191

<sup>446</sup> Ibid at 210

meet the gravity threshold of an ‘armed attack’.<sup>447</sup> The question of whether or not a use of force is required to be ‘armed’ purely for the purposes of Article 2(4) however is concerned with stretching the notion of ‘armed’ to encompass attacks carried out absent a traditional weapon. If this is permissible, these attacks can be classed as ‘uses of force’ and then be assessed in terms of gravity in order to establish if they amount to an ‘armed attack’ for the purposes of invoking self-defence under Article 51.

In a strictly textual sense, Article 2(4)’s omission of the qualification of ‘armed’ could be interpreted as indicative of Drafter’s intention to maintain a broad definition of use of force which encompasses various more abstract forms of force rather than requiring attacks which involve conventional weaponry. The former would include the exertion of economic or political coercion against a state. One can consider the fact that throughout the Charter there is explicit inclusion of the ‘armed’ qualification. The Preamble notes as a purpose of the Charter ‘to ensure, by the acceptance of principles and the institution of methods, that *armed* force shall not be used, save in the common interest’. Article 41 enumerates measures which do not amount to ‘armed force’<sup>448</sup> and Article 46 again references prefaces force with ‘armed’.<sup>449</sup> Therefore one could be tempted to suggest that exclusion of ‘armed’ in Article 2(4), when there is a demonstrated propensity to

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<sup>447</sup> M. Schmitt, “‘Attack’ as a Term of Art in International Law: The Cyber Operations Context” 4th International Conference on Cyber Conflict (NATO) (2012) at 286

<sup>448</sup> UN Charter Article 41 states that ‘The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations’

<sup>449</sup> UN Charter Article 46 states that ‘Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.’

specify ‘armed’ in other articles, indicates that the drafters intended to cover force in all its incarnations.<sup>450</sup>

However, the above argument is easily counteracted and the majority view on the issue would seem to dictate that force must be ‘armed’ in nature in order to violate Article 2(4). Article 31 of the *Vienna Convention on the Law of Treaties* stipulates that the ordinary meaning must be given to terms in light of the object and purpose of the treaty.<sup>451</sup> Employing this interpretive principle, it can be argued that the Preamble of the Charter indicates *armed* force and the prevention of the scourge of war emanating from its use is the purpose of the document. An interpretation of Article 2(4) taking this into account would therefore produce the conclusion that force in 2(4) is qualified implicitly as ‘armed’,<sup>452</sup> as this reading of the provision is in harmony with the primary objective of the organisation which is to establish a system of collective security.

Furthermore, by virtue of Article 32 of the VCLT recourse to the *travaux préparatoires* is permitted in cases where the meaning of a treaty term is found to be ambiguous.<sup>453</sup> As Roscini highlights, an attempt was made by the Brazilian Delegation at San Francisco to include within the term ‘use of force’ acts of political or economic coercion against a state as an amendment to Article 2(4). This amendment was explicitly rejected, which proves that the omission of the term

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<sup>450</sup> R. Buchan, ‘Cyber Attacks: Unlawful Uses of Force or Prohibited Interventions?’ 17 *Journal of Conflict & Security Law* 211 (2012) at 215

<sup>451</sup> Vienna Convention on the Law of Treaties 1965, Article 31

<sup>452</sup> *Supra* n.443 Buchan at 215

<sup>453</sup> Vienna Convention on the Law of Treaties 1965, Article 32

‘armed’ in Article 2(4) was not intended by the drafters to permit an interpretation of force encompassing political or economic coercion.<sup>454</sup>

Finally, support for the view that force in the context of Article 2(4) must be ‘armed’ is found in the 1970 *Declaration on Friendly Relations* which sheds light on whether force must ‘armed’ in order to violate Article 2(4). The Declaration fails to cite economic or political measures in the Principle on the Use of Force, but mentions these forms of coercion in the context of the Principle imposing a duty not to ‘intervene in matters within the domestic jurisdiction of any State’.<sup>455</sup> Similarly, in the *Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations* 1987 economic and political coercion are cited in the context of “the subordination of the exercise of ... sovereign rights” rather than as uses of force.<sup>456</sup> Both of these documents situate actions falling short of armed force within the purview of Article 2(7) of the Charter which prohibits intervention in the internal affairs of states rather than within the Article 2(4) prohibition.

It would appear therefore that for a cyber-attack to amount to a use of force for the purposes of Article 2(4) it must go beyond the realm of political or economic coercion and graduate to the level of ‘armed’ force, which would therefore make it contrary illegal in all but cases of self-defence in response to an armed attack. The issue therein is whether or not an attack carried out by non-kinetic

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<sup>454</sup> Supra n.424 Roscini at 105

<sup>455</sup> *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, A/RES/25/2625 (1970)

<sup>456</sup> *Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations*, A/RES/42/22 (1987)

means without the employment of conventional weaponry can be considered to encompass ‘armed’ force. If this extension of logic is not possible then it would seem that cyber-attacks are to be governed by non-intervention provisions in customary international law and the Charter and are therefore coercive rather than forceful in nature.

### **Cyber-Attacks as ‘Armed Force’**

There are three modes of assessment when considering whether cyber-attacks amount to a use of force for the purposes of Article 2(4) according to Graham.<sup>457</sup> Firstly, the instrument-based approach seeks to establish whether or not the outcome of the attack in question could have only been achieved by a kinetic attack prior to the advent of offensive cyber operations. In the case of Stuxnet, the outcome of physical disruption and destruction of functioning property would previously have required the occurrence of a physical attack with the use of conventional weaponry. In a similar vein, Stuxnet could be analysed using effects-based evaluation focussing on the result of the attack, in this case physical damage to property and the consequences of such damage. Focus is placed on whether the outcome is such as to debilitate or damage specifically ‘critical national infrastructure’ or systems pertaining to the protection of national economic, health or public safety as well as national security structures.

In both effects-based and instruments-based analyses, Stuxnet would appear to amount unambiguously to an act of force. In the case of strict-liability theory, the purpose of the facility at Natanz would have to be considered. If such a purpose thought to be the production of highly-

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<sup>457</sup> D. Graham, ‘Cyber Threats and the Law of War’, 4 Journal of National Security Law & Policy 87 (2010)

enriched uranium to fuel the Tehran Research Reactor for the production of medical isotopes, as claimed by Iran, Stuxnet could be seen to amount to an act of force under all three theories. Clearly to suggest that Natanz constitutes part of national security infrastructure carries the implication that it comprises part of a broader nuclear weapons program, as perceived by Western States, a summation which has no confirmed basis in IAEA reports. Furthermore, Iran has stated that the purpose of Natanz is convert uranium hexafluoride to low-enriched uranium-235 for the purposes of fuelling its light water reactors in order to produce nuclear energy for civilian purposes such as electricity production. Therefore, the purpose of the Natanz facility could fall within the definition of national economic infrastructure, as a move towards nuclear energy has been indicated by Iran as a means of reducing national economic dependence on oil reserves and their export. Under the strict liability theory, any and all attacks on national critical infrastructure, regardless of physical damage would amount to uses of force for the purposes of Article 2(4). However as noted by Waxman, this approach is flawed as it does not uphold the distinction between coercion and armed force<sup>458</sup> and would broaden the spectrum of the prohibition to an extent which is not consonant with the Charter, as explained above.

The common denominator in the preferable former approaches is the production of physical damage by the attack. In order to analogise cyber-attack with armed force therefore, the attack must produce kinetic, tangible physical effects to qualify as ‘armed force’. Similarly, examination of cyber-attacks as potential uses of armed force, advocated by Roscini, could take into

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<sup>458</sup> M.C Waxman, ‘Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)’ 36 YJIL 421 (2011) at 436



consideration the definition of the word ‘armed’.<sup>459</sup> Roscini cites Black’s Dictionary which defines ‘armed’ as ‘equipped with a weapon’ or ‘involving the use of a weapon’ and clarifies that there is nothing to suggest that weapons must be incendiary or explosive in their operational nature. He notes that biological and chemical weapons are considered uses of armed force because of their deleterious effects rather than their *modus operandi*.

Furthermore, use of such weapons is considered ‘warfare’ by Brownlie, the hallmarks of which are the destruction of life and property.<sup>460</sup> Silver notes that the criterion for establishing if use of a certain technology constitutes warfare is if the technology is associated with the armed branch or military of the state that uses it,<sup>461</sup> as is the case with numerous states with cyber branches of their military which are not confined to intelligence agency purposes. Notably, China,<sup>462</sup> the US,<sup>463</sup> Israel<sup>464</sup> and the UK<sup>465</sup> all have confirmed the addition of cyber military branches to their armed forces. This means that cyber-attacks form part of offensive and defensive strategies of numerous states and can therefore be classed as modalities for warfare, which suggests their use can be classified as an act of ‘armed force’.

Support for this view can be extracted from the *Advisory Opinion on the Legality of the Use of Nuclear Weapons* in which the ICJ clarified that Article 2(4) does not require the use of a specific type of weapon but rather is concerned with uses of force regardless of the type of weapon

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<sup>459</sup> *supra* n.424 Roscini at 106

<sup>460</sup> I. Brownlie, *International Law and the Use of Force by States* (1963)

<sup>461</sup> D.B. Silver, ‘Computer Network Attack as a Use of Force under Article 2(4)’, 76 *International Law Studies* 73 (2002) at 84

<sup>462</sup> S. Tiezzi, ‘China (Finally) Admits to Hacking’, *The Diplomat*, March 18 (2015)

<sup>463</sup> ‘US Under Constant Cyber Attack, Top General Claims’, *The Telegraph*, May 15 (2013)

<sup>464</sup> B. Caspit, ‘Israeli Military Invests in Cyber Warfare’, *Al-Monitor*, July 12 (2013)

<sup>465</sup> ‘New Cyber Reserve Unit Created’, Ministry of Defence, Joint Forces Command, September 29 (2013)

employed.<sup>466</sup> Zemenak concurs with this interpretation of the requirements of ‘armed force’, noting that the weapon employed in the September 11th attacks, conventional aircraft utilised to produce huge destruction, was not the salient detail in ascertaining that such attacks were uses of ‘armed’ force.<sup>467</sup> Waxman similarly endorses the effects-based analysis and it would appear to be the optimum prism through which to view cyber-attacks as uses of ‘armed force’.<sup>468</sup>

‘Acts that kill or injure persons or destroy or damage objects are unambiguously uses of force,’ according to the *Tallinn Manual on the International Law Applicable to Cyber Warfare*.<sup>469</sup> This legally non-binding manual, co-authored by twenty independent international law experts was commissioned by the NATO Cooperative Cyber Defence Centre of Excellence, and sets out 95 principles regarding the governance of armed conflict in cyberspace. Covering bases from sovereignty, *jus ad bellum*, international humanitarian law and state responsibility, it is a comprehensive work which seeks to situate the as-yet unregulated issue of cyber-warfare within the existing international legal framework.

While the research panel drafting the *Tallinn Manual* agreed Stuxnet represented an ‘act of force’, it was not agreed upon whether or not in the case of Stuxnet the attack amounted to an ‘armed attack’. The latter classification which would signal the beginning of hostilities, the use of force in

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<sup>466</sup> *Advisory Opinion on the Legality of the Use of Nuclear Weapons* ICJ Reports 244 (1996) at para 39

<sup>467</sup> A. Zemanek, ‘Armed Attack’ Encyclopaedia Entry, Max Planck Encyclopaedia of Public International Law [MPEPIL] (2013)

<sup>468</sup> *supra* n.451 Waxman at 432

<sup>469</sup> M.N Schmitt, (Ed) *Tallinn Manual on the International Law Applicable to Cyber Warfare*, (Cambridge University Press) (2013)

which would be sanctioned by the Geneva Convention and which would give rise to the Article 51 right of self-defence, which will be investigated below.

Although Schmitt notes that the ‘Charter use of force prohibition reflects a fair degree of imprecision in the CNA context,’<sup>470</sup> the above reasoning suggests that in the case of physical damage caused directly by a cyber-attack, Article 2(4) is violated as such force qualifies as ‘armed’. Assessing Stuxnet on the basis of this criterion leads to the conclusion that the attack amounted to a use of armed force and therefore violated the Article 2(4) prohibition as physical destruction of centrifuges was caused by the virus. However, it is worth noting with regard to future uses of cyber-attack in the context of counter-proliferation that attacks not involving kinetic damage or constituting acts of armed force are also, at a minimum, contrary to international law as they violate the non-intervention principle.

Schmitt has outlined criteria for expansion upon the effects-based analysis which considers the overall consequences of the attack in evaluating whether or not a cyber-attack amounts to an act of force.<sup>471</sup> He lists severity, immediacy, directness, invasiveness, measurability, military character and presumptive legitimacy as the key factors for consideration. This would seem to broaden the category of cyber-attack capable of regulation by Article 2(4) by not placing absolute emphasis on the direct production of physical damage. These criteria therefore could arguably encompass coercive acts, as posited by Gervais,<sup>472</sup> as the reasonably foreseeable consequences of the attack

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<sup>470</sup>Supra n.422 Schmitt at 936

<sup>471</sup> Ibid Schmitt at 915

<sup>472</sup> M. Gervais, ‘Cyber Attacks and the Laws of War’, 30 Berkeley Journal of International Law 525 (2012) at 539

are considered with reference to the criteria. In practice, an attack which would normally be confined to a violation of the principle of non-intervention due to its failure to directly produce kinetic destruction could amount to a use of armed force if it is the proximate cause of consequences which reach a level of measurable severity.

These criteria permit an extension of ‘armed force’ so long as the consequences produced are not too remote from the initial attack and therefore broaden the prohibition of Article 2(4) in the context of cyber-attacks. This extension would appear to be consonant with the finding in *Nicaragua* that the arming, financing and provision of support to irregulars could amount to a use of force, but fell short of an ‘armed attack’. The reasoning behind this, viewed in a consequence-based manner, is that the act of arming the band of rebels was not in itself ‘armed force’ but rather amounted to the proximate cause of physical damage caused by resultant attacks. These criteria will not however extend the prohibition to cover the majority of cyber-attacks, the extended effects of which will be non-kinetic and definitively coercive in nature.

### **Cyber-Attacks as Violations of Sovereignty and the Principle of Non-Intervention**

It is true that while a cyber-attack can amount to a use of force for the purposes of Article 2(4), many cyber-attacks will fall outside this definition and therefore must be judged with reference to other principles to assess their legality. As mentioned above, these attacks despite their inability to meet the Article 2(4) criteria are not to be deemed lawful. It is demonstrated in Article 41 that “partial or complete interruption . . . of . . . telegraphic, radio, and other means of communication” are classified as “measures not involving the use of armed force.” Buchan distinguishes between

acts of force causing physical damage by means of a cyber-attack and cyber-attacks which cause no physical damage but still cause destruction of systems or networks.<sup>473</sup> Charter provisions and international legal principles to govern the former category of attacks must be identified, lest this lacuna be interpreted as permitting unilateral resort to cyber-attacks short of armed force.

The principle of non-intervention is widely recognised as representative of customary international law. The ICJ in the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*<sup>474</sup> confirmed that

The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law.<sup>475</sup>

The principle is recognised as paramount in various documents. The UN *Declaration on Friendly Relations* states that

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

Specifically in the context of cyber-attacks the UN General Assembly *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of State*,<sup>476</sup> as noted by Roscini, explicitly enumerates interference with systems of information and mass media as

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<sup>473</sup> *supra* n.443 Buchan at 212

<sup>474</sup> *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*; *Merits*, International Court of Justice, 27 June (1986)

<sup>475</sup> *Nicaragua* at para 201

<sup>476</sup> *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of State*, A/RES/36/103 (1981)

violative of the principle.<sup>477</sup> In the context of cyber-attacks and intervention, it is imperative to note that the ICJ in *Nicaragua* explicitly denoted acts which specifically interfere with state sovereignty as those amounting to impermissible intervention. The Court affirmed that

a prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. [...] the element of coercion [...] defines, and indeed forms the very essence of, prohibited intervention.<sup>478</sup>

It must therefore be considered whether or not cyber-attacks which produce non-kinetic effects can constitute violations of state sovereignty, and briefly examine if sovereignty can be said to encompass cyber-space. In so far as cyber-attacks can produce far-ranging implications for national systems, it would seem that they are capable of classification as coercive measures which impermissibly interfere with matters such as political and economic governance and the formulation of foreign policy doctrine. For example, had Stuxnet been a syntactic attack which did not produce physical destruction of centrifuges but rather caused them to malfunction for a period of time, this would still amount to an impermissible intervention into the Sovereignty of Iran, as it would affect its political and economic policy to harvest nuclear power for energy production.

Classification of non-kinetic cyber-attacks as violations of the principle of non-intervention is however not without issue. A common form of cyber-attack is one which interferes with the provision of internet services in a certain state, known as a Denial-of-Service attack. These attacks,

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<sup>477</sup> *supra* n.424 Roscini at 103

<sup>478</sup> *Nicaragua* at para 205

in today's technologically-dependant landscape be more than disruptive and as such must be considered in the context of intervention. Difficulty with classing such attacks as interventions arises when one considers the traditional territorial-based notion of sovereignty, as fostered by the PCIJ *Lotus* case.<sup>479</sup> DoS attacks do not impinge on territorial sovereignty and therefore at first glance are difficult to construe in terms of a violation of sovereignty.<sup>480</sup> It has also been advanced by the US Department of Defence that cyber-space represents a 'global commons' akin to international waters, outer space and international airspace, meaning that no state can claim sovereignty over any part of it.

Countering these arguments, Francese lists the following as requisite characteristics of a global commons

1. global commons has a governing international treaty.
2. treaty provides specific permissible uses and prohibitions of that global commons.
3. the global commons has boundaries and is definable.
4. nations have agreed to forgo, or at least leave unasserted in the case of the Antarctic, claims of exclusive sovereignty over any portion of the global commons
5. no single state is capable of controlling the global commons.<sup>481</sup>

It is clear that these characteristics are absent in the case of cyber-space. Having considered cyber-space under each of the above headings Francese concludes that 'states must realize that cyberspace neither is immune from state sovereignty nor can it be considered a global commons'.<sup>482</sup> Sovereignty therefore should be capable of exercise in cyber-space to the extent that states have a right to control

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<sup>479</sup> *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7)

<sup>480</sup> *supra* n.443 Buchan at 222

<sup>481</sup> P.W. Franzese, 'Sovereignty in Cyber-Space: Can it Exist?', 64 A.F. L. Rev. 1 (2009) at 17

<sup>482</sup> *ibid* at 40

the portion of cyber-space subject to operation in its territory. Sovereignty, as enunciated in the Island of Palmas arbitration, “signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.”<sup>483</sup> According to Schmitt, in the context of cyber-attacks, sovereignty means states have the right to control and regulate its cyber infrastructure and activities in its territory.<sup>484</sup>

It can be argued therefore that a cyber-attack which fails to meet the gravity threshold of an armed use of force still impinges on the victim state’s sovereignty, therefore violating the principle of non-intervention. In the Charter context, disruptions in communications fall short of armed force however still require Article 41 based authorisation in order to be legal. Cyber-attack is a weapon which is legitimate only when used under the auspices of the collective security framework. Unilateral cyber-attacks are therefore not permissible under international law. A state which is the victim of such an intervention may however respond with lawful measures such as economic sanctions, or as noted by Schmitt ‘to cyber or kinetic actions short of uses of force that would otherwise be unlawful’ such as a hack-back, both of which are *prima-facie* unlawful but represent lawful countermeasures in these circumstances.<sup>485</sup>

## Conclusion

It has been established that the cyber-attacks, as a novel and emergent form of force, call for an assessment of legality which takes into account the nuances of their *modus operandi* and consequences in order to evaluate their position in relation to the Charter’s use of force framework. While the Charter

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<sup>483</sup> *Island of Palmas Case*, United States v Netherlands, Award, (1928) ICGJ 392 (PCA 1928), 4th April 1928, Permanent Court of Arbitration

<sup>484</sup> M.Schmitt, ‘Below the Threshold: Cyber Operations’, 54 Virginia Journal of International Law (2014) at 704

<sup>485</sup> M. Schmitt, ‘International Law and Cyber Attacks: Sony v North Korea’, Just Security December (2014)



drafters did not envisage such modernised uses of force when formulating the parameters of Article 2(4), they did seek to commit the Member states to a system of collective security which outlaws unilateral action in the majority of instances which would endure the development of new technologies.

With this in mind it must be noted that cyber-attacks, in so far as they cannot be reconciled with the principle of non-intervention or Article 2(4) are only lawful when exercised under the collective security machinery afforded to the Security Council under Chapter VII, or as proportionate and necessary countermeasures in response to a prior illegal attack. There is therefore no place in the counter-proliferation legal framework for resort to cyber-attack as a means of deterring or derailing nuclear ambitions and as such, Stuxnet represented disregard for international law in the context of the Iranian nuclear crisis.

An Article 96-based ICJ Advisory Opinion would be helpful to clarify this complex legal quandary presented by cyber-attacks. This would potentially dispel the possibility of legally using cyber-attacks as a tool for counter-proliferation and therefore would appear unpalatable to powerful states with extensive cyber-capabilities. The circumstances necessary to require an ICJ elucidation on the relationship between Article 2(4) and cyber-attacks are unlikely to arise, according to Silver. He therefore posits that international consensus on the status of CA's in relation to the use of force

prohibition is more likely to be achieved through the adoption of a multilateral convention on the issue.<sup>486</sup>

However, cyber capabilities are a double-edged sword in a states arsenal, regardless of long-established powerful state status. The more technologically-advanced a state is the more vulnerable it is to an attack with widespread destructive consequences. Despite efforts to eradicate vulnerabilities in their networks, traditionally powerful states such as the US are highly susceptible to cyber-attacks, which can be carried out by states which previously would have been incapable of exacting force against a superpower. As Waxman explains

The power and vulnerability distribution that accompanies reliance on networked information technology is not the same as past distributions of military and economic power, and perhaps not to the United States' advantage relative to rivals.<sup>487</sup>

The emergence of cyber-attacks as a preferred method of covert warfare therefore necessitates reassessment of traditional powerful state status, the results of which do not correlate with previous positions. It is therefore in the best interests of powerful states such as the US to seek to clarify and codify the law applicable to cyber-attacks, even though such clarification would likely rule out their admissibility as counter-proliferation tools. In order to maintain an approach to the Iran crisis (and non-proliferation issues in future) which is cognisant and respectful of international law, cyber-attacks must not become the norm in counter-proliferation bids.

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<sup>486</sup> D.B. Silver, 'Computer Network Attack as a Use of Force under Article 2(4)', 76 International Law Studies 73 (2002) at 77

<sup>487</sup> M.C Waxman, 'Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)' 36 YJIL 421 (2011) at 451

### **Surgical Strikes as a Counter-Proliferation Tool**

While members of the international community remained constant in their vow that ‘all options are on the table’<sup>488</sup>, the other options alluded to have no place at a table which is committed to the observance of international law. It will be demonstrated that forcible counter-proliferation methods engaged with as policy options in this crisis find no justification in international law in this circumstance, a point which further reinforces the need to adhere to the framework in place. Years of threats to utilise these options, and indeed the employment of cyber tactics, failed to produce meaningful results in this crisis and drew the saga further still from the parameters of international law.

In the case of Israeli protestations to the effect that Iran’s nuclear program represented an ‘existential threat’ to the nation’s existence, the threat of unilateral military action was a loaded one. Compounded with Israel’s previous unilateral forcible counter-proliferation actions, surgically striking Iraq’s Osirak reactor in 1981 and Al-Kibar in Syria more recently in 2007, Israeli intervention was a distinct possibility throughout the decade of conflict.

Unlike the legal issues explored extensively throughout the course of this study, the military option, although one of the more widely discussed and speculated about topics throughout the Iranian nuclear crisis, is the most clearly incompatible with international law. As with the bombardment of Osirak, a surgical strike against Natanz, Fordow or any other Iranian nuclear installation would have undisputedly fallen foul of Article 2(4) of the Charter. In issuing an undisputedly condemnatory Resolution 487 in response to this action, the UNSC stated that it

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<sup>488</sup> D. Tierney, ‘What ‘All Options Are on the Table’ With Iran Actually Means’, The Atlantic, August 10<sup>th</sup> (2012)

strongly condemned the military attack by Israel which was in clear violation of the Charter and international norms.<sup>489</sup>

The British Representative to the Council was vocal in his denouncement of Israel's actions, and highlighted the lack of available legal justification – pre-emptive, anticipatory or basic self-defence - for such a surgical strike in stating that:

It has been argued that the Israeli attack was an act of self-defence. But it was not a response to an armed attack on Israel by Iraq. There was no instant or overwhelming necessity for self-defence. Nor can it be justified as a forcible measure of self-protection. The Israeli intervention amounted to a use of force which cannot find a place in international law or in the Charter and which violated the sovereignty of Iraq.<sup>490</sup>

The UN Secretary General at the time, Kurt Waldheim denounced the attack as 'a clear contravention of international law', with France issuing a statement calling the attack 'unacceptable'.<sup>491</sup>

Furthermore, Israel's actions in that instance can be said to have undermined the IAEA-NPT framework, as Osirak was subject to IAEA verification and monitoring at the time of its destruction. IAEA inspectors had fulfilled their verification duties at the facility prior to the attack and had been able to account for all materials, thus confirming Iraq's compliance with its safeguards obligations. The Director General of the IAEA in light of this stated 'that one can only conclude that it is the Agency's safeguards system which has also been attacked'. The Board of

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<sup>489</sup> UNSC Resolution 487, 19 June (1981) at para 1

<sup>490</sup> Statement of Sir Anthony Parsons, UN Doc. no. S/PV.2282:42 (1981)

<sup>491</sup> 'The Osirak Attack': Documents, Institute for International Law and Justice, [ 6/9/81 NYT A7 ]

Governors of the IAEA therefore strongly condemned the attack which it described as ‘premeditated and unjustified’.<sup>492</sup>

It can be concluded therefore that unilateral military action by Israel, or any other state, targeting the nuclear program of Iran would be unlawful in all circumstances and in the context of the crisis at hand, catastrophic to all efforts towards resolution of the dispute.

Whether concerning the employment of conventional means of force via surgical strike or modern cyber-ware, no doctrine in international law can be located which would have justified an attack on Iran’s nuclear program throughout the course of the crisis. It appears therefore that the only appropriate means of resolution of the ongoing nuclear issue is through multilateral diplomacy and negotiation, which in recent months has borne more fruit than the past decade of sanctions and thinly veiled military threats.

### **Results of Multilateral Diplomacy – The Joint Comprehensive Plan of Action 2015**

While sanctions took their toll on the Iranian economy and objection to dialogue with Iran continued to flow from Israel’s Netanyahu, intensive diplomatic efforts on the part of the EU, the US and Iran resulted in the adoption in November 2013 of an interim deal between Iran and the P5+1. This was followed in July 2015 by the landmark finalised deal, the Joint Comprehensive Plan of Action. The JCPOA, in itself is not legally binding, but was then endorsed by the SC in Resolution 2231.

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<sup>492</sup> "Military attack on Iraqi nuclear research centre and its implications for the Agency", IAEA Board of Governors Resolution S/14532, 12<sup>th</sup> June (1981)

Following close to a decade of conflict and dispute over Iran's alleged nuclear ambitions, the US & EU reached an agreement with Iran in Lausanne, Switzerland. This deal requires, *inter alia*, Iran to reduce its uranium stockpile while permitting increased Agency inspections and access to Iranian facilities and commitment to ratification of the Additional Protocol. In consideration for these concessions, the US & EU have committed to lift their extensive Iranian sanction regimes in conjunction with the extinguishment of the UNSC resolutions suite and the demands and sanctions contained therein. Importantly, the right to enrich uranium for peaceful purposes appears to have been recognised by the deal and demands for cessation of enrichment by Iran have been revoked.

Having already considered the alternative courses of action to end the decade of deadlock, namely forcible counter-proliferation measures, it is clear that a negotiated solution of any kind was the preferable outcome, reframing the issue as one capable of examination through a legal lens. The resulting deal, as with any deal reached by diametrically opposed parties with wildly divergent interests, embodies compromise and respect on both sides of the table.

From a political perspective, it can be seen as the possible foundation for increased intercourse between Iran and the West, re-establishment of consular relations and decreased hostility and suspicion by both parties. The deal will certainly herald Iran's return to the international sphere as a prospective trading partner for numerous states regionally and globally, as it emerges from years of economic exile. The deal however is not without its flaws, and the remainder of this chapter seeks to examine both the positive and negative elements of the deal from a legal perspective as well as potential problems with its implementation in the long run owing to political will.

## The Legal Status of the JCPOA

The JCPOA is a forward thinking document which includes concessions on both sides, differentiating it from the earlier international responses to the Iranian nuclear issue and representing a rational outcome to a legal dispute in which both sides possessed rights and obligations. The deal is far from perfect, with some rather novel features which will be examined below. However the deal is a testament to the power of multilateral diplomacy and considered reasoning, representing an outcome which arguably injects some legitimacy back into the non-proliferation system in the aftermath of a decade of debate over its efficacy. Had the crisis led to confrontation, increased hostility in the Strait of Hormuz or indeed Iranian withdrawal from the NPT, it is difficult to imagine an outcome which left the system intact.

The status of the JCPOA as an informal political accord changed to an extent upon endorsement by the SC in Resolution 2231, which by virtue of invocation of Article 41 and Article 25 purported to make binding numerous commitments contained therein. The commitments subject to such treatment however are limited to paragraphs which describe the role the Council will play in the reintroduction of previous sanctions in the event of non-performance and in the lifting of previous UN sanctions as required by the JCPOA on Implementation Day.<sup>493</sup> UNSCR 2231 does purport to

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<sup>493</sup> S/RES/2231(2015) at paras 7, 8 and 9 which state:

7. Decides, acting under Article 41 of the Charter of the United Nations, that, upon receipt by the Security Council of the report from the IAEA described in paragraph 5: (a) The provisions of resolutions 1696 (2006), 1737 (2006), 1747 (2007), 1803 (2008), 1835 (2008), 1929 (2010) and 2224 (2015) shall be terminated; (b) All States shall comply with paragraphs 1, 2, 4, and 5 and the provisions in subparagraphs (a)-(f) of paragraph 6 of Annex B for the duration specified in each paragraph or subparagraph, and are called upon to comply with paragraphs 3 and 7 of Annex B;

8. Decides, acting under Article 41 of the Charter of the United Nations, that on the date ten years after the JCPOA Adoption Day, as defined in the JCPOA, all the provisions of this resolution shall be terminated, and none of the previous resolutions described in paragraph 7 (a) shall be applied, 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;

make binding the entirety of the JCPOA or to solidify soft law commitments – such as the lifting of domestic sanctions by states such as the US – into legal commitments in and of themselves.

Operative paragraph two of the resolution, for example, could see Member States renege on commitments without technically breaching any legal commitment. The paragraph states that the Council:

“Calls upon all Members States... to take such actions as may be appropriate to support implementation of the JCPOA, including by taking actions commensurate with the implementation plan set out in the JCPOA...and by refraining from actions that undermine implementation of commitments under the JCPOA.”

As ‘calls upon’ can be likened to ‘urges’, traditionally used to signify a hortatory paragraph in the absence of the formal verb ‘decides’, a Member State failing to scale back its domestic sanctions regime, it has been argued by Bellinger, would not violate international law.<sup>494</sup> That said, as has been the demonstrated case throughout the crisis, political considerations such as the international fallout associated with reneging on the informal commitment to waive sanctions would influence any state considering scaling back on the deal, as it would undoubtedly spell the end of cooperation on the Iranian side, thus sinking the deal entirely. The danger therefore remains, that the same political rhetoric and wrangling which caused the initial escalation could once again exacerbate efforts to resolve the issue in a way which respects all parties to the dispute and resultant deal.

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9. Decides, acting under Article 41 of the Charter of the United Nations, that the terminations described in Annex B and paragraph 8 of this resolution shall not occur if the provisions of previous resolutions have been applied pursuant to paragraph 1

<sup>494</sup> J.B Bellinger, “The new UNSCR on Iran: Does it bind the United States (and future presidents)?” Brookings, July 21st (2015)



However, the choice of as a political agreement, rather than treaty, as the vehicle for the JCPOA can be attributed to understandable factors. In order to agree myriad finer technical details, not unlike in the case of Subsidiary Arrangements, an informal document was preferable to an iron-clad international treaty. Such informal arrangements make multilateral agreement on such precise and intricate details more likely and in the case a decade of deadlock, this consideration was paramount to reach a negotiated solution. Had the formal treaty route been taken, ratification by each domestic legislature, with the associated debate, delays and likely disagreement on much of the content, would have been required and in all likelihood, elusive.

In the place of a complex international treaty, the JCPOA embodies an intricate political accord which has accomplished the feat of balancing the delicate interests of each party in mutually agreeable way. Iran's acceptance of the key cornerstones of the JCPOA - provisional application of the Additional Protocol, Modified Code 3.1 and a cap on enrichment activities at 3.67% - can be seen to firmly place the legal issues raised and investigated in this study at the forefront of the resolution of the situation and while the JCPOA itself is not a legally-binding document, it has put into motion outcomes which have legal effect and consequences.

### **The Investigative Mandate of the IAEA and the JCPOA**

As the object of this study has been to shed light on the existing legal framework and apply it to the Iranian situation to demonstrate that myriad legal issues required addressing, the JCPOA's commitment to demystifying and clarifying the IAEA's investigative mandate within Iran is a welcome outcome. As explored in Chapter II, the use of incorrect standards of inquiry by the Agency was the basis of a legal dispute between Iran and the IAEA which was never adequately

disposed of. The JCPOA serves the purpose of illuminating exactly what the rights and obligations of the Agency are in relation to its monitoring duties in Iran, rather than creating new legal obligations.

The JCPOA envisages the IAEA coming to a ‘Broader Conclusion’, which requires the Agency to make positive findings on two fundamental issues based on its expanded investigative mandate. First, that there has been no diversion of declared nuclear materials, the mandate provided by the CSA and second that no undeclared nuclear materials are present in Iran. The mandate to confirm the latter issue is derived from Iran’s signature of the Additional Protocol, a key JCPOA concession, thus confirming the central hypothesis of Chapter II of this study, which argued that the IAEA had erroneously applied the CSA, which was the only treaty in force between the Agency and Iran prior to the JCPOA.

In the case of Modified Code 3.1, consent to the Code and the design information timeframe provision by Iran is secured, anchoring the deal in the existing legal framework. In line with the investigation undertaken in Chapter II of this study, the Modified Code 3.1 dispute was one of a legal nature, with various questions surrounding its status and significance which were left unapproached. The JCPOA recognises the need for Iranian consent to adhere to the Modified Code, thus putting an end to its disputed applicability in the Iranian case, with both sides having had their input on the debate and treating the issue as such, rather than as a clear cut breach of an obligation by Iran as was the case in 2006.

The Additional Protocol, and the consent to be bound required in the case of such international treaties, is a firm feature of the JCPOA. Saliently, Iran has agreed to provisionally apply the Additional Protocol, as was the case in 2003, pending ratification which will be sought from the Majles on Termination Day, set to take place in 2023. The choice of provisional application pending ratification, opines Joyner, can be attributed to the need to maintain a bargaining chip of sorts in the next decade, a modicum of leverage in the face of the possibility of breaches on the part of members of the EU+3.<sup>495</sup> Provisional application, as provided for in Article 25 VCLT, enables the signatory to delay ratification but requires that no behaviour which conflicts with the object and purpose of the treaty is engaged in.

Access “on a selective basis in order to assure the absence of undeclared nuclear material” is the focal point of the AP and the expanded investigative power and mandate it grants to the Agency. As application of the AP is a primary feature of the JCPOA, the agreement on this issue confirms that the necessary machinery to solve the issue was an existing treaty, contained in a broader legal framework, the application of which was side-stepped for the duration of the crisis in favour of claiming such investigative powers were contained in the applicable CSA.

This outcome directly relates to the crucial issue of whether or not Iran was in a state of non-compliance with its safeguards obligations as per the declaration of the IAEA BOG in 2006, which was analysed in Chapter II. Iran’s firm contention that the Agency’s ability to confirm the non-diversion of declared materials was the conclusion required for compliance with the CSA appears

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to have been vindicated with the acceptance in the JCPOA that signature of the AP is required in order to investigate the absence of undeclared materials in Iran,

### **The Enrichment Question and the JCPOA**

What the JCPOA does accomplish, in my opinion, is concretising recognition of the inalienable right to enrich uranium. The right extensively explored in Chapter IV of this thesis, was the critical piece in the puzzle and the implications for Iran's enrichment program as a result of the deal can be summarised as follows. The right to enrich uranium domestically is affirmed, with agreed restrictions upon the level of enrichment which may take place. Iran may continue enrichment to a capped level of 3.67%, the enrichment level required to fuel reactors.

While Iran had enriched uranium to 20% purity a number of years ago for the stated purpose of medical isotope research, agreement has been reached that such levels of enrichment will be voluntarily foregone in order to build confidence in the exclusively peaceful nature of Iran's nuclear program. In the case of enrichment, a detailed timeframe is laid out in order to accomplish the stated goal in paragraph IV of the preface which states that:

“Successful implementation of this JCPOA will enable Iran to fully enjoy its right to nuclear energy for peaceful purposes under the relevant articles of the nuclear Non-Proliferation Treaty (NPT) in line with its obligations therein, and the Iranian nuclear programme will be treated in the same manner as that of any other non-nuclear-weapon state party to the NPT.”

Iran has agreed to a stockpile limit of 300kg of enriched uranium, meaning any more than this will either be allocated to export sale or stockpiled in another state.<sup>496</sup> With the purchase of

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<sup>496</sup> Joint Comprehensive Plan of Agreement, A. Enrichment, Enrichment R&D and Stockpiles, para. 7

additional nuclear power reactors that from Russia planned to expand the peaceful nuclear program, Iran has agreed that such reactors will come with lifetime fuel supplies, significantly reducing the need for domestic nuclear fuel production. Iran's uranium mines and extraction of indigenous uranium will also be subject to strict monitoring, for the next two decades.

In addition, Fordow, the underground nuclear reactor of primary concern to those alleging that Iran was engaged in a covert weapons program and the target of bunker buster surgical strike rhetoric, will not be used to enrich uranium or be permitted to house uranium for a period of 15 years. All uranium enrichment will take place in Natanz, which will be heavily monitored and Arak, the heavy water plant under construction will be redesigned in order to prevent the production of plutonium, which can be used as an alternative route to a nuclear explosive.

In effect, Iran has voluntarily placed a defined limit on its levels of enrichment, capacity to enrich by expansive reduction of centrifuges and disassembly of advanced IR-2 models and nuclear facilities in order to demonstrate that it harbours no intention to develop a nuclear weapon. Iran has gone above and beyond what is required of a NNWS under the NPT, CSA and AP, but has done so in a way which is rooted in the current framework and the JCPOA is firmly grounded in the legal landscape this thesis has sought to unearth. This demonstrates that engagement and analysis of the strictures of the applicable law at the beginning of the crisis, an appreciation of how the relevant treaties were being misapplied and a commitment to adhering to the letter of the law in employing enforcement measures, may have reduced tensions and prevented escalation. After all, it can be recalled that prior to the transfer of the Iranian nuclear dossier to the Security Council by the BoG under the auspices of non-compliance, Iran was voluntarily adhering to Modified Code 3.1, provisionally implementing the Additional Protocol as confidence-building measures.

## **Dispute Resolution Mechanisms**

With a commitment to maintaining diplomatic engagement and reasoned dispute resolution, a welcome feature of the JCPOA for the purposes of this study is the creation of the Joint Commission, a board comprised of a member from each of the P5+1 states, an Iranian representative and an EU representative. This body effectively replaces the committee established in SC Res 1737 to monitor imposition of sanctions. This board is tasked with overseeing the implementation of the deal's provisions but most significantly plays a dispute resolution role. The Commission is to be called to action in the case of either Iran or the P5+1/EU alleging that the other side is not meeting its commitments under the deal. The Commission would then have a period of 15 days to resolve the issue, which can be extended by consensus. This can then be passed over to foreign ministerial level, which permits the creation of an arbitral panel consisting of a member from the complaining state, the accused state and a neutral member. This panel can issue a non-binding opinion on the issue.

The JCPOA Joint Commission can in effect be seen as a safeguard against the blurring of the line between technical failures and the interpretation of ambiguous provisions and non-compliance – the very issue which was the root cause of the Iranian nuclear crisis. Expressing disagreement with the way in which legal provisions are interpreted is not an act of non-compliance or an attempt at legal sorcery to veil covert schemes, it is the unquestionable right of each party to a bilateral or multilateral agreement. The JCPOA has, at its core, the objective of ensuring the same political considerations which fuelled escalation initially are not allowed to take hold when legal issues require objective examination.

Theoretically, reasoned dispute resolution is a key cornerstone of the deal, which is a positive development, assuming it is engaged in in good faith and in the absence of capricious considerations. In the event that the Commission cannot reach a resolution, or if the resolution fails to satisfy the complainant's suspicions, the latter may declare significant non-performance and suspend the operation of the agreement in whole or in part. This non-performance could and likely would then be reported to the Security Council, which leads to the next salient feature of the JCPOA for the purpose of this study.

### **Snap-back Sanctions and The Reverse Veto**

The veto power accorded to the permanent members of the Council ensures that geopolitical interests of each of these powerful states are a feature in all decision-making. Article 27(3) of the Charter states that an affirmative vote of nine members of the Council, including a concurring vote of all 5 permanent members of the Council in order for a decision to be made.<sup>497</sup> At a minimum an abstention from voting on the part of a permanent member in disagreement with the motion is required and qualifies as a concurring vote for this purpose,<sup>498</sup> as is agreed practice by the Council.

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<sup>497</sup> UN Charter Article 27.3 states "Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting."

<sup>498</sup> Such an understanding was established after a Soviet abstention in the matter of the Spanish Question was taken to represent a concurring vote and the resolution S/RES/4 1946 adopted despite abstention.

However, the veto power has been manipulated in a sense with the passing of the JCPOA. Its subsequent endorsement by the Security Council in Resolution 2231 made the non-legally binding agreement capable of creating binding obligations under Article 25, cited in the preamble. More pertinently, in the event of a report of suspected non-compliance with the JCPOA which has not been resolved by the dispute resolution Joint Commission as above, the Council's permanent members will be provided with the opportunity to use the veto power in reverse. Paragraph 7(a) of Resolution 2231 provides for the lifting of sanctions in accordance with the JCPOA however this is followed by 7(b) which permits this lifting of sanctions to be reversed in the event of the above Joint Commission mechanism failing to resolve the issue. This provision gives binding effect to paragraph 37 of the JCPOA which states that

37. Upon receipt of the notification from the complaining participant, as described above, including a description of the good-faith efforts the participant made to exhaust the dispute resolution process specified in this JCPOA, the UN Security Council, in accordance with its procedures, shall vote on a resolution to continue the sanctions lifting. If the resolution described above has not been adopted within 30 days of the notification, then the provisions of the old UN Security Council resolutions would be re-imposed, unless the UN Security Council decides otherwise....<sup>499</sup>

Whereas the concurring vote of the P5 is generally needed, meaning a common course of action is to be affirmatively endorsed by each without resort to veto to express disagreement, the case of the JCPOA is slightly different. The Council upon notification of alleged non-compliance has 30 days in which to issue a new resolution continuing the suspension of the suite of sanctions resolutions from 1737-1929, which the JCPOA stipulated were to be lifted on Implementation Day (16<sup>th</sup> January 2016). This new resolution would decide whether or not to continue the suspension, rather than reinstate the sanctions, therefore reversing the effect of the veto.

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<sup>499</sup> Joint Comprehensive Plan of Action, July 15<sup>th</sup> 2015 at para 37. Full text available [http://eeas.europa.eu/statements-eeas/docs/iran\\_agreement/iran\\_joint-comprehensive-plan-of-action\\_en.pdf](http://eeas.europa.eu/statements-eeas/docs/iran_agreement/iran_joint-comprehensive-plan-of-action_en.pdf)



A resolution will normally be adopted in order to impose sanctions, therefore meaning each P5 member could oppose their imposition with the power of veto – simply one member alone could prevent action and stop sanctions being imposed. In this instance, a permanent member, for argument's sake the US, would be capable of ensuring the reinstatement of sanctions with the power of veto – rather than requiring all permanent members to agree in order to take an Article 41 based action, only one vote would be required to take affirmative action.

In the event that the Joint Commission fails to resolve the issue and it comes before the Council, the provisions agreed to in Resolution 2231 stipulate that the reverse voting procedure is to be employed, as the JCPOA itself is not a legally binding document. In this instance the Council has manipulated its Charter power to permit the reintroduction of sanctions and thus act under Article 41 without having to make a fresh Article 39 determination. Considering it has been argued above that a valid threat determination was never made in the case of Iran, this by-passing of such an obstacle to introducing sanctions is somewhat worrying and certainly leaves many legal questions to be considered, which would merit further examination in future scholarship.

This provision was a concession to concerns that it would be too difficult to reach an affirmative consensus on the re-introducing sanctions. The possibility of utilisation of this very powerful veto could throw the entire deal into disarray, as Iran has expressly stipulated that it will terminate performance should sanctions be reinstated. This feature could be seen to undermine the commitment to transparent open dialogue and negotiation, if it were to be resorted to hastily, and undercut multilateral efforts by placing the power in the hands of one state. On a positive note, this

mechanism will be called into action only when Joint Commission dispute resolution has been exhausted, unlike in 2006 when UNSC sanctions were initially imposed absent concerted efforts to resolve the dispute.

That said, manipulation of these processes can and does occur, meaning if one member of the Joint Commission persistently refuses to accept settlement of the dispute, the situation could come before a Council which has the power to dismantle the agreement with one veto, if it so chooses. The reverse veto and threat of sanction snap back is the weak link in the deal from a stability perspective, but was a necessary concession to attain acknowledgement of the right to enrich uranium domestically. The underlying volatility of this provision remains to be seen.

The ILA agrees, dispute resolution needs to play a more regulated and consistent role in the process of preventing nuclear weapons proliferation, as every contentious non-proliferation case has come to a close not through enforcement measures but rather as a result of negotiated agreement.<sup>500</sup> This non-coercive approach, which strikes a balance between legal analysis and political dominance and strong arming is key. Diplomacy can only work when every party is given the chance to make their case and more importantly, is heard. No solution could have been reached if Iran's contentions were not allowed to be aired and worked through and if opposing parties had persisted with the line Mohammed El-Baradei once described as 'nothing would satisfy short of Iran coming to the table completely undressed'.<sup>501</sup>

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<sup>500</sup> ILA Johannesburg Conference Draft Final Report at para 23

<sup>501</sup> M. El-Baradei, *The Age of Deception: Nuclear Diplomacy in Treacherous Times* (Picador)(2011) at 313

The ILA asks as many questions as it answers, proving that issues of non-proliferation in international law are far from resolved at the time of writing. The Iranian case study however, gives us much insight into the functioning of the system until now, its shortcomings and failures and how we can move forward to ensure that a decade long dead-lock, which neared disaster on numerous fronts and occasions, can be avoided in future.

### **The JCPOA Sunset Clause**

The JCPOA, notably envisages ten years from Adoption Day, UNSCR Termination Day. On this date, the Council will no longer be seized of the matter and Iran, having cooperated with the stipulations of the plan of action will be able to conduct its peaceful nuclear program, including uranium enrichment, without the enhanced scrutiny and suspicion of the IAEA and international community. Iran will then be on the same footing as NNWS states such as Japan and Germany, both of which possess advanced nuclear programs capable of weapons ‘breakout’ in a short period of time, should the state so choose.

This is the risk inherent in every NNWS, but it is a fact of mastery of the full nuclear fuel cycle, to which Iran is entitled as a NNWS and never consented to forego. Iran has consented to numerous constraints on this right with the JCPOA, with the end goal of fully enjoying this right without undue international intervention in the future and bolstering its economy with nuclear energy use.

## **Chapter 7 – Conclusion**

Questions raised by the Iran nuclear case span the entire spectrum of international law, in the same way this thesis has touched on varied issues from treaty interpretation to state responsibility in the context of the crisis. In each instance, there is something to be said for greater emphasis on dialogue and reasoned dispute resolution over knee-jerk enforcement responses in the form of resolutions and sanctions. It is hoped that the outcome of the situation to date can be taken as a positive and progressive one, and a victory for the nuclear non-proliferation system.

In picking apart the situation with a fine tooth legal comb, this study can only serve to strengthen the Safeguards system going forward by first clarifying what the key document, the Comprehensive Safeguard Agreement, entails and analysing in depth the extent to which this empowers the Agency to carry out its work of nuclear material accounting in States which have negotiated and signed a CSA with the IAEA, as required by Article III NPT. This study has engaged with Iran's contention that the declaration of non-compliance with the CSA made by the BoG at the outset was tainted with illegality concerns and demonstrated that the Agency erred in its declaration and subsequent referral to the Council.

This thesis, in treating the Iranian nuclear crisis as one predicated on a legal dispute, has demonstrated that what was lacking throughout the crisis was not the ability to treat a highly politicised issue as a legal one, but rather the will to challenge the orthodox view of an infallible IAEA which was widely erroneously viewed as a nuclear watchdog and policeman with an unfettered mandate.

From the very first instances of dispute over the mandate of the IAEA to search for undeclared materials, to the utilisation of Chapter VII powers by the Security Council in the absence of an Article 39 determination, the tone was set in this case for an encounter which would be dictated significantly by policy concerns at the expense of legal considerations and investigations. Iran's history of diplomatic isolation perhaps fuelled this, putting the Islamic Republic in a position of guilty until proven innocent in the eyes of the international community. Of course, in an area as populated with dual use technology as nuclear energy, proving a negative would always have been difficult, exacerbated by Iran's lack of good standing on the world stage. Approaching the issue through a legal lens, engaging with consistent Iranian contentions of illegality and adopting a doctrinal methodology to do so enables the study to side-step these external factors which played an integral role in the handling and escalation of this issue.

Before resolution of this issue, the credibility of the IAEA was attracting scrutiny, as it should in order to maintain rigorous impartiality, and it is hoped that the Iran case and this study has served to note the potential for abuse of Agency power. It has been highlighted in Chapter II that the Agency dealt with supposed non-compliance in a very different manner in other cases and perceived itself capable of auto-interpretation of its mandate in this case. This thesis has demonstrated the shortcomings of the Agency in its dealings with Iran, and firmly resituated the crux of the dispute in the legal context in which it belongs. Establishing the scope of the mandate of the IAEA under the CSA, and its limitations, has demonstrated convincingly that the Agency acted outside the bounds of international law in declaring Iran to be in non-compliance.

The resolution of the Iran case, with voluntary confidence-building measures accepted in order to verify the peaceful nature of its program, will perhaps underscore the fact that the IAEA's powers to insist upon such measures are limited. The JCPOA's endorsement of implementation of the AP by Iran, provisionally pending ratification, highlights the fact that the Agency's mandate regarding undeclared materials did not extend to verifying their absence as the IAEA consistently claimed as the basis for the declaration of non-compliance. The need for the IAEA to act rigidly within its mandate to maintain NNWS confidence in the verification system has been highlighted by the Iranian case and serves as a lesson for the Agency going forward, as the legitimacy of the non-proliferation system begins with and very much relies upon the impartiality of the IAEA.

The role of international law, and the structure and context it can provide in the face of errant political will, competing geopolitical considerations and uncertainty is evidenced in abundance in this study. While one can as easily reverse Higgins' assertion that those with a weak legal argument overcompensate with policy considerations<sup>502</sup> to state that those with lesser political power overcompensate with cumbersome legalese, this study has proven that placing such disputes within a legal context can provide a necessary anchor, a checks and balance approach to situations otherwise vulnerable to manipulation by powerful actors.

Challenging the assumption that the IAEA is an international nuclear weapons watchdog is vital in the quest to strengthen the current system, rather than representing an attempt to undermine it and as such, this study is a contribution to the broader understanding of the safeguards system

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<sup>502</sup> R. Higgins, 'The Role of the Security Council in the Settlement of Disputes', 64 AJIL 1 (1970) at 8

going forward. The Agency may only attain the more expansive authority and arsenal required to ‘sniff out’ potential weapons proliferation with a legal extension of its mandate. In order to expand upon such a mandate, firstly, it must be abundantly clear what the Agency’s mandate entails to begin with, and this study demonstrated the legal limits of the Agency’s constitutive document, and exposed the limited powers granted to it in the bilateral context of the Comprehensive Safeguards Agreement with Iran.

As the IAEA is a well-respected international organisation, no red flags were raised when it erred in the exercise of its powers in the Iranian context. Iran’s protestations of impropriety on the Agency’s part were side-stepped, and the issue was not treated as a legal dispute when in reality, there were many legal issues in need of examination from the outset.

For over a decade, the Iran dispute was played out with disregard for applicable legal standards which exist precisely for the purpose of navigating such issues with certainty and a lack of meaningful engagement with the process of interpretation of such standards prevailed. When legal objections were raised, for example in INFCIRC/814 by the Iranian delegation, the attempts to ground the issue in international law were ignored and the advice “let’s not tinker with the legalities” became the narrative, and this study has sought to rectify this.

This thesis, employing a doctrinal approach to this issue allows us to answer the question – did the IAEA, and subsequently the Council, act within the bounds of international law, by thoroughly examining the applicable treaties and agreements. It places the spotlight firmly on what states have consented to, in a landscape where this is increasingly encroached upon and disregarded. It also

allows us to explore whether or not the situation could possibly have been resolved expeditiously within the existing framework.

In an arena where capricious considerations pervade every decision-making process, international law provides some discernible structure to chaotic international relations. In an area as delicate and vital to international peace and security, this structure is a lifeline in a red sea of unpredictability.

The IAEA's transfer of the Iranian dossier to the Council citing non-compliance when there was a legal dispute at issue as to whether the Agency's mandate under the CSA extended to verifying the absence of undeclared materials highlighted issues with the interpretation of the governing provisions of the CSA. This thesis has demonstrated that the Council's subsequent failure to engage in meaningful investigation of the issue and effective acceptance of the contention of one party to the dispute over the other and imposition of a settlement obfuscated the line between the Council's powers in Chapter VI and VII.

In addition, the issuance of Resolutions 1737-1929 shed light on the fact that the Article 39 determination of a threat requirement is more elastic than ever, which is a worrying prospect. This thesis investigated thoroughly the Iranian argument that the Council had acted outside of the strictures of the Charter, and came to conclude that this was a well-founded contention. The purposes and principles constraints on the Council in the exercise of its broad Chapter VII enforcement powers have proven ineffective in this case and the study has shown that despite the existence of certain legal limitations on the Council in the Charter, these cannot and do not always function effectively to ensure the Council acts in accordance with the Charter, as is demonstrated in Chapter III of this study.



In regard to the inalienable right to peaceful nuclear energy, the JCPOA and resolution of the Iranian nuclear issue can be seen as a positive step towards the acceptance of this right as it was originally conceived by the drafters. This study offered an extensive investigation into the right as it appears in Article IV NPT and actively engaged with the Iranian contention that Agency and Council demands to cease enrichment could not be reconciled with the protection afforded to the right. The right extends to domestic enrichment of uranium, and demands to cease such enrichment in Iran have been abandoned, recognising that this step is an integral part of the right which cannot be taken away. Iran has agreed to curtail this right to enrich, undertaking to enrich uranium to 3.7% purity only, a voluntary concession which preserves the essence of the right. This outcome vindicates Chapter IV's central conclusion, reached through the employment of treaty interpretation process, that term 'inalienable' offered extensive protection to the right to develop a peaceful nuclear energy program.

Iran has consented to a curtailment of the right to an extent, following acceptance by the P5+1 that calls for complete suspension of the enrichment were unacceptable to Iran and other NAM member states. This acceptance goes some way towards placing NNWS in a tenable position with regard to the benefits of NPT membership, as the grand bargain always hinged upon access to the full fuel cycle, in exchange for the promise to forego weapons development. This study has attempted, in Chapter IV, to demonstrate that the crux of the dispute was the need for recognition and unfettered acceptance of this right, which was of paramount importance to Iran and which could not be interfered with lightly. The ramifications of persisting with the demand for uranium

suspension could have resulted in NAM disillusionment with the NPT bargain, witnessing one of their own members being denied the fundamental principle of NPT membership.

Attributing the correct interpretive significance to the right and to the parameters of Article IV is vital in ensuring that NNWS cannot be threatened with curtailment of this right in light of unproven allegations and the application of erroneous standards of investigation. As in the preceding Chapters, the possibility of legal debate over interpretation of this NPT provision was highlighted and the need to engage meaningfully with protestations that Article 103 of the UN Charter neatly disposed of the inalienable right was affirmed. This claim was widely accepted as dispositive of Iran's right to enrich, and this study highlighted the fact that a more detailed legal examination of the content and scope of Article 103, rather than a recital of its text, suggested there was ample room for debate on this issue.

Sanctions wise, the Iran case has raised issues of member states using expansive interpretation to expand upon the explicit demands of SC resolutions under Chapter VII where such resolutions present ambiguous terms. Gordon suggests that the use of terms like 'exercise vigilance' and 'enhanced monitoring' in SC resolutions regarding financial transactions which may be connected to the Iranian nuclear program gives member states a *carte blanche* to expand on the scope of the demand,<sup>503</sup> within a margin of appreciation. This occurred in the case of the US placing pressure on the EU and Canada in relation to sanctions on Iranian financial institutions, and gaps in the law permitting such expansion whilst citing compliance with SC resolutions were exposed. The illegality of extra-territorial sanctions was highlighted as one of many issues of concern relating

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<sup>503</sup> J. Gordon, "Crippling Iran – The UN Security Council and the Tactic of Deliberate Ambiguity", *Georgetown Journal of International Law* (2013) at 975

to the sanction regimes imposed on Iran throughout the crisis, which in the case of US and EU sanctions appear to have constituted illegal countermeasures, both in relation to standing and proportionality.

Despite the exposed legal deficiencies of extra-territorial sanctions, impermissible expansion of UNSC sanctions amounting to illegal countermeasures and a lack of proportionality, the JCPOA has cemented sanctions as the primary underpinning enforcement mechanism. While the JCPOA has served to terminate and waive unilateral sanction regimes of the EU and US as well as the UNSCR sanctions which underpinned them, it has been noted above that a novel means of maintaining the spectre of re-imposition of sanctions has been employed. With the reverse veto snap-back mechanism, US waiver rather than termination of sanctions and the need for certification of the deal by the US President every 90 days, both UN and unilateral sanctions could be employed as a result of politically motivated concerns which are afforded the opportunity to circumvent legal constraints.

As this study has demonstrated, sanctions driven by policy goals, setting aside valid legal considerations, considerably escalated tensions in this context in the past. It will be recalled that Iran had agreed to voluntarily adhere to Modified Code 3.1, sign the Additional Protocol and cease uranium enrichment as confidence building measures prior to the transfer of the nuclear dossier by the IAEA to the Council. This legally dubious referral resulted in a decade of deadlock which has been resolved by the lifting of sanctions, in return for many of the concessions Iran had offered initially.

As such, sanctions in this case have served as both the match and the extinguisher for the fire that was the Iranian nuclear crisis, the tinder for which was the mishandling of the case by the IAEA. A decision by a state party with veto power to renege on JCPOA adherence could easily see the situation go up in flames again with snap-back sanctions. Such action would disregard the mammoth task negotiators of the deal achieved to come to an agreement which was cognisant of all existing legal optics explored in this study.

While this thesis primarily sought to investigate the illegality of non-forcible measures taken against Iran, two forcible counter-proliferation measures were also explored through a legal lens to comprehensively demonstrate their illegality. Chapter V of this study demonstrates that resort to cyber-attack, as was the case with Stuxnet in the course of the crisis, cannot be reconciled with international law. Examination of the applicable Charter provisions in this study permitted arrival at the conclusion that such attacks can amount to uses of force, prohibited by Article 2(4). International law provides no basis for such unilateral forcible measures, and the same is demonstrated in the case of surgical strikes on nuclear facilities. The possibility of engaging in such policy options was therefore conclusively dismissed.

Finally, this study looked towards the JCPOA with optimism, as a deal which has gone some way towards placing peaceful dispute resolution at the forefront of the nuclear non-proliferation agenda. Recognition that Iran's right to enrich should be preserved and removal of sanctions in favour of a consensual verification regime which can restore the confidence of the international

community in the Iranian program are progressive features of the deal. As noted above, the success of the deal remains to be seen and the existence of the sanctions snap back and reverse veto scenario could easily unravel the progress made should a compliance issue fail to be resolved diplomatically as first occurred in 2006. One can only hope the long and arduous task of reaching the agreement and the lessons taken from the original crisis prevent a second from occurring.

In effect, the JCPOA has resulted in Iran voluntarily placing a defined limit on its levels of enrichment, capacity to enrich by expansive reduction of centrifuges and disassembly of advanced IR-2 models and nuclear facilities in order to demonstrate that it harbours no intention to develop a nuclear weapon. Iran has gone above and beyond what is required of a NNWS under the NPT, CSA and AP, but has done so in a way which is rooted in the current framework and the JCPOA is firmly grounded in the legal landscape this thesis has sought to unearth. This demonstrates that engagement and analysis of the strictures of the applicable law at the beginning of the crisis, an appreciation of how the relevant treaties were being misapplied and a commitment to adhering to the letter of the law in employing enforcement measures, may have reduced tensions and prevented escalation.

Future scholarship on the issue will likely focus on questions such as complementarity and harmonisation of diplomatic initiatives by States and institutional frameworks regulating non-proliferation issues. The question of acceptability and indeed efficacy of countermeasures against non-compliance with safeguards obligations also requires further examination.

Improvements to the enforcement mechanisms of the NPT system could be investigated so as to prevent geo-politically influenced reactions to incidents of proliferation concern. An example of possible avenues of exploration would be the ability and desirability of the General Conference of the IAEA, based on Article V.D of the IAEA Statute, recommending collective measures to States Parties that would resemble enforcement measures – as the OPCW Conference may do under Article XII.3 of the Chemical Weapons Convention.

While this thesis has demonstrated that the Iranian nuclear crisis was one fraught with legal issues eventually resolved through extensive diplomatic efforts and reframing the dispute as one with legal underpinnings, the future success of multilateral diplomacy in the field of international security can easily be cast into doubt with changes of power and tactics in influential states. While extensive efforts ensured that the last ten years did not end in a disaster for the non-proliferation system, there is no guarantee that level-headedness of world leaders in the decade ahead. The JCPOA is a solution to many of the issues raised throughout this thesis and proves that hearing both sides and giving due weight and regard to existing applicable legal documents was the only viable solution.

The nuclear sword of Damocles, as John F. Kennedy noted, hangs upon the most slender of threads above us all.<sup>504</sup> A decade of disregard for Iranian contentions of illegality saw the thread begin to unravel and this thesis has resituated what was a legal dispute from the outset within the correct context. The peaceful resolution of the Iranian nuclear crisis, the preservation and strengthening

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<sup>504</sup> Address by President John F. Kennedy to the UN General Assembly, September 25, 1961.

of the nuclear non-proliferation system through reasoned negotiation has ensured that the slow unravelling of this thread has been thwarted, for now.

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